

DATE: March 14, 1997

In Re:

SSN: -----

Applicant for security clearance

ISCR OSD Case No. 96-0127

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

Appearances

FOR THE GOVERNMENT

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FOR THE APPLICANT

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STATEMENT OF CASE

On April 8, 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 May 2, 1996.

The first hearing was held on June 24, 1996.<sup>(1)</sup> The case was transferred to the undersigned on July 5, 1996.<sup>(2)</sup> The Government and Applicant submitted documentary evidence.<sup>(3)</sup> The Government presented 2 witnesses. Testimony was taken from Applicant and one witness. The transcript was received on July 2, 1996. A supplemental hearing was held on February 19, 1997. The transcript was received on February 28, 1997.

RULINGS ON PROCEDURE

At the original hearing on June 24, 1996, subparagraph 2c was amended by adding the number "4" to the clause describing alleged use of cocaine. Subparagraph 2c now reads, "You answered "YES" and indicated that you had used marijuana 20-40 times during the approximate period from 1979 to 1980, had used cocaine about 10 times during the period 1981 until 198[4]...." (Vol. I, Tr. 9-10).

In the week of July 15, 1996, Applicant was advised that the originally assigned Judge was not expected to return for approximately 6 weeks. Applicant was advised he could have the case reheard by another judge or he could have the case decided by the undersigned based on the case record. On July 23, 1996, Applicant stated his preference to have the case decided by the original judge. On October 4, 1996, and by telephone conversation in the week of October 7, 1996, Applicant was requested to furnish his decision to have the case reheard by another judge or have the case decided on the written record. On October 16, 1997, Applicant's counsel stated by letter his client would agree to this Administrative Judge deciding the case on the record if he listened to the tapes of the first hearing.

On October 16, 1996, Applicant provided a letter (dated October 16, 1996) from the treatment center (Applicant's Exhibit C) regarding Applicant's updated status in the program. On October 22, 1996, the Government filed a Motion in Opposition to the admission into evidence of the treatment status letter.

On February 7, 1997, a conference call was held with the parties. I indicated I would not listen to the tapes of the first hearing because the transcript and not the tapes constitute the official record. I scheduled a supplemental hearing for February 19, 1997 to allow Applicant an opportunity to present any additional evidence he believed was relevant. I also indicated the post-hearing treatment exhibit (filed on October 16, 1997) would be ruled upon at the supplemental hearing.

At the supplemental hearing on February 19, 1997, Applicant presented a second updated treatment report from the same treatment center.<sup>(4)</sup> The Government's Motion in Opposition to the two updated treatment letters, was denied because of Enclosure 3 of the Directive, section 19, which provides that the rules of evidence should be relaxed to permit the development of a full record. Hence, even though the counselor's letters contain significant evidentiary defects of hearsay and lack of foundation, the six documents were marked as Applicant's Exhibit D and admitted in the record.

### 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) and Criterion J (criminal conduct). Applicant denied subparagraph 1h and explained he did not recall the recent use of marijuana until after he signed the statement. He denied 1j and 1k because he did not recall his last use of marijuana until the interviews with the Special Agent on or around October 19, 1995. He did not answer subparagraph 3a as the subparagraph constitutes a conclusion of law. He admitted all the other allegations of the SOR.<sup>(5)</sup>

Applicant is 36 years old and employed as an ----- for 12 years by a defense contractor.<sup>(6)</sup> He seeks a top secret clearance.

Applicant first smoked marijuana in 1977 or 1988 and used the drug in different social settings at different frequencies from 1977 to 1983.<sup>(7)</sup> Sometimes, he smoked marijuana once a week or twice a month. From 1983 to 1988, he used the drug about 20 times. Between 1988 and January 1993, he used the drug about 10 times. He used the drug about 20 times in 1993, but only three or four times in 1994. He smoked the drug two or three times between January 1995 and March 1995. After abstaining from the drug between March and May 1995, Applicant thinks he used the drug on May 28, 1995. He purchased marijuana only two or three times between 1977 and 1985.

Applicant smoked hashish on two occasions between 1980 and 1982.<sup>(8)</sup> He never bought hashish. He used cocaine in 1980 in a pipe. He used cocaine about 10 times between 1980 and 1983 or 1984. He used LSD in 1979 but did not know it. He used 2 additional times and was aware he was using the drug. He purchased LSD once. Applicant first used speed in 1979. Between 1979 and 1981 and 1982, Applicant used speed about 15 times. He may have bought the drug also. He used mushrooms in 1979 and also one or two times in 1983. Applicant may have used PCP in 1980 but is not certain. Applicant continued using marijuana after being granted a clearance on March 22, 1990.

On July 11, 1988,<sup>(9)</sup> Applicant falsified a supplemental questionnaire dated July 1988 (questions #1 and #2), by disclosing less marijuana, cocaine and amphetamine use than he actually used.<sup>(10)</sup> (Vol. I, Tr. 98). He failed to mention

his frequency and use of PCP mushrooms altogether. Applicant falsified questions #3 and #4 of the July 11, 1988 supplemental form when he answered "NO" to question #3 and then explained the only drug he purchased once or twice was marijuana.<sup>(11)</sup> (Vol. I, Tr. 98).

