

Date: December 30, 1996

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 96-0155

DECISION OF ADMINISTRATIVE JUDGE

ROBERT R. GALES

APPEARANCES

FOR THE GOVERNMENT FOR THE APPLICANT

Claude R. Heiny, II, Esquire

Department Counsel

Pro se

STATEMENT OF CASE

On March 13, 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 and modified, 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 a clearance should be granted, continued, denied, or revoked.

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

In a sworn written statement, dated April 4, 1996, Applicant responded to the allegations set forth in the SOR, and elected to have his case decided on a written record, in lieu of a hearing. Department Counsel submitted the Government's written case on August 14, 1996. A complete copy of the file of relevant material (FORM)⁽¹⁾ was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. He apparently chose not to do so within the prescribed 30-day period. The case was initially assigned to Administrative Judge Kathryn Moen Braeman on October 22, 1996, but due to caseload considerations, was subsequently reassigned to, and received by, this Administrative Judge on December 17, 1996.

FINDINGS OF FACT

Applicant has admitted nearly all of the factual allegations pertaining to drug involvement under Criterion H (subparagraphs 1.a. through 1.c., 1.e. and 1.f.); personal conduct under Criterion E (subparagraphs 2.a. through 2.c.);

and criminal conduct under Criterion J (subparagraph 3.a.). Those admissions are hereby incorporated herein as findings of fact. He denied only one allegation (subparagraph 1.d.).

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

Applicant is a 32 year old male employed by a defense contractor, and he is seeking to retain the SECRET clearance which was granted to him in May 1990.

Applicant has been a poly-substance abuser whose choice of substances has been marijuana and cocaine.⁽²⁾ He first experimented with marijuana while he was a senior in high school, in 1981, out of curiosity. From that initial exposure, he continued to use marijuana on a periodic irregular basis, primarily for social reasons. His last such use occurred in March 1994, while with his wife on a Caribbean island. There is no evidence to rebut his contention that he has abstained since that time.

All of the marijuana used by Applicant was either purchased for him by his wife⁽³⁾ or supplied to him by friends.

On one occasion, in 1981-82, following a bicycle accident, Applicant snorted one or two lines of cocaine which had been furnished to him by friends. There is no evidence to rebut his contention that he has abstained from further cocaine use since that time.

On January 9, 1996, Applicant denied that marijuana is harmful in "small infrequent doses," and proclaimed that in the right circumstances, and with the right group of friends, he may again use marijuana, and could conceivably foresee where he might want to try cocaine or mushrooms.⁽⁴⁾ He immediately modified that statement by saying that such possible use would not occur until he changed jobs or lost his security clearance. On April 4, 1996, he refined his position:⁽⁵⁾

. . . I voluntarily stated, 'I do not plan on using illegal drugs in the future, however I couldn't rule out the use of an illegal drug some time in the future.' The reason I won't say that I will never in my lifetime use illegal drugs is because I don't see anything inherently evil or immoral about infrequent drug use and I could conceive of a situation in which I might use them. However, I can say with certainty that as long as I carry a DOD clearance, I will not use any illegal drugs or misuse any drugs. The truth of the matter is even if I did not carry a security clearance, the chances of me using drugs would be very small.

Applicant has never participated in any drug treatment or rehabilitation program.

Applicant completed the privacy section of a PSQ on January 9, 1990, and in response to inquiries pertaining to ever having used a variety of illegal substances, including cannabis and cocaine, except as prescribed by a licensed physician,⁽⁶⁾ and ever having been involved in the illegal purchase, possession, or sale of such substances,⁽⁷⁾ Applicant responded "no." He certified that his PSQ responses were true, complete, and accurate, but they were false. He had lied, falsified, omitted, and concealed his true history of substance abuse, as described above. Applicant attributed his falsifications to a fear that if he were truthful he could be denied a security clearance and lose his job.⁽⁸⁾

Applicant completed the privacy section of a PSQ on May 2, 1995, and in response to an inquiry pertaining to ever having used a variety of illegal substances, including cannabis and cocaine, except as prescribed by a licensed physician,⁽⁹⁾ Applicant responded "no." He certified his PSQ response was true, complete, and accurate, but it was false. He had again lied, falsified, omitted, and concealed his true history of substance abuse, as described above. Applicant attributed his falsification to a desire to remain consistent with his earlier response, as well as a fear about jeopardizing his security clearance, if the truth became known.⁽¹⁰⁾

On November 3, 1995, Applicant was interviewed by a DIS agent, pertaining to substance abuse, and while he admitted using marijuana, he failed to report, or address, his previous experimental use of cocaine. He certified and swore that his statement was true, complete, and accurate, but it was false. He had again lied, falsified, omitted, and concealed his true

history of substance abuse, as described above. Applicant attributed his omission to a fear about making himself look too bad. [\(11\)](#)

Applicant has been employed by his current employer since August 1989. The quality of his performance has not been characterized.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Factors) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Factors). An Administrative Judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision -- an expansion of the factors set forth in Section F.3. of the Directive, are intended to assist the Administrative Judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered to make a meaningful decision. The Adjudicative Process factors which an Administrative Judge should consider are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (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 pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of 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.

