

DATE: July 17, 1997

In RE:

SSN

Applicant for Security Clearance

ISCR OSD Case No. 96-0767

DECISION OF ADMINISTRATIVE JUDGE

JOSEPH TESTAN

Appearances

FOR THE GOVERNMENT

Martin H. Mogul

Department Counsel

FOR THE APPLICANT

James R. Phillips, Esq.

STATEMENT OF THE CASE

On November 26, 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 a Statement of Reasons (SOR) (copy appended) 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 clearance should be denied or revoked.

The applicant responded to the SOR in writing on December 20, 1996. The case was received by the undersigned on January 21, 1997, and a Notice of Hearing was issued on February 4, 1997. A hearing was held on April 2, 1997.

RULINGS ON PROCEDURE

At the hearing, Department Counsel moved to amend the Statement of Reasons by adding an allegation that applicant deliberately provided false, material information to the Government in response to two questions on a National Agency Questionnaire (NAQ). Applicant did not object to Department Counsel's motion. After considering the authority for granting such a motion (Paragraph 17, Page 3-3 of the Directive) and the evidence presented at the hearing, Department Counsel's motion was granted in part and denied in part (TR at 48-50). Pursuant to the ruling on the motion, the SOR was amended by adding the following allegation:

Criterion E: Personal Conduct

1. On a NAQ signed by you on July 7, 1992, you answered "no" to question 20.a. which asked: "Have you ever tried or used or possessed any narcotic (to include heroin or cocaine), depressant (to include Quaaludes), stimulant, hallucinogen (to include LSD or PCP), or cannabis (to include marijuana or hashish), or any mind-altering substance (to

include glue or paint), even one time or on an experimental basis, except as prescribed by a licensed physician?" when in fact, as you well knew, you had used cannabis as alleged in paragraph 3.a. of the SOR.

On April 5, 1997, applicant filed a written response to this allegation. This response was marked as Exhibit C and admitted into evidence.

FINDINGS OF FACT

Applicant is a forty year old divorced man. He is employed as a systems engineer by a defense contractor, and has held a DOD security clearance since at least 1992.

Criteria D and J

Applicant engaged in voyeuristic activities with varying frequency, at times daily, from approximately 1980 through May 1996. He engaged in this activity in his immediate neighborhood "thinking that (he) wasn't hurting anyone because no one would know" (G-2). As a result of this activity, applicant was stopped and questioned by the local police department on four or five occasions (TR at 29, 46).

On June 6, 1988, the police went to applicant's home and spoke with him after someone in the neighborhood filed a complaint following one of applicant's voyeuristic adventures. Applicant testified that, contrary to SOR Allegation 1.b., he was not arrested on this occasion, but rather the police talked to him about his "situation" and suggested that he do something to "solve the problem" (TR at 47). Apparently, at least in part because of this conversation, applicant sought treatment for voyeurism from-----. However, because he did not feel he was receiving any benefit from this treatment, he discontinued it (TR at 28-29).

On December 20, 1994, applicant was arrested for Criminal Trespass after he jumped over a fence into his neighbor's backyard "early one morning to see what (he) could see" (G-2). Although he initially told the police they had the wrong man, he eventually admitted to them that he was the individual in the neighbor's yard. Applicant testified that he pleaded guilty to the charge to get the process over with so he could get into a treatment program. As a result of his guilty plea, he was placed on probation for three years and ordered to get counseling.

Within a week of his arrest, he contacted----- (Counselor 1). He saw Counselor 1 on two occasions in January 1995. He stopped seeing Counselor 1 after the court instructed him to get treatment from ----- (Counselor 2). Applicant had his first appointment with Counselor 2 on February 17, 1995. A March 27, 1997 letter from Counselor 2 was admitted in evidence and in pertinent part is as follows:

"I am documenting (applicant's) completion of treatment in the Sex Offender Program ----- (Applicant) began treatment with an intake interview on February 17, 1995. Since intake he has attended nine individual and thirty-nine group therapy sessions. (Applicant's) attendance and attitude towards treatment have been good. (Applicant) did suffer a relapse in 1996. Since his relapse he has worked hard on developing additional skills in identifying and preventing his relapse process. He has completed assignments in victim empathy, clarification/apology statements, and identifying contributors and interventions to prevent any future relapses. Since making a geographical move, (applicant) has developed additional interests, and discontinued his substance abuse. He remained gainfully employed during his treatment and has reported no relapses or other legal referrals since his relapse last year. (Applicant) completed treatment today. His aftercare plans include locating and attending local support group meetings." (Exhibit A)

From the time of his December 1994 arrest to November or December 1995, applicant did not engage in voyeurism. However, following what applicant described as "triggering events,"⁽¹⁾ he resumed this activity and engaged in it approximately twenty-five times through May 1996. He stopped sometime in May 1996 because he "got caught by one or more" of the residents of his apartment (G-2). Although he was not arrested on this occasion, he was asked to move out of his apartment, which he did in June 1996. When the court was notified of applicant's "relapse," his court-ordered counseling period was extended beyond the original October 1996 completion date.

Applicant testified that as a result of his treatment with Counselor 2, he feels like he has the training and tools to recognize the danger signs that lead to his inappropriate behavior. He believes that this training will enable him to

control his deviant behavior.

Criterion H

Applicant used marijuana with varying frequency, at times daily, from approximately 1976 to March or April 1996. He purchased marijuana with varying frequency, at times weekly, from approximately 1979 to March or April 1996. Applicant used hash, speed and cocaine a few times in the 1970s.

Applicant testified that his drug usage has "completely gone away."

