

DATE: May 30, 1997

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In Re:

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SSN: -----

Applicant for Security Clearance

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DOHA Case No. 96-0557

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR THE GOVERNMENT

Pamela C. Benson, Esquire

Attorney Advisor

FOR THE APPLICANT

*Pro Se*

STATEMENT OF THE CASE

On August 3, 1996, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, "*Safeguarding Classified Information Within Industry*," dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6 "*Defense Industrial Personnel Security Clearance Review Program*" (Directive) dated January 2, 1992, as amended by Change 3, dated February 13, 1996, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make a preliminary determination that it was clearly consistent with the national interest to grant or continue a security clearance for him.

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

Applicant responded to the SOR in writing on August 27, 1996, and requested that his case be decided without a hearing. [\(U\)](#) Applicant received the Government's File of Relevant aterial (FORM) consisting of 16 exhibits on March 26, 1997. He did not offer any rebuttal to the information in the FORM, or any additional exculpatory information on his own behalf. The case record was closed on April 26, 1997, and on May 7, 1997, the case was assigned to this Administrative Judge for decision.

FINDINGS OF FACT

The SOR alleges illegal involvement with drugs under Criterion H. Specific allegations are that Applicant used marijuana (from early 1984 to the summer of 1995), hashish (from early 1984 to the summer of 1995), cocaine (in 1995), and heroin (in 1995), that he purchased marijuana (from early 1984 to the summer of 1995), hashish (from early 1984 to 1993), and crack cocaine (from early 1993 to March 1996), that he sold crack cocaine for profit from early 1993

to March 1996, and that he was arrested for attempting to purchase marijuana in 1992. The SOR alleges that Applicant demonstrated questionable judgment, untrustworthiness, and unreliability under Criterion E when he falsified material information about his drug involvement on a National Agency Questionnaire (NAQ) and in two signed, sworn statements to the Defense Investigative Service (DIS). Finally, the SOR alleges that Applicant's falsifications constituted criminal conduct under Criterion J.

Applicant admitted that he had used heroin and cocaine, that he had purchased marijuana and hashish, and that he had been arrested for attempting to purchase marijuana in 1992. He denied--without explanation--all other allegations under Criterion H, all of the allegations under Criterion E, and he did not answer the allegation under Criterion J.

After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact.

Applicant is a 26 year old employee of a defense contractor who has worked for his current employer since November 1992. Previously, he had served in the United States Navy from 1988 to 1992. He is seeking to retain the confidential clearance granted to him in February 1996. The DOHA could not make a preliminary determination on Applicant's suitability to retain his security clearance because of the misconduct alleged in the SOR.

Applicant first became involved with illegal drugs in 1984 when he used marijuana/hashish<sup>(2)</sup> at the age of 14. From the time of his first use until he joined the Navy in August 1988, Applicant used marijuana/hashish an average of once a month. He did not use marijuana/hashish during the first few months that he was in the Navy, but did use it again in early 1989. Because he was afraid of testing positive in a urinalysis, he limited his use of marijuana/hashish to only 3-5 times while he was in the Navy. After he was discharged from the Navy in August 1992, he began using marijuana/hashish once or twice a week and continued this rate of usage until 1993 when he reduced his consumption to once a month. He continued to use marijuana/hashish at the rate of once a month until he stopped all use in the summer of 1995.

Applicant's involvement with illegal drugs has not been limited to his use of marijuana/hashish. He used heroin one time during the 1984-1985 time frame and he used cocaine during the same time period. He estimates that he purchased marijuana/hashish one-fourth of the time that he had used the substance, making his last purchase of marijuana/hashish in 1993. More recently Applicant was involved in the purchase and sale--but not the use--of crack cocaine. From early 1993 to March 1996, he trafficked in crack cocaine to "make some extra cash" because he was "having some financial problems at home" (Item # 13 Gov. FORM).

When Applicant completed his NAQ on January 25, 1995 (Item # 10), he certified that:

....the entries made by me are true, complete and accurate to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both.

In response to question 20.a. which asked if he had used or possessed any narcotic (to include heroin or cocaine)....hallucinogen (to include LSD or PCP), or cannabis (to include marijuana or hashish),

Applicant answered "yes" and explained that he had used marijuana infrequently with his last use being in November 1992. In response to question 20.b. which asked if he had ever been involved in the illegal purchase or sale of marijuana or other illegal drugs, Applicant answered "yes." He explained that his involvement with the purchase and sale of illegal drugs had been limited to a one-time attempt to purchase marijuana in 1992.

