

DATE: May 23, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-21123

DECISION OF ADMINISTRATIVE JUDGE

RICHARD A. CEFOLA

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

Paul R. Bays, Esquire, Applicant's Counsel

SYNOPSIS

The Applicant was less than candid with the Government on five separate occasions. Each time was also a violation of 18 U.S.C. Section 1001. Clearance is denied.

STATEMENT OF THE CASE

On December 26, 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, issued a Statement of Reasons (SOR) to the Applicant, which detailed the 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 the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

Applicant filed an Answer to the SOR on January 23, 2002.

The case was received by the undersigned on March 13, 2002. A notice of hearing was issued on March 27, 2002, and the case was heard on May 2, 2002. The Government submitted documentary evidence, and called one witness to testify. Testimony was taken from the Applicant, who called four witnesses to testify on his behalf. The transcript was received on May 9, 2002. The issues raised here are whether the Applicant's personal conduct and related criminal conduct militate against the granting of a security clearance.

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony. The Applicant is 24 years of age, has a Bachelor's of Science in Information Technology, and is employed by a defense contractor who seeks a security clearance on behalf of the Applicant.

Guideline E - Personal Conduct & Guideline J Criminal Conduct

1.a.~1.l. On five separate occasions, the Applicant was asked about his past drug involvement (Government Exhibits (GXs) 4~8). It was only at his hearing that he divulged the true extent of his past drug abuse. The Applicant used **marijuana on two separate occasions** while in high school, **once in 1994 and the last time in May, June or July of 1996** (Transcript (TR) at page 44 line 7 to page 45 line 8). On these two occasions, the Applicant also acted as a "middle man" by sharing the marijuana he **purchased** with friends (TR at page 31 lines 7~14). In the spring of 1996, he threw marijuana seeds out of his bedroom window, but he denies any attempt to grow marijuana (TR at page 31 line 15 to page 32 line 2). In **1996**, the Applicant also **attempted to use LSD** (TR at page 45 lines 14~25, *see also* at page 76 line 10 to page 77 line 6 and Applicant's Exhibit (AppX) K). He was sitting in the back seat of a car with friends, who passed him the LSD. He merely touched it to his tongue, and when his friends were not looking he threw the LSD out the window of the car. He suffered no ill affects by touching the drug to his tongue (*id*). He also used **hallucinogenic mushrooms once in 1996** (TR at page 45 lines 11~13). Finally, the Applicant **illegally used steroids twice in 1997** (TR at page 46 lines 1~25, and at page 52 lines 17~25). He ingested them in pill form (*id*).

In answering questions 23 and 26 on his **August 25, 1997**, Security Clearance Questionnaire (SCQ), the Applicant knowingly and wilfully failed to disclose any of his past drug involvement (GX 8 at page 6). He avers credibly that when he filled out his SCQ he followed the advice of his Army recruiter who told the Applicant "to omit my experimental drug usage" (TR at page 62 line 21 to page 63 line 17). The Applicant also acknowledges, however, that the first page of the SCQ states that "any advice you may have received from anyone concerning the withholding of requested or applicable information must be disregarded" (TR at page 62 line 21 to page 63 line 2, and GX 8 at page 1). This lack of candor is a violation of 18 U.S.C. Section 1001.

In answering question 24 on his **August 29, 1997**, Questionnaire for National Security Positions (QNSP), the Applicant again knowingly and wilfully failed to disclose any of his past drug involvement (GX 7 at page 8). He avers he was just following the advice of his recruiter (TR at page 67 line 14 to page 68 line 1). This lack of candor is also a violation of 18 U.S.C. Section 1001.

In answering question F on a subsequent undated Personnel Security Screening Questionnaire (PSSQ) in the **summer of 1997**, the Applicant knowingly and wilfully failed to disclose that he had purchased marijuana on two occasions, that he had distributed it to his friends on those two occasions, that he used hallucinogenic mushrooms once in 1996, and that he illegally used steroids twice in 1997 (TR at page 55 lines 23~25, and GX 6 at page 5). This lack of candor is a further violation of 18 U.S.C. Section 1001.

During a **September 4, 1997**, Personnel Security Screening Interview, he Applicant again knowingly and wilfully failed to disclose that he had purchased marijuana on two occasions, that he had distributed it to his friends on those two occasions, that he used hallucinogenic mushrooms once in 1996, and that he illegally used steroids twice in 1997 (GX 5). This lack of candor is another violation of 18 U.S.C. Section 1001.