Criterion E

Applicant intentionally provided false, material information to the Government when he responded "no" to question 20.a. on the NAQ he executed on July 7, 1992 (G-1). He did so because he was concerned that if he revealed his use of illegal drugs it might affect his chances of obtaining a security clearance.

A performance appraisal covering the period January 1 through December 31, 1996 was admitted in evidence (Exhibit B). This appraisal establishes that in 1996 applicant performed well at his job.

POLICIES

Enclosure 2 of the Directive sets forth the Adjudication Policy (divided into Disqualifying Factors and Mitigating Factors) which must be followed by the Administrative Judge. Based on the foregoing Findings of Fact, the following Disqualifying Factors and Mitigating Factors are applicable:

SEXUAL BEHAVIOR

Disqualifying Factors:

1. Sexual behavior of a criminal nature, whether or not the individual has been prosecuted.
2. Compulsive or addictive sexual behavior when the person is unable to stop a pattern of self-destructive or high-risk behavior or that which is symptomatic of a personality disorder.
4. Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.

Mitigating Factors:

None.

CRIMINAL CONDUCT

Disqualifying Factors:

1. Any criminal conduct, regardless of whether the person was formally charged.
2. A single serious crime or multiple lesser offenses.

Mitigating Factors:

None.

DRUG INVOLVEMENT

Disqualifying Factors:

1. Any drug abuse.
2. Illegal drug possession.

Mitigating Factors:

None.

PERSONAL CONDUCT

Disqualifying Factors:

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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Mitigating Factors:

None.

CONCLUSIONS

In DOHA cases, the Government has the initial burden of producing evidence that reasonably suggests an applicant cannot be relied upon to safeguard classified information. If the Government meets its burden, it has established a prima facie case. Once the Government establishes a prima facie case, the burden shifts to applicant to produce evidence in refutation, extenuation, mitigation or reformation sufficient to establish that, notwithstanding the Government's prima facie case, he or she can be relied upon to safeguard classified information. In view of the Directive's requirement that a security clearance be granted only upon a finding that to do so is clearly consistent with the national interest, the applicant has a heavy burden.

Criteria D and J

The Government established a prima facie case under Criteria D and J. The evidence establishes that applicant engaged in voyeuristic activity from approximately 1980 through May 1996, and that this conduct resulted in an arrest for Criminal Trespass in 1994. Applicant's sexually perverted and criminal conduct reflects adversely on his judgment, reliability and trustworthiness, and strongly suggests that he can not be relied upon to safeguard classified information.

Applicant failed to establish that he has reformed. Although his December 1994 arrest and subsequent conviction forced him into the much needed treatment with Counselor 2, and that as a result of this treatment applicant believes he can now control his deviant behavior, it is too soon to safely conclude that applicant can, in fact, control this sexually deviant and criminal conduct. In view of (1) his approximately fifteen years of sexually deviant and criminal conduct, (2) his demonstrated inability to control this conduct, particularly from late 1995 to early 1996 when he had already been in treatment for at least eight months, and (3) the lack of a favorable prognosis from Counselor 2, I cannot conclude at this time that applicant is unlikely to engage in voyeuristic activity and/or criminal conduct in the future. For this reason, Criteria D and J are found against applicant.

Criterion H

The Government established a prima facie case under Criterion H. The evidence establishes that applicant (1) used marijuana with varying frequency, at times daily, from approximately 1976 to at least March or April 1996, (2) purchased marijuana with varying frequency, at times weekly, from approximately 1979 to March or April 1996, and (3) used hash, speed and cocaine in the 1970s. This abuse of illegal drugs, particularly after he received a DOD security clearance in 1992, reflects adversely on applicant's judgment, reliability and trustworthiness, and reasonably suggests that he cannot be relied upon to safeguard classified information for at least two reasons:

First, individuals granted access to classified information are responsible for safeguarding it twenty-four hours per day, seven days per week, on and off the job. An applicant who uses illegal drugs such as marijuana and cocaine cannot be relied upon to meet his or her security responsibilities because the risk of an unauthorized disclosure of classified information through neglect or inattention while "high" on them is too great. Second, applicant used marijuana for many years with full knowledge that each time he used it he was breaking the law. This suggests that applicant may be unwilling to abide by security regulations if he finds them in conflict with his personal wishes or desires.

Applicant failed to establish that he has reformed. In view of his earlier intentional falsification of material facts concerning his drug use, his uncorroborated testimony that he has reformed cannot be considered credible evidence that he no longer uses marijuana or that he will not use it in the future. For this reason, Criterion H is found against applicant.

Criterion E

The Government established a prima facie case under Criterion E. The evidence establishes that applicant intentionally provided false, material information to the Government when he denied any illegal drug use in response to question 20.a. on the NAQ he executed on July 7, 1992. This dishonest conduct reflects adversely on applicant's judgment and reliability, and strongly suggests that he lacks the trustworthiness required of individuals with access to classified information.

Applicant failed to rebut the Government's prima facie case. Other than one performance appraisal, applicant failed to offer any independent evidence indicating that he is now a trustworthy individual. In view of the recency and seriousness of applicant's falsification, the lack of such evidence precludes a finding that he is now sufficiently trustworthy to be relied upon to be truthful with the Government. For this reason, Criterion E is found against applicant.

FORMAL FINDINGS

PARAGRAPH 1: AGAINST THE APPLICANT

PARAGRAPH 2: AGAINST THE APPLICANT

PARAGRAPH 3: AGAINST THE APPLICANT

PARAGRAPH 4 (Criterion 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.

Joseph Testan

Administrative Judge

1. The triggering events were "a couple of accidental viewings of women undressing in their apartments" (G-2).