Later, incident to his first interview with the DIS on September 25, 1995, Applicant signed a statement in which he swore that he had used marijuana a total of four times: once in 1984, twice in 1988, and once in November 1992 (Item # 11 of Gov. FORM). In the same statement, he denied that he had ever purchased or sold marijuana/hashish or any other illegal drug, while admitting that he had been arrested for attempting to purchase marijuana in 1992. On March 13, 1996, in a second signed statement to the DIS, Applicant swore again that his involvement with illegal drugs was limited to that which he had disclosed on his earlier (September) statement (Item # 12 of Gov. FORM)..

Applicant finally admitted the full extent of his involvement with illegal drugs during a third interview with the DIS on April 29, 1996. In a sworn statement which he signed incident to that interview, Applicant admitted that he had used marijuana/hashish with varying frequency--as often as weekly--from 1984 to the summer of 1995; he admitted that he had purchased marijuana/hashish one-fourth of the time that he had used it between 1984 and 1993; he admitted that he had used heroin (one time) and cocaine (one time) in 1984 or 1985; and he admitted that he had purchased crack cocaine and sold it for profit from early 1993 to March 1996. Applicant admitted that he had not been "truthful from the beginning" because he was afraid of loosing his job (Item # 13 of Gov. FORM).

In his answer to the SOR, Applicant has denied that he purchased and sold crack cocaine for profit between early 1993 and March 1996. He has also denied that he used marijuana/hashish between 1984 and 1995. However, he has not explained why he admitted participating in these activities in this third signed, sworn statement to the DIS if he had not--in fact--participated in them. Without such an explanation, his admissions in Item # 12 of the Government FORM are found to be true.

## **POLICIES**

The Adjudicative Guidelines of the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations with reasonable consistency that are clearly consistent with the interests of national security. In making those overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines but in the context of the factors set forth in section F.3. of the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate that the facts proven have a nexus to an applicant's lack of security worthiness.

The following Adjudicative Guidelines are deemed applicable to the instant matter.

## **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.

Drugs are defined as mood and behavior altering:

- (a) drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens) and
- (b) inhalants and other similar substances.

Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

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

- (1) Any drug abuse
- (2) Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.

**Conditions that could mitigate security concerns include:**

- (3) A demonstrated intent not to abuse any drugs in the future.

## **PERSONAL CONDUCT**

## (Criterion E)

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

(2) The deliberate omission, concealment, or falsification of relevant and material facts from any personal security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities,

(3) Deliberate providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personal security trustworthiness determination.

**Conditions that could mitigate security concerns include:**

None Applicable

**CRIMINAL CONDUCT**

## (Criterion J)

**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 Applicable

**Burden of Proof**

The Government has the burden of proving any controverted facts alleged in the Statement of Reasons. If the Government establishes its case, the burden of persuasion shifts to the applicant to establish his security suitability through evidence which refutes, mitigates, or extenuates the disqualifying conduct and demonstrates that it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the 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 is nonetheless security worthy. As noted by the United States Supreme Court in *Department of 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." As this Administrative Judge understands that Court's rationale, doubts are to be resolved against an applicant.

**CONCLUSIONS**

Having considered the record evidence in accordance with the appropriate legal precepts and factors, this Administrative Judge concludes that the Government has established its case with regard to Criteria H, E, and J.

In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Section F.3, as well as those referred to in the section dealing with the Adjudicative Process, both in the Directive.

The Government has established its case with respect to Criterion H. Applicant has admitted that he purchased and sold crack cocaine regularly from early 1993 to March 1996 to earn extra income. He has admitted that he used marijuana/hashish monthly until the summer of 1995, and he has admitted that he purchased marijuana/hashish until 1993. And he admitted to one-time use of heroin and cocaine in the 1984-1985 time frame.

Applicant's involvement with illegal drugs other than crack cocaine is mitigated by the passage of time and by his stated intention not to use these substances in the future. There is no evidence to refute his statement that he has not used marijuana/hashish since the summer of 1995, nor is there evidence to refute his statement that his one-time use of cocaine and heroin occurred more than ten years ago. Subparagraphs 1.c., 1.d., 1.e., 1.f., 1.g., 1.h., and 1.j. are concluded for Applicant.

