

Date: April 25, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR OSD Case No. 96-0736

DECISION OF ADMINISTRATIVE JUDGE

ROBERT R. GALES

APPEARANCES

FOR THE GOVERNMENT FOR THE APPLICANT

Carla Conover, Esquire

Department Counsel

Pro se

STATEMENT OF CASE

On November 20, 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 and modified, 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 a clearance should be granted, continued, denied, or revoked.

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

In a sworn written statement, dated December 23, 1996, Applicant responded to the allegations set forth in the SOR, and elected to have his case decided on a written record, in lieu of a hearing. Department Counsel submitted the Government's written case on January 14, 1997. A complete copy of the file of relevant material (FORM) [\(1\)](#) was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. His undated response was postmarked February 13, 1997. The case was assigned to, and received by, this Administrative Judge on March 24, 1997.

FINDINGS OF FACT

Applicant has admitted nearly all, or portions thereof, of the factual allegations pertaining to drug involvement under Criterion H (subparagraph 1.e., and portions of subparagraphs 1.a., 1.c., and 1.d.). Those admissions are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:⁽²⁾

Applicant is a 33 year old male employed by a defense contractor, and is seeking to retain a security clearance. A TOP SECRET security clearance was originally granted to him in 1983, and he was subsequently granted a SECRET security clearance in September 1994.⁽³⁾

Applicant has been a poly-substance abuser whose choice of illegal substances has been primarily marijuana, but who has also experimented with hashish and a substance identified as "speed." He commenced using marijuana in about August 1980, when he was about 17 years of age, while in high school, and continued to use marijuana, on a monthly basis, or about 20-25 times, until about July 1982.⁽⁴⁾

On two separate occasions prior to entering active military service, in July 1982 and January 1983, Applicant was required to complete SCI Access Eligibility Drug Waiver Applications because of his earlier substance abuse. In each such application, signed by Applicant, there appears an identical statement pertaining to future substance abuse:⁽⁵⁾

I will refrain from any future personal. . . use of any and all types of marijuana. . . .

Applicant was aware that substance abuse was against the law and DoD policy.

During the ensuing 13 years, including four years on active military service (January 1983 until March 1987) he apparently abstained. However, after being posted to an overseas location by his current employer, Applicant resumed his substance abuse. During the period August 1995 until October 1995, he used marijuana on about three occasions. He used marijuana on one occasion in January 1996, and on another occasion in April 1996.⁽⁶⁾ There is no evidence to rebut Applicant's contention that he has abstained since April 1996.

On two occasions in August 1995, out of curiosity, Applicant experimented with hashish.⁽⁷⁾ There is no evidence to rebut his contentions that he has abstained since that time.

On one occasion in September or October 1981, Applicant experimented with a substance referred to as "speed."⁽⁸⁾ While the SOR alleges that the substance was an amphetamine, Applicant has steadfastly denied that fact and argued that the diet pill(s) he used consisted of nothing other than highly concentrated caffeine.⁽⁹⁾ There is no evidence to rebut Applicant's contentions or explanations in this regard.

On at least one or two occasions during the earlier phase of his marijuana abuse, Applicant purchased an unspecified quantity of marijuana, characterized as four marijuana cigarettes or "joints."⁽¹⁰⁾ At least one such purchase was on behalf of a friend, and Applicant participated in the purchase while the friend remained in the automobile nearby. There is no evidence to rebut Applicant's contention that there were no additional marijuana purchases.

Applicant has never undergone any drug treatment or rehabilitation as a result of his substance abuse.⁽¹¹⁾

He has again indicated that he has no plans to ever use another illegal substance.⁽¹²⁾

Applicant has been employed by his present employer, or a subsidiary thereof, since June 1987. His current supervisor supports the application, and has characterized Applicant as a highly intelligent and reliable person, and a valued employee, whose job performance is excellent.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified

information (Disqualifying Factors) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Factors).

An Administrative Judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision -- an expansion of the factors set forth in Section F.3. of the Directive, are intended to assist the Administrative Judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny 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 making a meaningful decision. The Adjudicative Process factors which an Administrative Judge should consider are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (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 pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

[Drug Involvement - Criterion H]: Improper or illegal involvement with drugs, raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.

Drugs are defined as mood and behavior altering:

- (a) drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens) and
- (b) inhalants and other similar substances.

Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

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

- (1) any drug abuse (see above definition);
- (2) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution;
- (3) failure to successfully complete a drug treatment program prescribed by a credentialed medical professional. Current drug involvement, especially following the granting of a security clearance, or an expressed intent not to discontinue use, will normally result in an unfavorable determination.

