

DATE: July 29, 1997

In RE:

SSN:

Applicant for security clearance

ISCR OSD Case No. 96-0460

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR THE GOVERNMENT

Melvin A. Howry, Esq.

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF THE CASE

On August 12, 1996, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued the attached 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 the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on September 3, 1996, and requested to have his case determined on a written record in lieu of a hearing. Department Counsel submitted the Government's File of Relevant Material (FORM) to the Applicant on March 3, 1997. The Applicant was instructed to submit information in rebuttal, extenuation or mitigation within 30 days of receipt. The Applicant received the Government's written case on March 8, 1997, and submitted an additional statement. The case was received by the undersigned for resolution on April 9, 1997.

FINDINGS OF FACT

The Applicant is 47 and single. He is employed by a defense contractor and he seeks to obtain a DoD security clearance in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a continued security clearance, based upon the allegations set forth in the attached Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and criterion in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

Paragraph 1 (Criterion N - Drug involvement). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he abuses illegal drugs and has been involved in illegal drug activity.

The Applicant began using marijuana in approximately 1973. He used it primarily on a weekly basis. The Applicant also purchased marijuana during the period he was using it. The Applicant stopped using marijuana in 1988 and expresses a credible intent not to use marijuana in the future. (Government Exhibit 10 at page 1.)

In September 1992, the Applicant was arrested, along with other people, for (1) Conspiracy to Possess a Controlled Substance Base (Cocaine) and (2) Possession of a Controlled Substance for Sale (Cocaine), both state felonies.⁽¹⁾ As a result of a plea bargain, the Applicant plead nolo contendere to Count (2) on March 22, 1993, and received a sentence which includes five years probation, 365 days in jail, and pay probation fees of about \$2,300. As of the date the record closed the Applicant continued to be on probation. The Applicant states that he only plead guilty because the person who was the real dealer declined to accept personal responsibility and threatened to harm the Applicant's two adult daughters. (Government Exhibits 9 and 10.) On the other hand, the same exhibits and the Probation Officer's Report (Government Exhibit 6), shows that the Applicant, who was the record owner of the house where the events took place, was at least tacitly involved in the incidents.⁽²⁾ Based on my evaluation of the available evidence, I find that the Applicant was in possession of cocaine base in the period of September 1992. I also find that, while he may not have been directly involved in the conspiracy to possess cocaine for sale, the Applicant could have and should have known that drug activity was taking place from his house. His failure to do anything about it shows extremely poor judgment on his part.

The Applicant consistently denies, in his Answer and two sworn statements, that he used cocaine in the period 1991 through 1992. (Applicant's Answer, Government Exhibits 9 and 11.) The only evidence that he used cocaine is found on page 5 of Government Exhibit 6, the Probation Officer's Report. As stated above, that report is incomplete and unsigned. Under the particular circumstances of this case, I find that the Government has not met its burden in proving that the Applicant has used cocaine as alleged in the Statement of Reasons.

Paragraph 2 (Criterion E - Questionable judgment). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he intentionally falsified material aspects of his personal background during the clearance screening process.

On November 21, 1995, the Applicant completed an official DoD questionnaire in which he stated that he had never used or purchased marijuana or cocaine. (Government Exhibit 7, questions 22.a. and 22.b.) The statements regarding marijuana were false answers to material questions pertaining to the Applicant's former involvement with illegal substances. As stated above, the Government failed to meet its burden regarding whether the Applicant used cocaine.

The Applicant was subsequently interviewed by a Special Agent of the Defense Investigative Service (DIS) April 4, 1996. In that first interview the Applicant discussed his drug related arrest and also stated, "I have never been involved in any use, sales, trafficking, manufacturing or distribution of any type of illegal drug or controlled substances." (Government Exhibit 9 at page 2.) The Applicant was reinterviewed on May 7, 1996, and admitted his marijuana use. He was evidently not asked about cocaine in this interview. (Government Exhibit 10.) In a subsequent interview on November 8, 1996, the Applicant once again categorically denied any cocaine use. He further stated that he had no idea how the statements regarding cocaine use came to be in Government Exhibit 6. (Government Exhibit 11.)

The Applicant stated that he had falsified his drug information, "(B)ecause I was afraid of not being granted a security clearance which is a requirement for being recalled back to work." (Government Exhibit 10 at page 1.)

Paragraph 3 (Criterion J - Criminal activity). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in criminal acts.

