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Applicant for security clearance

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April 4, 1997

ISCR Case No. 96-0709

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR THE GOVERNMENT FOR THE APPLICANT

Melvin A. Howry, Esq. *Pro se*

Department Counsel

STATEMENT OF THE CASE

On October 3, 1996, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) 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 a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on December 3, 1996, and requested a hearing. A Notice of Hearing was issued on January 22, 1997. The case was transferred to the undersigned on February 10, 1997.

A hearing was held on February 14, 1997, at which the Government presented nine documentary exhibits, and called one witness. Testimony was taken from the Applicant, who submitted four hearing exhibits and one post-hearing exhibit. The transcript was received on February 24, 1997.

FINDINGS OF FACT

The Applicant is 43, separated and has a high school diploma. He is employed by a defense contractor as a truck driver, and he seeks to retain a Secret-level DoD security clearance previously granted in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a continued security clearance, based upon the allegations set forth in the attached Statement of Reasons. The following findings of fact are entered as to each paragraph and criterion in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.⁽¹⁾

Paragraph 1 (Criterion H - Drug involvement). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he abuses illegal drugs.

The Applicant first used illegal drugs in about 1971, when he began smoking marijuana. He used marijuana, on a monthly to weekly basis, until approximately 1987, when he began using cocaine. The Applicant purchased marijuana and, in 1972, was arrested for Possession of Marijuana and received a fine.

In the mid to late 1980s until approximately 1991, the Applicant used amphetamines (speed) in powder form. The Applicant usually snorted the drug. He stopped using the drug in 1991 because he was beginning to be involved in drug treatment, and he wanted to stop.

The Applicant first began using cocaine in approximately 1987. The Applicant states, "I use cocaine because I am addicted to cocaine, and I lose my willpower not to use cocaine. I have smoked my cocaine through a pipe, but I have also snorted cocaine. I am what they call a 'Binge User' of cocaine. I will smoke cocaine, and then it can be months before I will use cocaine again." (Government Exhibit 5 at page 2.) He used cocaine on a binge basis until March 1992. The Applicant did not use cocaine, or any other type of illegal drug, from March 1992 until March 1995. In March and October 1995, the Applicant broke down and used cocaine. The Applicant came up positive on a company administered drug test after using cocaine in October 1995. He subsequently attended a drug treatment program from November 1995 until at least May 1996 (SOR subparagraph 1.v.). Due to circumstances beyond his control, he was unable to complete the program (Applicant's Exhibit "B.") The Applicant attends Alcoholics Anonymous and Narcotics Anonymous meetings on a regular basis. He has a sponsor and still attends aftercare at the treatment center, but not on a regular basis. He has not used any drugs since October 1995, and expresses a credible intent not to use cocaine or any other illegal drug in the future.

The Applicant purchased cocaine during the period he was using it. In 1988, the Applicant was arrested for possession of cocaine. He was placed in a diversion program for this offense, and attended a program run by his state highway patrol. The diversion was terminated, allegedly for noncompliance, in 1990. The Applicant maintains that he did complete the program, but through a mixup, the court was never notified. The Applicant testified that he notified the court of this error. The evidence shows that the case was dismissed on January 12, 1996. (Government Exhibit 7 at page 1.)

The Applicant's employer has known of his drug use since 1991, when he first went to the Employee Assistance Program (EAP). Since that time he has been followed by counselors at the Program. In addition, the Applicant has had to take drug tests administered by the EAP. On at least three occasions the tests came out positive, March and September 1992 and again in October 1995. The Applicant admitted that he was using cocaine in March 1992 and October 1995. His September 1992 positive result was because the Applicant was taking drugs that had been properly prescribed for him.

In addition to the treatment program discussed above, the Applicant attended treatment at another facility in 1992 (SOR subparagraph 1.n.), and 1995 (SOR subparagraph 1.s.). The Government alleges that the Applicant did not successfully complete either of the latter two programs, leaving against medical advice on both occasions. However, the Government presented no evidence to support the allegation. The Applicant maintains that he did complete the first program in 1992. His subsequent three years of abstinence tend to support that statement. As for the 1995 program, the Applicant states that he left the program because it was not fulfilling his needs (Transcript at pages 49 through 54). It was after he left

this program that he used cocaine the last time, came up positive on a drug test, and started going to the treatment center discussed in SOR subparagraph 1.v. The counseling the Applicant received from a psychiatrist in 1993 (SOR subparagraph 1.q.) was not primarily for drug use.