Conditions that could mitigate security concerns include:

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

Since the protection of the national security is the paramount determinant, the final decision in each case must be arrived at by applying the standard that the issuance of the clearance is *clearly consistent with the interests of national security*,⁽¹³⁾ or *clearly consistent with the national interest*. For the purposes herein, despite the different language in each, I have concluded that both standards are one and the same. In reaching this Decision, I have endeavored to draw only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have attempted to avoid drawing inferences that are grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the Government to establish a case

which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the Government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the Government's case, and to ultimately demonstrate that it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's loyalty and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides that industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than loyalty and patriotism. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied decision as to Applicant's loyalty or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, an assessment of the witness credibility, and after application of all appropriate legal precepts and factors, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

With respect to Criterion H, the Government has established its case. Applicant's improper and illegal drug abuse, with particular emphasis on that marijuana abuse which occurred while he was an employee of defense industry in possession of a security clearance, is of particular concern, especially in light of his desire to have continued access to the nation's secrets.

Applicant's actions commencing in August 1995, and continuing until April 1996, were not those of an immature adolescent, but rather of an adult in his 30s. It was to his credit that after abusing marijuana during the early 1980s, he ceased doing so and abstained for 13 years. However, the marijuana abuse resumed for some unexplained reason, and was accompanied by curiosity-driven experimental abuse of hashish, as well, on two occasions in August 1995. Notwithstanding the legal status of his endeavor, he exhibited a pattern of questionable judgment, irresponsibility, and immature behavior, and continued his substance abuse for an eight month period. Despite having previously vowed to refrain from any future marijuana abuse in 1982 and 1983, and after he had been granted security clearances, as early as 1983 and as recently as September 1994, he placed his drug-induced pleasures above his fiduciary responsibilities toward the Government and the drug laws.

Applicant's continuing abstinence since April 1996 is to be encouraged, but the current period of abstinence is still relatively brief, too brief, in light of his substance abuse history. In this instance, I believe that both the successful completion of a drug treatment and rehabilitation program, as well as continued abstinence, for a period longer than the current twelve months to the closing of the record, should be required to demonstrate the truly successful transformation from substance abuser to a dedicated, abstinent, drug-free person, and to provide the basis for a conclusion that such conduct will not continue or recur in the future. Under the evidence presented, I am not confident that Applicant's substance abuse is a thing of the past, or that it will not recur.

I do not take this position lightly, but based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my evaluation of the evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under Enclosure 2 of the Directive, I believe that Applicant has failed to mitigate or overcome the Government's case. The evidence leaves me with grave questions and doubts as to Applicant's continued security eligibility and suitability. Accordingly, allegations 1.a. through 1.c., and 1.e., of the SOR are concluded against

Applicant.

Applicant's experimentation with the substance known as "speed" -- regardless of whether or not it was an amphetamine -- on one occasion in 1981, has not been repeated thereafter, and I consider such abuse to be stale, with little current security significance. Moreover, the Government has offered no evidence to rebut Applicant's contentions that the pill(s) were nothing other than highly concentrated caffeine. Thus, I conclude that Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the Government's case. Accordingly, allegation 1.d. of the SOR is concluded in favor of Applicant.

For the reasons stated, I conclude Applicant is not suitable for access to classified information.

FORMAL FINDINGS

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

Paragraph 1. Criterion H: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Subparagraph 1.d.: For the Applicant

Subparagraph 1.e.: 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 grant or continue a security clearance for Applicant.

Robert R. Gales

Chief Administrative Judge

1. The Government submitted nine items in support of its contentions.
2. Applicant has been afforded several opportunities to furnish detailed scenarios of his substance abuse history, and in doing so, his stories and estimates have been chronically inconsistent. In reconstructing his substance abuse history, I have created a mosaic of his various admissions, along with other evidence, and I find this mosaic to represent the actual facts.
3. *See*, Item 4.
4. *See*, Item 5, at 4; Item 6, at 1; Item 7, at 2; Item 8, at 2; and Item 9, at 1.
5. *See*, Item 7, at 7; Item 8, at 7.
6. *See*, Item 3.
7. *See, ibid.*

8. *See*, Item 6, at 1; Item 7, at 2; Item 8, at 2; and Item 9, at 1.

9. *See*, Item 3; and Item 6, at 1; and Response to FORM, at 1.

10. *See*, Item 6, at 1; Item 9, at 1; and Response to FORM, at 1-2. *But, also see*, Item 3, and Item 5, at 4, wherein he denied ever purchasing marijuana -- denials which were untrue.

11. *See*, Item 3.

12. *See, ibid.*

13. *See*, Executive Order 12968, "*Access to Classified Information*;" as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995. However, the Directive uses both "clearly consistent with the national interest" (*see*, Sec. B.3; Sec. C.2.; and Sec. D.2.; Enclosure 3, Sec. 1.; and Sec. 25), and "clearly consistent with the interests of national security" (*see*, Enclosure 2 (Change 3), Adjudicative Guidelines, at 2-2).