

DATE: February 25, 1997

In Re:

SSN: -----

Applicant for Security Clearance

DOHA Case No. 96-0734

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 October 8, 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 her.

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

Applicant responded to the SOR in writing on November 1, 1996, and requested a hearing before a DOHA Administrative Judge. The case was assigned to this Administrative Judge on December 2, 1996. On December 16, 1996, a hearing was convened for the purpose of considering whether it would be clearly consistent with the national security to grant Applicant's security clearance. The Government's case consisted of four exhibits; Applicant relied on seven exhibits and her own testimony. A transcript of the proceedings was received on December 31, 1996.

FINDINGS OF FACT

Applicant has admitted all of the factual allegations pertaining to drug involvement (Criterion H) set forth under subparagraphs 1.a. through 1.g., all of the factual allegations pertaining to personal conduct (Criterion E) set forth under subparagraphs 2.a. through 2.c., and all of the factual allegation pertaining to criminal conduct (Criterion J) under subparagraph 3.a.

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 25 year old employee of a defense contractor. She has worked for her current employer since September 1995 and is applying for a secret clearance. A favorable preliminary determination could not be made in her case because of drug use and falsification.

Applicant first smoked marijuana in 1985 when she was 14 years old. After being introduced to it by a friend, she used marijuana every two or three months until she was 17. When she was 17 in 1988, she began smoking marijuana daily after she began dating the man whom she would later marry. After dating for a year, Appellant lived with him for another year before marrying him in May 1990. They were married until December 24, 1993, when Appellant moved out and got her own apartment. During the time that they were married, Appellant worked regularly and earned the income on which they lived. Although her husband seldom worked, she allowed him to manage their money--which was the income she earned from her job. While they were married, they continued to smoke marijuana daily. Appellant rationalizes that she used marijuana as frequently as she did during that time period because she needed something to calm her down; she would get very upset over the fact that her husband would be sitting on the couch, "stoned," and "doing nothing" every night when she came home from work. He earned whatever money he did by selling marijuana and hashish. While Applicant was married, she had helped her husband process marijuana stems and leaves into hashish on a couple of occasions, and had also helped him to sell marijuana.

After leaving her husband in December 1993, Appellant continued to use marijuana daily for at least another two years. She used it during the time that she had her own apartment--from December 1993 until she moved back in with her mother in June 1995. And she continued to smoke marijuana once a month even after moving back in with her mother in June 1995. Appellant stopped smoking marijuana in October 1995 after completing the initial paperwork for her security clearance. She did not intend to use marijuana again, however, in the April-May time frame of 1996, she smoked marijuana on three more occasions.

During the past five years, Appellant has had a series of medical problems which have caused her to experience chronic and debilitating pain. These medical problems have required her to have surgery on three different occasions.²

When Applicant completed her National Agency Questionnaire (NAQ) on September 27, 1995, she certified that:

...the entries made by me are true, complete and accurate to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both.

In response to question 20.a. which asked if she had "ever tried or used or possessed any narcotic..., hallucinogen (to include LSD or PCP), or cannabis (to include marijuana or hashish)..." and question 20.b. which asked if she had "ever been involved in the illegal purchase, manufacture, trafficking, production, or sale of any narcotic, depressant, stimulant, hallucinogen, or cannabis?" Applicant answered "no."

During her first interview with the Defense Investigative Service (DIS) on May 28, 1996 (Govt. Exh. 4), Applicant admitted that she had started smoking marijuana in 1985 when she was 14. She went on to state that she began smoking marijuana daily in 1989 after moving in with the man whom she married a year later. She admitted that she continued to smoke marijuana daily while she was married, but stated that she had quit smoking in 1994 shortly after getting divorced. She denied that she had ever sold, grown, or manufactured drugs, and stated--in her signed, sworn statement--that she did not intend to use drugs in the future. During her second interview with the DIS the following day (Govt. Exh. 3), Applicant admitted that she had continued to smoke marijuana occasionally until October 1995. And she admitted that she had purchased some marijuana after her divorce. During this interview, Applicant also admitted that while she was married, she had experimented with hashish and LSD, and may have sold marijuana.

Applicant was interviewed by the DIS again on June 6, 1996. During this interview, she admitted that she had continued to smoke marijuana daily until June 1995 (Govt. Exh. 2). From June 1995 to October 1995, she estimates that she smoked marijuana weekly. She intended to quit smoking marijuana in October 1995--when she realized that she could not smoke marijuana and keep her job--but she did not remain steadfast to her resolve. Applicant admitted that she

smoked marijuana on three different occasions with three different people in late April, early ay of 1996. During the June 6 interview, Applicant also admitted that--while married-- she had sold small quantities of marijuana when her husband was not home. Finally, she admitted that she had assisted her husband in his efforts to manufacture hashish, and may have assisted his attempt to grow marijuana by watering a young plant.

