

December 31, 1996

In Re:

SSN:

Applicant for Security Clearance

ISCR OSD Case No. 96-0522

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL KIRKPATRICK

Appearances

FOR THE GOVERNMENT

Earl C Hill, Jr., Esq.

Department Counsel

FOR THE APPLICANT

Pro Se

STATEMENT OF THE CASE

On July 30, 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 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 which recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

Applicant responded to the SOR in writing on August 3, 1996, and in his Answer he elected to have the case determined on a written record in lieu of a hearing. Department Counsel submitted the Government's File of Relevant Material (FORM) to Applicant on September 25, 1996. The Government submitted seven items in support of its contentions. Applicant was instructed to submit information in rebuttal, extenuation or mitigation within 30 days of receipt. The date on which Applicant received the FORM cannot be determined from the file, but he submitted additional material for consideration on October 25, 1996. On November 20, 1996, Department Counsel submitted his written objections to the Applicant's additional material. Nevertheless, the undersigned Administrative Judge has overruled Department Counsel's objections and considered Applicant's additional material submitted on October 25, 1996.

The case was assigned to the undersigned Administrative Judge on November 25, 1996.

FINDINGS OF FACT.

In his Answer to the SOR, Applicant admitted the material facts alleged in SOR subparagraphs 1.a., 1.b., 1.c., and 1.d., and those admissions are hereby incorporated herein as findings of fact. The following additional findings of fact are entered as to each paragraph and subparagraph in the SOR:

Applicant is 34 years old, and he is employed as a ----- by a defense contractor. A secret-level Department of Defense security clearance is required in order for him to perform his assigned duties.

Paragraph 1 (Criterion H - Drug Involvement). The Government alleges that Applicant is ineligible for clearance because he has used marijuana and cocaine.

Applicant first smoked marijuana in 1978, when he was in high school. From 1980 to 1984, when he was in college, Applicant smoked marijuana from two to three times per month, on the average, although there was periods of up to four or five months when he abstained from smoking marijuana. (Items 3, 4, and 5.) During this period of time, Applicant purchased marijuana once or twice, paying less than \$20.00 for an eighth of an ounce of marijuana on each occasion. (Items 3, 4, and 5.) His motivation for smoking marijuana was "enjoyment and recreation." (Item 5.)

In March of 1983, on Applicant's 21st birthday, he snorted cocaine. He does not intend to use cocaine again. (Items 3, 4, and 5.)

On June 13, 1985, Applicant signed and submitted a Personnel Security Questionnaire (PSQ) as part of an employment and security clearance application process, certifying that his answers were true and complete and accurate. In that PSQ, Applicant stated that his desire and his opportunity to smoke marijuana had "dropped, though not disappeared." (Item 4.)

In his signed, sworn statement dated January 2, 1986, Applicant stated, "I have no intention of any future use of marijuana as it is not part of my current lifestyle." (Item 5.)

Nevertheless, Applicant did smoke marijuana during the period from December of 1989 to January 15, 1996. His frequency of use was two or three times per week, on the average, although there were periods of two to three months at a time when he did not use marijuana, and even one period of nine months when he did not smoke marijuana. (Items 3, 6, and 7.) He last smoked marijuana on January 15, 1996, celebrating his "good fortune" in being offered a job with a defense contractor. (Items 3, 6, and 7.) During the period from approximately 1989 to January of 1996, Applicant purchased marijuana approximately ten to twenty times, paying from \$25.00 to \$50.00 per occasion to purchase an eighth of an ounce. (Item 7.)

Applicant arranged and paid for drug screening tests on nine separate dates during a three month period from February 26, 1996 to May 29, 1996, and the results of those tests were negative. (Item 3.) He also arranged and paid for a drug screening test on September 17, 1996, and the results of that test were negative. (Additional Material submitted by Applicant in response to the FORM.)

Applicant's intention is not to smoke marijuana "at least through (his) period of employment with (a defense contractor) and/or the duration of (his) need to hold a security clearance." (Item 7.) Applicant states that "marijuana is still in (his) environment because (he) continues to associate with musicians and other performers about twice a week ..." (Item 7.)

Mitigation.

Applicant's use of illegal drugs has not resulted in any arrests or in any financial problems. He has never trafficked in, sold, distributed, manufactured, or grown any illegal drugs. (Item 7.)

Applicant graduated in the top ten percent of his high school class, and he graduated from college. (Items 3, 4, and 6.)

Applicant arranged and paid for drug screening tests on nine separate dates during a three month period from February 26, 1996 to May 29, 1996, and the results of those tests were negative. (Item 3.) He also arranged and paid for a drug screening test on September 17, 1996, and the results of that test were negative. (Additional Material submitted by Applicant in response to the FORM.)

