

DATE: November 7, 1996

In Re:

SSN: -----

Applicant for Security Clearance

ISCR OSD Case No. 96-0385

**DECISION OF ADMINISTRATIVE JUDGE**

**JOHN R. ERCK**

**APPEARANCES**

**FOR THE GOVERNMENT**

Earl C. Hill, Jr., Esquire

Department Counsel

**FOR THE APPLICANT**

Karen Lessard, Esquire

**STATEMENT OF THE CASE**

On June 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 by Change 3, dated February 13, 1996, issued a Statement of Reasons (SOR) to Michael Stephen Walker (Applicant) which detailed reasons why DOHA could not make a preliminary determination that it was clearly consistent with the national interest to grant or continue a security clearance for him.

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

The Applicant responded to the SOR in writing on July 16, 1996, and requested a hearing before a DOHA Administrative Judge. The case was assigned to this Administrative Judge on July 26, 1996. A hearing was convened on August 22, 1996 for the purpose of considering whether it would be clearly consistent with the national security to grant, continue, deny or revoke Applicant's security clearance. The government's case consisted of twelve exhibits and no witnesses; Applicant relied on two exhibits<sup>(1)</sup> and on his testimony. Transcripts of the proceedings were received on September 4 and September 30, 1996<sup>(2)</sup>.

**FINDINGS OF FACT**

Applicant has denied, with explanation, the factual allegations set forth under subparagraphs a., b., c., e., f., i., and l. of paragraph 1 (Criterion H). He has admitted, with explanation, the factual allegations set forth under subparagraphs d., h., j., k., m., and n. of paragraph 1. With respect to paragraph 2 (Criterion E), Applicant has denied the principal

Criterion E allegation, but has admitted, with explanation, the factual allegations set forth under subparagraphs a., b., c., and d. Likewise with respect to paragraph 3 (Criterion J), Applicant has denied the principal Criterion J allegation, but has admitted with explanation, the factual allegation set forth under subparagraph a.

I have accepted Applicant's admissions and incorporate them as part of my findings of fact.

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

Applicant is a 28 year old employee of a defense contractor. He has been employed by his current employer for four years and is applying for a secret clearance. Applicant had previously held a secret clearance while serving in the U.S. Navy. Applicant's current suitability for a security clearance has been referred to an Administrative Judge because of drug abuse and falsification.

Applicant's use of drugs began with cocaine when he was 16 years old. He first used cocaine with three friends in 1984 when he was a freshman in high school.<sup>(3)</sup> After his initial use, he used cocaine occasionally from 1985 to 1987. He estimates that he used it a couple of times after 1987 at parties, but has not used it since December 1989. On two or three occasions during the 1985 to 1987 time frame, Applicant contributed money toward the purchase of cocaine. He denies that he ever purchased it directly from a dealer.

Applicant first used marijuana in March 1985. From that date until he graduated from high school in 1987, he used it as often as weekly. From 1987 until June 1996, Applicant continued to use marijuana occasionally<sup>(4)</sup> on weekends. He used marijuana most recently on June 23, 1996. During the time that Applicant was using marijuana, he was also purchasing it. He purchased marijuana most regularly and most frequently from 1985 to 1987. On one occasion in 1986, he and a friend purchased a quantity of marijuana and sold it for a profit (Tr. 81). He continued to purchase it after that date in varying amounts with varying degrees of frequency. He had purchased \$20.00 worth in 1996 up to the time he answered the SOR.

In addition to cocaine and marijuana. Applicant also used other illegal substances. He used crank (methamphetamine) weekly in 1985-86, hashish once in 1986, and magic (hallucinogenic) mushrooms three times in 1987.

On August 30, 1991, Applicant was discharged from the U.S. Navy before the term of his enlistment had expired for "MISCONDUCT - DRUG ABUSE" (Govt. Exh 8). He was given a General Discharge under Honorable Conditions. Previously Applicant had received punishment under Article 15 of the Uniform Code of Military Justice for wrongful possession and distribution of LSD. While Applicant has admitted that he used LSD twice and purchased it once, he has consistently denied that he has ever sold or distributed LSD.

When Applicant completed his National Agency Questionnaire (NAQ) on October 25, 1994, he certified that:

.....the entries made by me are true, complete and accurate to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both.

In response to question 18.a. which asked if he had ever been arrested, Applicant was required to list all arrests, including non-judicial punishment under Article 15, UCMJ or Captain's Mast. Applicant answered "YES" to this question and listed a single arrest for "Trespassing/Fireworks" on July 4, 1990.

In response to question 20.a. which asked Applicant if he had ever used or possessed marijuana or other drugs, he answered "YES" with the following explanation:

Cannabis - 1986 last date used.

