

January 3, 1997

In RE:

SSN:

Applicant for security clearance

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ISCR OSD Case No. 96-0452

**DECISION OF ADMINISTRATIVE JUDGE**

**RICHARD A. CEFOLA**

Appearances

FOR THE GOVERNMENT

Melvin A. Howry, Esq.

Department Counsel

FOR THE APPLICANT

*Pro se*

**STATEMENT OF CASE**

On July 26, 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 19, 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 13, 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 18, 1996, and submitted nothing in response. The case was received by the undersigned

for resolution on October 22, 1996. The issues raised here are whether the Applicant's past drug involvement, personal conduct, and related criminal conduct militates against the granting of a security clearance.

## **FINDINGS OF FACT**

The following Findings of Fact are based on Applicant's Answer to the SOR, and the File of Relevant Material. The Applicant is 32 years of age, has a secret security clearance, and is employed by a defense contractor who seeks that level clearance on behalf of the Applicant.

### **Criterion H - Drug Involvement.**

1.a., 1.b., 1.e., 1.f. and 1.g. The Applicant used cocaine on two occasions. The first "time in about the mid 1980's . . . [t]he second time . . . was on the night . . . [he] was arrested in June 95 . . ." (Government Exhibit (GX) 8 at page 1). On the second occasion, the night of June 16th, the Applicant purchased the cocaine, along with an unsolicited opiate, for \$40.00 (GX 8 at page 2). As a result of ingesting these drugs, the Applicant "started to feel sick." (GX 8 at page 2). He describes his feeling in the following terms: "I started to hear things echoing, and things were becoming blank to me. My heart was racing away and felt tight." (GX 8 at page 2). He subsequently broke into a restaurant and was arrested for Burglary (GX 10). He was indicted on related charges on August 22nd, but they were soon thereafter dismissed without prejudice (GX 3 at page 14). The June 16, 1995, purchase and usage occurred after the Applicant had been granted a secret security clearance in September of 1989 (GX 4 at page 3).

1.c. and 1.d. The Applicant received treatment from June 16~18, 1995, for a condition diagnosed as Acute Cocaine Intoxication and Drug Induced Psychosis (GX 12 at page 1). He tested positive for cocaine and opiates the day of his admission (GX 11 at page 40).

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

2.a. In answering question 18.a. on his September 1993 National Agency Questionnaire (NAQ), the Applicant knowingly and wilfully failed to disclose that he was cited in April of that year for Criminal Property Damage (GX 4 at page 3, and GX 5 at page 1).

2.b. In answering question 20.a. on his September 1993 NAQ, the Applicant again knowingly and wilfully failed to disclose that he had used cocaine in "the mid 1980's" (GX 4 at page 3, and GX 8 at page 1).

2.c. The Government has failed to demonstrate that the Applicant was less than candid with his Facility Security Officer regarding the status of his June 1995 charges.

2.d. In a signed, sworn statement, executed by the Applicant on October 19, 1995, the Applicant knowingly and wilfully failed to disclose his past drug abuse, his drug related arrest, and his treatment for his drug abuse (GX 6 at page 6).

2.e. In a second signed, sworn statement, executed by the Applicant on May 13, 1996, the Applicant again knowingly and wilfully failed to disclose his past drug abuse, his drug related arrest, and his treatment for his drug abuse (GX 7 at page 1).

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

3.a. The conduct which led to the Applicant's citation in 1993 and his arrest in 1995, constituted criminal conduct.

3.b. The Applicant violated the provisions of 18 U.S.C. Section 1001, when he failed to disclose his 1993 citation and his past drug abuse on his 1993 NAQ. He further violated the provisions of the same federal code section when he failed to disclose his past drug abuse, his drug related arrest, and his treatment for his drug abuse in his October 1995 and March 1996 sworn statements.

### **Mitigation.**

The Applicant's drug involvement appears to have been isolated and infrequent, and his employer has some laudatory comments regarding his job performance (GX 3 at page 4).

Considering all of the evidence, and in light of the fact that the Applicant was less than candid about his drug involvement; 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:

### Drug Involvement

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

- (1) any drug abuse (drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction).
- (2) illegal drug . . . purchase . . . .

#### Condition that could mitigate security concerns:

\* \* \*

- (2) the drug involvement was an isolated or infrequent event.

### 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 H (drug involvement), 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.

The improper or illegal involvement with drugs, raises questions regarding an individual's willingness or ability to protect classified information. 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

Considering first the Applicant's past drug involvement, it was clearly isolated and infrequent, and ceased about eighteen months ago. The Applicant has also offered additional, credible documentation that demonstrates apparent abstinence on his part (GX 3 at pages 7~10). I therefore conclude that the Applicant's past drug involvement is **not** of present security significance. He has thus mitigated the Government's security concerns as to this Criterion.

The same can not be said, however, as to his past personal conduct, and related criminal conduct. I conclude that they **are of present security significance**. The Applicant was less than candid with the Government about his past drug involvement on his 1993 NAQ (GX 4 at page 3). Furthermore, he made no good-faith effort to correct this falsehood. He instead continued his lack of candor about his drug involvement in two subsequent sworn statements. I also conclude that these falsehoods are violative of 18 U.S.C. Section 1001, and of present security significance.

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: FOR THE APPLICANT

- a. For the Applicant.
- b. For the Applicant.
- c. For the Applicant.
- d. For the Applicant.
- e. For the Applicant.
- f. For the Applicant.
- g. For the Applicant.

#### Paragraph 2: AGAINST THE APPLICANT

- a. Against the Applicant.
- b. Against the Applicant.
- c. For the Applicant.
- d. Against the Applicant.
- e. Against the Applicant.

#### Paragraph 3: AGAINST THE APPLICANT

- a. Against the Applicant.
- b. 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