

April 15, 1997

In RE:

SSN:

Applicant for security clearance

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DOHA OSD Case No. 96-0585

DECISION OF ADMINISTRATIVE JUDGE

RICHARD A. CEFOLA

Appearances

FOR THE GOVERNMENT

Melvin A. Howry, Esquire

Department Counsel

FOR THE APPLICANT

Irwin Trester, Esquire

Applicant's Counsel **STATEMENT OF CASE**

On August 22, 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 the Applicant, which detailed the reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The SOR is attached.

Applicant filed an Answer to the SOR on September 27, 1996.

The case was received by the undersigned on November 12, 1996. An initial notice of hearing was issued on November 21, 1996, setting the hearing for January 9, 1997. On December 9, 1996, however, Applicant's newly retained counsel requested a continuance. For good cause shown, and there being no objection by Department Counsel, the case was

continued to and heard on March 26, 1997. The Government submitted documentary evidence, and called two witnesses to testify. Testimony was taken from the Applicant, who also submitted documentary evidence and called two witnesses to testify on his behalf. The transcript was received on April 11, 1977. The issues raised here are whether the Applicant's past drug involvement, personal conduct, and related criminal conduct militate against the granting of a security clearance.

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony. The Applicant is 28 years of age, has two years of a college education, and is employed by a defense contractor as a truck driver. He currently has a secret security clearance, which he initially received in 1989 (Transcript (TR) at page 39 lines 3~7). His employer seeks retention of this level clearance on behalf of the Applicant.

Criterion H - Drug involvement

1.a.~1.c. The Applicant's drug abuse began in about 1988, and in his sworn statement of May 29, 1996, he describes his abuse in the following terms:

I first used marijuana in about 1988 and used it sporadically to about 1993. Use was probably at its heaviest in about 1992 for a year or so when I used it weekly. After Nov[ember] 1993 it has been very sporadic. I used it a couple of times a year or so up until the last time I recall using it at New Years of this year [1995]. (Government Exhibit (GX) 3 at page 1).

The Applicant also purchased the drug, and in this sworn statement describes it as follows: "I have bought it myself on a few occasions, spending at most \$20.00 at one time for a baggie. I probably bought for myself maybe five times" (GX 3 at page 1, *see* also TR at page 36 lines 13~16).

Criterion E - Personal Conduct

2.a. In answering questions 20.a. and 20.b. on his July 1995 National Agency Questionnaire (NAQ), the Applicant knowingly and wilfully failed to disclose any of his past drug involvement, as set forth in paragraph 1. of the SOR (GX 1 at page 3).

2.b. In a signed sworn statement executed on March 19, 1996, the Appellant also knowingly and wilfully failed to disclose the full extent of his past drug abuse, as set forth in paragraph 1. of the SOR (GX 2 at page 2). Here he stated, "I sampled marijuana five or six times between 1990 and 1992 when it was offered to me by friends" (GX 2 at page 2).

Criterion J - Criminal Conduct

3.a. The Applicant violated the provisions of 18 U.S.C. Section 1001, when he failed to disclose his past drug involvement on his 1995 NAQ, and in his March 1996 sworn statement.

Mitigation

The Applicant has not used marijuana since December of 1995, is very active in his church, and intends no future drug abuse (TR at page 51 lines 8~10).

Considering all of the evidence, and in light of the fact that the Applicant was less than candid about his past drug involvement on two separate occasions; the Applicant bears a heavy burden of persuasion in demonstrating his suitability for security clearance access.

POLICIES

Enclosure 2 and Section F.3. of the 1992 Directive set forth both policy factors, and conditions that could raise or mitigate a security concern; which must be given binding consideration in making security clearance determinations.

The conditions 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 should not be assumed that these conditions exhaust the realm of human experience, or apply equally in every case. Conditions most pertinent to evaluation of this case are:

Drug Involvement

Conditions that could raise a security concern:

- (1) any drug abuse (drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction).
- (2) illegal drug possession, including . . . purchase.

