

January 20, 1997

In RE:

Applicant for Security Clearance

ISCR Case No. 96-0559

DECISION OF ADMINISTRATIVE JUDGE

JOSEPH TESTAN

Appearances

FOR THE GOVERNMENT

Melvin Howry

Department Counsel

FOR THE APPLICANT

Pro Se

STATEMENT OF THE CASE

On September 19, 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) (copy appended) 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 applicant responded to the SOR in writing on October 22, 1996. The case was received by the undersigned on November 26, 1996, and a Notice of Hearing was issued on December 12, 1996. A hearing was held on January 7, 1997.

RULINGS ON PROCEDURE

At the hearing, Paragraph 1.c. of the SOR was amended to delete any reference to Executive Order 12564. As amended, Paragraph 1.c. is as follows:

You used and purchased marijuana, as set forth in subparagraphs 1.a. and 1.b., above, after having been granted a Department of Defense Top Secret Clearance on December 18, 1990.

FINDINGS OF FACT

Applicant is a thirty-four year old married man. He has been employed by the same defense contractor since 1986. He has held a DoD Top Secret security clearance since 1990.

Applicant used marijuana with varying frequency, at times "on a nearly daily basis," from 1975 to June 1981. From the time he graduated from high school in June 1981 to sometime in late 1992 or early 1993, he used marijuana very infrequently, at most "several times." However, in late 1992 or early 1993, he resumed his regular use of it, and

eventually his use "snowballed" to the point that he was again using it "on a nearly daily basis." This regular use of marijuana continued until July 1995 when applicant "simply decided to quit." Applicant testified that he has not used marijuana since July 1995, and does not intend to use it in the future.

During the time applicant was using marijuana he was also purchasing it. He usually purchased small bags of it; however, on one occasion in the 1990s, he purchased an ounce of it for "about \$300-350."

From the time he was hired by his current employer in 1986 until approximately November 1994, applicant completed and executed approximately six PSQs. Applicant intentionally provided false, material information about his involvement with illegal drugs on all of the PSQs when, in response to questions concerning his past involvement with illegal drugs, he stated that he had used marijuana only twenty-four times, and/or stated that he had not used marijuana since 1981. Although applicant admits that he had lied about the recency and frequency of his marijuana use, he testified, credibly, that when he stated on the 1990 and 1991 PSQs (G-2 and G-3) that he did not intend to use marijuana in the future, he meant it (TR at 41-43).

In September 1995, applicant got tired of lying about his drug use. In his words, "it bothered (his) conscience." After he told his wife and family members about his drug use, he voluntarily informed his employer's security department that he had lied on his PSQs. At the same time, he provided the security department with the true facts about his drug use; namely, that his use of marijuana prior to 1982 was much more extensive than the twenty-four times he had admitted to, and that he had used marijuana through July 1995. In a signed, sworn statement that he gave to the Defense Investigative Service (DIS) in February 1996 (G-8), applicant stated that he "purposely falsified" his PSQs to ensure that he got his clearance.

POLICIES

Enclosure 2 of the Directive sets forth the Adjudication Policy (divided into Disqualifying Factors and Mitigating Factors) which must be followed by the Administrative Judge. Based on the foregoing Findings of Fact, the following Disqualifying Factors and Mitigating Factors are applicable:

DRUG INVOLVEMENT

Disqualifying Factors:

1. Any drug abuse
2. Illegal drug possession

Mitigating Factors:

None.

PERSONAL CONDUCT

Disqualifying Factors:

None.

Mitigating Factors:

None.

CONCLUSIONS

In DOHA cases, the Government has the initial burden of producing evidence that reasonably suggests an applicant cannot be relied upon to safeguard classified information. If the Government meets its burden, it has established a prima facie case. Once the Government establishes a prima facie case, the burden shifts to applicant to produce evidence in

refutation, extenuation, mitigation or reformation sufficient to establish that, notwithstanding the Government's prima facie case, he or she can be relied upon to safeguard classified information. In view of the Directive's requirement that a security clearance be granted only upon a finding that to do so is clearly consistent with the national interest, the applicant has a heavy burden.

In this case, the Government established a prima facie case under Criterion H. The evidence establishes that applicant used marijuana (1) with varying frequency, at times "on a nearly daily basis," from 1975 to June 1981, (2) on an infrequent basis from June 1981 to late 1992 or early 1993, and (3) with varying frequency, at times "on a nearly daily basis," from late 1992 or early 1993 to July 1995. Applicant's abuse of marijuana reflects adversely on his judgment, reliability and trustworthiness, and reasonably suggests that he cannot be relied upon to safeguard classified information for at least two reasons:

First, individuals granted access to classified information are responsible for safeguarding it twenty-four hours per day, seven days per week, on and off the job. An applicant who abuses marijuana cannot be relied upon to meet his or her security responsibilities because the risk of an unauthorized disclosure of classified information through neglect or inattention while "high" on it is too great.

Second, applicant used marijuana for many years with full knowledge that each time he used it he was breaking the law. This suggests that applicant may be unwilling to abide by security regulations if he finds them in conflict with his personal wishes or desires.

Applicant testified that he has not used marijuana since July 1995, and does not intend to use it, or any other illegal drug, in the future. In most cases, when an applicant has a history of lying about his drug use, his uncorroborated testimony that he has reformed is not considered credible. However, in this case, I conclude that applicant's testimony is credible and worthy of belief. Although this conclusion is based upon a consideration of the evidence as a whole, including applicant's demeanor and conduct while testifying, the fact that he voluntarily reported his dishonest conduct and the true extent of his drug use to his security department, knowing full well that these disclosures could cost him his security clearance and employment, is the most persuasive evidence that applicant is now telling the truth about his drug use.

Unfortunately, applicant's credible testimony is insufficient to overcome the Government's prima facie under Criterion H. In view of (1) applicant's long history of marijuana abuse (over twenty years), (2) the recency of this abuse (less than two years ago), (3) applicant's previous inability to follow through with his stated intention not to use marijuana in the future (notwithstanding the fact that when he stated this intention on his 1990 and 1991 PSQs, almost ten years had passed since he had last used marijuana on a regular basis), and (4) the fact that he has not received any type of drug counseling (even though he has stated that he believes he was psychologically addicted to marijuana),⁽¹⁾ I cannot conclude, at the present time, that applicant will be able to follow through with his stated intention and not use marijuana again. For this reason, Criterion H is found against applicant.

With respect to Criterion E, the factual allegations incorporated by reference (i.e., applicant's use and purchase of marijuana after he received a security clearance), do not support an adverse finding.⁽²⁾ Therefore, Criterion E is found for applicant.

FORMAL FINDINGS

PARAGRAPH 1: AGAINST THE APPLICANT

PARAGRAPH 2: 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 interest to grant or continue a security clearance for applicant.

Joseph Testan

Administrative Judge

1. G-8, page 2.

2. Applicant's intentional falsification of material facts on the PSQs would be cognizable under the Personal Conduct adjudication factors had this conduct been alleged in the SOR. Since it was not alleged in the SOR, I cannot enter adverse findings based on it. See, DISCR OSD No. 90-1699 (January 31, 1992) at page 5.