He answered "NO" to question 20.b. which asked if he had ever been involved in the illegal purchase or sale of any illegal drugs to include marijuana. During his first interview with the Defense Investigative Service (DIS) in January 1996, Applicant acknowledged that he had been discharged from the U.S. Navy "for trafficking and use of marijuana

and LSD." (Govt Exh 2). However, he denied that he had ever purchased or sold illegal drugs and he continued to deny any and all involvement with marijuana and other illegal drugs except for a one time use of marijuana in 1986.

Later during his second DIS interview in April of 1996, Applicant admitted that he had used marijuana and other illegal substances. He admitted that he had first used marijuana in 1984, and then admitted that he had used it weekly between 1986 and 1989. He stated that he used marijuana only a couple of times while in the U.S. Navy between 1989 and 1991, but began to use it more regularly after discharge. He admitted that he had used marijuana once every two or three months after discharge and that he had continued to use it at that rate up to the present time. He told the DIS Special Agent that he had last used marijuana the weekend before the interview.

When he answered the SOR, Applicant admitted that he had used marijuana one more time on June 23, 1996. At his administrative hearing, Applicant confirmed that June 23, 1996 was the last date that he had used marijuana. He began seeing a counselor shortly after that date, and does not intend to use marijuana in the future.

Applicant has been a diligent and conscientious employee in every work environment he has been placed. He had that reputation when he worked in a ----- as a high school student and has consistently displayed the same work ethic in subsequent work environments. While in the U.S. Navy, he earned a reputation as an above average sailor who consistently performed above and beyond the requirements of his rating. In his current capacity as an employee of a defense contractor, Applicant has been given very high marks for his technical skills, productivity and professionalism. In the performance appraisal which he received in August 1995, Applicant was rated "above expected" in every performance rating category. He was promoted most recently on October 30, 1995.

### **PROCEDURAL RULING**

At the conclusion of Applicant's testimony, Department Counsel moved to amend the SOR to allege marijuana abuse until June 23, 1996, in conformance with Applicant admissions (Tr. 101-102). Motion was granted.

### **POLICIES**

The Adjudicative Guidelines of the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations with reasonable consistency that are clearly consistent with the interests of national security. In making those overall common sense determinations Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines but in the context of the factors set forth in section F.3. of the Directive as well. Deviations from these guidelines should not frequently be made and must be carefully explained and documented. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, it also must demonstrate that the facts proven have a nexus to an applicant's lack of security worthiness.

The following Adjudicative Guidelines are deemed applicable to the instant matter.

### **DRUG INVOLVEMENT**

(Criterion H)

#### **Disqualifying Factors:**

1. Any drug abuse.
3. Current drug involvement, especially following the granting of a security clearance

#### **Mitigating Factors:**

2. A demonstrated intent not to use drugs in the future.

## **PERSONAL CONDUCT**

(Criterion E)

### **Disqualifying Factors:**

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 personal security trustworthiness determination.

### **Mitigating Factors:**

None Applicable

## **CRIMINAL CONDUCT**

(Criterion J)

### **Disqualifying Factors:**

1. Any criminal conduct, regardless of whether the person was formally charged

### **Mitigating Factors:**

None Applicable

### **Burden of Proof**

The Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government establishes its case, the burden of persuasion shifts to the applicant to establish his security suitability through evidence which refutes, mitigates, or extenuates the disqualifying conduct and demonstrates that it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgement, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against an applicant.

## **CONCLUSIONS**

Having considered the record evidence in accordance with the appropriate legal precepts and factors, this Administrative Judge concludes that the Government has established its case with regard to Criteria H, E, and J.

In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Section F.3, as well as those referred to in the section dealing with the Adjudicative Process, both in the Directive.

The Government has established its case with respect to Criterion H. Applicant has used marijuana with varying frequency-- as often as weekly--for almost twelve years. During this time, he has also used cocaine, crank, hashish and

LSD. As a member of the U.S. Navy, Applicant used marijuana after he had been granted a security clearance. More recently, he continued to use marijuana **after** his previous use had caused him to lie--and deny that use--when he completed his NAQ in October 1994. And Applicant used marijuana again after he had lied to the DIS during the first interview in January 1996. Finally, he used marijuana yet again after he had told the DIS during the second interview in April 1996 that he did not intend to use it in the future.

Applicant's abuse of illegal drugs other than marijuana is mitigated by the passage of time and his stated intention not to use these substances in the future. Favorable consideration has also been given to Applicant's outstanding work record as a member of the U.S. Navy and in his current employment for a DoD contractor. However, Applicant has failed to overcome or mitigate the Government's case with respect to his abuse of marijuana. He has abused marijuana as recently as June 1996 - only two months before his administrative hearing. Applicant's testimony that he does not intend to use marijuana in the future must be weighed against his recent contradictory statements and action. In addition to using marijuana on June 23, 1996, as recently as July 16, 1996, Applicant admitted -- in his answer to the SOR-- that he may use marijuana in the future if it was offered to him at the right time. Notwithstanding this evidence, Applicant now appears to be motivated to stop using marijuana; he is receiving professional counseling, he has developed other interests, and his girlfriend has become much less tolerant of his marijuana abuse (Tr. 95). His testimony that he does not intend to use marijuana in the future is credible, however, because of his recent marijuana abuse, and his testimony describing a near compulsion to use marijuana (Tr. 67,68 & 77), more time is needed to satisfy this Administrative Judge that Applicant will actually succeed in terminating his long-term relationship with marijuana. Accordingly, allegations a., b., and d. of Criterion H are concluded against Applicant.

