

DATE: _September 11, 1997

In Re:

Applicant for security clearance

DOHA Case No. 96-0580

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

Appearances

FOR THE GOVERNMENT

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FOR THE APPLICANT

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STATEMENT OF CASE

On August 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, amended by Change 3, February 13, 1996, 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 October 28, 1996.

The case was received by the undersigned on April 4, 1997. A notice of hearing was issued on May 29, 1997, and the case was heard on June 17, 1997. The Government and Applicant submitted documentary evidence. Testimony was taken from Applicant. The transcript was received on July 11, 1997.

RULINGS ON PROCEDURE

As a part of his supplemental Answer to the SOR, Applicant presented four affirmative defenses in support of his claim that the entire action should be dismissed. Applicant's constitutional claims are that his due process rights under the Fifth Amendment and equal protection rights under the Fifth and Fourth Amendment were violated because he was granted inadequate notice that his marijuana use could have a negative impact on his clearance. Even though the Administrative Judge, as an administrative officer, has several explicit and implied powers under Directive 5220.6, he has no authority to entertain or rule on constitutional attacks of the security clearance-investigative process under which he operates.

Applicant's third affirmative defense is that the Government is equitably estopped from using any information generated in the security investigation because Applicant was deceived during the course of the investigation. The deception, according to Applicant, precludes the Government from taking advantage of the improper actions of its agents in using information generated during the security investigation. Applicant's equitable estoppel claim lacks merit because

Applicant has made no specific showing of detrimental reliance or affirmative misconduct by the Government.

Applicant's fourth affirmative defense is that the Government's proposed action against his clearance is arbitrary and capricious because the Government has not established any evidence he is a threat to national security. Applicant's claim is again incorrect. The Government is not obligated to wait until a security rule or regulation is violated, or, classified information is compromised, before investigating or adjudicating an applicant's security clearance record or his application for security clearance. Rather, an applicant's security clearance suitability may be investigated and/or adjudicated whenever the circumstances reveal that he represents a risk for mishandling classified information, or whenever the circumstances raise doubt about his judgment, reliability and trustworthiness.

At the beginning of the hearing, Applicant argued that the sworn statement taken on March 19, 1996 (GE #4), should be disallowed from admission in evidence because the statement violates Applicant's fifth Amendment privilege against self-incrimination.⁽¹⁾ Specifically, according to Applicant, the statement was a product of coercion and pressure directed at Applicant by Agent #3. Considering the evidence as a whole, specifically, Applicant's supporting affidavit to Applicant's Exhibit A, testimony of Agent #3, and GE #7 and #8, Applicant's Motion to Exclude GE #4, and any testimonial evidence connected thereto, is overruled. (TR. 23-24) I do not find that Applicant was coerced to sign GE #4. Even though the interview was more than four hours long, and Agent #3 could not remember any portions of the interview except the contents of his report of investigation and GE #4, there is a complete lack of evidence to infer or even suggest Agent #3 employed coercive tactics to extract Applicant's history of marijuana use and his intention to use marijuana in the future.

On July 14, 1997, Applicant submitted an *errata* sheet identifying proposed corrections to the transcript. Those corrections are hereby accepted.

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 H), personal conduct (Criterion E) and criminal conduct (Criterion J). Applicant denied subparagraph 1a but admitted marijuana use at various times in his life. Applicant does not intend to use marijuana in the future because he is willing now to comply with the company drug policy.⁽²⁾

Even though he denied trying to conceal information, Applicant intentionally falsified the Personnel Security Questionnaire (DD Form 49 - GE #3) on August 8, 1988 when he responded "no" to the drug use/drug possession questions.⁽³⁾ Even though he denied falsifying any material facts in the December 7, 1988 interview, Applicant provided false information to Agent #1 when he stated his marijuana use occurred only two or three times between 1964 and 1968 during college.⁽⁴⁾

Applicant falsified a Personnel Security Questionnaire (DD Form 398 - GE #1) on June 14, 1995 when he indicated he had never used any drugs.⁽⁵⁾ On December 7, 1995, Applicant provided false information in a sworn statement (GE #6) when he understated his marijuana use between 1964 and December 1995.⁽⁶⁾

Applicant's marijuana use began in 1964, and he used the drug about every two months until the late 1970s (GE #4). Between the 1970s and the late 1980s, there were years he did not use marijuana. Since the late 1980s, he used marijuana about four or five times a year. His future use would likely be no more than it was in the past few years. Applicant received his security clearance on December 9, 1994. See, GE #1.