Applicant's supervisors and co-workers have submitted letters on her behalf. While indicating an awareness of her drug abuse history, all express their opinion that Appellant has put her past behind her and should be granted a security clearance. She works hard; she is motivated; and she consistently displays sound judgment.

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 facts 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.

DRUG INVOLVEMENT

(Criterion H)

Drugs are defined as mood and behavior altering:

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

(b) inhalants and other similar substances.

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

(1) Any drug abuse

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

Conditions that could mitigate security concerns:

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

PERSONAL CONDUCT

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

(2) The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

(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 personal security trustworthiness determination.

Mitigating Factors:

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,
- (2) A single serious crime or multiple lesser offenses.

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.

CONCLUSION

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 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 H. Applicant has admitted that she used marijuana daily from 1989 to June 1995, weekly from June to October 1995, and on three separate occasions in late April, early May 1996. In addition to using marijuana regularly over an extended period of time, Applicant also admitted that she had purchased and sold marijuana, and that she had assisted her ex-husband in his manufacture of hashish and in his attempt to grow marijuana. Further evidence of Applicant's drug involvement is found in her admission that she has experimented with hashish and LSD.

In deciding whether Appellant's extensive marijuana abuse can be mitigated, I have given favorable consideration to Applicant's age and to the personal circumstances under which she began using marijuana regularly. Partially as the result of a dysfunctional family environment, she became involved with the wrong man when she was quite young. She allowed him to make her decisions during the three and one-half years they were married. After she divorced, she continued to use marijuana regularly because she was upset and depressed over the chronic pain she was experiencing as the result of the medical problems which eventually required her to have surgery on three different occasions.

Mitigation for Applicant's drug involvement is found in her stated intention to abstain from marijuana and other drugs in

the future. Unfortunately the credibility of her current resolve is significantly diminished by her failure to remain steadfast to that resolve earlier during her initial attempt to live drug free. Her abuse of marijuana on three different occasions in April-May of 1996, after she realized the consequences of continuing to use marijuana, causes this Administrative Judge to have considerable doubt about her ability to remain true to her resolve and to continue to abstain from marijuana and other drugs. Because Applicant had used marijuana daily for more six years and has already had one relapse, a longer period of abstinence is now necessary for her to demonstrate that she has turned the corner and put that part of her life behind her. Criterion H is concluded against Applicant.

Criterion E applies to "the deliberate omission...of relevant and material facts from any personnel security questionnaire... or 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's agency decision, e.g., a decision to grant or deny a security clearance. In this instance Applicant's daily use of marijuana from 1988 until June 1995 falls well within the definition of materiality. Also falling within the definition of materiality and also omitted from her NAQ--which she signed on September 27, 1995--are Applicant's experiments with LSD and hashish, her involvement in the manufacture of hashish, and her purchase and sale of marijuana.

And Appellant's omissions and falsifications did not end in September when she signed her NAQ. After her first interview with the DIS on May 28, 1996, she signed a statement in which swore that she had stopped smoking marijuana in 1994. In the same statement, she swore that she had never used any drugs other than marijuana, and that she had never been involved in the sale or manufacture of any drugs. And after an interview with the DIS only one day later, she swore that she had used marijuana "rarely" after June 1995, and that she had quit smoking marijuana "completely" (Govt. Exh. 3) in October 1995. In both of these statements, Applicant lied when she failed to disclose that she had used marijuana on three occasions within a month of the DIS interview.

While Applicant finally disclosed the full extent of her drug abuse and told of her involvement in the manufacture and sale of drugs during her third interview with the DIS, her belated truth telling does not mitigate her earlier falsifications. Her disclosures came too late for her to be credited with making a "prompt, good-faith effort to correct the falsification," and under circumstances where she cannot be credited with providing "correct information voluntarily." Nor is her falsification mitigated because it was an isolated incident; Applicant had provided false or misleading information on three occasions over a nine month period. 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 her security clearance eligibility violates 18 U.S.C. §1001. The information withheld by Applicant had the potential to influence the course of the 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 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. Against the Applicant

Subparagraph 1.e. Against the Applicant

Subparagraph 1.f Against the Applicant

Subparagraph 1.g Against the Applicant

Paragraph 2 (Criterion E) AGAINST THE APPLICANT

Subparagraph 2.a. Against the Applicant

Subparagraph 2.b. Against the Applicant

Subparagraph 2.c. Against the Applicant

Paragraph 3 (Criterion J) AGAINST THE APPLICANT

Subparagraph 3.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