

Date: December 30, 1996

In Re:

SSN: -----

Applicant for Security Clearance

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DOHA Case No. 96-0448

DECISION OF ADMINISTRATIVE JUDGE

ROBERT R. GALES

APPEARANCES

FOR THE GOVERNMENT FOR THE APPLICANT

Carla Conover, Esquire

Department Counsel

Pro se

STATEMENT OF CASE

On June 21, 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 ----- (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 two sworn written statements, dated August 19, 1996, and September 3, 1996, Applicant responded to the allegations set forth in the SOR, and elected to have his case decided on a written record, in lieu of a hearing. Department Counsel submitted the Government's written case on October 18, 1996. A complete copy of the file of relevant material (FORM)⁽¹⁾ was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. He apparently chose not to do so within the prescribed 30-day period. The case was assigned to, and received by, this Administrative Judge on December 20, 1996.

FINDINGS OF FACT

Applicant has admitted nearly all of the factual allegations pertaining to drug involvement under Criterion H (subparagraphs 1.a. through 1.h.); 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. He denied only one allegation (subparagraph 1.i.).

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:

Applicant is a 24 year old male employed by a defense contractor, and he is seeking to retain the SECRET clearance which was granted to him in June 1990.

Applicant has been a poly-substance abuser whose choice of illegal substances has been primarily marijuana, but who has also used lysergic acid diethylamide (LSD), crystal methamphetamine, and cocaine.⁽²⁾ He commenced using marijuana in about the Fall of 1990, when he was about 18 years of age, and continued doing so, on a monthly basis until March 1992. His frequency of abuse increased, and from March until June 1992, he used it on a daily basis. From that point, and continuing until June 1995, Applicant used marijuana on a weekly basis. While the frequency of subsequent use is unclear, Applicant continued to abuse marijuana until January 1996. There is no evidence to rebut his contention that he has abstained since that time.

On five or six occasions, during the period 1990-95, Applicant used LSD. There is no evidence to rebut his contention that he has abstained from further LSD use since that time.

On two occasions, during the period 1993-94, Applicant "snorted" cocaine. There is no evidence to rebut his contention that he has abstained from further cocaine use since that time.

On one occasion, during the period 1994-95, Applicant inhaled crystal methamphetamine. There is no evidence to rebut his contention that he has abstained from further crystal methamphetamine use since that time.

During the period of his substance abuse, Applicant purchased varying quantities of the illegal substances which he was using.

Applicant has never participated in any drug treatment or rehabilitation program.

On February 28, 1996, Applicant proclaimed that while he did not plan on using any illegal substances in the future, his intentions were not "definite," and he could not rule out that possibility.⁽³⁾ Approximately six months later, upon receipt of the SOR, Applicant modified his position and stated that he will not use illegal drugs in the future because he values his job too much and respects himself too much to use illegal drugs.⁽⁴⁾

Applicant completed the privacy section of an NAQ on August 7, 1995,⁽⁵⁾ and in response to an inquiry pertaining to ever having tried or used a variety of illegal substances, including narcotics (cocaine), stimulants (crystal methamphetamine), hallucinogens (LSD), or cannabis (marijuana),⁽⁶⁾ Applicant responded "yes," and added that he had used marijuana four times from October 1990 to September 1993. He certified that his NAQ 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. Applicant later attributed his falsification to a fear that if he were truthful, he would not get the job which he really wanted.⁽⁷⁾

Applicant completed the privacy section of an NAQ on August 7, 1995, and in response to an inquiry pertaining to ever having been involved in the illegal purchase, possession, or sale of such substances, as described above,⁽⁸⁾ Applicant responded "no." He certified that his NAQ 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.

On February 28, 1996, Applicant was interviewed by a DIS agent, pertaining to substance abuse, and while he admitted using marijuana more frequently and more recently than previously acknowledged, and admitted one-time use of LSD in the Fall of 1993, he expressly denied ever having used any other illegal substances, and denied ever having purchased any illegal substances. He failed to report, or address, his more extensive use of marijuana and LSD, and concealed his use of crystal methamphetamine and cocaine, as well as his purchases of the illegal substances. He certified and swore that his statement was true, complete, and accurate. It was false. He had again lied, falsified, omitted, and concealed his true history of substance abuse, as described above. Applicant attributed his omissions to a surprise about being interviewed, and a fear about losing his job.⁽⁹⁾

During one summer vacation, from June until August 1990, while Applicant was attending college, he was temporarily employed by a large government organization involved in national security. He has been employed by his current employer since July 1995. The quality of his performance has not been characterized.

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 to make 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.

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 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;

Conditions that could mitigate security concerns include:

- (5) the individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or pressure;

[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,"⁽¹⁰⁾ 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 potential, 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 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. Applicant's improper involvement with illegal substances, especially that abuse which occurred after June 1990, when he was granted a security clearance, as well as after July 1995, when he became an employee of defense industry, is of particular concern, especially in light of his desire to have continued access to the nation's secrets.

