

Date: November 20, 1996

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 96-0179

**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 20, 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 -----  
- (u) (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 undated statement, Applicant responded to the allegations set forth in the SOR, and requested a hearing. The case was assigned to, and received by, this Administrative Judge on May 3, 1996. A notice of hearing was issued on October 16, 1996, and the hearing was held before me on October 22, 1996. During the course of the hearing, four Government exhibits and four Applicant exhibits, and the testimony of three Applicant witnesses (including the Applicant), were received. The transcript was received on November 8, 1996.

**FINDINGS OF FACT**

Applicant has admitted all of the factual allegations pertaining to drug involvement under Criterion H (subparagraphs 1.a. through 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.

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:<sup>(2)</sup>

Applicant is a thirty-five year old male employed by a defense contractor, and he is seeking to retain a SECRET clearance which was previously granted to him in August 1985.

Applicant has been a poly-substance abuser whose choice of illegal substances has been primarily marijuana, but who has also used cocaine and hallucinogenic mushrooms. He commenced using marijuana in about 1976-77, when he was a sophomore in high school, and continued doing so, on an irregular, occasional basis. His most recent use occurred in November 1995.<sup>(3)</sup>

On one occasion during the Summer of 1980, when he was about 19 years of age, Applicant experimented with hallucinogenic mushrooms. He has not used the substance since that time, and has vowed not to use it again in the future. There is no evidence to rebut his contentions regarding use or future intent.

On about two occasions in March 1992, Applicant also experimented with cocaine. He has not used the substance since that time, and has vowed not to use them again in the future. There is no evidence to rebut his contentions regarding use or future intent.

During his period of substance abuse, Applicant purchased the hallucinogenic mushrooms, on one occasion, during the Summer of 1980, spending seven dollars; and on one occasion, in March 1992, he contributed to a group-purchase of cocaine, spending twenty dollars. He has never purchased marijuana.

In addition, on one occasion, after receiving a marijuana cigarette as a tip sometime in the late 1970s or early 1980s, he sold the marijuana cigarette to a friend for one dollar.<sup>(4)</sup>

Applicant has never undergone any drug treatment or rehabilitation.<sup>(5)</sup>

On April 18, 1995, Applicant completed the privacy section of a Personnel Security Questionnaire (PSQ), and in response to an inquiry pertaining to ever having used a variety of illegal substances, including cocaine, hallucinogens, or cannabis,<sup>(6)</sup> Applicant responded "no." He certified that his PSQ response was true, complete, and accurate. It was false. He had lied, falsified, omitted, and concealed his true history of substance abuse, as described above.<sup>(7)</sup> Applicant subsequently explained that when he was initially hired in 1985, he was encouraged by a co-worker not to indicate past drug abuse as it would raise a "red flag." Since he considered his substance abuse to have been minimal, and he was afraid of repercussions if he answered truthfully, he followed that advise and concealed the truth. Thereafter, on succeeding PSQs, including the one of April 1995, in order to be consistent, Applicant continued his lie.<sup>(8)</sup>

On April 18, 1995, Applicant completed the privacy section of a PSQ, and in response to an inquiry pertaining to ever having purchased or sold a variety of illegal substances, including cocaine and hallucinogens,<sup>(9)</sup> Applicant responded "no." He certified that his PSQ response was true, complete, and accurate. It was false. He had lied, falsified, omitted, and concealed his true history of the purchases and/or sales of the illegal substances, as described above. Applicant subsequently provided the same explanation, as described above, for his failure to be truthful.

On November 13, 1995, Applicant was interviewed by an agent of the Defense Investigative Service (DIS), pertaining to his substance abuse. During that interview, Applicant was questioned several times if he had ever used any illegal substances, and he repeatedly responded "no." After further questioning, and "upon reflection" by him, in a signed, sworn statement, he finally admitted having used marijuana from 1976 until the Spring of 1995. He specifically denied using any other illegal substances.<sup>(10)</sup> In addition, he specifically denied ever purchasing or selling any illegal substance. He certified that his sworn, written statement was true, complete, and accurate. It was false. He had lied, falsified, omitted, and concealed his use of cocaine and hallucinogenic mushrooms, and his more extensive use of marijuana, as well as his purchases of cocaine and hallucinogenic mushrooms, and his sale of marijuana, as described above. Furthermore, he had used marijuana only one week prior to being interviewed by DIS.

