

November 13, 1996

In RE:

SSN:

Applicant for security clearance

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ISCR OSD Case No. 96-0231

**DECISION OF ADMINISTRATIVE JUDGE**

**RICHARD A. CEFOLA**

Appearances

FOR THE GOVERNMENT

Martin H. Mogul, Esq.

Department Counsel

FOR THE APPLICANT

*Pro se*

**STATEMENT OF CASE**

On May 10, 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 the Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The SOR is attached.

Applicant filed an Answer to the SOR on or about August 2, 1996.

Applicant elected to have this case determined on a written record in lieu of a hearing. Department Counsel submitted the Government's File of Relevant material (FORM) on September 11, 1996. Applicant was instructed to submit objections or information in rebuttal, extenuation or mitigation within 30 days of receipt of the FORM. Applicant received his copy on September 16, 1996, and Applicant's reply was received on October 15, 1996. The case was

received by the undersigned for resolution on October 22, 1996. 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 File of Relevant Material and Applicant's Response. The Applicant is 30 years of age, and is employed by a defense contractor who seeks a security clearance on behalf of the Applicant.

### **Criterion E - Personal Conduct**

1.a. and 1.b. In answering questions 20.a. and 20.b. on his March 27, 1995, National Agency Questionnaire (NAQ), the Applicant knowingly and wilfully failed to disclose the vast majority of his past drug usage, and that he had also purchased cannabis (marijuana) (Government Exhibit (GX) 5 at pages 2 and 3). The Applicant admitted only to using "cocaine one time," in April of 1989, and that he used "marijuana not more than five times."

The Applicant, in fact, used marijuana "on a weekly basis during weekends" from September of 1984 to May of 1985 (GX 6 at page 2). From May of 1985 to December of 1986, he used the drug "once or twice a week." (GX 6 at page 2). After several months of abstinence, he "smoked marijuana once or twice a week from Sep 87 until May 89. . . . During the period May 89 to Sep 89, . . . [his] use of marijuana decreased to no more than three times a month . . ." (GX 6 at page 2). Subsequent to this, the Applicant used marijuana on three or four occasions, the last time being in December of 1994 (GX 6 at page 2).

In addition to marijuana usage, the Applicant also used Lysergic Acid Diethylamide (LSD) once "between May 85 and Dec 86"; and he used amphetamine on several occasions during the Fall of 1987 (GX 6 at page 2). Furthermore, the Applicant purchased marijuana on numerous occasions during the ten year period of his usage, from 1984 to 1994 (GX 6 at page 2).

1.c. and 1.d. In answering questions 23. and 24. on his April 3, 1995, NAQ, the Applicant again knowingly and wilfully failed to disclose the vast majority of his past drug usage, and that he had also purchased cannabis (marijuana) (GX 4 at pages 6 and 7). The Applicant again admitted only to the "one time" use of cocaine, and that he used "marijuana" " five time[s]" (GX 4 at page 6). Here, he claimed to have used the marijuana in January of 1989 (GX 4 at page 6).

1.e. In a signed, sworn statement, executed by the Applicant on November 27, 1995, he knowingly and wilfully failed to disclose the full extent of his past drug usage for a third time (GX 6 at page 2). He swore to the following:

If I was to approximate I would guess my use of marijuana to be 20-40 times and my use of cocaine was once. Other than that I have no experimentation. This use occurred between 1988 and the spring of 1989. Since that time I have been drug-free (GX 7 at page 15).

### **Criterion J - Criminal Conduct.**

2.a. The Applicant violated the provisions of 18 U.S.C. Section 1001, when he failed to disclose his past drug usage on his March 1995 NAQ, again on his April 1995 NAQ, and finally in his November 1995 sworn statement (*See* Certifications at GX 4 at page 8, GX 5 at page 2, and at GX 7 at page 1).

### **Mitigation.**

The Applicant avers that he was less than candid with the Government about his past drug usage in the following terms:

I know that lying about my past drug use was wrong. I really wanted to tell, but I was scared. This job represents the best opportunity for advancement in the art field that I've ever had. I didn't think I'd have a chance if I told the truth. I'm not sure if fear for your family stability and well being is a reason for withholding information, but that's what happened. (Applicant's Response (AppR)).

Considering all of the evidence, and in light of the fact that the Applicant was less than candid about his past drug usage on three separate occasions; the Applicant bears a heavy burden of persuasion in demonstrating his suitability for security clearance access.

## POLICIES

Enclosure 2 and Section F.3. 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 Conduct

#### Conditions that could raise a security concern:

\* \* \*

(2) the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire . . . or similar form used to conduct investigations . . . .

(3) deliberately providing false or misleading information concerning relevant and material matters to an investigator . . . in connection with a personnel security or trustworthiness determination.

#### Conditions that could mitigate security concerns:

None.

### Criminal Conduct

#### Condition that could raise a security concern:

(1) any criminal conduct, regardless of whether the person was formally charged.

#### Conditions that could mitigate security concerns:

None.

As set forth in the Directive, "[e]ach 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 which is speculative or conjectural in nature.

The Government must make out a prima facie case under Criteria 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.

Personal conduct is conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations; and criminal conduct also creates doubt about a person's judgment, reliability and trustworthiness. 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 in his private affairs, then there exists the possibility that an applicant may demonstrate the same attitude towards security rules and regulations.

## **CONCLUSIONS**

I conclude that the Applicant's fairly recent personal conduct, and related criminal conduct, are of present security significance. Over a period of time covering eight months, the Applicant was less than candid with the Government on three separate occasions, and he made no good-faith effort to correct the repeated falsehoods he made as to his past drug involvement. These repeated and fairly recent attempts at deception are also violative of 18 U.S.C. Section 1001.

On his March 1995 NAQ, he failed to disclose not only the vast majority of his past drug involvement, but that he had also used cannabis only three months prior to executing this document. The following week, he had an opportunity to correct this falsehood when he executed another NAQ. He chose not to take this opportunity for rehabilitation, but instead reiterated the lie. Mitigating condition (4) under Personal Conduct requires that "the previously omitted information was [subsequently] promptly and fully provided." There is clearly no prompt, full disclosure here; and as such, no mitigation of his improper personal conduct. On the contrary, when interviewed by a DIS Agent seven months later about his drug involvement, he continued the gravamen of his deception in his sworn statement.

Considering all the evidence, the Applicant has not rebutted the Government's prima facie case regarding his personal conduct and related criminal conduct. The Applicant has thus not met the mitigating conditions of Criteria E and J, and of Section F.3. of the Directive. Accordingly, he has not met his ultimate burden of persuasion under Criteria E and J.

## **FORMAL FINDINGS**

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

### Paragraph 1: AGAINST THE APPLICANT

- a. Against the Applicant.
- b. Against the Applicant.
- c. Against the Applicant.
- d. Against the Applicant.
- e. 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 interests of national security to grant or continue a security clearance for the Applicant.

Richard A. Cefola

Administrative Judge