

DATE: November 5, 1996

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR OSD Case No. 96-0376

**DECISION OF ADMINISTRATIVE JUDGE**

**JOHN G. METZ, JR.**

**APPEARANCES**

**FOR THE GOVERNMENT**

Earl C. Hill, Jr.

Department Counsel

**FOR THE APPLICANT**

James E. Campion, Jr., Esquire

**STATEMENT OF THE CASE**

On 17 May 1996, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding<sup>(1)</sup> that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. In an undated answer, Applicant answered the SOR and requested a hearing. The case was assigned to me on 9 July 1996. The case was originally set for 15 August 1996; however, on 5 August 1996, Applicant's counsel requested a continuance because he had just been retained by Applicant on 2 August. I reset the case for 29 August 1996.

At the hearing, the Government presented ten exhibits--three admitted over Applicant's objection, the rest admitted without objection--and three witnesses; the Applicant presented two exhibits--admitted without objection--and the testimony of two witnesses, including himself. I received the transcript on 20 September 1996.

A copy of the SOR is attached to this Decision and incorporated by reference.

**RULINGS ON PROCEDURE**

At the hearing, Department Counsel moved to amend the execution date of the Standard Form 86 (SF 86) listed in paragraph 2.c. from September 1990 to "approximately March 1990." Applicant did not object, and I granted the motion.

Also at the hearing, I proposed to take official notice of the contents of the pertinent questions on the SF 86 which formed the basis of the allegation in paragraph 2.c. of the SOR, and directed Department Counsel to provide me with

either a legible copy of the SF 86 actually signed by the Applicant or a legible copy of a blank SF 86. Neither counsel objected to my taking notice of the SF 86. On 10 October 1996, Department Counsel provided me with a legible copy of a blank SF 86.

### FINDINGS OF FACT

Applicant denied with explanation the allegations of paragraph 1., and denied the remaining allegations of the SOR. I found the explanations of little evidentiary value in reviewing the case; accordingly, I have not incorporated any of the answer as findings of fact.

Applicant is a 34-year old employee of a defense contractor seeking a secret clearance.

On 6 September 1989, Applicant falsified a Personnel Security Questionnaire (PSQ)(DD Form 48)(G.E. 1) when he answered "no" to a question designed to elicit his drug purchase history; further, while he admitted using drugs, he falsely asserted that he had used only marijuana, and at most five times in 1978-1979.<sup>(2)</sup> Based on this PSQ, Applicant was granted a secret clearance at his prior employer on 4 December 1989.

In approximately March 1990, Applicant completed a Questionnaire for Sensitive Positions (SF 86); the form in use at the time required disclosure of drug use within the past five years. At the time he completed the form, he had not used drugs within the last five years. Consequently, he correctly answered the pertinent drug questions "no."

On 30 December 1992, Applicant falsified a National Agency Questionnaire (NAQ)(DD Form 398-2)(G.E.3) when he answered "no" to questions designed to elicit his drug history.<sup>(3)</sup> On 27 December 1994, Applicant wrote to the Defense Investigative Service (DIS) and disclosed the falsification of his earlier NAQ (G.E. 8); he wrote a similar letter to his employer on 23 December 1994 (A.E. B). In both letters, Applicant alleged that the facility security officer (FSO) asked him in 1992 to change his "yes" answers to the drug questions to "no," ostensibly because the company could not afford to have Applicant unavailable for classified contract work while DIS investigated the "yes" answers; Applicant later alleged that the security office's administrative assistant (AA) was also involved in changing the answers (Tr. 117). However, I conclude that no such incident occurred. The senior security representative (SSR) on duty at the time Applicant started work at the company briefed Applicant on security requirements at the time Applicant first reported to work, and gave him the necessary paperwork to apply for a security clearance (Tr. 207). The FSO and AA were not at work that day, nor indeed anytime the week Applicant executed the NAQ.<sup>(4)</sup>

