

DATE: January 15, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 96-0441

DECISION OF ADMINISTRATIVE JUDGE

JOHN G. METZ, JR.

APPEARANCES

FOR THE GOVERNMENT

Earl C. Hill, Jr.

Department Counsel

FOR THE APPLICANT

Pro Se

STATEMENT OF THE CASE

On 19 June 1996, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding⁽¹⁾ that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On 11 July 1996, Applicant answered the SOR and requested a hearing. DOHA assigned the case to me on 4 September 1996; I received it on 30 September 1996. I set the case on 24 October 1996, and issued a notice of hearing on 8 November 1996 for a hearing on 4 December 1996.

At the hearing, the Government presented six exhibits--admitted without objection--and no witnesses; Applicant presented seven exhibits-- admitted without objection--and the testimony of one witness, himself. I received the transcript on 16 December 1996.

A copy of the SOR is attached to this Determination and incorporated by reference.

FINDINGS OF FACT

Applicant admitted using marijuana with varying frequency from the early 1970s to December 1995 (subparagraph 1.a.) and falsifying a 31 January 1996 sworn statement (subparagraph 2.a.); accordingly, I incorporate the admissions as findings of fact.

Applicant is a 37-year old employee of a defense contractor seeking to retain a security clearance.

Sometime in 1983, Applicant falsified a security questionnaire when he failed to disclose his drug abuse history.⁽²⁾ He

later received the security clearance which he seeks to retain. In January 1996, Applicant was again the subject of a background investigation. In a 31 January 1996 sworn statement (G.E. 2), he disclosed that he had used cocaine several times while in college, had used marijuana 25-30 times while in high school and college, and had bought marijuana for his personal use in high school; however, he falsely asserted that he had not used marijuana since approximately 1990. When confronted with the prospect of a polygraph examination on 1 April 1996, Applicant finally disclosed the full extent of his marijuana use: he had used marijuana no more than four or five times a year since graduating from college, the last time in December 1995.⁽³⁾ He had purchased small amounts of marijuana during this period, but had much of the marijuana provided for him at social gatherings. He falsified his marijuana use for fear he would lose his security clearance (G.E. 6). Applicant states an intent to not use marijuana in the future (G.E. 2, 6; Tr. 43).

Applicant appears to be a much better than average employee (A.E. A, B, C), and is involved in family activity with his children (A.E. G). He was remorseful for falsifying his drug abuse history and continuing to use drugs after his clearance was granted in 1983.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section F.3. and in Enclosure (2) of the Directive. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.* Decisions must consider the whole person.

Considering the evidence as a whole, the following adjudication policy factors are most pertinent to 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.

Conditions that could raise a security concern and may be disqualifying include:

- (1) any drug abuse;
- (2) illegal drug possession, including . . . purchase . . .

Conditions that could mitigate security concerns include:

- (1) the drug involvement was not recent;
- (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 include:

- (2) 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, . . . [or] determine security clearance eligibility or trustworthiness. . . ;

- (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 include:

None.

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.

Burden of Proof

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance. The Directive contemplates an evaluation of the whole person, as well as an analysis of the likelihood that the misconduct will recur.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the 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."

CONCLUSIONS

The Government has established its case under criterion H. Applicant's history of drug abuse, especially after receiving his clearance in 1983, raises doubts about his fitness for access to classified information. On those occasions when he was using drugs, he risked compromising or mishandling classified information. However, Applicant's drug abuse does not appear to have resulted in any psychological or physiological dependence; his cocaine abuse ended in 1983, and his marijuana abuse ended in December 1995. Although the illegality of his drug abuse--and his knowledge that both the Government and his employer prohibited drug abuse--did not affect his choice to use drugs in the past, I conclude that Applicant is unlikely to return to drug use. Applicant now fully realizes the potential adverse consequences if he should return to drug abuse. Accordingly, I find Criterion H. for Applicant.

The Government has established its case under Criteria E. The information sought by the Government during the subject interview was relevant and material to the Government's investigation of the Applicant's fitness for access to classified information, and the Applicant knowingly and wilfully falsified that information. Applicant disclosed only so much of his drug history as he thought would get by the DIS. The Applicant's failure to fully disclose his drug abuse history until he was confronted with a polygraph examination, suggests that he cannot be relied upon to speak the truth if the truth presents possible adverse consequences for his own interests. He knew the answers he provided were false; and indeed he perceived the answers had to be false for him to get what he wanted--a security clearance. At no time before the polygraph examination did Applicant make any effort to fully disclose his drug abuse history, much less a prompt, good faith effort. Nevertheless, the purpose of a security clearance decision is not to reward good conduct nor punish misconduct, but to assess whether the misconduct is likely to recur and whether Applicant presents a risk to compromise

classified information, either deliberately or inadvertently. I found Applicant's expressions of remorse for his misconduct⁽⁴⁾ credible. I conclude that Applicant now recognizes that he must be completely truthful with the Government in executing his security obligations and is unlikely to repeat the falsifications. Accordingly, I find criterion E. for the Applicant.

The Government has established its case under Criteria J. The Applicant's knowing falsification to an agency of the federal government on matters within that agency's jurisdiction clearly violates 18 U.S.C. §1001. The falsifications had the potential to influence the course of the background investigation--in areas of legitimate concern to the Government. Nevertheless, for the reasons stated above, I find that Applicant is unlikely to repeat his misconduct in the future. Accordingly, I find criterion J. for the Applicant.

FORMAL FINDINGS

Paragraph 1. Criterion H: FOR THE APPLICANT

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: For the Applicant

Paragraph 2. Criterion E: FOR THE APPLICANT

Subparagraph a: For the Applicant

Paragraph 3. Criterion J: FOR THE APPLICANT

Subparagraph a: For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

John G. Metz, Jr.

Administrative Judge

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992--and amended by Change 3 dated 16 February 1996 (Directive).
2. This falsification was not alleged in the SOR and I have not considered it on the merits of this case; I have, however, considered it on the issue of Applicant's credibility. I have referred to this falsification principally to place this case in its correct factual context.
3. At the hearing, Applicant asserted that over the last five or six years he estimates that his marijuana use decreased to two or three times a year.
4. As distinct from expressions or remorse at being caught.