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 (see above definition);

(3) failure to successfully complete a drug treatment program prescribed by a credentialed medical professional. [\(12\)](#)
Current drug involvement, especially following the granting of a security clearance, or an expressed intent not to discontinue use, will normally result in an unfavorable determination.

Conditions that could mitigate security concerns include:

(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 also include:

- (2) the 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, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;
- (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;
- (4) personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or pressure;
- (5) a pattern of dishonesty or rule violations;

Conditions that could mitigate security concerns include:

- (5) the individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or pressure;

[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 apply.

Since the protection of the national security is the paramount determinant, the final decision in each case must be arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security." In reaching this Decision, I have endeavored to draw only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have attempted to avoid drawing inferences that are grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the Government to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the Government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the Government's case, and to ultimately demonstrate that it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to

potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's loyalty and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides that industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than loyalty and patriotism. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied decision as to Applicant's loyalty or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, an assessment of the witness credibility, and after application of all appropriate legal precepts and factors, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

With respect to Criterion H, the Government has established its case. Applicant's improper and illegal involvement with marijuana, especially that abuse which occurred after May 1990, while he was an employee of defense industry in possession of a security clearance, is of particular concern, especially in light of his desire to have continued access to the nation's secrets.

It is to his credit that after experimenting with cocaine, he ceased doing so and never resumed such abuse. However, his marijuana abuse is another issue. He did not simply experiment out of curiosity and quit. Instead, motivated by social pleasures, notwithstanding the legal status of his endeavor, he exhibited a pattern of questionable judgment, irresponsibility, and immature behavior, and continued his substance abuse for approximately four years after receiving his security clearance. In so doing, Applicant has demonstrated the relative lack of importance his fiduciary responsibilities towards the Government or the drug laws have *vis-a-vis* his drug-induced social pleasures. As stated above, improper or illegal involvement with drugs raises questions regarding an individual's willingness or ability to protect classified information.

Applicant's actions and initial responses to inquiry regarding future intentions have answered those questions. I am concerned about Applicant's philosophical support of substance abuse, and his vacillating position regarding his future. Rather than exhibiting a "demonstrated intent not to abuse any drugs in the future," Applicant has offered a *conditional* intent. As recently as January 1996, he disputed the harmful affects of marijuana in small infrequent doses, and proclaimed that in the right circumstances and with the right group of friends, he might again use marijuana. It appears that continued abstinence by Applicant was determined by his environment -- circumstances and friends -- rather than the law, policy, and a dedication to abstinence.

As recently as April 1996, Applicant supported continued substance abuse because he saw nothing inherently evil or immoral about infrequent drug abuse. Once again, he offered conditions for his resumption of drug abuse.

While it appears that no illegal substance is now being used, the period of abstinence, as stated above, along with the absence of evidence of drug abuse counseling, treatment, or rehabilitation, are significant. Applicant's continuing abstinence is to be encouraged. But this period of abstinence -- about two and one-half years -- is still relatively brief in light of his substance abuse history. It is still too brief. In this instance, I believe that both the successful completion of a drug treatment and rehabilitation program, a more enlightened acceptance of the law as it pertains to substance abuse, as well as a longer period of abstinence should be required to demonstrate the truly successful completion of a transformation from long-term illegal substance abuser to an abstinent, drug-free person, and to provide the basis for a conclusion that such conduct will not continue or recur in the future. Under the evidence presented, I am not comfortably confident that Applicant's substance abuse is a thing of the past, or that it will not recur. To the contrary, Applicant has finally proclaimed the conditions under which his future actions will be guided, and *conditional* abstinence is unacceptable.

I do not take this position lightly, but based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my evaluation of the evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under Enclosure 2 of the Directive, I believe that Applicant has failed to mitigate or

overcome the Government's case. The evidence in this case leaves me with grave questions and doubts as to Applicant's continued security suitability. Accordingly, allegations 1.a., 1.b., and 1.f. of the SOR are concluded against Applicant.

Applicant's experimentation with cocaine on one occasion in 1981-82 has not been repeated thereafter, and with the exception of his declared *conditional* abstinence, I consider such abuse to be stale, with little current security significance. Applicant's declaration pertaining to both cocaine and hallucinogenic mushrooms (which he has never tried), appear to be manifestos of general policy rather than an actual intention to resume future substance abuse. This position may appear somewhat inconsistent with my approach towards Applicant's position regarding marijuana, but there are reasons for it.

In the situation involving marijuana, Applicant had a long history of abuse, and consistent with his philosophy, he continued to abuse it. Cocaine was another matter, for after one occasion of experimentation, notwithstanding his philosophy, the abuse ceased and was never resumed. And his position with hallucinogenic mushrooms is even more remote, for he has never even used the substance. Under these circumstances, I believe that his possible future use of those two substances is simply too remote to provoke meaningful misgiving. Thus, I conclude that Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the Government's case. Accordingly, allegations 1.c. through 1.e. of the SOR are concluded in favor of Applicant.