In 1970 the Applicant was given mescaline and/or LSD in a drink without his knowledge. This 27 year old incident has no current security significance. In arch 1996, the Applicant found an envelope of crank or crystal (methamphetamine) at his place of employment. He immediately brought it to the attention of his supervisor. Far from showing poor judgment, this latter incident showed good judgment by the Applicant. Subparagraphs 1.a. and 1.j. will be found for the Applicant.

Regarding his future intentions regarding drug use the Applicant stated the following:

I hope to God that I've learned my lesson. Like I said, as long as I can stay focused -- you know, personally, you know, I can tell you that I'll never use again. But, in reality, you know -- but, to me, I would never -- you know -- how can I put it? Before they were fun, they were recreational, they were the thing, they were the in thing. When I use -- when an addict uses, it's not fun. It's -- you do it yourself. You've secluded your -- you feel horrible. It's unbelievable. You would think that after you did it and the feelings that you got, you would never use again because it's not what it was. You know, you fantasize or you can -- how do you want it -- you can romance it. You can do whatever you want with it. But, in reality, it's the devil. It's just something that shouldn't be tolerated and it isn't tolerated. (Transcript at 64 through 65.)

Mitigation. The Applicant has a 13 year old daughter, who he has custody of. He testified that he obtained custody of his daughter because her mother, his wife, is still a drug user. Having custody of his daughter helps him retain his sobriety.

Through his daughter, he has become involved in a girl's amateur softball league. A letter of recommendation from the president of the softball association is found in the Applicant's Post-Hearing Exhibit. In that letter, dated February 18, 1997, the president, a reverend, states, "I have known (the Applicant) 3 years now, and he has had problems that have confronted him, that could overwhelm a man, but I've seen him face these situations head on, and deal with them, and he has done 'well' with these matters."

The Applicant also submitted letters of commendation from his work (Applicant Exhibits C, D and Post-Hearing Exhibit). These exhibits show the Applicant to be a hard worker, who does a good job which has been acknowledged by his superiors.

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 and Section F.3. of the 1992 Directive, has set forth policy factors 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 factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. 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 H (Drug involvement)

Conditions that could raise a security concern:

- (1) any drug abuse;
- (2) illegal drug possession, including cultivation, processing, manufacture, purchase, sale or distribution.

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.

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 factors (General Factors):

- a. The nature, extent and seriousness of the conduct
- 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 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 acts of drug abuse that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue 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. 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

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a *prima facie* case has been established, 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 national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by *prima facie* evidence that the Applicant has abused illegal drugs (Criterion H).

The Applicant, on the other hand, has successfully mitigated the Government's case. The evidence shows that, after he entered treatment in 1992, the Applicant eliminated all drug use for three years. In 1995, the Applicant slipped and used cocaine on two occasions. Since October 1995, he has again been completely abstinent. In other words, with two slips, the Applicant has not used drugs for five years. The Applicant's compelling testimony shows that he knows the costs of his drug use, and is determined not to be involved with it again. He currently attends Alcoholics Anonymous and Narcotics Anonymous meetings. Having custody of his daughter, and his wife's continuing drug use, have helped the Applicant decide to remain clean and sober. The Applicant's drug use was serious and recent. However, the vast majority of it occurred more than five years ago, and he evinces a credible, demonstrated intent not to engage in drug use in the future.

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

Subparagraphs 1.a. through 1.w.: For the Applicant.

DECISION

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.

Wilford H. Ross

Administrative Judge

1. At the conclusion of the Government's case in chief, the Department Counsel made a motion to amend SOR subparagraphs 1.r., s. and w., to conform to the evidence presented at the hearing. The Applicant did not object and the allegations were amended in accordance with Paragraph 17, Enclosure 3, of the Directive.