

DATE: February 25, 1997

In Re:

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SSN: -----

Applicant for security clearance

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ISCR OSD Case No. 96-0275

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

Appearances

FOR THE GOVERNMENT

Claude R. Heiny III, Esq.

Department Counsel

FOR THE APPLICANT

*Pro se*

STATEMENT OF CASE

On April 15, 1996, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked. The SOR is attached. Applicant filed his Answer to the SOR on June 3, 1996.

The case was received by the undersigned on December 3, 1996. A notice of hearing was issued on December 4, 1996, and the case was heard on December 11, 1996. The Government and Applicant submitted documentary evidence. Testimony was taken from Applicant and one witness. The transcript was received on December 23, 1996.

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony. The SOR alleges Criterion H (drug involvement), Criterion E (personal conduct), Criterion J (criminal conduct), and Criterion M (noncompliance with rules). Applicant admitted all the factual allegations except for subparagraph 3a and 4a. (u) In response to 4a, Applicant defended his use of his own software on his employer's computer because it happened only once and has no impact on his ability to protect classified information.

Applicant is 36 years old and employed as a ----- by a defense contractor. He seeks a secret level clearance.

Applicant admitted using cocaine for a two month period in 1992. He also admitted purchasing the drug.

Applicant falsified his security forms on January 23, 1990, June 11, 1991, and April 17, 1995, by omitting his child molestation arrest on November 22, 1985.<sup>(3)</sup>

Applicant falsified the drug use and possession questions on his security form of April 17, 1995 when he answered 'no' to question 20a addressing drug use and question 20b addressing drug purchase(s). He explained: (1) the drug use occurred during his divorce; (2) the drug use only lasted a short time; and, (3) he has received consistently negative drug tests while on probation. (Answer; Tr. 21). He also believed his two month drug use was insignificant. (GE #6). In addition to testifying the drug use only lasted for a short time, Applicant testified he did not conceal the drug information intentionally but he was embarrassed. (Tr. 28).

Applicant falsified his November 8, 1995 sworn statement when he stated he only used cocaine in 1992 on two occasions and never purchased any drug. Applicant was embarrassed about his drug use and did not omit the use intentionally.

Applicant admitted he was arrested in July 1983 on 18 counts of burglary. He pled guilty to 3 counts of burglary and was sentenced to 5 years probation. He noted in his Answer the crimes occurred 13 years ago and were already investigated by Defense Investigative Service (DIS) before he received his clearance. Applicant admitted he pled to one count of felonious criminal solicitation to commit assault in February 1993.<sup>(4)</sup>

According to Applicant's version of the events, he tried to get his gun back on two occasions and abandon the crime. (GE #8). Applicant testified his plan to kill his wife was based on a period of stupidity in 1992.<sup>(5)</sup> He did not want to be around his wife but did not want to get a divorce like his parents had gotten. (GE #5).

Applicant admitted he was terminated from his employer in June 1994 for using the employer's computer to work on his own software. (Answer). He explained that substantial idle time at his job prompted him to work on his software. (Tr. 51).

The branch manager and security officer testified she has known Applicant for 5 years. She is not aware of any adverse information about Applicant. She could not recall how long it took Applicant to fill out his most recent security form (Tr. 43), but recalled there were many phone calls and other activity around the reception desk when Applicant was working on the form. (Tr. 29).

## **POLICIES**

Enclosure 2 of the Directive set forth policy factors which must be given binding consideration in making security clearance determinations. These factors must be considered in every case according to the pertinent criterion; however, the factors are in no way automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the entire realm of human experience or that the factors apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Factors most pertinent to evaluation of the facts in this case are:

### **Criterion H (drug involvement)**

#### **Factors Against Clearance:**

1. any drug use.
2. illegal drug possession.

#### **Factors for Clearance:**

1. the drug involvement was not recent.

3. a demonstrated intent not to abuse drugs in the future.

### **Criterion E (personal conduct)**

#### Factors Against Clearance:

2. the deliberate omission...or relevant and material facts from any personnel security questionnaire...to...determine security clearance eligibility or trustworthiness....

3. deliberately providing false or misleading information concerning relevant and material matters to an investigator...in connection with a personnel security or trustworthiness determination.

#### Factors for Clearance:

None.

### **Criterion J (criminal conduct)**

#### Factors Against Clearance:

1. any criminal conduct, regardless of whether the person was formally charged.

2. a single serious crime or multiple lesser offenses.

#### Factors for Clearance:

None.

### **Criterion M (violation of rules, regulations)**

#### Factors Against Clearance:

4. Introduction of hardware, software or media from any information technology system without authorization, when specifically prohibited by the rules., procedures, guidelines or regulations.

#### Factors for Clearance:

None.

### **General Policy Factors (Whole Person Concept)**

Every security clearance case must also be evaluated under additional policy factors that make up the whole person concept. Those factors (found at page 2-1 of Enclosure 2 of the Directive) include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other behavioral changes; (7) the motivation for the conduct; and, (8) the likelihood of continuation or recurrence.

### **Burden of Proof**

As set forth in the Directive, every personnel security determination must be a fair and impartial overall commonsense decision based upon all available information, both favorable and unfavorable, and must be arrived at by applying the standard that the granting (or continuance) of a security clearance under this Directive may only be done upon a finding that to do so is clearly consistent with the national interest. In reaching determinations under the Directive, careful consideration must be directed to the actual as well as the potential risk involved that an applicant may fail to properly

safeguard classified information in the future. The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature.

The Government must establish all the factual allegations under Criterion H (drug involvement), Criterion E (personal conduct), Criterion J (criminal activity), and Criterion M (violation of rules) which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to the sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation which demonstrates that the past adverse conduct is unlikely to repeat itself and Applicant presently qualifies for a security clearance.