Applicant presented character evidence from colleagues, past and present, describing him as a diligent, trustworthy person. Two references have known Applicant since 1973 and consider him to be trustworthy and in the top 20% of engineers.⁽⁷⁾ Applicant exercised commendable integrity during a recent political campaign. Another colleague has known Applicant for 20 years and opined that Applicant's past use of marijuana never affected his trustworthiness.

Applicant started employee assistance counseling on September 23, 1996. He attended counseling for six weeks. He indicated to the counselor his past use of marijuana was social and he did not intend to use marijuana in the future. The

social worker noted there was no reason to disbelieve Applicant's future intentions not to use marijuana and gave a good prognosis.

Mr. A, the radar technical director, met Applicant in 1985. He interviewed and authored a written recommendation to hire Applicant with his present employer. Applicant's expertise is well-respected by other engineers. Mr. A knows Applicant is serious about security requirements.⁽⁸⁾ In addition, Applicant works hard and is trustworthy. Applicant's falsifications would have been taken into consideration in Mr. A's original decision to hire Applicant, had Mr. A known about the falsifications.

Mr. B, co-owner of Applicant's previous employer, has known Applicant since 1976. They have worked on several projects together. Applicant has always been knowledgeable of security procedures and produces high quality work. (TR. 129)

Applicant's wife finds Applicant to be an excellent father who is active in politics and volunteer work at a local legal services organization. In 1992, Applicant became depressed over the financial misfortune of his previous employer and visited a psychologist. His wife was aware Applicant used marijuana in approximately 1977, and at some other time with close friends, although she never actually saw him use the drug. (TR. 138)

Mr. C is presently retired. He worked on a daily basis with Applicant between 1973 and 1975. Applicant is security conscious and trustworthy. Knowing that Applicant smoked some marijuana does not change Mr. C's favorable opinion of Applicant, because engineers are essentially honest people. (TR. 145)

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:

Drug Involvement

Factors Against Clearance:

1. any drug use;
2. illegal drug possession, including...purchase....

Factors for Clearance:

1. the drug involvement was not recent;
2. the drug involvement was isolated or infrequent.
3. a demonstrated intent not to abuse any drugs in the future.

Personal Conduct

Factors Against Clearance:

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

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

Factors for Clearance:

None.

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 a case of drug involvement under Criterion H. Applicant has used marijuana with varying frequency from 1964 until March 1996 with an intention (as of arch 19, 1996 - GE #4) to use the drug in the future. Even though Applicant's history of marijuana use was neither daily nor weekly over the years, it carries security significance in that the use occurred roughly every two months until the late 1980s, when it decreased to an occasional level which was four or five times a year. In addition, Applicant indicated he would use the drug in the future.

The troubling aspect of Applicant's marijuana history is the fact he lied about his use on four occasions between June 1988 and March 1996. Furthermore, in his interview of December 1988, his sworn statements of December 1995 and January 1996, Applicant unequivocally stated his intention to forego future use of the drug. However, after each stated intention not to use marijuana in the future, Applicant eventually used the drug again. Applicant has repeatedly stated in his Answer he will not use marijuana in the future. However, the fact he articulated the same intention on three earlier occasions, together with his stated intention in March 1996 to use marijuana in the future, raise serious doubts about his resolve to remain drug-free in the future. Even though there is no evidence of drug use since March 1996, I cannot conclude with complete confidence Applicant will not return to marijuana use some time in the future, notwithstanding his apparent understanding of the negative impact drug use can have on a security clearance.

The Government has clearly established a pattern of intentional falsifications within the scope of Criterion E. If, as Applicant repeatedly claimed, he did not intend to falsify the security forms and the interviews and sworn statement, then what did he intend to do by omitting all or portions of his marijuana use from official documents and the interview? Noting Applicant's assertion he volunteered his drug history information during the December 1988 interview, I choose to accept the version of events set forth in GE #5, which indicates Applicant did not volunteer information but was asked whether he ever used drugs; he chose to provide an incomplete answer of his overall marijuana use. In summary, there is no evidence Applicant independently came forward on his own to correct the misinformation before he was challenged in March 1996 (GE #4) about his past accounts of drug use. Considering all the information concerning Applicant's background and the surrounding circumstances of each falsification, there is no evidence Applicant's falsifications were caused by improper or inadequate security advice, or advice from legal counsel or other officials.