In September 1995, Applicant was interviewed by a DIS Special Agent about his drug abuse history. Applicant acknowledged that his 1989 PSQ failed to disclose the full extent of his marijuana use and omitted his abuse of other drugs (G.E. 4). Applicant disclosed that he had first used marijuana in 1977, and between 1977 and 1978 used marijuana between 10 and 20 times. Between 1978 and 1985, he used marijuana about 10 more times. In approximately 1977 or 1978, Applicant chipped in to buy small amounts (\$5.00) of marijuana; in 1977, he tried to grow a marijuana plant. Applicant used marijuana laced with PCP (Killer Weed) once in 1977 or 1978; used speed once in 1978; used cocaine once or twice in 1982 or 1983. Applicant's disclosures were false in this respect: he failed to disclose additional use of marijuana in November 1992 and summer 1994, and he failed to disclose his use of LSD in approximately 1978.

On 15 February 1996, Applicant was interviewed by a DIS Special Agent as part of a pre-test polygraph interview. Applicant acknowledged that he had not been entirely truthful in disclosing his drug abuse history: he disclosed for the first time that he had used marijuana in November 1992 and Summer 1994, had used cocaine more frequently and later than previously disclosed, and had used LSD in approximately 1978. He admitted falsifying his drug abuse history for fear he would lose his security clearance (G.E. 7).<sup>(5)</sup>

The record contains no evidence of Applicant's work record or character, or other evidence of extenuation, mitigation, or rehabilitation.

### POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security

eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section F.3. and in Enclosure (2) of the Directive. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

Considering the evidence as a whole, the following adjudication policy factors are most pertinent to this case:

### **DRUG INVOLVEMENT (CRITERION H)**

Improper or illegal involvement with drugs raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.

Conditions that could raise a security concern and may be disqualifying include:

- (1) any drug abuse;
- (2) illegal drug possession, including . . . purchase . . .

Conditions that could mitigate security concerns include:

- (1) the drug involvement was not recent.
- (3) a demonstrated intent not to abuse any drugs in the future.

### **PERSONAL CONDUCT (CRITERION E)**

Conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying include:

- (2) deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, . . . [or] 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;

Conditions that could mitigate security concerns include:

None.

### **CRIMINAL CONDUCT (CRITERION J)**

A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

- (1) any criminal conduct, regardless of whether the person was formally charged;

Conditions that could mitigate security concerns include:

None.

## **Burden of Proof**

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

## **CONCLUSIONS**

The Government has established its case under criterion H; however, I find the conduct mitigated. Applicant's drug abuse was never extensive, and except for his marijuana abuse had ceased by 1986--the last time he used cocaine. Although Applicant used marijuana twice since 1985--and once since receiving his clearance in 1993--I am persuaded that he will not use drugs in the future. Accordingly, I find criterion H. for Applicant.

The Government has established its case under Criteria E, except for the allegations under paragraph 2.c. The questionnaire at issue requested drug abuse within the last five years; although Applicant used cocaine in 1986, at the time all his other drug use had ceased by 1985. Notwithstanding the cocaine use in 1986, I find the Government's evidence insufficient to establish the fact of falsification on this allegation.<sup>(6)</sup> However, the information sought by the Government on the PSQ, NAQ and during the subject interview was relevant and material to the Government's investigation of the Applicant's fitness for access to classified information, and the Applicant knowingly and wilfully falsified that information. In 1989, Applicant disclosed some drug abuse but under reported his marijuana use and omitted other drug use that might have triggered a more extensive background investigation; he was given a security clearance in part based on the false information provided. In 1992, he provided knowingly false answers to protect his job and his clearance, coming forward only when rumors surfaced at his company that falsifying a drug statement had cost a co-worker a job. In 1995, Applicant again under reported his drug abuse during a subject interview. These falsifications suggest that Applicant is unwilling to speak the truth if the truth presents possible adverse consequences for his own interests. Although Applicant claims that he falsified the NAQ on the advice of others, I find that Applicant did not rely on such advice in good faith. He knew the answers he provided were false; and indeed he knew the answers had to be false for him to get what he wanted--a security clearance. Furthermore, at no time did Applicant make a prompt, good faith effort to fully disclose his drug abuse history; his disclosure of the falsification two years after the fact provides some mitigation, but not enough to overcome the adverse inferences of the earlier falsifications. I find criterion E. against the Applicant.