### CONCLUSIONS

A case of drug abuse is established under drug factor number 1 against clearance. In addition, Applicant's falsifications of his drug abuse raise some question as to whether Applicant actually stopped in 1992. However, this doubt is dispelled by the absence of any direct or circumstantial evidence of any drug use since 1992. Three years of abstinence mitigates Applicant's drug involvement as a security concern.

More difficult to reconcile are Applicant's falsifications January 23, 1990, June 11, 1991, and April 17, 1995. They demonstrate a pattern of intentional conduct that is not mitigated or extenuated by any of Applicant's explanations. First, the stigma connected with any kind of sexual crime involving a child does not permit a person to intentionally provide false answers on a security form. Second, Applicant's uncorroborated claim that an unidentified a security officer would disclose the information to Applicant's detriment, does not justify falsifying an official government document. Third, Applicant's innocence in the child molestation charge is not the determining factor for disclosure of his child molestation arrest. The question requires disclosure of criminal conduct even if the charges were dismissed, or dropped or the person was found not guilty.

Applicant's falsification of the drug use and purchase questions on April 17, 1995, was also intentional and demonstrates additional evidence of a pattern of dishonest conduct that is also not mitigated or extenuated by Applicant's explanations. Concealing the drug use because it lasted only for a short period of time does not truthfully answer either question on the form. Concealing the drug use because of embarrassment does not qualify as a justification for lying on a security form. With his intentional falsification of his drug history in his sworn statement in November 1995, Applicant provided false information to the Government on five occasions in almost 6 years. His embarrassment in not disclosing the full extent of his drug use is no excuse for his intentional falsification. A person applying for access to classified information must provide truthful information during all phases of the security investigation.

Applicant's knowing falsifications of relevant and material information between 1990 and 1995 constitute a violation of 18 USC 1001. The falsifications were unequivocally material because the information concealed was essential in determining Applicant's security qualifications. The intentional omissions of part of his criminal record and his most of his drug history did mislead the Government into granting Applicant as security clearance.

Applicant's criminal conduct in July 1983 was very serious because he participated in at least 18 break-ins in one year. Applicant did not know why he committed the crimes but thought his step-father's death and his mother kicking him out of the house were contributing factors to his criminal conduct. Had there been no recent criminal activity after 1983, then the passage of nine years may have mitigated the adverse inferences of Applicant's earlier criminal conduct. However, during a two week period in 1992, Applicant demonstrated poor judgment by taking steps to have his wife murdered. The falsifications between 1990 and 1995, together with the criminal conduct in 1983, and attempt to have his wife murdered in 1992, raises significant doubts about Applicant's judgment, reliability and trustworthiness. The seriousness of the plot is not extenuated simply because the plot was not carried out. In addition, there is no evidence in the record to support Applicant's claims he tried to retrieve the weapon or abandon the plan.

Even though the criminal conduct occurred in 1992, and was obviously a different kind of crime than the burglaries in

1983, the 1992 conduct was very disturbing because Applicant was willing to hire someone to take the life of another human being. Choosing to have his wife killed rather than going through the legal system to obtain a divorce, raises distressing concerns about what Applicant's response would be if he were to disagree with a security rule or regulation.

Applicant's use of his company's computer system for his own personal business raises even greater apprehension about Applicant's judgment. If he is willing to defy company rules (and jeopardize his own job) to satisfy his own objectives, as he did in June 1994, then he may be willing to avoid or defy any security rule or regulation that does not conform with his personal objectives or agenda. Given (1) Applicant's termination from a previous employer in 1994 for violation of his employer's rules, (2) his pattern of falsifications over a five year period ending in November 1995, and, (3) his serious criminal conduct which has him still on probation until 1998, Applicant's negative drug tests and the favorable information from the branch manager are insufficient to carry his ultimate burden of persuasion under Criterion M, Criterion J, and Criterion E.

### **FORMAL FINDINGS**

Formal Findings required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1 (drug involvement): FOR THE APPLICANT.

- a. For the Applicant.
- b. For the Applicant.

Paragraph 2 (falsification) : AGAINST THE APPLICANT.

- a. Against the Applicant.
- b. Against the Applicant.
- c. Against the Applicant.
- d. Against the Applicant.
- e. Against the Applicant.

Paragraph 3 (criminal conduct): AGAINST THE APPLICANT.

- a. Against the Applicant.
- b. Against the Applicant.
- c. Against the Applicant.

Paragraph 4 (rules violations) : AGAINST THE APPLICANT.

- a. Against the Applicant.

Factual support and reasons for the foregoing findings are set forth in FINDINGS OF FACT and CONCLUSIONS above.

### **DECISION**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Paul J. Mason

## Administrative Judge

1. Applicant's denials shall be weighed and balanced against the evidence supporting the allegation before reaching a finding of fact. His admissions shall be incorporated as findings of fact.
2. Applicant's Exhibit A reflects negative drug tests for the past three years.
3. Applicant omitted this arrest from this form and subsequent forms because: (1) child molestation is a crime which evokes a stigma and embarrassment; and, (2) the probability the facility security officer would disclose the adverse information to the company. (Tr. 26; Answer).
4. He was originally charged with criminal solicitation to commit murder. (GE #8). Some time in March 1992, Applicant met with the contract killer and explained he wanted to get rid of his wife but he did not want to divorce her. Applicant gave the contract killer a loaded handgun. About 2 weeks later, Applicant asked the killer why he had not killed Applicant's wife. The killer said he would carry out the plan the next week. (GE #8).
5. He gave the killer \$75 and promised to pay him \$5000 at some future date, but, after talking with his present wife, decided to abandon the plan entirely. (GE #5).