

DATE: January 15, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR OSD Case No. 96-0591

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR THE GOVERNMENT

Barry M. Sax, Esquire

Department Counsel

FOR THE APPLICANT

Pro Se

STATEMENT OF THE CASE

On August 21, 1996, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, "Safeguarding Classified Information Within Industry," dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6 "Defense Industrial Personnel Security Clearance Review Program" (Directive) dated January 2, 1992, as amended by Change 3, dated February 13, 1996, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make a preliminary determination that it was clearly consistent with the national interest to grant or continue a security clearance for him.

A copy of the SOR is attached to this Decision and included herein by reference.

The Applicant responded to the SOR in writing⁽¹⁾ and requested a hearing before a DOHA Administrative Judge. The case was assigned to this Administrative Judge on October 7, 1996. On November 6, 1996, a hearing was convened for the purpose of considering whether it would be clearly consistent with the national security to grant, continue, deny, or revoke Applicant's security clearance. The Government's case consisted of six exhibits; Applicant relied on 6 exhibits and his own testimony. A transcript of the proceedings was received on November 14, 1996.

FINDINGS OF FACT

Applicant has admitted, with explanation, all of the factual allegations pertaining to alcohol consumption set forth under subparagraphs 1.a. through 1.h. of Criterion G, all of the factual allegations pertaining to drug involvement under subparagraph 2.a. through 2.h., and the factual allegation pertaining to personal conduct under Criterion E. Applicant's answer to the criminal conduct (Criterion J) alleged in subparagraph 4 is considered to be a denial; it is neither an

admission nor a denial of the allegation, but a recitation of his professional accomplishments and community involvement.

After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is a 39 year old employee of a defense contractor. He has worked for his current employer since June 1992 and has held a secret clearance since December 1992. A favorable preliminary determination could not be made in his case because of alcohol consumption, drug involvement, personal conduct, and criminal conduct.

Applicant began consuming alcohol when he was 16 years old. He admits that he drank heavily in college but claims that he was a moderate social drinker until two or three years ago when "a lot of family stress" caused him to begin drinking more heavily (Tr. 26-27) . Notwithstanding his claim that he was a moderate social drinker until recently, Applicant was arrested twice for alcohol related offenses in the early 1980's. In November 1980, he was arrested for "Illegal Possession of a Prohibitive Substance, Liquor." This charge was dismissed after he paid \$37.00 in court costs. In February 1984, he was arrested for driving under the influence, and was fined \$250.00.

While Applicant was in college--from 1979 to 1983, he began smoking marijuana and continued to smoke it weekly until he graduated. He also abused other illegal substance during the same time frame: cocaine about six times, speed (amphetamines) about 30 times, Psilocybin mushrooms one time, and LSD twice. Applicant's wife--whom he married in 1982-- also used marijuana regularly while in college. According to Applicant she "put herself through school" selling marijuana. Applicant had purchased marijuana on many occasions but never trafficked in it, and did not profit from his wife's marijuana transactions. After graduating from college, he reduced his use of marijuana to once monthly from 1983 to 1985. Applicant has stated that he used marijuana on only three or four occasions after 1985, however, the credibility of this statement is undermined to a considerable extent by information in the same signed, sworn statement that his wife has continued to use marijuana regularly, occasionally in his presence (Gov. Ex. 2).⁽²⁾ Applicant also stated that he has received several telephone calls asking him if he wanted to buy marijuana (Tr. 44 and Gov. Ex. 2).

The stressors which caused Applicant to drink more heavily in the early 1990's were his father's heart attack in 1992, his brother's fatal heart attack in 1993, and his father becoming ill with cancer in 1994. As a consequence of drinking more heavily, Applicant was arrested for driving under the influence in May 1993. He was sentenced to two days in jail, fined \$400.00 and placed on probation for six months. He stopped drinking alcohol for a while after this arrest, but began drinking again after a short period of sobriety (Tr. 48). From the time that he resumed drinking in mid-1993 until November 1995, Applicant consumed alcohol on a daily basis--one or two drinks every night, and considerably more than that on weekends (Tr. 46-47).