On September 12, 1988,<sup>(12)</sup> Applicant falsified a personal security questionnaire when he revealed less than the full history of marijuana use.<sup>(13)</sup> Applicant actually used marijuana about 20 times between 1984 and 1988. (Vol. I, Tr. 129-130; GE #6). He also did not reveal he had used LSD, PCP, and mushrooms. In addition, Applicant provided false information on the questionnaire by answering "NO" to question 18b (the drug purchase and possession question).<sup>(14)</sup> Applicant answered "NO" because: (1) the drug use happened so long ago (Vol. I, Tr. 98); (2) he did not understand the question;<sup>(15)</sup> and, (3) he thought the question applied to drug dealers. (Vol. I, Tr. 131).

On January 13, 1995 (subparagraphs 2e and 2f), Applicant falsified questions 22a and 22b of his security form. In response to question 22a, he minimized his drug use. (Vol. I, Tr. 135). In response to question 20b, he indicated had never purchased any drug.<sup>(16)</sup> He also provided less than the full picture of his drug history on GE #2. (Vol. I, Tr. 137).

Applicant provided a sworn statement on June 30, 1995 (subparagraph 2h) in which he falsely stated he last used marijuana in January 1995, when his last use was really at the end of ay 1995.<sup>(17)</sup>

In an interview of June 20, 1995, Applicant denied ever falsifying a security form. (Vol. I, Tr. 142).<sup>(18)</sup>

Applicant provided false information during an interview on October 12, 1995. In the initial interview about his drug use, Applicant provided false information when he said used marijuana in February 1995, but denied any use or possession after that time. (Vol. I, Tr. 67). In a later interview (during the polygraph examination), Applicant provided false information when he said his last use of marijuana was no later than March 1995 instead of February 1995. (Vol. I, Tr. 66-67). After the polygraph examination, Applicant stated his last use was May 28, 1995. (Vol. I, Tr. 67).<sup>(19)</sup>

Applicant's performance evaluations for 1991, 1992 and 1993, signed by his supervisor, reflect he has exceeded requirements. (Applicant's Exhibits A, B). Applicant has received a promotion to ----- and has been awarded merit increases since the last hearing. (Vol. II, Tr. 21). He is the ----- for the section and regularly participates in group meetings to increase the competitiveness of the section. (Vol. II, Tr. 23). Applicant intends to forego all future drug use because he has matured, recently married and become a father. (Vol. I, Tr. 117).

Applicant's Exhibits C and D explain Applicant's participation in an outpatient treatment program. Treatment for six months was recommended and Applicant began treatment on June 14, 1996. As of June 20, 1996, he had completed three sessions with a negative urinalysis. On October 16, 1996, the counselor indicated Applicant completed 24 three hour sessions and had plans to accomplish the four months of one hour per week after care. On February 17, 1997, Applicant completed all his after care sessions. He continued to use the 12 Step education, along with his sponsor and home group. Applicant attended numerous Alcoholics Anonymous (AA) meetings and continues to attend. (Vol. II, Tr. 19).<sup>(20)</sup> Applicant has consumed no alcohol since June 17, 1996,<sup>(21)</sup> and believes his falsifications were primarily the result of minimization and denial of his drug addiction. (Vol. II, Tr. 20, 27).

Applicant's supervisor since 1985 considers Applicant's job performance above average with a good attendance record. (Vol. I, Tr, 74). Applicant is truthful, reliable, and sometimes, performs supervisory duties. (Vol. I, Tr. 78-79).

Applicant's credibility is negatively affected by the various explanations he provided for furnishing false information on security forms and sworn statements.<sup>(22)</sup> Even though Applicant believes denial caused by his alcohol and drug addiction are at the heart of his falsehoods, the other explanations are equally relevant to Applicant's state of mind at the times he was confronted with official documents and had to decide whether to provide truthful or untruthful information.

## POLICIES

Enclosure 2 of the Directive sets 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 abuse.
2. illegal drug possession, including...purchase....

#### Factors for Clearance:

None.

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

#### Factors Against Clearance:

2. deliberate omission...falsification of relevant and material facts from any personnel security questionnaire...to conduct investigations...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 activity)**

#### 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.

### **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) 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

The Government has established a case under Criterion H as Applicant has used seven drugs over the years at various times and frequencies. Applicant's drug of choice was marijuana because he used the drug from 1977 to May 28, 1995. He also purchased marijuana periodically until 1985 and even continued to use the drug after he was granted a top secret clearance in arch 1990. In addition, Applicant furnished false information about his marijuana and other drug use on a number of occasions between 1988 and October 1995.