On January 16, 1996, Applicant was again interviewed by an agent of DIS, pertaining to his substance abuse. During the pre-polygraph test phase of that interview, Applicant was asked about his illegal substance abuse. In his signed, sworn statement, he responded that he wished to correct and expand on the information previously provided DIS, and acknowledged that he had not been completely truthful, and explained that he had been embarrassed and initially reluctant to discuss his substance abuse, and did not know how his substance abuse and lack of candor might affect his security clearance.<sup>(11)</sup> He added that he had used marijuana from 1977 until August 1995 -- a change from his earlier acknowledged period of abuse from 1976 until the Spring of 1995. He certified that his sworn, written statement was true, complete, and accurate. It was false. He had again lied, falsified, omitted, and concealed his more extensive use of marijuana, as described above. The following day, in another signed, sworn statement, he acknowledged that he was in error, and after checking his personal calendar, he concluded that he had last used marijuana on November 5, 1995.<sup>(12)</sup>

Applicant subsequently denied that he had intended to provide false information, and contended that he was simply confused as to time and actions taken by him, and that in attempting to be precise, he had furnished inaccurate responses, which he characterized as "mistaken estimates." He specifically denied attempting to mislead or falsify.<sup>(13)</sup> However, in light of his history of deception, his lack of candor, his inconsistencies, and his acknowledgments that he was not "completely truthful," I conclude that, in fact, Applicant had, repeatedly, willfully lied, falsified, omitted, and concealed his true history of illegal substance abuse.

Applicant has been employed by his present employer since June 1985. At one point, for a period of about two years, he was a security supervisor. Co-workers have characterized him as reliable, conscientious, helpful, and creative, and have spoken about his honest and integrity. His former group manager places his quality of performance in the low to mid level of his nine employees.

### 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 in making 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);

(2) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution;

(3) failure to successfully complete a drug treatment program prescribed by a credentialed medical professional. 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.**

**The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:**

(2) refusal to complete required security forms, releases, or provide full, frank and truthful answers to lawful questions of investigators, security officials or other official representatives in connection with a personnel security or trustworthiness determination.

**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;

(6) association with persons involved in criminal activity.

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

None apply.

**[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,"<sup>(14)</sup> or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded that both standards are one and the same. 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 the potential for, 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 testimony, demeanor, and 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. At the outset, I am obliged to state that I had ample opportunity to evaluate the demeanor of Applicant, observe his manner and deportment, appraise the way in which he responded to questions, assess his candor or evasiveness, read his statements, listen to his testimony, and watch the interplay between himself and those around him. It is my impression that his explanations regarding his illegal substance abuse are remarkably fluid, and hence, hollow. While he presently seems to have successfully abstained from marijuana for about one year, I am, nevertheless, left with the impression that he is continuing to minimize his past substance abuse, and has still not arrived at the complete truth.

Applicant's irregular, occasional abuse of marijuana clearly continued up to November 1995. It, along with his experimentation with cocaine and hallucinogenic mushrooms, occurred while he was an employee of defense industry, and continued after being granted his security clearance in 1985. Moreover, it took place while he was a security

supervisor. So much for fiduciary responsibilities. In order to abuse marijuana, cocaine, and hallucinogenic mushrooms, as described above, he had to knowingly ignore both corporate and DoD policy, as well as the law -- components in a legal society which were of no apparent significance to Applicant.

Applicant's continuing abstinence is to be encouraged, but the current period of abstinence is still relatively brief, too brief, in light of his substance abuse history. In this instance, I believe that both the successful completion of a drug treatment and rehabilitation program, as well as a longer period of abstinence, should be required to demonstrate the truly successful completion of a transformation from long-term illegal poly-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 confident that Applicant's substance abuse is a thing of the past, or that it will not recur.

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 leaves me with grave questions and doubts as to Applicant's continued security eligibility and suitability. Accordingly, allegations 1.a. and 1.f. of the SOR are concluded against Applicant.

Applicant's experimentation with hallucinogenic mushrooms on one occasion during the Summer of 1980, as well as his experimentation with cocaine on about two occasions in March 1992, have not been repeated thereafter, and I consider such abuse, including use, purchase, and sale, to be stale, with little current security significance. Thus, I conclude that Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the Government's case. Accordingly, allegations 1.b. through 1.e. of the SOR are concluded in favor of Applicant.

With respect to Criterion E, the Government has established its case. Examination of Applicant's actions reveals a pattern of conduct involving questionable judgment, untrustworthiness, unreliability, and unwillingness to comply with rules and regulations; and a continuing association with persons of ill-repute -- those abusing illegal substances. There is little dispute surrounding Applicant's pattern of deceptive actions or his purposes, for he has admitted the essential elements of the allegations. Applicant contended that he tried to be honest and precise, but the facts support a different conclusion. He lied, willfully falsified, omitted, concealed, and minimized his history of substance abuse, and eventually, incrementally admitted doing so, and attributed his actions to embarrassment over his illegal substance abuse and because he wanted his false responses to be consistent.

Notwithstanding his certifications, oaths, and affirmations that his responses and statements were true and accurate, Applicant succumbed to temptation and embarrassment, and in so doing, repeatedly, willfully falsified, omitted, or concealed material facts pertaining to his history of substance abuse, and intentionally tried to mislead DIS with half truths and lies in an effort to distort the truth and minimize any damage he might have done to himself. It is significant that at the very time he answered the PSQ in April 1995, he was actively abusing marijuana, and he continued doing so for at least another seven months. I cannot accept those deceptions, or the explanations as justification for same.

