DATE: February 28, 1997

In Re:

SSN: ----------

Applicant for security clearance

ISCR OSD Case No. 96-0500

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

Appearances

FOR THE GOVERNMENT

William S. Fields, Esq.

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF CASE

On July 10, 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 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 clearance should be denied or revoked. The SOR is attached. Applicant filed his Answer to the SOR on July 30, 1996.

The case was received by the undersigned on August 26, 1996. The first notice of hearing was issued on October 22, 1996, and the case was heard on November 7, 1996. The hearing was concluded on January 27, 1997. The Government submitted documentary evidence. Testimony was taken from Applicant. The transcript was received on February 6, 1997.

RULINGS ON PROCEDURE

During pre-evidentiary portion of the first hearing on November 7, 1996, Applicant's initial responses prompted some concern about whether he understood and/or comprehended the proceedings.(1) A *voir dire* examination was conducted to determine whether Applicant was competent to represent himself or whether the hearing should be continued so Applicant could obtain some type of representation. Applicant was told to talk to the union employee about representing Applicant. (Vol. I, Tr. 27). Applicant asked if he could get someone on the job to represent him. (Vol. I, Tr. 28). Applicant was advised he could get anyone who could read or write better than Applicant, such as a personal representative. (Vol. I, Tr. 28). Applicant was told what the personal representative would do at the hearing. (Vol. I, Tr.

28). Applicant was finally told he would have only one continuance and if he chose not to get representation, the hearing would be conducted anyway. (Tr. 28-29). At the beginning of the continued hearing on January 27, 1997, Applicant asked for a continuance to obtain an attorney. (Vol. II, Tr. 5-6). His request was denied.

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony. The SOR alleges drug involvement (Criterion J), personal conduct (Criterion E), and criminal conduct (Criterion J). Applicant's answers to paragraph 1 are understandable. However, he answered each enumerated allegation under paragraph 2 but did answer whether he falsified or omitted the enumerated allegations by not furnishing the requested information in the identified security form or sworn statement. I shall conclude he denies all allegations under paragraphs 2 and 3.

Applicant is 42 years old and employed as a ------- by a defense contractor. He seeks a secret level clearance.

Applicant used marijuana on a weekly basis from 1972 until his arrest on March 25, 1989. (GE #2; Vol. II, Tr. 17).[(2)] He stopped using the drug because he was on probation for 2 years and he was subject to drug screenings. (GE #2). H resumed in 1991 and used marijuana twice a month until February 1996 when he stopped using marijuana. He purchased marijuana once a week between 1972 and 1989 and then fifty per cent of the time between 1991 and February 1996.

Applicant used cocaine, according to GE #2, once in the 1970s and once in the early 1980s, and three or four times between 1989 and February 1996. He purchased the drug three or four times because he knew the seller. (Vol. II, Tr. 22).

Applicant used acid (LSD) on one occasion in the middle 1970s. (GE #2).

On March 25, 1989, Applicant was arrested for (1) misdemeanor possession of marijuana, (2) misdemeanor possession of cocaine, and (3) misdemeanor possession of drug paraphernalia. He pled guilty to the marijuana and paraphernalia charges and was ordered to serve 2 years probation in lieu of an eight month sentence. He was also ordered to attend a drug program.

Applicant continued to use and purchase marijuana and cocaine after receiving his company confidential security clearance on May 16, 1983. (GE #2, 3 ,4; Vol. II, Tr. 91).

On May 26, 1995, Applicant omitted his June 1987 worthless check charge and August 1991 arrest for driving while intoxicated (dwi) and no operators license. I am persuaded Applicant inadvertently forgot to supply information regarding both arrests on the security form (Vol. II, Tr. 88), and his sworn statement of December 8, 1995. He received a deferred sentence for the worthless check charge in 1987, almost 8 years before he completed his security form in May 1995, and more than eight years before he furnished the sworn statement in December 1995. With respect to the 1991 offenses, the dwi charge was actually withdrawn within 3 hours after the arrest because the breathalyser measured Applicant's alcohol level below the legal limit in the state. (GE #5). The dismissed dwi gave Applicant a good faith though incorrect belief he was not required to include the traffic arrests from 1991 on his security form of March 1995.