Conditions that could mitigate security concerns:

- (1) the drug involvement was not recent.

* * *

- (3) a demonstrated intent not to abuse any drugs in the future.

Personal Conduct

Conditions that could raise a security concern:

- (2) the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire
- (3) deliberately providing false or misleading information concerning relevant and material matters to an investigator . . . in connection with a personnel security or trustworthiness determination.

Conditions that could mitigate security concerns:

none

Criminal Conduct

Condition that could raise a security concern:

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

Conditions that could mitigate security concerns:

none

As set forth in the Directive, "Each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate:

- a. Nature and seriousness of the conduct and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age of the applicant.

- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequence involved.
- e. Absence or presence of rehabilitation.
- f. Probability that circumstances or conduct will continue or recur in the future."

The Administrative Judge, however, 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 make out a prima facie case under Criteria H (drug involvement), E (personal conduct), and 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 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 be repeated, and that the Applicant presently qualifies for a security clearance.

The improper or illegal involvement with drugs, raises questions regarding an individual's willingness or ability to protect classified information. Personal conduct is conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations; and criminal conduct also creates doubt about a person's judgment, reliability and trustworthiness. 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 an applicant may demonstrate the same attitude towards security rules and regulations.

CONCLUSIONS

The Applicant's drug involvement spans a period of nearly eight years, but ended 15 months ago. I conclude that this past marijuana abuse is not of present security significance. The Applicant has demonstrated through his testimony (TR at page 51 lines 8~10), and through his documentation (GX 3 at page 1, and Applicant's Exhibit A), a clear intent against future drug abuse.

The same cannot be said, however, of his personal conduct and related criminal conduct, which I conclude are of present security significance. The Applicant admits that when he executed his July 1995 NAQ he was not candid with the Government (TR at page 28 line 24 to page 32 line 14, and at page 51 lines 3~7). The Applicant offered that, "I was scared that they would take my clearance away" (TR at page 32 lines 5~6). Eight months later, in March of 1996, he was given an opportunity to correct this falsehood, but continued his ruse. He claims that he did come forward with the truth in his March 19, 1996, sworn statement. This is not believable. In that statement, he admits to using marijuana only "five or six times between 1990 and 1992" (GX 2 at page 2). He in fact used marijuana as recently as December of 1995 (TR at page 35 lines 4~6); and according to his most recent sworn statement of May 29, 1996, his frequency of use was at times "weekly" (GX 3 at page 1).

At his hearing, the Applicant tried to disavow material aspects of this most recent sworn statement. He admits to have used the drug only once after 1992 (TR at page 35 line 23 to page 36 line 12). In his May 29, 1996, sworn statement, however, he averred that, "**After Nov[ember] 1993** it [his usage] has been very sporadic. **I used it a couple of times a year or so up until the last time I recall using it at New Years of this year [1995]**" (GX 3 at page 1, emphasis supplied). This is a sworn statement he had every opportunity to change, and chose not to do so (TR at page 21 line 24 to page 23 line 21).

Considering all the evidence, the Applicant has not rebutted the Government's prima facie case regarding his personal conduct and related criminal conduct. The Applicant has thus not met the mitigating conditions of Criteria E and J, and

of Section F.3. of the Directive. Accordingly, he has not met his ultimate burden of persuasion under Criteria E and J.

FORMAL FINDINGS

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

Paragraph 1: FOR THE APPLICANT

- a. For the Applicant.
- b. For the Applicant.
- c. For the Applicant.

Paragraph 2: AGAINST THE APPLICANT

- a. Against the Applicant.
- b. Against the Applicant.

Paragraph 3: AGAINST THE APPLICANT

- a. Against the Applicant.

Factual support and reasons for the foregoing are set forth in **FINDINGS OF FACT** and **CONCLUSIONS**, supra.

DECISION

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

Richard A. Cefola

Administrative Judge