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 or to avoid embarrassment. Applicant's concerns for the national security during this period were seemingly as non-existent as they were for corporate policies and procedures, or for the law.

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 offenses therefore pose a serious potential risk to the nation's security precautions which go to the very heart of the nation's security system.

Applicant's subsequent, incremental forthrightness regarding his history of substance abuse does not lessen or minimize, much less erase or nullify, the impact of his initial and recurring concealments, omissions, and deceptions. In this instance, deception was actively practiced by Applicant on two occasions between June 1985 and sometime prior to in April 1995, repeated in April 1995, again in November 1995, and finally again in January 1996. And very possibly, it continues to this day, for I remain unconvinced that absolute candor was practiced during the hearing. While he has seemingly taken some positive steps of finally being somewhat candid about his substance abuse history to reduce or

eliminate vulnerability to exploitation, there is no evidence of rehabilitation or other pertinent behavioral changes to enable me to conclude that similar actions might not recur.

Applicant had clear opportunities to clean up his act after he had been granted a security clearance in August 1985, but he chose to continue his illegal substance abuse; and when he responded to questions appearing in PSQs or being asked by DIS, but he chose to lie, repeatedly. He has chosen to place his self-interests above those of the country, and in so doing, he has sundered the fiduciary relationship which he had with the Government by virtue of his acceptance of his responsibilities attendant to that security clearance. He has taken that special relationship and effectively dashed the trust and confidence which he had previously enjoyed.

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 encompass matters within the jurisdiction of the Department of Defense, and are provided for under Title 18, United States Code, Section 1001. <sup>(15)</sup> Applicant's explanations for failing to accurately relate his entire history of substance abuse simply will not justify or exonerate such actions. I conclude, therefore, that Applicant's felonious conduct --misrepresentations, falsifications, omissions, and concealment (deception) of his substance abuse history, on repeated occasions, were material and made in a knowing and willful manner in contravention of Title 18, United States Code, Section 1001.

While a person should not be held forever accountable for misconduct from the past without a clear indication of subsequent reform, remorse, or rehabilitation, I am unable to determine with reasonable certainty the probability that such conduct will not recur in the future. Without more, I simply do not believe that the period of time from the most recent acknowledged falsification -- that which occurred in January 1996 -- to the hearing, is sufficient to persuade me that recurrence of such criminal conduct is unlikely. Consequently, 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.: For 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.(1): Against the Applicant

Subparagraph 2.a.(2): Against the Applicant

Subparagraph 2.b.: Against the Applicant

Subparagraph 2.c.: Against the Applicant

Paragraph 1. 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.

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Robert R. Gales

Chief Administrative Judge

1. Applicant's complete name is -----, but for some unexplained reason, the ----- was not included in the caption.
2. Applicant has been afforded several opportunities, over a ten year period, to furnish detailed scenarios of his substance abuse history, and in doing so, his stories and estimates have been both deceptive and inconsistent. During that period he has denied any substance abuse; admitted very limited use of marijuana; admitted experimentation with two other illegal substances; admitted even more extensive use of marijuana; denied the purchase of any illegal substance; admitted the purchase of some substances; denied the sale of some substances; and eventually admitted the sale of marijuana. 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. *See*, Government Exhibit 4, at 1. As recently as late December 1995, he was with a friend who offered him marijuana, but he declined to accept it. *See*, Government Exhibit 3, at 2.
4. *See*, Government Exhibit 3, at 2.
5. *See*, Transcript (Tr.), at 44. It should be noted that all references to the Transcript are to the third *corrected* version thereof.
6. Question 22.a.
7. On two other occasions prior to this one, commencing in 1985, Applicant completed other PSQs, and in response to the same question, he provided the same false answer. *See*, Tr., at 25.
8. *See*, Response to SOR, at 4; and Government Exhibit 2, at 1; and Tr., at 37-38. *But see*, Tr., at 38, wherein he denied that he feared for either his clearance or his job, and merely was afraid of being questioned.
9. Question 22.b.
10. *See*, Government Exhibit 2, at 1.
11. *See*, Government Exhibit 3, at 1.
12. *See*, Government Exhibit 4, at 1.



13. *Ibid.*

14. *See*, Executive Order 12968, "*Access to Classified Information*;" as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995. However, the Directive uses both "clearly consistent with the national interest" ( *see*, Sec. B.3; Sec. C.2.; and Sec. D.2.; Enclosure 3, Sec. 1.; and Sec. 25), and "clearly consistent with the interests of national security" (*see*, Enclosure 2 (Change 3), Adjudicative Guidelines, at 2-2).

15. 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."