On Monday, October 30, 1995, Applicant and four of his co-workers were subjected to a random drug and alcohol test.⁽³⁾ Applicant tested positive for both substances; he had a blood alcohol level of .088--a level considerably higher than the level at which he could legally operate an automobile in the state where he resides. Applicant also tested positive for marijuana. Applicant was sent home from work and encouraged to enter a drug rehabilitation program immediately (Gov. Ex. 5).

Applicant was admitted to Facility A for inpatient treatment on December 3, 1995. The counselor whom Applicant had seen initially for outpatient treatment, referred Applicant to Facility A because he was continuing to drink. The admitting diagnosis at Facility A was alcohol dependence and alcohol withdrawal. When he was discharged from this facility on December 18, 1995, there was no discharge diagnosis, but it was recommended that he continue outpatient treatment. Applicant attended Alcoholics Anonymous for a while, but stopped because most of the people who were attending AA had already lost everything and did not "have a life" (Tr. 43). He did not fit in because he still had his health and his family.

On April 19, 1996, when Applicant was first interviewed by the Defense Investigative Service (DIS) about the positive tests--for alcohol and marijuana--on October 30, 1995, he denied that he had ever used marijuana, except for the one-time use which he had disclosed when he originally applied for his security clearance. He stated his belief that the positive marijuana test was caused by faulty test procedures (Gov. Ex. 1). Later during a second DIS interview on June

26, 1996, he admitted that he had not been truthful when he denied using all illegal drugs--except for the one time marijuana use. In a signed, sworn statement, he admitted that he had used marijuana regularly while in college, that he had used it monthly from 1983 to 1985, and that he had used it three or four times between 1985 and 1995. He admitted that he had used marijuana most recently at a Halloween Party the weekend prior to the positive test results (Gov. Ex. 2). Applicant also admitted using amphetamines (speed), LSD, and psilocybin mushrooms while in college.

At his hearing, Applicant testified that he had denied using marijuana during the first DIS interview because he was not certain at the time of the interview that he had actually used marijuana on the weekend prior to being tested (Tr. 31). It was only after he talked with friends who had attended the same Halloween party, that he realized that he had taken a puff from a marijuana cigarette (Tr. 33-36). He claims that his own recollection of these events was not clear because he had been drinking heavily and was "too drunk" to know what he was doing (Tr. 32). At the hearing, Applicant also denied marijuana use after 1983. He was unable to explain why he had signed a statement (Gov. Ex. 2) admitting marijuana use after that date (Tr. 51).

Since testing positive for marijuana on October 30, 1995, Applicant has been subject to two urinalyses. Both of the tests have been negative for marijuana.

Applicant has submitted letters of reference from his immediate supervisor and from an employee of another contractor who has had frequent contact with him. Applicant is considered to be an excellent worker who takes pride in his work, and except for the incident in October 1995, has never exhibited any evidence of drug or alcohol abuse. The Performance Appraisals submitted by Applicant indicate that he is a hard worker on whom his employer can depend.

POLICIES

The Adjudicative Guidelines of the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations with reasonable consistency that are clearly consistent with the interests of national security. In making those overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines but in the context of the factors set forth in section F.3. of the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate that the facts proven have a nexus to an applicant's lack of security worthiness.

The following Adjudicative Guidelines are deemed applicable to the instant matter.

ALCOHOL CONSUMPTION

(Criterion G)

Conditions that could raise a security concern and may be disqualifying:

(1) Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use,

Conditions that could mitigate security concerns:

(3) Positive changes in behavior supportive of sobriety,

DRUG INVOLVEMENT

(Criterion H)

Conditions that could raise a security concern and may be disqualifying include:

(1) Any drug abuse

- (2) Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.

Conditions that could mitigate security concerns include:

- (2) The drug involvement was an isolated or infrequent event;
- (3) A demonstrated intent not to abuse any drugs in the future.

PERSONAL CONDUCT

(Criterion E)

Conditions that could raise a security concern and may be disqualifying:

- (3) Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination.
- (6) Association with persons involved in criminal activity.

