

March 19, 1997

In Re:

SSN: -----

Applicant for Security Clearance

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ISCR OSD Case No. 96-0599

DECISION OF ADMINISTRATIVE JUDGE

DARLENE LOKEY ANDERSON

Appearances

FOR THE GOVERNMENT FOR THE APPLICANT

Martin H. Mogul, Esquire *Pro Se*

Department Counsel

STATEMENT OF THE CASE

On October 23, 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 recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

The Applicant responded to the SOR in writing on November 18, 1996. This case was assigned to the undersigned on January 2, 1997, and a Notice of Hearing was issued on January 16, 1997.

A hearing was held on February 28, 1997 at which the Government presented five documentary exhibits. The Applicant also presented five documentary exhibits and testified on his own behalf.

The official transcript was received on March 10, 1997.

FINDINGS OF FACT

The Applicant is 43 years old and married, and he has a high school diploma with some college. He is employed by a defense contractor as a Network Cable Plant Specialist, and he seeks a Secret-level security clearance in connection with his employment.

The Government opposes the Applicant's request for a continued security clearance, on the basis of allegations set forth in the attached Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and criterion in the SOR:

Paragraph 1 (Criterion J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he has engaged in criminal conduct.

The Applicant has admitted to being arrested on two separate occasions.

On May 12, 1990, the Applicant was arrested and charged with Receiving Stolen Property, a felony. The Applicant had purchased pieces of motor hardware from several garage sales, not knowing that the items he purchased were stolen from his place of employment. The Applicant was later arrested and spent four days in custody. The Applicant pled nolo contendere to a reduced charge of Receiving Stolen Property, a misdemeanor. The Applicant was required to serve 45 days in a work release program, complete 240 hours of community service, pay \$1,305.00 and was placed on probation for three years. The Applicant testified that he has satisfied all of the court requirements. (See, Government Exhibit 3).

On August 18, 1992, the Applicant was arrested and charged with Trafficking A Controlled Substance, a felony; Possession of a Substance, a felony; and being Under the Influence of a Controlled Substance, a felony. The Applicant, who had buried his father that same day, was driving back home when he was stopped by the police and arrested. The Applicant testified that because he had been having some problems sleeping at night, a co-worker recommended that he use marijuana to help him sleep. The Applicant purchased \$35.00 worth of marijuana for his own use, and had it in his possession at the time of his arrest. The Applicant had also used some marijuana earlier that day. The Applicant testified that this was the first and only time he has ever used or purchased any illegal drug, and he has no intentions of any future drug use. The Applicant pled guilty to Possession of a Substance, a felony, was placed on probation for three years, fined \$1000.00 and ordered to complete a drug education class. The Applicant testified that he has satisfied all of the court requirements.

The Applicant indicated that he has never been arrested other than for the two arrests and convictions discussed above.

Paragraph 2 (Criterion E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because he intentionally falsified material aspects of his personal background during the clearance screening process.

On January 25, 1996, the Applicant completed an application for security clearance which required him to indicate whether he has ever been charged or arrested for a felony offense, and whether he has ever been charged with or convicted of any offenses related to alcohol or drugs. The Applicant answered "no" to both of these questions. The Applicant did not list the arrest, the charges or the conviction resulting from his arrest of August 18, 1992, for Possession of a Controlled Substance, a felony. (See, Government Exhibit 1, Questions 23.(a) and 23.(d)). The Applicant explained that he did not intentionally conceal the information, but was told by his attorney that he was not required to report the conviction due to the provisions of his probation stipulation. (See, Applicant's Exhibit B and Tr. Pg. 25). The Applicant had a good faith belief that his conviction fell within the Federal Controlled Substance Act and was expunged by the court under the authority of 21 USC 844 or 18 USC 3607. I find that the Applicant's statements are credible and that he had no intent to deceive the Government. Accordingly, allegation 2.(a), is found for the Applicant.

