

March 13, 1997

In Re:

SSN: -----

Applicant for Security Clearance

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ISCR OSD Case No. 96-0485

DECISION OF ADMINISTRATIVE JUDGE

DARLENE LOKEY ANDERSON

Appearances

FOR THE GOVERNMENT FOR THE APPLICANT

Martin H, Mogul, Esquire *Pro Se*

Department Counsel

STATEMENT OF THE CASE

On September 9, 1996, 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 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 clearance should be denied or revoked.

The Applicant responded to the SOR in writing on October 10, 1996. This case was assigned to the undersigned on October 22, 1996, and a Notice of Hearing was issued on November 8, 1996.

A hearing was held on January 24, 1997, at which the Government presented eight documentary exhibits. The Applicant presented four documentary exhibits and testified on his own behalf.

The official transcript was received on February 3, 1997.

FINDINGS OF FACT

The Applicant is 40 years old, and married. He is employed by a defense contractor as a Senior Research Assistant, and he seeks to retain a Secret-Level security clearance previously granted in connection with his employment.

The Government opposes the Applicant's request for a continued security clearance, on the basis of 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:

Paragraph 1 (Criterion H - Drug Involvement). The Government alleges that the Applicant is ineligible for clearance because he abuses illegal substances.

The Applicant has admitted to abusing and becoming addicted to both cocaine and methamphetamine during the period from approximately early 1994 to at least July 1995. In the beginning, the Applicant used cocaine on a weekly basis. By June 1994, the Applicant's use of cocaine had progressively increased to daily use. The Applicant purchased the cocaine he used from persons on the street, and at times he spent about \$30.00 a day on cocaine to supply his use.

In June 1994, the Applicant's cocaine habit became too expensive so he replaced the cocaine with methamphetamine, and began using it on a weekly basis. By October 1994, the Applicant's methamphetamine habit had increased to the point where the Applicant was using it daily. The Applicant also purchased the methamphetamine he used from persons on the street. The Applicant testified that he has never purchased or sold any illegal drug for profit.

In October 1994, the Applicant realized that he needed help with his addiction and voluntarily entered into a 30-day, in-patient treatment program for his drug problem. During this treatment program which lasted from October 24, 1994 to November 23, 1994, the Applicant was diagnosed with "Amphetamine Dependency and Polysubstance Dependency." (See, Government Exhibit 8).

From October 1994 until mid July 1995, the Applicant was able to completely abstain from the use of illegal drugs. In mid July 1995, however, the Applicant relapsed for one week and used methamphetamine every other day. As a result of his July relapse, the Applicant entered another treatment program on July 17, 1995, which required him to live in a sober living home for two months, followed by out-patient counseling and random drug screening. During this treatment, the Applicant was diagnosed with "Chemical Dependency." The Applicant was also required to attend Narcotics Anonymous meetings and, upon completion of the program on October 27, 1995, has continued attending them on a weekly basis.

In January 1982, the Applicant was granted a security clearance by the Department of Defense. On March 7, 1991, and on May 14, 1992, the Applicant provided two signed sworn statements to the Defense Investigative Service indicating that he had no future intentions of using any illegal substance. (See, Government Exhibits 3 and 4). The Applicant testified that at the time he made the statements he had no intentions of using illegal drugs.

The Applicant understood at the time he received his security clearance in 1982 that the Department of Defense prohibited the use of illegal drugs, however, he still used and purchased cocaine and methamphetamine. The Applicant has not used any illegal drug since July 1995, and has no intention of any future use.

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

On March 14, 1996, the Applicant completed an application for security clearance which required him to indicate whether he has ever illegally used any controlled substance since the age of 16 or in the last 7 years, whichever is shorter. The Applicant answered "yes" to the question and indicated that he had used methamphetamine. He did not indicate that he had also used cocaine during this period. (See, Government Exhibit 1, Question 24.(a.)) The Applicant explained that the reason he did not list his cocaine use was because the question listed a series of illegal drugs,

including cocaine, and he believed that cocaine was one of the substances to which he was answering "yes". The question did not list methamphetamine. Therefore, he listed methamphetamine as a drug he had used. (Tr. Pg. 31 and Answer to SOR). I find that the Applicant misunderstood the question and believed that he was being asked to list any illegal drugs he used that were not listed in the question. Given the fact that the Applicant mistakenly answered the question wrong, I do not find that there is sufficient evidence in the record to support the allegation that the Applicant intentionally concealed this material information in bad faith. Accordingly, allegation 2.(a)., is found for the Applicant.