Conditions that could mitigate security concerns:

None Applicable

CRIMINAL CONDUCT

(Criterion J)

Conditions 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 applicable.

Burden of Proof

The Government has the burden of proving any controverted facts alleged in the Statement of Reasons. If the Government establishes its case, the burden of persuasion shifts to the applicant to establish his security suitability through evidence which refutes, mitigates, or extenuates the disqualifying conduct and demonstrates that it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands that Court's rationale, doubts are to be resolved against an applicant.

CONCLUSIONS

Having considered the record evidence in accordance with the appropriate legal precepts and factors, this Administrative Judge concludes that the Government has established its case with regard to Criteria G, H, E and J.

In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Section F.3, as well as those referred to in the section dealing with the Adjudicative Process, both in the Directive.

The Government has met its burden with respect to Criterion G. Applicant was involved in three alcohol related arrests between 1980 and 1993. His claim that he was "just a social drinker" (Gov. Ex. 1) until family related stress caused him to begin drinking more heavily two or three years ago (Tr. 25-26) is challenged by these incidents. While he now believes that he is an alcoholic (Tr. 38), his participation in prescribed aftercare has been minimal. He attended AA briefly, but stopped attending when he sensed that he did not have anything in common with the other attendees. His aftercare at the time of the hearing consisting of seeing a counselor "periodically" (Tr. 52); however, he admitted that it had been six months since he had had an appointment with this counselor (Tr. 52).

Applicant has marked his sobriety date from December 3, 1995, the date he entered Facility A for inpatient treatment. In spite of minimal participation in any recognized aftercare program, he appears to be controlling his consumption of alcohol. Since December 3, 1995, he has consumed alcohol on only one occasion--July 4, 1996. In the absence of a discharge diagnosis of "alcohol abuse" or "alcohol dependence," Applicant's achieved sobriety during the past 11 months and his stated intention to avoid alcohol in the future is sufficient to mitigate the security concerns raised by his past alcohol abuse. Accordingly, Criterion G is concluded for Applicant.

The Government has established its case with respect to Criterion H. Applicant tested positive for a marijuana metabolite as recently as October 30, 1995; and has admitted smoking marijuana on the weekend immediately preceding the test. Applicant also admitted using cocaine, amphetamines, Psilocybin mushrooms and LSD while in college.

There is conflicting evidence about whether Applicant's use of marijuana in late October 1995 was an isolated incident, or was merely another incident in a pattern of abuse. Applicant's statements and testimony denying all recent drug use other than the October 1995 incident is supported by the fact that he had not previously tested positive for an illegal substance even though he had been subjected to random urinalysis on three occasions (over three years) prior to the test that was administered on October 30, 1995 (Tr.45). Undermining Applicant's denials of more extensive marijuana abuse is his testimony that his wife is a long-time, regular marijuana user who has continued to smoke marijuana in their home, even after he tested positive for marijuana, and had received treatment in a drug and alcohol rehabilitation facility (Gov. Ex. 2). Also detracting from Applicant's credibility on this issue is evidence that he had not been truthful to DIS in April when he denied all prior drug use except for a single, earlier instance of marijuana use. Applicant had actually used marijuana weekly while in college, and had used other illegal drugs as well. Since Applicant had not been truthful when he denied the extent of his marijuana and drug use while in college, there is a higher probability that he would not be truthful about more recent marijuana use which he would have known was more damaging to his security clearance eligibility. Because he was living in an environment where he had maximum exposure to marijuana, it is likely that he used it on occasions other than October 1995.

Mitigation for Applicant's past marijuana abuse is found in evidence that he passed a drug test in December 1995 (Gov. Ex. 2) and at least one random urinalysis during the past year (Appl. Ex. C). Given the events of the past year, it is unlikely that he would have used marijuana at any other time after the October 1995 incident. Initially, he was subject to a continuing investigation as a result of the positive urinalysis. More recently, he has had to answer the SOR and prepare for his hearing. Applicant is also credited with his stated resolve not to use marijuana in the future (Tr. 42). Criterion H is concluded for Applicant.