The Government has established its case under Criteria J. The Applicant's knowing, multiple falsifications to an agency of the federal government on matters within that agency's jurisdiction clearly violate 18 U.S.C. §1001. The falsifications had the potential to influence the course of the background investigation--in areas of legitimate concern to the Government. I find criterion J. against the Applicant.

## **FORMAL FINDINGS**

Paragraph 1. Criterion H: FOR THE APPLICANT

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: For the Applicant

Subparagraph e: For the Applicant

Subparagraph f: For the Applicant

Subparagraph g: For the Applicant

Subparagraph h: For the Applicant

Paragraph 2. Criterion E: AGAINST THE APPLICANT

Subparagraph a: Against the Applicant

Subparagraph b: Against the applicant

Subparagraph c: For the Applicant

Subparagraph d: Against the Applicant

Subparagraph e: Against the applicant

Subparagraph f: Against the Applicant

Paragraph 3. Criterion J: AGAINST THE APPLICANT

Subparagraph a: Against the Applicant

### **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.

**John G. Metz, Jr.**

**Administrative Judge**

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6, dated January 2, 1992--and amended by Change 3 dated 16 February 1996 (Directive).
2. Applicant admitted that the PSQ understated his marijuana use and omitted mention of other drugs he had used (Tr. 191-192).
3. Applicant alleges that he was told by company security personnel to change the "yes" answers he had given on worksheets to "no" on the computer-generated NAQ which was submitted to DIS. Although I reject this explanation for reasons stated elsewhere in this decision, I would still conclude that Applicant falsified his NAQ even if I accepted his explanation. Applicant knew the answers given on the NAQ he signed and swore to were false, yet he made no apparent effort to resist providing a false answer. He knew that the alleged advice to change his answers to "no" was wrong, yet he acquiesced. He made no prompt effort to disclose the truth; not until two years later did he notify DIS that he had submitted a false NAQ. The fact that Applicant needed the job does not excuse or mitigate his conduct in answering the drug questions falsely.
4. The SSR's testimony is confirmed by the time cards (G.E. 9, 10) and the NAQ (G.E. 3), which shows the SSR as the individual who signed the NAQ for the company, and a temporary employee as the person who prepared the NAQ from information provided by the Applicant. The AA also testified that neither she nor the FSO were at work that week; she specifically denied being involved with changing Applicant's answers to the drug questions. Applicant's testimony also

confirms that the SSR briefed him on company security requirements (Tr. 114). Applicant's credibility is bolstered somewhat by the fact that he did report his falsification in December 1994; however, I find that disclosure motivated more by the rumor that someone at Applicant's company lost their clearance (Tr. 80) for falsifying their drug history to the DIS, than by any real remorse over the earlier falsifications. Further, I found Applicant evasive in his testimony about his drug history and the circumstances of his interviews with the DIS agents. On balance, I find the testimony of the Government's witnesses and documents more credible than the Applicant's.

5. In assessing what Applicant said to the DIS agents during the two interviews, I have given greater weight to the agents' statements of what Applicant said. I had the opportunity to observe both agents testify and found them to be credible witnesses. Neither had any motive to do anything other than accurately record what Applicant said during the course of the two interviews. Both noted the difficulty in getting Applicant to execute a sworn statement. While Applicant was not required to sign a statement, I conclude from my observation of Applicant at the hearing that the agents' failure to obtain statements--resulting in Certified Results of Interviews rather than Applicant's sworn statements--was due more to Applicant's semantic quibbles than the agents' failure to accurately record what Applicant said during the interviews. Coupled with Applicant's evasiveness at the hearing and his greater motive to understate his drug involvement, I conclude that the Certified Results of Interview more accurately portray the full extent of Applicant's drug abuse.

6. Although I conclude that Applicant understated his cocaine abuse in 1995 when he placed it in the 1982-1983 timeframe, I believe he was trying to be forthright during the 1996 subject interview when he placed the use in 1983-1984. These latter dates are consistent with Applicant's answer to the March 1990 questionnaire. I attribute the discrepancy between the 1983-1984 dates given during the 1996 subject interview and Applicant's testimony (Tr. 189; Answer) that he used cocaine in 1986 to faulty memory.