In the same security questionnaire, the Applicant was required to indicate whether he ever purchased or sold any controlled substance for his own intended profit or for that of another in the last 7 years. The Applicant responded "no" to the question. (See, Government Exhibit 1, Question 24.(c.)) Although the Applicant purchased both cocaine and methamphetamine for his own use, there is no evidence in the record that the Applicant ever purchased or sold drugs for his profit or that of another within the questions time frame. Therefore, I find no falsification. Accordingly, allegation 2. (b.), is also found for the Applicant.

Paragraph 3 (Criterion J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he knowingly and willfully violated the felony provisions of 18 USC 1001, a federal criminal statute.

As found above, I do not find that the Applicant knowingly and wilfully provide false material information to DOD during the clearance screening process. Accordingly, there is no violation of Title 18, United States Code, Section 1001, a felony.

Mitigation.

Several memorandums of recommendation on the Applicant's performance reflect that the Applicant is a valuable and dedicated worker. The Applicant's most recent performance appraisal indicates an overall satisfactory rating. (See, Answer to SOR Attachments and Applicant's Exhibits A and C).

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive sets forth policy factors and conditions that could raise or mitigate a security concern; 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 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 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, proceeding, manufacture, purchase , sale or distribution.

Condition that could mitigate security concerns:

None.

Criterion E (Personal Conduct)

Condition that could raise a security concern:

None.

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.

Condition that could mitigate security concerns:

None.

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 general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances
- 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, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing 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 in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have 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

In DOHA cases the Government has the initial burden to go forward with *prima facie* evidence in support of the factual and conclusionary allegations in the SOR. If the Government meets this initial obligation, 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 interests of national security to grant him or her a security clearance.

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 repeated instances of off-duty drug abuse which demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

Furthermore, 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 he or she may demonstrate the same attitude towards security rules and regulations.

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

In this case, the Government has met its initial burden of proving by *prima facie* evidence that the Applicant has used illegal drugs (Criterion H). 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.

The record evidence clearly shows that the Applicant has violated the law by using and purchasing cocaine and methamphetamine from early 1994 until at least July 1995. The evidence also shows that the Applicant has been diagnosed and treated for his addiction to cocaine and methamphetamine, however, as recently as twenty months ago the Applicant relapsed and last used methamphetamine. In addition, the Applicant has violated DoD policy by using and purchasing illegal drugs while holding a security clearance. The Applicant told the Defense Investigative Service in 1991, and again in 1992, that he had no intentions of using any illegal drug, however in 1994, he used them anyway. The Applicant is commended for voluntarily obtaining drug treatment, and for completely abstaining from illegal drug use since July 1995. Given the fact that he has only been drug free for twenty months, and is battling an addiction to both cocaine and methamphetamine, there has not been sufficient time in rehabilitation to show that the Applicant will not relapse again. This does not preclude the Applicant for applying for a security clearance at some future date when there is additional evidence to support his full rehabilitation. Accordingly, I find against the Applicant under Criterion H, (Drug Involvement).

As previously discussed, with respect to the Government's allegations concerning the Applicant's intent to conceal or falsify information on his security application concerning his illegal drug involvement, I find for the Applicant under Criterion E, (Personal Conduct) and Criterion J, (Criminal Conduct).

On balance, it is concluded that the Applicant has failed to overcome the Government's *prima facie* case opposing his request for a continued security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 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.

Subpara. 1.a.: Against the Applicant.

Subpara. 1.b.: Against the Applicant.

Subpara. 1.c.: Against the Applicant.

Subpara. 1.d.: Against the Applicant.

Subpara. 1.e.: Against the Applicant.

Subpara. 1.f.: Against the Applicant.

Subpara. 1.g.: Against the Applicant.

Subpara. 1.h.: Against the Applicant.

Subpara. 1.i.: Against the Applicant.

Subpara. 1.j.: Against the Applicant.

Paragraph 2: For the Applicant.

Subpara. 2.a.: For the Applicant.

Subpara. 2.b.: For the Applicant.

Paragraph 3: For the Applicant.

Subpara. 3.a.: For the Applicant.

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interests to grant or continue a security clearance for the Applicant.

DARLENE LOKEY-ANDERSON

Administrative Judge