Criterion E applies to "deliberately providing false and misleading information....to an investigator in connection with a personnel security...determination." Facts are considered relevant and material when they are capable of influencing a federal agency's decision, e.g., a decision to grant or deny a security clearance. In this instance, Applicant's use of marijuana on the weekend preceding the random urinalysis on October 30, 1995 falls well within the definition of materiality. Applicant provided false and misleading information to the DIS in April 1996 when he denied using marijuana on that occasion and attributed the positive urinalysis to faulty testing procedures. His explanation for not being truthful in his April 1996 statement--that he was intoxicated in October 1995 and uncertain that he had used marijuana until after he made the April statement--is contradicted by the evidence. As early as November 3, 1995, Applicant had received a letter from his employer informing him that the drug test administered on October 30 had been positive for marijuana (Gov. Ex. 5). He knew that the positive urinalysis required an explanation. Yet, there is no

evidence that Applicant ever proffered the intoxication explanation prior to his administrative hearing even though two DIS interviews provided him with an opportunity to do so. His recent testimony that he did not know how the marijuana got into his system until after he had talked with his friends after the April interview is not believable (Tr. 34, 49-50). Marijuana was not an alien substance in Applicant's life. His wife used it regularly and he had received telephone calls asking him if he wanted to buy marijuana (Tr.44). How marijuana came to be in his system was not a mystery, and Applicant was not being truthful when he attempted to portray it as one.

Applicant also lied in his April 1996 statement to the DIS when he stated that he had used marijuana only once. In fact, Applicant has used marijuana weekly during the four years that he was attending college. He has also used it on several more recent occasions. (Gov. Ex. 2).

The circumstances of this case do not warrant the application of any of the conditions that would mitigate the security concerns raised by Applicant's falsification. Applicant withheld information that was relevant and material to a determination of his judgment, trustworthiness and reliability. He withheld this information recently and while he eventually disclosed the withheld information, he did not do it under circumstances where he can be credited with providing the information voluntarily. And there is no evidence that Applicant withheld this information because he had received erroneous advice. Criterion E is concluded against Applicant.

The Government has established its case under Criterion J. Applicant's willfully withholding information from the DoD on matters that are clearly relevant to his security clearance eligibility violated 18 U.S.C. §1001. The information withheld by Applicant had the potential to influence the course of his background investigation in areas of legitimate concern to the DoD. Criterion J is concluded against Applicant.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7, of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 (Criterion G) FOR THE APPLICANT

Subparagraph 1.a. For the Applicant

Subparagraph 1.b. For the Applicant

Subparagraph 1.c. For the Applicant

Subparagraph 1.d. For the Applicant

Subparagraph 1.e. For the Applicant

Subparagraph 1.f For the Applicant

Subparagraph 1.g. For the Applicant

Subparagraph 1.h. For the Applicant

Paragraph 2 (Criterion H) FOR THE APPLICANT

Subparagraph 2.a. For the Applicant

Subparagraph 2.b. For the Applicant

Subparagraph 2.c. For the Applicant

Subparagraph 2.d. For the Applicant

Subparagraph 2.e. For the Applicant

Subparagraph 2.f. For the Applicant

Subparagraph 2.g. For the Applicant

Subparagraph 2.h For the Applicant

Paragraph 3 (Criterion E) AGAINST THE APPLICANT

Subparagraph 3.a. Against the Applicant.

Paragraph 4 (Criterion J) AGAINST THE APPLICANT

Subparagraph 4.a. 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 continue Applicant's security clearance.

John R. Erck

Administrative Judge

1. Applicant's response is undated.
2. Applicant indicated that his wife did not use marijuana in his presence after he tested positive for marijuana in late October 1995, however, she had used it in his presence prior to that incident (see Gov. Ex. 2).
3. Applicant had been subjected to this test on two previous occasions by his current employer. Since there is no evidence of a positive result prior to October 30, 1995, it is reasonable to assume that the results from the prior tests were negative.