

DATE: February 22, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-03683

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Michael H. Leonard, Esq., Department Counsel

FOR APPLICANT

Tobe Lev, Esq.

SYNOPSIS

Applicant intentionally falsified his drug history by understating his crack cocaine use in October 1998, January 1999 and April 1999. Also, in October 1998 and January 1999, he completely denied he had used marijuana while in the service between 1979 and 1990. By intentionally providing false information about his drug history, Applicant concealed material information which the Government has a legitimate right to inquire about before making a decision about a person's security worthiness. This intentional concealment also falls within criminal conduct under 18 USC 1001. Because of the recency of Applicant's falsifications, his positive character evidence is not enough to meet his ultimate burden of persuasion under the personal and criminal conduct guidelines. However, the lack of evidence of drug use since July 1998 weighs in Applicant's favor under the drug involvement guideline. Clearance is denied.

STATEMENT OF CASE

On July 5, 2001, 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, amended by Change 3, February 13, 1996, and Change 4, April 20, 1999, 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. Applicant submitted his response to the SOR on September 14, 2001. Applicant requested a hearing.

The case was assigned to the undersigned on October 12, 2001. A notice of hearing was issued on November 8, 2001, and the case was heard on November 27, 2001. The Government and Applicant submitted documentary evidence. The Government called one witness. Testimony was taken from Applicant and one witness. The transcript (Tr.) was received on December 12, 2001.

RULINGS ON PROCEDURE

At the hearing, the Government moved to amend the SOR by deleting subparagraph 1.a.(2).⁽¹⁾ The motion was granted because the drug abuse is outside the seven year time frame referenced in subparagraph 1.a. (Question 27 of Standard Form 86) of the SOR.

At the hearing, Applicant moved to continue the hearing to a new date because he had been retained a short time before the hearing. (Tr. 41) After chronologically reviewing various procedural events in the case file, and noting neither this oral motion nor any other motion had been filed in the 4 ½ months since the SOR was published, the motion was denied.

FINDINGS OF FACT

The SOR alleges personal conduct, drug involvement, and criminal conduct. In his answers to the SOR dated August 3, 2001, and September 14, 2001, Applicant denied all allegations under paragraph 1 except for 1.f. Even though Applicant did not answer paragraphs 2 and 3 of the SOR, the unanswered paragraphs shall be interpreted as denials to those paragraphs.

Applicant is 41 years old and has been employed as a climate data specialist by a defense contractor since April 1998. He seeks a secret level clearance.

On October 21, 1998, Applicant falsified a Questionnaire for National Security Positions, Standard Form (SF)-86, by understating the frequency and scope of crack cocaine use. His falsification was his claimed two-time use of crack cocaine until November 1997, when in fact he used crack cocaine more frequently and recently. Applicant indicated when he was answering question 27 of the security form (SF-86), "I put down on my form that was handwritten a couple of times with my girl friend. The person who typed up the form put a couple of times to mean two." (Tr. 95) Applicant was not sure how many times he used the drug. He stated, "I wasn't sure exactly how many times I'd done it, but basically I figured a handful of times." (Tr. 95-96)

On October 21, 1998, Applicant falsified the same SF 86 when he answered "no" to Question 28, seeking information of drug use while holding a security clearance. Applicant's "no" answer is directly contradicted by his sworn statement six months later (April 1999), which reflects he used marijuana on a daily to quarterly basis between 1979 and 1990.

On January 25, 1999, Applicant falsified a signed sworn statement to the Defense Security Service (DSS) when he stated he had only used crack cocaine approximately a dozen times until November 1997. Applicant provided the same false information about crack cocaine use during a pre-test interview in April 1999. To accept Applicant's January 1999 declarations, I must reject Applicant's earlier statements in October 1998 about his crack use occurring only twice. Having weighed and balanced the information provided in his security form with the information he provided in January 1999 and April in the pre-test interview, I find the information he provided in the sworn statement in April 1999, to be the most credible.

Applicant also falsified the January 25, 1999 statement by indicating he had not used marijuana while in the United States Air Force between 1981 and 1989. Applicant's denial of marijuana use while in the Air Force is not believable given Applicant's more recent sworn statement in April 1999 admitting marijuana use between 1979 and 1990.