Applicant's four intentional falsifications between August 1988 and December 1995, establish a pattern of dishonesty that demonstrates criminal conduct within scope of 18 USC 1001. An applicant's drug history is relevant and material to his suitability for safeguarding classified information. Applicant's intentional concealment of his drug history on two security forms, an interview and a sworn statement, interfered with the Government's investigation into Applicant's qualifications for possession a security clearance.

The record contains favorable character evidence of Applicant's good job performance, his trustworthiness, and civic and political activism. However, after evaluating the favorable evidence with the unfavorable evidence of Applicant's marijuana history and his intentional falsifications of his marijuana history on four occasions between June 1988 and December 1995, Applicant has failed to overcome the negative evidence under Criterion H, Criterion E and Criterion J.

FORMAL FINDINGS

Having weighed the appropriate specific and general factors (whole person concept), the following Findings of Fact are:

Paragraph 1 (drug involvement): AGAINST THE APPLICANT.

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

Paragraph 2 (personal conduct): AGAINST THE APPLICANT.

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

Paragraph 3 (criminal conduct): AGAINST THE APPLICANT.

a. Against the Applicant.

DECISION

In light 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. See, Applicant's Motion in Support (Applicant's Exhibit A), TR. 23-24, 70-84.
2. If he is allowed to keep his security clearance, he would be foolish to try marijuana again.
3. I have carefully considered Applicant's explanations for believing he did not intend to conceal his drug use on the June 1988 security form (GE #1), and, I find Applicant's explanations are not credible. First, even though Applicant may not have used marijuana for ten years and was not anticipating any future use subsequent to the submission of the form in June 1988, he is not excused from furnishing false information on an official document used by the Government to assess security clearance suitability. Second, even though Applicant may have felt uncomfortable about answering the drug use and possession questions, his uneasiness does not relieve him from supplying truthful information to the Government. Third, Applicant's belief he could disclose his marijuana use in a follow-up interview, does not excuse Applicant from providing false information in the earlier security form. Significantly, Applicant even provided an incomplete picture of this drug use in the December 1988 interview. Finally, Applicant's subjective belief that 'trying marijuana' does not carry the same meaning as 'using marijuana', cannot be accepted as a credible explanation for providing false information to the Government.
4. Even though Applicant recalled that on December 7, 1988, he was asked by Agent #1 whether he had ever used drugs (GE #5), Applicant denied in his Answer that the Agent ever asked him about his drug use. Assuming Agent #1 asked Applicant about his drug use, a reasonable interpretation of the question of whether a person has ever used drugs would logically call for an answer at least addressing when a person used drugs and how long they used drugs. The question would also allow Applicant (as he claimed in his Answer) an opportunity to discuss his drug use as he anticipated when he provided "no" answers to the drug use and possession questions six months earlier. Further, Agent #1 remembered specifically asking Applicant whether he had otherwise used marijuana or any other drug and Applicant answered he had not. (TR. 32) Even if Agent #1 had not asked Applicant about his drug use (which I do not believe occurred), Applicant should have come forward with his drug history because he knew an interview would be scheduled to allow him the opportunity to disclose his drug history that he declined to disclose on the security form.
5. Applicant's explanations have been examined independently and together, but constitute after-the-fact rationalizations for intentionally falsifying question 22a of the June 14, 1995, security form (GE #1). Applicant was again faced with the decision to disclose or conceal his marijuana use on the form. When Applicant decided not to disclose his marijuana history, he clearly demonstrated an intention to withhold information from the Government in June 1995. Even though Applicant did not characterize himself as a user, his response to question 22a, in light of his education, overall knowledge of security matters, and the fact he had confronted the same question seven years earlier, indicates he should have answered in the affirmative to the drug use question.
6. Applicant's falsifications in August 1988, December 1988, June 1995, cast doubt on his credibility of the answers he provided in his December 7, 1995 sworn statement. The fact that Applicant in December 1988, December 1995, and January 1996, failed to live up to his intention to abstain from marijuana use, casts additional doubts about the veracity of the December 1995 statement and Applicant's description of his marijuana use.
7. A background investigation in 1988 and 1995 uncovered no derogatory information. (TR. 40)

8. On June 14, 1995, Applicant indicated his willingness to abide by the Government drug policy. See, GE #2. While he did not completely understand the conflict between marijuana use and his security clearance in 1988, Applicant appeared to understand the relationship in his sworn statements in December 1995 and January 1996. See, GE #5, GE #6. Notwithstanding his comprehensive understanding of the Government drug policy, he used marijuana again in March 1996, even though the use was influenced by depression associated with the financial losses of his former employer.