The Government has established its case under Criterion E. The information sought by the Government in the personnel security questionnaire and sworn statements was relevant and material to the Government's investigation of Applicant's suitability for safeguarding classified information. Applicant's explanations for falsifying the forms have been thoroughly evaluated individually and together. Except for his explanation of alcohol or drug-related denial, and the explanation of concern over his security clearance and/or his job, his other explanations lack any credibility and are actually rationalizations for intentionally falsifying the security forms and sworn statements. After analyzing all the explanations, the undeniable conclusion is Applicant, even though he was going through different denial stages of his addictions between 1988 and ay 1995, intentionally falsified the questionnaires and sworn statements with total denials or partial pictures of the complete scope of his drug history.

Applicant's concern about his job and clearance is not a satisfactory reason for intentionally falsifying Government documents. An applicant must provide forthright and honest information during all phases of the security investigation. Applicant's pattern of dishonest conduct between 1988 and October 1995 raises significant concern about Applicant's judgment to comply with security regulations in all places and at all times.

Applicant's intentional falsifications between 1988 and October 1995 constitutes felonious criminal conduct in violation of 18 USC 1001. The omitted information was material because the Government was denied essential background information potentially affecting the outcome of Applicant's application for a security clearance.

Applicant's performance evaluations, his job promotions and his participation in other job-related activities weigh positively in Applicant's favor. The completion of therapy and after care, and Applicant's continuing commitment to AA and the 12 Steps, provides sufficient evidence to conclude Applicant will continue abstinence and recovery in the future. Because Applicant's drug use was not extensive, and did not include long-term use of several kinds of drugs or more serious drugs, i.e., cocaine, and the treatment program reports reflect he is determined to maintain his recovery, I find for Applicant under Criterion H.

But, the positive evidence of drug rehabilitation under Criterion H falls well short of overcoming Applicant's ultimate

burden of persuasion under Criterion E and J. The eleven falsifications seriously undermine Applicant's credibility because the falsehoods occurred repeatedly over a seven year period until October 1995 and involved the deliberate omission of material information designed to minimize Applicant's drug history to maximize his chances of obtaining a security clearance and/or protecting his job.

**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.
- c. For the Applicant.
- d. For the Applicant.
- e. For the Applicant.
- f. For the Applicant.
- g. For the Applicant.
- h. For the Applicant.
- i. For the Applicant.
- j. For the Applicant.
- k. For the Applicant.
- l. For the Applicant.

Paragraph 2 (personal conduct): AGAINST THE APPLICANT.

- a. Against 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.

Paragraph 3 (criminal conduct): 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. The first hearing transcript is 174 pages and shall be cited as Volume I; the supplemental hearing transcript is 64 pages and is Volume II.
2. The original Administrative Judge became incapacitated shortly after the hearing and a determination was made to transfer case.
3. The findings shall refer to the transcript (Tr.) or the exhibits, i.e., GE (followed by the appropriate government exhibit number) and E (followed by the letter of Applicant's exhibit).
4. The report, dated February 17, 1997, is two pages in length, with a one page drug test report and a one page brochure about the program.
5. Applicant's admissions will be included among my findings of fact.
6. Vol. II, Tr. 23.
7. The entire paragraph transcribes information Applicant provided about his marijuana use in GE #6; See also, Vol. I, Tr. 124-125, 127 .
8. The information in this paragraph regarding Applicant's use of hashish, cocaine, LSD, speed and PCP, is found in GE #6; See also, Vol. I, Tr. 124-125, 127.
9. subparagraph 2a, 2b.
10. GE #4; Tr. Vol. I, Tr. 134.
11. Applicant checked the box acknowledging he understood the drug policy prohibiting drug use and he agreed to refrain from drug use as of July 11, 1988. Although his signature appears above the signature box instead of in the box, I am sufficiently satisfied he understood his signature represented his position not to violate the drug policy.
12. Subparagraphs 2c, 2d.
13. GE #3.
14. GE #3.
15. Applicant's handwritten denial he ever bought or sold drugs (supplemental portion to GE #3) strongly suggests he really understood question 18b of the security form. (Vol. I, Tr. 133).

16. GE #1.

17. GE #5; Tr. 137. Significantly, Applicant was allowed to prepare GE #5 on his own time and the Agent gave him an outline from the first meeting on June 20, 1995; the Agent and Applicant met again on June 30, 1995. (Vol. I, Tr. 32);

18. See also, Applicant's Answer to the SOR.

19. Applicant signed GE #6 on October 19, 1996 because the Agent accommodated Applicant's request to take the statement home and review it first. (Vol. I, Tr. 58; 55).

20. He admitted he was an abuser the first week of treatment.

21. Applicant's Exhibit C shows the beginning date of abstinence as June 12, 1996.

22. Another explanation was being unaware the two agencies (of the Department of Defense) were separate because he thought by furnishing information to one agency, the information would be transferred to the agency. (Vol. I, Tr. 140). Another explanation for mistakes in GE #5 was Applicant's fatigue from working a lot and playing in the band. (Vol. I, Tr. 109-110).