As found above, the Applicant plead nolo contendere to, and was found guilty of, a state felony, Possession of Cocaine Base for Sale.

As found above, the Applicant knowingly and willfully provided false material information to DoD during the clearance screening process. In so doing the Applicant violated the felony criminal provisions of 18 USC 1001.

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 and Section F.3. of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent criterion. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

Criterion H (Drug involvement)

Conditions that could raise a security concern:

- (1) any drug abuse;
- (2) illegal drug possession, including cultivation, processing, manufacture, purchase, sale or distribution.

Conditions that could mitigate security concerns:

- (1) the drug involvement was not recent;
- (3) a demonstrated intent not to abuse any drugs in the future.

Criterion E (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, 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;
- (5) a pattern of dishonesty or rule violations.

Conditions that could mitigate security concerns:

(None of the stated conditions have application in this case.)

Criterion J (Criminal conduct)

Conditions that could raise a security concern:

- (1) any criminal conduct, regardless of whether the person was formally charged;
- (2) a single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns:

(1) the criminal behavior was not recent;

(2) the crime was an isolated incident;

In addition, as set forth in Enclosure 2 of the Directive at page 2-1, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors (General Factors):

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence."

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in acts of drug abuse, falsification and criminal conduct, that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue 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. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the granting of a security clearance. If such a *prima facie* case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's *prima facie* case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by *prima facie* evidence that the Applicant has used illegal drugs and been involved in drug related criminal activity (Criteria H and J); and that he intentionally made false material statements to DoD, in violation of a felony criminal statute (Criteria E and J).

The Applicant, on the other hand, has not introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's *prima facie* case against him, except in part. Under Paragraph 1 (Criterion H), as set forth above, subparagraph 1.a. is found for the Applicant as the Government did not prove that the Applicant used cocaine. Subparagraph 2.c. (Criterion E) is found for the Applicant as the Government failed to prove that the Applicant falsified that particular statement, based on my factual finding regarding subparagraph 1.a.

Applicant's marijuana use ended approximately nine years ago. He expresses a credible intention not to use marijuana in the future. Accordingly, subparagraphs 1.c. and 1.d. will be found for the Applicant.

The Applicant's involvement in the drug operation out of a house he owns cannot, however, be mitigated at the present time. Looked at in the best light for the Applicant, he was incredibly naive and allowed his roommate to run a drug operation out of his house. At its worst, there is evidence in the record that the Applicant knew about the drug operation and may have been a part of it. (Government Exhibit 6 at page 8.) In addition, there is the fact that the Applicant remains on probation as of the date the record closed. Accordingly, subparagraph 1.b. and Paragraph 1 (Criterion H) must be found against the Applicant, as well as subparagraph 3.a.

The Government relies heavily upon the integrity and honesty of clearance holders, and it is a negative factor for security clearance purposes where an Applicant has deliberately provided false information about material aspects of his or her personal background. Under the particular facts of this case, the eight year gap between the end of his marijuana use and his falsification cannot be used as a mitigating factor. Criteria E and J are found against the Applicant.

The Applicant's efforts at reform are noted, and he is commended for his decision to refrain from further drug use. Under the particular circumstances of this case, this evidence does not overcome the adverse information that has been presented by the Government.

On balance, it is concluded that the Applicant has failed to overcome the Government's information opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the conclusionary allegations expressed in Paragraphs 1, 2 and 3 of the Government's Statement of Reasons.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1: Against the Applicant.

Subparagraph 1.a.: For the Applicant.

Subparagraph 1.b.: Against the Applicant.

Subparagraph 1.c.: For the Applicant.

Subparagraph 1.d.: For the Applicant.

Paragraph 2: Against the Applicant.

Subparagraph 2.a.: Against the Applicant.

Subparagraph 2.b.: Against the Applicant.

Subparagraph 2.c.: For the Applicant.

Paragraph 3: Against the Applicant.

Subparagraph 3.a.: Against the Applicant.

Subparagraph 3.b.: 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 the Applicant.

Wilford H. Ross

Administrative Judge

1. It is noted that while the Department Counsel enclosed copies of the relevant Federal statutes (Exhibits 12 and 13), he did not include these relevant state statutes. It is highly recommended that such statutes be included in these cases in the future.
2. Government Exhibit 6 is missing page 9 and is unsigned. However, it has sufficient indicia of reliability for me to use in making the decision in this case.