Criterion E applies to "the deliberate omission...of relevant and material facts from any personnel security questionnaire...or deliberately providing false and misleading information..to an investigator in connection with a personnel security...determination." Facts are considered relevant and material when they are capable of influencing a federal's agency's decision, e.g., a decision to grant or deny a security clearance. In this instance Applicant's receipt of an Article 15 for possession and distribution of LSD as a member of the U.S. Navy falls well within the definition of materiality. Also falling within the definition of materiality, and also omitted from his NAQ, and from his first signed, sworn statement, are Applicant's abuse of marijuana-- as often as weekly-- during the past eleven years, and his abuse of other illegal substances during the same time frame. It is critical that Applicant failed to disclose information about his Article 15 and substance abuse on his NAQ under circumstances where he was obviously acting willfully and deliberately. He testified that he felt "shame and fear" about the Article 15, and knew that his security clearance application would be rejected if he included that information (Tr. 65-66). Applicant clearly knew that he had smoked marijuana more than once in 1986 as he had stated on his NAQ, and during his first DIS interview.

Because Applicant had provided this misinformation on two occasions -- in October 1994 and January 1996; this misconduct was neither an isolated incident, nor was it misconduct far removed from the present. Although Applicant finally admitted the full extent of his marijuana and other drugs abuse during the DIS interview in April 1996, he did not make these admissions under circumstances where he can be credited with making a prompt, good-faith effort to correct his prior falsification. Allegations a., b., c., and d. of Criterion E are concluded against Applicant.

The Government has established its case under Criterion J. Applicant's willfully withholding information from the DoD on matters that are clearly relevant to his security clearance eligibility violates 18 U.S.C. §1001. The information withheld by Applicant had the potential to influence the course of the background investigation in areas of legitimate concern to the DoD. Criterion J is concluded against Applicant.

### **FORMAL FINDINGS**

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1, (Criterion H): **AGAINST THE APPLICANT**

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c: Against the Applicant

Subparagraph 1.d: Against the Applicant

Subparagraph 1.e. For the Applicant

Subparagraph 1.f. For the Applicant

Subparagraph 1.g. For the Applicant

Subparagraph 1.h. For the Applicant

Subparagraph 1.i. For the Applicant

Subparagraph 1.j. For the Applicant

Subparagraph 1.k. For the Applicant

Subparagraph 1.l. For the Applicant

Subparagraph 1.m. For the Applicant

Subparagraph 1.n. For the Applicant

Paragraph 2, (Criterion E): AGAINST THE APPLICANT

Subparagraph 2.a. Against the Applicant

Subparagraph 2.b. (1) Against the Applicant

Subparagraph 2.b. (2) Against the Applicant

Subparagraph 2.c. (1) Against the Applicant

Subparagraph 2.c. (2) Against the Applicant

Subparagraph 2.d. (1) Against the Applicant

Subparagraph 2.d. (2) Against the Applicant

Subparagraph 2.d. (3) 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 Applicant's security clearance.

**John R. Erck**

**Administrative Judge**

1. Although Applicant proffered only two exhibits at the hearing, he had previously submitted seven exhibits along with his answer to the SOR. The exhibits submitted with Applicant's answer have also been considered in reaching the decision in this case.

2. The original transcript was incomplete.

3. There are discrepancies-- regarding the drugs Applicant used and their time of use-- between the information provided by him in his second, signed, sworn statement to the DIS (Govt. Exh. 5), and the information provided in his answer to the SOR. Because of the explanation Applicant has provided for these discrepancies (Tr. 75), the account of drug use provided in his answer is found to be more credible in those instances where there is a conflict between the two accounts.

4. Applicant's statements about how frequently he abused, or needed to abuse, marijuana are inconsistent. In his second, signed sworn statement to the DIS (Govt. Exh. 5), he stated that "from 1991 to the present I smoked marijuana every two or three months," and in his answer, he admitted to "occasional weekend use from about summer of 1987 till June 23, 1996." At his hearing he testified about his marijuana abuse in the context of "chemical addiction" (Tr. 46). He also testified that it was something he "didn't have control over" (Tr. 67), that he continued to use marijuana even though he "wasn't enjoying it (Tr. 68), and that he continued to use marijuana even when he knew he was under investigation (Tr. 77). The latter expressions describe a relationship with marijuana of considerably greater intensity than use every two or three months.