In the same questionnaire, the Applicant was required to indicate whether he ever illegally used any controlled substance since the age of sixteen or in the last seven years, whichever is shorter. The Applicant was also required to indicate whether in the last seven years he has ever purchased or sold any illegal drug for his own intended profit or that

of another. The Applicant responded "no" to both questions and failed to list his use and purchase of marijuana on August 18, 1992. (See, Government Exhibit 1, Questions 24.(a) and 24.(c)). The Applicant credibly explained that he did not admit to using or purchasing marijuana because of the advice from his attorney concerning his probation stipulation, and his own understanding of his probation stipulation. However, after giving the question more thought, the Applicant admitted that he made a mistake and should have admitted to using and purchasing marijuana. He was also concerned about jeopardizing his chances of obtaining a security clearance. Under the particular facts of this case, I find that the Applicant had no intent to make a false statement, but was merely acting upon the advice and direction of his attorney. Furthermore, there is no evidence in the

record to support the allegation that the Applicant purchased or sold marijuana for his own intended profit or that of another. Accordingly, Criterion E is found for the Applicant.

Mitigation.

Eleven character references which include current and former supervisors, and personal friends of the Applicant indicate that he is reliable and honest, a hard worker, and an asset to the work force. (See, attachments to Answer to SOR).

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive sets forth policy factors and conditions that could raise or mitigate a security concern; which must be given binding consideration in making security clearance determinations. These factors 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 cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

Criterion J (Criminal Conduct)

Conditions that could raise a security concern:

- (1) any criminal conduct regardless of whether the person was formally charged;
- (2) a single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns:

- (1) the criminal behavior was not recent;
- (4) the factors leading to the violation are not likely to recur.

Criterion E (Personal Conduct)

Conditions that could raise a security concern:

None.

Conditions that could mitigate security concerns:

None.

In addition, as set forth in Enclosure 2 of the Directive at page 2-1, "In evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances

- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- I. The likelihood of continuation or recurrence."

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

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 repeated instances of criminal activity which demonstrates poor judgment, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have 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. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned.

CONCLUSIONS

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

Criminal Conduct reflects questionable judgment, unreliability, and untrustworthiness and increases the risk of unauthorized disclosure of classified information. 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 he or she may demonstrate the same attitude towards security rules and regulations.

In this case, the Government has met its initial burden of proving by *prima facie* evidence that the Applicant has engaged in criminal conduct, (Criterion J). Where an Applicant repeatedly engages in criminal conduct, it can be presumed that he will not take a serious attitude toward the important matter of protecting classified information. The Applicant, on the other hand, has introduced persuasive evidence in rebuttal, explanation or mitigation which is

sufficient to overcome the Government's *prima facie* case against him. Accordingly, he has met his ultimate burden of persuasion under Criterion J.

The record evidence shows that the Applicant was arrested on two separate occasions, once in 1990, and once in 1992, for engaging in criminal conduct. Clearly, on these two occasions, the Applicant used poor judgment. However, except for these two arrests, the Applicant has never engaged in or been arrested for any other criminal conduct. Under the extraordinary circumstances of this case, I do not find that the Applicant's conduct shows a pattern of criminal behavior. In the first instance, the Applicant was arrested for purchasing items that he did not know were stolen. In the second instance, the Applicant's father had just died, and the Applicant purchased and used marijuana for the first and only time in his life. I find that the criminal conduct was isolated in nature, which last occurred over five years ago, and is not likely to reoccur. It appears that the Applicant has gained the insight into the seriousness of his criminal conduct and is prepared to act responsibly, and is unlikely to repeat his irresponsible conduct. Accordingly, Criterion J, (Criminal Conduct) is found for the Applicant.

As previously discussed, the Applicant's credible testimony reveals that under the circumstances, he did not deliberately conceal information from the Government about his past illegal drug involvement, given the advice from his attorney and his understanding of the conditions of his probation stipulation. Accordingly, Criterion E, (Personal Conduct) is found for the Applicant.

On balance, it is concluded that the Applicant has overcome the Government's *prima facie* case opposing his request for a continued security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the Government's Statement of Reasons.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: For the Applicant.

Subpara. 1.a.: For the Applicant.

Subpara. 1.b.: For the Applicant.

Paragraph 2: For the Applicant.

Subpara. 2.a.: For the Applicant.

Subpara. 2.b.: For the Applicant.

DETERMINATION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

DARLENE LOKEY ANDERSON

Administrative Judge