With respect to Criterion E, the Government has established its case. There is little dispute surrounding Applicant's deceptive actions or his purposes, for he has admitted the essential elements of the allegations. Notwithstanding his certification, oath, and affirmation that his responses were true and accurate, on three occasions, in January 1990, May 1995, and November 1995, Applicant willfully falsified, omitted, and concealed material facts pertaining to his history of substance abuse. It was only when he was confronted with another DIS interview, six years after the initial false PSQ responses, and two months after the latest DIS interview, that the truth became known. Applicant attributed his actions to a fear that the truth might negatively impact his job and his security clearance. After his initial deception, he chose to continue his deceptions in order to be consistent, and not expose himself to the possible ramifications of the truth. In this instance, I have no evidence of inadvertent or accidental oversight, but rather calculated and deliberate omissions of information which Applicant chose not to reveal simply because he felt it necessary to protect his interests. Applicant's concerns for the national security at that time were obviously less significant or possibly non-existent.

Complete honesty and candor on the part of applicants for access to classified information is essential to make an accurate meaningful security clearance determination. Without all the relevant and material facts, a clearance decision is susceptible to error, thus jeopardizing the nation's security. The nature of Applicant's offense therefore poses a serious potential risk to the nation's security precautions which go to the very heart of the nation's security system.

Applicant's eventual acknowledgment regarding his history of substance abuse does not lessen or minimize, much less erase or nullify, the impact of his earlier concealments, omissions, and deceptions. In this instance, deception was actively practiced by Applicant over a six year period, with the most recent incident occurring about ten months prior to the closing of the record. While he has seemingly taken the positive step of finally being candid about his substance abuse history to reduce or eliminate vulnerability to exploitation, there is no evidence of rehabilitation or other pertinent behavioral or philosophical changes to enable me to conclude that similar actions might not recur. In light of the repeated false certifications and oaths, as well as the lengthy periods following those falsifications, during which he remained silent as to the truth, under the circumstances, his security-suitability, in the face of the negative inferences to be drawn, is suspect and, considering the nation's security is at stake, is to be resolved against him. Thus, I conclude that Applicant has failed to mitigate or overcome the Government's case. Accordingly, allegations 2.a. through 2.c. of the SOR are concluded against Applicant.

With respect to Criterion J, the Government has established its case. Statements made by an applicant for access to classified information, both in questionnaires and to investigators, encompass matters within the jurisdiction of the Department of Defense, and are provided for under Title 18, United States Code, Section 1001.⁽¹³⁾ Applicant's deceptions fit well within the ambit of that provision. His explanations for failing to accurately relate his history of substance abuse, simply will not justify or exonerate such action. I conclude, therefore, that Applicant's felonious conduct -- falsifications, omissions, and concealments (deception) of his substance abuse history, on three occasions, were material and made in a knowing and willful manner in contravention of Title 18, United States Code, Section

1001. Thus, I conclude that Applicant has failed to mitigate or overcome the Government's case. Accordingly, allegation 3.a. of the SOR is concluded against Applicant.

For the reasons stated, I conclude Applicant is not suitable for access to classified information.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1. Criterion H: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: For the Applicant

Subparagraph 1.e.: For the Applicant

Subparagraph 1.f.: Against 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

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.

Robert R. Gales

Chief Administrative Judge

1. The Government submitted nine items in support of its contentions.

2. Applicant has been afforded several opportunities, over a multi-year period, to furnish detailed scenarios of his substance abuse history, and in doing so, his stories have been inconsistent. He has denied prior use of any illegal substances. Applicant eventually admitted that he had been deceptive and had lied both on his Personnel Security Questionnaire (PSQ) and to the Defense Investigative Service (DIS), and subsequently modified his earlier denials as well as his earlier admissions. In reconstructing his substance abuse history, I have created a mosaic of his various admissions, along with other evidence, and I find this mosaic to represent the actual facts.

3. Applicant's wife -- a physician with prescription-writing powers -- has, on occasion, provided him with marijuana, free samples of prescription drugs, and drugs which had been previously prescribed for herself. *See*, Item 7, at 3.

4. *See*, Item 7, at 4.

5. *See*, Item 3, at 6.

6. Question 18.a.

7. Question 18.b.

8. *See*, Item 3, at 6; Item 6, at 1; and Item 7, at 4.

9. Question 22.a.

10. *See*, Item 3, at 6. Applicant claimed to be grappling with guilt over being untruthful again versus the embarrassment and possible consequences of "fessing" [*sic*] up to his drug history.

11. *Id.*, at 7.

12. A credentialed medical professional is defined as a licensed physician, licensed clinical psychologist, or board certified psychiatrist.

13. The cited provision provides, in relevant part, as follows: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up a . . . material fact . . . shall be fined not more than \$10,000 or imprisoned not more than five years, or both."