Applicant falsified his questionnaire on May 26, 1995 when he answered in the affirmative to question 20a, and stated he had been arrested in June 1984, but then stated he had never used marijuana. He omitted his use of marijuana with varying frequency from 1972 to May 1995. (GE #2). He omitted his use of cocaine once in the 1970s and middle 1980s and also three or four occasions between 1989 and February 1996. His omission of a one-time use of LSD is extenuated by the passage of 20 years.

Applicant also intentionally falsified question 20b (the drug purchase and possession question) on his May 26, 1995 security form.[(3)] Applicant actually purchased marijuana from 1972 to 1989 approximately once a month and, after a 2 year period when he purchased no marijuana because he was on probation, he resumed purchasing drugs about fifty per cent of the time. (GE #2).[(4)] His purchase of cocaine is also addressed in GE #2.

Applicant falsified his sworn statement of December 8, 1995 when he minimized his drug history by stating he used marijuana only three times in 1989 and purchased marijuana and cocaine only once in March 1989. He actually used marijuana much more and also used cocaine as set forth in GE #2.

POLICIES

Enclosure 2 of the Directive sets forth policy factors which must be given binding consideration in making security clearance determinations. These factors must be considered in every case according to the pertinent criterion; however, the factors are in no way 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 case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the entire realm of human experience or that the factors apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Factors most pertinent to evaluation of the facts in this case are:

Criterion H (Drug Involvement)

Factors Against Clearance:

1. any drug use.

2. illegal drug possession...purchase....

Factors for Clearance:

None.

Criterion E (personal conduct)

Factors Against Clearance:

1. the deliberate omission, concealment...of relevant and material facts from any personnel security questionnaire...to...determine security clearance eligibility or trustworthiness....

2. deliberately providing false or misleading information concerning relevant and material matters to an investigator...in connection with a personnel security or trustworthiness determination.

Factors for Clearance:

None.

Criterion J (criminal conduct)

Factors Against Clearance:

1. any criminal conduct, regardless of whether the person was formally charged.

Factors for Clearance:

None.

General Policy Factors (Whole Person Concept)

Every security clearance case must also be evaluated under additional policy factors that make up the whole person concept. Those factors (found at page 2-1 of Enclosure 2 of the Directive) include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 behavioral changes; (7) the motivation for the conduct; and, (8) the likelihood of continuation or recurrence.

Burden of Proof

As set forth in the Directive, every personnel security determination must be a fair and impartial overall commonsense decision based upon all available information, both favorable and unfavorable, and must be arrived at by applying the standard that the granting (or continuance) of a security clearance under this Directive may only be done upon a finding that to do so is clearly consistent with the national interest. In reaching determinations under the Directive, careful consideration must be directed to the actual as well as the potential risk involved that an applicant may fail to properly safeguard classified information 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.

The Government must establish all the factual allegations under Criterion H (drug involvement), Criterion E (personal conduct), and Criterion 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 the 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 repeat itself and Applicant presently qualifies for a security clearance.

CONCLUSIONS

The Government has established Criterion H because Applicant engaged in a regular habit of marijuana use from 1972 to February 1996. From 1972 until he was arrested for possession of marijuana and cocaine in March 1989, Applicant used marijuana weekly. If it were not for his arrest and sentence to probation with random drug screenings, he probably would have continued to use marijuana. After his probation was completed, Applicant resumed using marijuana about once a month until February 1996. Although he denied using cocaine, I conclude he used cocaine as described in GE #2. Even though Applicant's cocaine use may have been infrequent or sporadic over the years, his marijuana purchase and use was definitely regular and is not extenuated simply by the passage of time of more than a year. Even though Applicant stated in GE #2 he would not use drugs in the future, his stated intention must be weighed and balanced against his earlier stated intentions set forth in GE #1 and 3, to abstain followed by additional drug use. In GE #1, he stated he never used marijuana. In GE #3, he dramatically minimized his drug use to provide the false impression he was an infrequent user when he was actually a regular user of marijuana. Finally, Applicant used drugs for at least 11 years after he was granted a company confidential clearance in 1983.

Although Applicant falsified his security form of May 26, 1995, and his sworn statement of December 8, 1995, his falsifications of the two official documents was not done intentionally. The 1987 charge occurred almost 8 years ago. Second, the sentence amounted to deferred adjudication which meant if Applicant abided by the law for a year, the original charge would be dismissed. Although the 1991 traffic offenses were more recent, the dwi charge was actually dropped within hours of Applicant's arrest. It is reasonable for him to think he was just arrested for no driver's license, even though Applicant knew he should not have been driving to begin with.