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines and policies for determining eligibility for access to

classified information, and these guidelines and policies must be given consideration in making security clearance determinations. The following adjudicative guidelines and policies are found to be applicable in this case:

Criterion H (Drug Involvement)

Conditions which could raise a security concern:

1. Any drug abuse;
2. Illegal drug possession, including ... purchase.

Conditions which could mitigate security concerns:

3. A demonstrated intent not to use abuse any drugs in the future.

In addition, the general adjudication policies expressed at Paragraph F.3. of the Directive and in Enclosure 2 of the Directive have been considered as to each criterion in this case. Enclosure 2 provides, in pertinent part, as follows: "The adjudication process is the careful weighing of a number of variables known as the whole person concept. All available information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. In evaluating the relevance of an individual's conduct, the adjudicator should consider the following factors:

"The nature, extent, and seriousness of the conduct.

"The circumstances surrounding the conduct, to include knowledgeable participation.

"The frequency and recency of the conduct.

"The individual's age and maturity at the time of the conduct.

"The voluntariness of participation.

"The presence or absence of rehabilitation and other pertinent behavioral changes.

"The motivation for the conduct.

"The potential for pressure, coercion, exploitation, or duress.

"The likelihood of continuation or recurrence."

In DOHA cases the Government has the initial burden to go forward with persuasive 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 sufficiently persuasive to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance

CONCLUSIONS

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 instances of off-duty drug abuse, conduct which may demonstrate poor judgment or unreliability. The Government relies heavily upon the sobriety, discretion, and good judgment of its security clearance holders.

The Directive's definition of drug abuse includes the "illegal use of a drug." The Directive defines "drugs" to include those mood and behavior altering drugs identified and listed in the Controlled Substances Act of 1970, as amended.

Both marijuana and cocaine are identified and listed in that statute, and marijuana is specifically identified as such a "drug" in the Directive itself. Applicant's past use of marijuana and cocaine therefore falls within the Directive's definition of drug abuse which may raise a security concern. In this case the Government has therefore met its initial burden of proving the facts alleged in the SOR under Criterion H that the Applicant has used and purchased marijuana, and that he used cocaine, and the Government has established that such drug involvement raises a security concern. Applicant's past use of marijuana and cocaine was clearly incompatible with security responsibilities. This is so because it reflects poor judgment and disregard for laws, and because of the obvious potential for an unauthorized disclosure of defense secrets resulting from neglect or misadventure or impaired social or occupational functioning when a person is intoxicated as a result of the use of marijuana or cocaine. A security clearance will normally be denied or revoked if the evidence reflects use of such drugs on a frequent or a sustained basis. However, the Directive also provides that a security clearance may be granted if the Applicant presents strong and convincing evidence of reform and rehabilitation consistent with the Directive's policies and guidelines.

In this case, the Applicant has not introduced evidence in rebuttal, explanation or mitigation which is sufficiently persuasive to overcome the Government's case against him. He smoked marijuana during thirteen of the past eighteen years, including frequent marijuana usage during the past seven years, when he smoked dope as often as three times per week. He last smoked marijuana less than a year ago. Therefore, his use of illegal drugs cannot be characterized as mere youthful experimentation, nor can it be characterized as isolated or infrequent.

Applicant stated that he now recognizes the adverse employment and security clearance implications of marijuana usage, and that he therefore doesn't intend to smoke marijuana for the duration of the present employment situation which requires a security clearance. That falls far short of an unequivocal and sincere expression of intent to never use marijuana again, especially in the context of Applicant's "track record." He indicated twice before, in 1985 (Item 4) and in 1986 (Item 5), that he would not use marijuana again, but he thereafter resumed marijuana usage. Further, he continues to associate with people who smoke marijuana.

In support of his contention that he now intends to abstain from use of illegal drugs so long as he needs a security clearance, Applicant has submitted evidence that he personally arranged for, and paid for, drug screening tests on nine separate occasions from February 26 to May 29 of 1996, and on another occasion on September 17, 1996. However, such evidence is entitled to little probative value, since he knew of the tests in advance. Evidence of drug testing would be much more impressive and probative if it had been conducted randomly, without prior warning or knowledge. Considering all of the evidence in this case, both favorable and unfavorable, the weight of the evidence is that Applicant's use of marijuana is not a thing of the past. It must be concluded that Applicant has not demonstrated a sincere intent to abstain from future use of marijuana.

There is no evidence that Applicant has ever completed a drug treatment program.

On balance, after carefully considering all of the evidence in this case, and after applying the Directive's pertinent disqualifying and mitigating concerns and the Directive's general adjudicative guidelines and policies, I conclude that Applicant has failed to overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in SOR Paragraph 1 and each of its subparagraphs.

For the reasons stated, I conclude that Applicant is not suitable for access to classified information.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations 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.

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.

Michael Kirkpatrick

Administrative Judge