More problematic is Applicant's involvement with crack cocaine. In typical drug involvement cases, evidence that an individual has trafficked in an illegal drug suggests a much deeper connection with the substance--long term use, perhaps addiction--than does occasional use of a drug by itself. This increased connection significantly increases the likelihood that the individual will continue to abuse the drug, or that he will relapse if he is able to quit for a period of time. Because there is no evidence to counter Applicant's claim that he has never used crack cocaine, there is no basis for concluding that his drug trafficking experience portends the likelihood of further drug involvement. Applicant's trafficking in crack cocaine was very serious criminal misconduct, but does not--under the circumstances of this case--increase the likelihood that his involvement with other illegal drugs will continue or resume. Subparagraphs 1.a. and 1.b. are concluded for Applicant.

Criterion E applies to "the deliberate omission...of relevant and material facts from any personnel security questionnaire...or deliberately providing false and misleading information...to an investigator in connection with a personnel security...determination." Facts are considered relevant and material when they are capable of influencing a federal agency's decision, e.g., a decision to grant or deny a security clearance. In this instance, Applicant's monthly use of marijuana/hashish at the time he completed his NAQ in January 1995 falls well within the definition of materiality. Also falling within the definition of materiality, and also omitted from his NAQ, were Applicant's purchasing and selling crack cocaine for profit since 1993, and his purchase of marijuana/hashish from 1984 to 1993. Applicant's omissions and misrepresentations about his drug involvement continued through interviews with the DIS in September 1995 and March 1996. Coincident with these interviews, Applicant signed sworn statements which omitted and misrepresented material information about his use, purchase and sale of illegal drugs.

Because Applicant had not been truthful to the DIS on three separate occasions--most recently in March 1996-- his falsification was neither an isolated incident, nor was it far removed from the present. When Applicant finally admitted the full extent of his involvement with illegal drugs in April of 1996, he did not make these admissions under circumstances where he can be credited with making a prompt, good-faith effort to correct his prior falsification. It was 15 months after he had signed his NAQ, and 12 months since he had signed the first signed, sworn statement to the DIS. Nor is Applicant's falsification mitigated by his explanation that he had not been truthful because he was afraid of losing his job. It seems particularly ironic that Applicant would lie about misconduct to protect his livelihood and then continue to purchase and sell crack cocaine--the very misconduct which he was lying to cover up. Subparagraphs 2.a., 2.b., and 2.c. are concluded against Applicant.

The government has established its case under Criterion J. Applicant's willfully withholding information from the DoD on matters that were clearly relevant to his security clearance eligibility violates 18 U.S.C. § 1001. The information withheld by Applicant had the potential to influence the course of his background investigation in areas of legitimate concern to the DoD.

Applicant's trafficking in crack cocaine for three years--from 1993 to 1996--is of even greater concern to the DoD than Applicant's falsification. Trafficking in a dangerous illegal drug is always very serious criminal activity. It is serious when done on a limited or occasional basis, and significantly more serious when done on a regular basis over a longer time period. And there is no mitigation in the circumstances which led Applicant to this activity. Applicant was not destitute; he did not need this money to provide the essentials of life for his family. By participating in this criminal activity, Applicant demonstrated that he was ready, willing and able to break the law on a regular basis over an extended period of time to earn extra income. This behavior does not portend well for a person seeking to retain access to classified information. Subparagraphs 3.a. and 3.b. are concluded against Applicant.

### **FORMAL FINDINGS**

Formal Findings as required by Section 3, Paragraph 7, of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 (Criterion H) FOR THE APPLICANT

Subparagraph 1.a. For the Applicant

Subparagraph 1.b. For the Applicant

Subparagraph 1.c. For the Applicant

Subparagraph 1.d. For the Applicant

Subparagraph 1.e. For the Applicant

Subparagraph 1.f For the Applicant

Subparagraph 1.g. For the Applicant

Subparagraph 1.h. For the Applicant

Subparagraph 1.i. For the Applicant

Subparagraph 1.j. For the Applicant

Paragraph 2 (Criterion E) AGAINST THE APPLICANT

Subparagraph 2.a. Against the Applicant

Subparagraph 2.b. Against the Applicant

Subparagraph 2.c. Against the Applicant

Paragraph 3 (Criterion J) AGAINST THE APPLICANT

Subparagraph 3.a. Against the Applicant

Subparagraph 3.b. 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 continue Applicant's security clearance.

**John R. Erck**

**Administrative Judge**

1. Applicant's original answer to the SOR was not notarized. It appears that the SOR was returned to Applicant for a notarized signature on September 13, 1996, and again on October 23, 1996. This effort and the special instructions which accompanied the SOR on each occasion did not succeed in eliciting Applicant's notarized signature as it is not found on any copy of the SOR in the file.
2. Applicant does not differentiate between marijuana and hashish, and does not distinguish the times when he used one substance from the times when he used the other substance (See Item # 9 of Gov. FORM)