In a signed sworn statement, executed by the Applicant on **December 12, 1997**, he knowingly and wilfully failed to disclose his drug involvement after July of 1995; i.e., that he used marijuana once during the spring/summer of 1996, that he purchased and distributed marijuana once during this same time frame, that he used hallucinogenic mushrooms once in 1996, and that he illegally used steroids twice in 1997 (GX 9). This lack of candor is yet another ion of 18 U.S.C. Section 1001.

As a result of the above, in April of 1998, a Statement of Reasons was issued by the Department of the Army alleging much that is contained in the present SOR (GX 3 at pages 4~5). In October of 1998, a Letter of Intent was issued to the Applicant by the Army's Central Personnel Security Clearance Facility (GX 3 at pages 1~3); and as a result, his affiliation with the Army was terminated, as the Applicant did not ask for a personal appearance.

In answering question 27 on his December 7, 1999, Security Clearance Applicant, the Applicant overstated his use of marijuana, and he stated that used illegal steroids once (GX 2 at page 10). He testified credibly, that as one cycle use of steroids required the ingestion of two pills, he put down one time use not two (TR at page 28 lines 7~17). This is a plausible explanation, and the fact that he erred on the side of caution and overstated his marijuana involvement (TR at page 27 lines 4~14), will not be held against the Applicant. Subparagraph 1.a. is found in his favor.

Mitigation

Four of the Applicant's fellow workers testified most favorably in the Applicant's behalf (TR at page 85 line 10 to page 115 line 15). He also testified credibly that he has no intention using illegal drugs in the future (TR at page 83 lines 21~23).

POLICIES

Enclosure 2 and Section E.2.2. of the 1992 Directive set forth both policy factors, and conditions that could raise or mitigate a security concern; which must be given binding consideration in making security clearance determinations. The conditions should be followed in every case according to the pertinent criterion, however, the conditions are neither 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 clearance case presents its own unique facts and circumstances, it should not be assumed that these conditions exhaust the realm of human experience, or apply equally in every case. Conditions most pertinent to evaluation of this case are:

Personal ConductConditions that could raise a security concern:

2. The deliberate omission, concealment; or falsification of relevant and material facts from any personnel security questionnaire . . .;
3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator . . . in connection with a personnel security . . . determination;

Conditions that could mitigate security concerns:

None.

Criminal ConductCondition that could raise a security concern:

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

Conditions that could mitigate security concerns:

None.

As set forth in the Directive, each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate:

- a. Nature and seriousness of the conduct and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequence involved.
- e. Absence or presence of rehabilitation.
- f. Probability that circumstances or conduct will continue or recur in the future."

The Administrative Judge, however, 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 that are speculative or conjectural in nature.

The Government must make out a case under Guidelines E (personal conduct), and J (criminal conduct); 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 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 be repeated, and that the Applicant presently qualifies for a security clearance.

Unacceptable personal conduct is conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations. The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations at all times and in all places. If an applicant has demonstrated a lack of respect for the law, there then exists the possibility that an applicant may demonstrate the same attitude towards security rules and regulations.

CONCLUSIONS

The Applicant was less than candid with the Government as to his past drug involvement on five separate occasions. The first time was on his August 25, 1997, SCQ. Relying on the advice of his Army recruiter, he completely disavowed any drug involvement. Mitigating condition 4 under Personal Conduct recognizes that the "omission of material facts" may be "caused or significantly contributed to by improper or inadequate advice of authorized personnel," but it also requires that the "previously omitted information was **promptly and fully provided**" (emphasis supplied). Such was not the case here. The Applicant continued his deceptive ruse four additional times from August to December of 1997. It was not until two years later, in December of 1999, that began to set the record straight when he executed a Security Clearance Application. This was too little too late. On the five occasions he was not candid with the Government, he was also in violation of 18 U.S.C. Section 1001.

Considering all the evidence, the Applicant has not rebutted the Government's case regarding his personal and related criminal conduct. The Applicant has thus not met the mitigating conditions of Guidelines E and J, and of Section E.2.2.. of the Directive. Accordingly, he has not met his ultimate burden of persuasion under Guideline E and J.

FORMAL FINDINGS

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

Paragraph 1: AGAINST THE APPLICANT

- a. For the Applicant.
- b. Against the Applicant.
- c. Against the Applicant.
- d. Against the Applicant.
- e. Against the Applicant.
- f. Against the Applicant.
- g. Against the Applicant.

h. Against the Applicant.

I. Against the Applicant.

j. Against the Applicant.

k. Against the Applicant.

l. Against the Applicant.

Paragraph 2: AGAINST THE APPLICANT

a. Against the Applicant.

Factual support and reasons for the foregoing are set forth in **FINDINGS OF FACT** and **CONCLUSIONS**, supra.

DECISION

In light of 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 the Applicant.

Richard A. Cefola

Administrative Judge