It is to his credit that after experimenting with cocaine in 1993-94, and crystal methamphetamine in 1994-95, he ceased doing so and never resumed such abuse. However, his LSD and marijuana abuse is another issue. He did not simply experiment out of curiosity and quit. Instead, motivated by social pleasures, notwithstanding the legal status of his endeavor, he exhibited a pattern of questionable judgment, irresponsibility, and immature behavior, and continued his substance abuse. With respect to LSD, it continued for approximately five years after receiving his security clearance; and with respect to marijuana, six years. In so doing, Applicant has demonstrated the relative lack of importance his fiduciary responsibilities towards the Government or the drug laws have *vis-a-vis* his drug-induced social pleasures. As stated above, improper or illegal involvement with drugs raises questions regarding an individual's willingness or ability to protect classified information.

Applicant's actions and initial responses to inquiry regarding future intentions have seemingly answered those questions. I am concerned about Applicant's initial indefinite intentions regarding substance abuse, and his vacillating position regarding his future. Rather than exhibiting a "demonstrated intent not to abuse any drugs in the future," Applicant was unwilling to rule out the possibility of continued substance abuse. It was only after receipt of the SOR that Applicant confronted the stark reality of the situation and swore off future drug abuse. Applicant's newly formulated position is rather mystifying. He claims he "respects himself too much to use drugs," but fails to offer any basis upon which he has altered his previous position. In the absence of such information, I am unable to examine the depth of his sincerity in this regard.

While it appears that no illegal substance is now being used, the period of abstinence, as stated above, along with the

absence of evidence of drug abuse counseling, treatment, or rehabilitation, are significant. Applicant's continuing abstinence is to be encouraged. But this period of abstinence -- 10 months -- is still relatively brief in light of his substance abuse history. It is still too brief. In this instance, I believe that both the successful completion of a drug treatment and rehabilitation program, a more enlightened acceptance of the law as it pertains to substance abuse, as well as a longer period of abstinence should be required to demonstrate the truly successful completion of a transformation from long-term illegal 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 comfortably confident that Applicant's substance abuse is a thing of the past, or that it will not recur. To the contrary, only three months prior to the closing of the record in this case, Applicant finally proclaimed his future intentions.

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 in this case leaves me with grave questions and doubts as to Applicant's continued security suitability. Accordingly, allegations 1.a. through 1.d., and 1.i. of the SOR are concluded against Applicant.

Applicant's experimentation with cocaine on two occasions in 1993-94; and with crystal methamphetamine on one occasion in 1994-95, have not been repeated thereafter, and I consider such abuse 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.e. through 1.h. of the SOR are concluded in favor of Applicant.

With respect to Criterion E, the Government has established its case. There is little dispute surrounding Applicant's deceptive actions or his purposes, for he has admitted the essential elements of the allegations. Notwithstanding his certifications, oaths, and affirmations that his responses were true and accurate, on two occasions, in August 1995, and February 1996, Applicant willfully falsified, omitted, and concealed material facts pertaining to his history of substance abuse. Applicant attributed his actions to a fear that the truth might negatively impact his ability to get the job he really liked. After his initial deception, he chose to continue his deceptions in order to be consistent, and not expose himself to the possible ramifications of the truth. 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. Applicant's concerns for the national security at that time were obviously less significant or possibly non-existent.

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

Applicant's eventual acknowledgment regarding his history of substance abuse does not lessen or minimize, much less erase or nullify, the impact of his earlier concealments, omissions, and deceptions. In this instance, deception was actively practiced by Applicant over a one year period, with the most recent incident occurring about ten months prior to the closing of the record. While he has seemingly taken the positive step of finally being candid about his substance abuse history to reduce or eliminate vulnerability to exploitation, there is no evidence of rehabilitation or other pertinent behavioral or philosophical changes to enable me to conclude that similar actions might not recur. In light of the repeated false certifications and oaths, as well as the lengthy periods following those falsifications, during which he remained silent as to the truth, 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, both in questionnaires and to investigators, encompass matters within the jurisdiction of the Department of Defense, and are provided for under Title 18, United States Code, Section 1001. ⁽¹¹⁾ Applicant's

deceptions fit well within the ambit of that provision. His explanations for failing to accurately relate his history of substance abuse, simply will not justify or exonerate such action. I conclude, therefore, that Applicant's felonious conduct -- falsifications, omissions, and concealments (deception) of his substance abuse history, on two occasions -- were material and made in a knowing and willful manner in contravention of Title 18, United States Code, Section 1001. Thus, 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.: 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.: Against the Applicant

Paragraph 2. Criterion E: AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.b.: Against the Applicant

Subparagraph 2.c.: 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 a security clearance for Applicant.

Robert R. Gales

Chief Administrative Judge

1. The Government submitted eight items in support of its contentions.
2. Applicant has been afforded several opportunities, over a one year period, to furnish detailed scenarios of his substance abuse history, and in doing so, his stories have been both deceptive and inconsistent. During that period he has admitted very limited use of marijuana; denied prior involvement in the purchase of any illegal substances; admitted slightly more extensive use of marijuana, and one-time experimentation with LSD; denied the use of, or experimentation with, any other illegal substance; eventually admitted much more extensive use of marijuana, as well as the limited use of LSD, crystal methamphetamine, and cocaine; and admitted the purchase of each of those substances. Applicant eventually admitted that he had been deceptive and had lied both on his National Agency Questionnaire (NAQ) and to the Defense Investigative Service (DIS), and subsequently modified his earlier comments. 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*, Item 8, at 2.
4. *See*, Item 4.
5. *See*, Item 7, at 5.
6. Question 23.
7. *See*, Item 4.
8. Question 24.
9. *See*, Item 8, at 2.
10. *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).
11. 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."