Applicant intentionally falsified both drug questions on his May 26, 1995 security form. In response to question 20a, Applicant replied 'yes' and, also he had been arrested in June 1984, then stated unequivocally he had never used marijuana. His answer to the question is a little confusing as some of the information about the arrest belongs under the criminal record question #18. However, given his weekly use of marijuana before 1989 and his monthly use of the drug between 1991 and February 1996, it is unreasonable to assume he simply forgot about his regular marijuana use. Even though Applicant used cocaine much less than marijuana, Applicant's weakened credibility provides an insufficient basis to conclude Applicant simply forgot about his cocaine use. The one-time use of LSD is dated and mitigated.

On May 26, 1995, Applicant intentionally falsified his response to question 20b of his security form when he indicated

'no' to the question of whether he had ever purchased drugs. Given the fact he bought marijuana once a month until 1989 and fifty per cent of the time between 1991 and February 1996, it is not credible to conclude Applicant simply forgot about his regular marijuana purchases over the years. While his cocaine purchases occurred on fewer occasions, he should have remembered one of the purchases led to his arrest for possession of cocaine in March 1989.

Applicant's pattern of intentional falsifications continued when he falsified his sworn statement in December 8, 1995. Applicant deliberately lied when he said he only used marijuana three times in 1989, and only purchased marijuana and cocaine on one occasion in 1989. Considering Applicant's regular use and purchase of marijuana from 1972 and 1989, and 1991 to February 1996, his infrequent use and purchase of cocaine before and after 1989, Applicant's claim of forgetfulness is not credible.

The Government has established its case under Criterion J (criminal conduct). Applicant's intentional falsifications of material information from his security form and sworn statement constitute criminal involvement in violation of 18 USC 1001. The falsifications were material because the Government was deprived of essential information concerning Applicant's qualifications to have security clearance access.

Applicant's claim of intentionally omitting information to protect his job and/or his clearance is not persuasive. An applicant has a responsibility to provide truthful information during all phases of the security investigation, which includes providing honest answers to the security form as well as the sworn statement. In view of Applicant's long history of drug use, including his drug use for about 11 years after he was granted a security clearance in 1983, and his intentional falsifications of his drug purchase and use, Applicant has failed to demonstrate he warrants a security clearance to safeguard classified information.

FORMAL FINDINGS

Formal Findings required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: AGAINST THE APPLICANT.

a. Against the Applicant.

b. Against the Applicant.

c. Against the Applicant.

d. Against the Applicant.

e. For the Applicant.

f. Against the Applicant.

g. Against the Applicant.

Paragraph 2: AGAINST THE APPLICANT.

a. For the Applicant.

b. For the Applicant.

c. Against the Applicant.

d. Against the Applicant.

e. Against the Applicant.

Paragraph 3: AGAINST THE APPLICANT.

a. Against the Applicant.

Factual support and reasons for the foregoing findings are set forth in FINDINGS OF FACT and CONCLUSIONS above.

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.

Paul J. Mason

Administrative Judge

1. The two transcripts are identified as Vol. I and Vol. II.

2. A *voir dire* examination of two Special Agents from the Defense Investigative Service (DIS) was taken to determine whether GE #2, #3, and #4 (sworn statements) should be admitted in evidence. (Vol. II, Tr. 34-48; 54-63). According to the Agents, Applicant had no problem understanding the purpose of the statements. (Vol. II, Tr. 36; 56, 60). While the Agent could not specifically remember reading GE #2 to Applicant, his habit would have been to read the statement to Applicant. (Vol. II, Tr. 39). The second Agent thought Applicant understood GE #3 and 4 and read both statements to him. (Vol. II, Tr. 56-57). The statement (GE #2) constitutes what Applicant told the Agent. (Vol. II, Tr. 40, 44). GE #2, 3, and 4 were admitted in evidence. (Vol. II, Tr. 51; 63).

3. Although in his answer he denies subparagraph 2d, he then explains he purchased marijuana at parties with no more purchases after his arrest in March 1989.

4. Applicant also explained he did not reveal all his drug use in the December 8, 1995 sworn statement because he was afraid of losing his job. (GE #2).