

DATE: January 30, 1997

In Re:

SSN: -----

Applicant for security clearance

ISCR OSD Case No. 96-0238

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

Appearances

FOR THE GOVERNMENT

Teresa A. Kolb, Esq.

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF CASE

On April 15, 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 22, 1996.

Applicant elected to have his case determined on a written record in lieu of a hearing. Department Counsel submitted the File of Relevant Material (FORM) on July 8, 1996. Applicant was instructed to submit objections or information in rebuttal, extenuation or mitigation within 30 days of receipt. Applicant received a copy on July 15, 1996. Applicant's reply was due by August 5, 1996. No reply was received. The case was received by the undersigned for resolution on September 17, 1996.

FINDINGS OF FACT

The Following Findings of Fact are based on Applicant's Answer and the File of Relevant Material. The SOR alleges Criterion H (drug involvement). Applicant used marijuana 3 or 4 times a year from 1980 until his arrest in February 1995. (Sworn Statement, February 23, 1996). He explained he inhaled two or three puffs from marijuana cigarettes or sometimes pipes that were shared at social gatherings. Marijuana caused Applicant to feel light-headed and hungry. He began cocaine use in 1990, using the drug three or four times annually at social gatherings until the middle of 1995. (Sworn Statement, February 23, 1996).⁽¹⁾

Applicant was arrested for possession of marijuana, cocaine and drug paraphernalia on February 3, 1995. He received deferred disposition of the possession charges by successfully completing drug intervention treatment from February 10, 1995 to May 5, 1995. (2)

Applicant used drugs because some of his friends did and the drugs were available in social settings. Applicant never purchased, sold, or trafficked in drugs. Applicant noted he has seen the error of his ways. He began with his present employer in January 1979 and is currently the vice president. Applicant has been a member of a professional ----- organization since 1989.

POLICIES

Enclosure 2 of the Directive set 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 use.
2. illegal possession....

Factors for Clearance:

None.

General Policy Factors (Whole Person Concept)

In addition, to the specific policy factors identified above, every security clearance case must be evaluated under several additional factors that make up the whole person concept. Those factors are: (1) the nature 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 of absence of rehabilitation; (7) the motivation for the conduct; (8) other behavioral changes; and, (9) the likelihood of continuation.

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) 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. Applicant engaged in the illegal use of marijuana for almost 15 years from 1980 to February 1995. He illegally used cocaine from 1990 to the middle of 1995. His use of marijuana and cocaine use was more than experimental or sporadic as he used marijuana and cocaine three or four times a year. His arrest for possession of both drugs in February 1995 strongly suggests he would have continued to use the drugs had he not been arrested for possession of the drugs.

Given the long history of drug involvement, the mitigating factors require an applicant to come forward with evidence of rehabilitation providing an adequate basis upon which to conclude he will not revert or resume drug use in the future. Several factors must be evaluated in order to assess the strength of an applicant's case in rehabilitation. One important factor is whether there is any independent evidence to support an applicant's statements of intention. Another factor is the congruity of an applicant's statements concerning his past drug use.

Apart from his statements and the supporting documentation, Applicant has presented no independent evidence explaining how the treatment program successfully educated him to refrain from illegal drug use in the future. Did he enter the treatment program to simply avoid potential confinement in a penal institution or was he seriously committed to the goals of treatment? Without evidence indicating what effect the treatment had on him, it is difficult to gauge his stated intention to abstain from drug use in the future.⁽³⁾

Applicant's statements in his NAQ of December 4, 1995, provide a different picture about his drug use than his statements in his sworn statement of February 23, 1996. A reasonable interpretation of his NAQ statements is that he used marijuana and cocaine only three or four times prior to the date of his arrest in February 1995. On the other hand, the inconsistent account of his drug use in his February 1996 statement reflects he used both drugs on a more frequent basis. The inconsistency between the statements undermines the credibility of both statements and raises the logical question of whether the February 1996 statement truly represents the entire account of his drug history.

Given Applicant's long history of drug use between 1980 and the middle of 1995, and the absence of supporting evidence in mitigation and extenuation, Applicant's character evidence is insufficient to overcome the Government's case under Criterion H.

FORMAL FINDINGS

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

Paragraph (Criterion H - drug involvement): AGAINST THE APPLICANT

- a. Against the Applicant.
- b. Against the Applicant.
- c. Against the Applicant.
- d. For the Applicant.

Factual support for the foregoing findings and conclusions is 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. However, in an attachment to his national agency questionnaire (NAQ) dated December 4, 1995, Applicant provided different information about the frequency of his marijuana and cocaine use. In the attachment, he indicated his last use of both marijuana and cocaine occurred on February 3, 1995. In addition, he indicated the frequency of marijuana and cocaine use before February 3, 1995 was only 3 or 4 times.
2. Attached to his Answer is documentation indicating Applicant completed the intervention program for substance abusers on May 25, 1995.
3. In view of the fact Applicant continued to use cocaine until after the end of the treatment program in the middle of 1995, it is reasonable to conclude the treatment had very little effect on Applicant.