On April 13, 1999, Applicant provided false information during the pre-test phase of the polygraph examination by stating his last use of crack cocaine was in November 1997.

During post-test phase of the polygraph examination on April 13, 1999, Applicant decided to provide the full extent of his drug use. Applicant first used marijuana in 1979, and used the drug on a daily to quarterly basis until 1990. He purchased marijuana in \$10.00 lots. Applicant began using crack cocaine in October 1997. He smoked the drug a few times between October and December 1997. Between January 1998 and July 1998, Applicant used crack cocaine a few times.

At the hearing, Applicant advanced a number of claims in support of his position he did not use crack cocaine until July 1998, and did not use marijuana in the Air Force between 1981 and 1989. First, Applicant claimed he became drowsy from medication he had taken on the day of the polygraph examination. (Tr. 98-101) Regarding the behavior of

Applicant, the Agent explained the polygraph procedures and had Applicant sign consent forms to take the polygraph examination (Tr. 24-26). Next, the Agent described his general practice of asking questions about an applicant's health before proceeding with the polygraph examination. (Tr. 25-27) The Agent could not recall what Applicant's specific responses were to the health questions, but would not have proceeded had there been any indication Applicant was not physically fit to take the polygraph examination. (Tr. 26) Apart from AE B, which reflects Applicant received medical attention for a foot ailment, there is no corroborative evidence indicating Applicant was under the influence of any kind of medication during the April 1999 polygraph examination.

Applicant's second claim is no recollection of GE 4, and if he had seen the exhibit before, he would certainly have objected to the marijuana use between 1979 and 1990, and the crack cocaine use between January 1998 through June 1998. (Tr. 100-101)

According to the Agent, Applicant stated he had not been truthful about his drug use in the earlier phases of the examination on April 13, 1999. (Tr. 29) Then, Applicant described the periods of drug use. The Agent read the full statement (GE 4) to Applicant out loud. (Tr. 32) Applicant swore to the statement and acknowledged it. (Tr. 32-33) Applicant placed his initials at various locations of GE 4 and signed the exhibit on the second page. Applicant acknowledged his initials and signature on GE 4. (Tr. 111-113)

As between the testimony of Applicant and the Agent concerning the drug use information which appears on GE 4, I find the Agent's testimony is credible while Applicant's testimony is undermined by Applicant's interest in the outcome of the proceeding. Second, the record does not support Applicant's medication/drowsiness claim or claim of no recollection of GE 4. Given Applicant's age when he took the polygraph, and his acknowledgment of his initials and signature on AE 4, I find the historical account drug use on AE 4 is the full extent of Applicant's drug use.

Applicant was arrested in October 1990 for First Degree Assault and Criminal Conspiracy. Applicant and his former girlfriend staged a robbery and assault with a weapon to influence a judge. On August 12, 1991, Applicant pled guilty to conspiracy to commit second degree assault and placed on probation for two years. He was also fined \$50.00 and ordered to undergo mental health counseling.

Applicant's coworker of four years, assisted in hiring Applicant and believes Applicant is dependable and has no drug habit. (Tr. 81)

Applicant's performance evaluations between 1999 and 2001 reflect good ratings in government contract compliance, business conduct and ethics, timekeeping and expense reporting, and affirmative action.

Applicant's former girlfriend gave birth to a boy in 1998. The girlfriend gave the child to her parents to raise. Applicant has regularly provided \$600.00 a month to help the parents rear the child. Applicant has also helped out with the mortgage or car repairs whenever necessary.

POLICIES

Enclosure 2 of the Directive sets forth policy factors which must be given 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:

Personal Conduct

Disqualifying Conditions:

2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire to determine security eligibility.

3. Deliberately 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 personnel security or trustworthiness determination.

Mitigating Conditions:

1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability;
2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.

Drug Involvement

Disqualifying conditions:

1. Any drug use;
2. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, and distribution.

Mitigating Conditions:

1. The drug involvement was not recent;
3. A demonstrated intent not to abuse any drugs in the future.

Criminal Conduct

Disqualifying Conditions:

1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged.

Mitigating Conditions:

1. The behavior was not recent;
2. The crime was an isolated event.
6. There is clear evidence of successful rehabilitation.

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 personal conduct (Guideline E), drug involvement (Guideline H), and criminal conduct (Guideline J) 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 her 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, 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

Deliberately omitting relevant material information⁽²⁾ from a security form represents questionable judgment under the personal conduct guideline, and indicates the person may not properly safeguard classified information. The Government has established a case of personal conduct. Applicant's intentional falsifications began on the security form⁽³⁾ October 1998 when he understated his crack cocaine use from late 1997 through June 1998. His second group of falsifications occurred in his January 1999 sworn statement⁽⁴⁾ when he again concealed material information about the full scope of this drug use.

The third falsification also is within the scope of DC 3 because Applicant intentionally furnished false information about his drug history.

The personal conduct guideline lists three mitigating conditions (MC). MC 1 is unavailable to mitigate as the drug information was substantiated and is pertinent to a determination of judgment, trustworthiness, reliability. MC 2 is not applicable to Applicant's case in mitigation because Applicant supplied false information on three separate occasions. After providing his signature to the most accurate account of his drug history in April 1999, Appellant has subsequently abandoned that version of his drug use. Hence, neither element of MC 2 can be met. MC 3 is unattainable because Appellant continues to deny the drug information he admitted in April 1999.

Applicant's falsification of his drug history also constitutes criminal conduct under 18 USC 1001, even though Appellant has never been charged.

The criminal conduct guideline lists three mitigating conditions that are potentially applicable to the circumstances of this case. However, MC 1 must be withdrawn for mitigation purposes because Applicant continues to deny what he admitted in April 1999. The pattern of falsifications in October 1998, January 1999, and April 1999, remove MC 2 from favorable consideration. MC 6 may apply in those cases where there is uncontroverted evidence of successful mitigation. Successful rehabilitation begins with a full acceptance that one has done something wrong. Though Applicant provided a truthful account of his drug history in April 1999, his present position of minimizing the full scope of his drug history, removes his conduct from the favorable purview of MC 6.

Applicant's second degree assault conviction occurred about 7 years ago before he falsified the security form in October 1998. However, the assault involved different conduct from the pattern of conduct displayed in October 1998 and since. The absence of similar criminal conduct since 1991 warrants a finding for Applicant under 1.f.

Drug involvement raises questions about a person's willingness to protect classified information. Drug abuse may impair social or occupational functioning, and may lead to the unauthorized disclosure of classified information. Applicant's illegal drug use (DC 1) is mitigated by the lack of evidence of drug use in more than three years. (MC 1)

Considering the evidence as a whole, I find against Applicant under personal conduct and criminal conduct; I find for Applicant under the drug involvement guideline. Having weighed the general factors of the whole person concept, I

reach the same conclusions under the whole person concept. Applicant's repeated falsifications are serious in scope and are ongoing. Appellant's commendable evidence concerning his financial and emotional support of his former girlfriend's child, his coworker's positive statements about Applicant's job performance, and Applicant's good performance reports, establish some evidence in rehabilitation. However, Applicant's testimony at the hearing, denying what he admitted in April 1999 about his crack cocaine abuse, continues to raise residual doubts about his judgment, and I resolve those doubts against Applicant.

FORMAL FINDINGS

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

Paragraph 1 (Personal Conduct): AGAINST THE APPLICANT.

a. Against the Applicant.

(1). Against the Applicant.

(2). For the Applicant.

b. Against the Applicant.

c. Against the Applicant.

d. Against the Applicant.

(1). Against the Applicant.

e. Against the Applicant.

(1). Against the Applicant.

f. For the Applicant.

Paragraph 2 (Drug Involvement): FOR THE APPLICANT.

a. For the Applicant.

3. Guideline J (Criminal Conduct): AGAINST THE APPLICANT.

a. Against the Applicant.

b. For 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 a security clearance for Applicant.

Paul J. Mason

Administrative Judge

1. The allegation reads, "You used marijuana on a daily to quarterly basis between 1979 to 1990."

2. Material information tends to influence the course of a background investigation in areas of legitimate concern to the Government. A person's drug history is a legitimate concern of the Government.

3. The intentional falsification of a security form falls within disqualifying condition (DC) 2 of the personal conduct guideline.
4. Deliberately providing false information to an investigator falls within DC 3 of the personal conduct guideline.