

DATE: May 7, 1997

In Re:

SSN: -----

Applicant for security clearance

ISCR OSD Case No. 96-0818

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

Appearances

FOR THE GOVERNMENT

Teresa A. Kolb, Esq.

Department Counsel

FOR THE APPLICANT

Personal Representative

STATEMENT OF CASE

On January 21, 1997, 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, amended by Change 3, February 13, 1996, 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 clearance should be denied or revoked. The SOR is attached. Applicant filed his Answer to the SOR on February 21, 1997.

The case was received by the undersigned on March 5, 1997. A notice of hearing was issued on March 10, 1997, and the case was heard on March 25, 1997. The Government and Applicant submitted documentary evidence. Testimony was taken from Applicant and one witness. The transcript was received on April 8, 1997.

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony. The SOR alleges personal conduct (Criterion E) and criminal conduct (Criterion J). Applicant denied all allegations without written explanation, and requested a hearing.

Applicant is 36 years old and employed as a ----- with a defense contractor. He seeks a secret level clearance.

On February 29, 1984, Applicant falsified a signed, sworn statement when he stated he had used marijuana once in 1978

and once when he was arrested in 1979, and he had never purchased any illegal drug.⁽¹⁾ He falsified a Personnel Security Questionnaire (PSQ) on August 25, 1987 when he answered "no" to the question which asked whether he had ever used drugs (question 15a), and when he answered "no" to the question which asked whether he had ever been involved in the illegal purchase, possession or sale of any drug (question 15b).⁽²⁾ Applicant falsified a second National Agency Questionnaire (NAQ) on July 18, 1995, when he answered "no" to the question which asked whether he had ever used drugs (question 20a), and when he answered "no" to the question which asked whether he had ever been involved in the illegal purchase of any drug (question 20b).⁽³⁾

In a sworn statement dated February 16, 1996, Applicant understated his marijuana use. On March 19, 1996, Applicant again falsified his sworn statement by furnishing an incomplete picture of his marijuana use. On April 10, 1996, Applicant falsified his marijuana use once more by not providing the complete picture.⁽⁴⁾

In the initial interview on September 3, 1996 with Agent B from the Defense Investigative Service (DIS), Applicant lied when he said he had not used any illegal drug since 1992.⁽⁵⁾ Applicant admitted he had not been truthful during the three earlier interviews because he was "upset by the interview and was not comfortable discussing it [drug use] at that time." (GE #7).⁽⁶⁾ He began using marijuana in 1978 and used the drug once or twice a month until 1982. Occasionally, he contributed about ten dollars to the purchase of marijuana. In 1982, he abstained from marijuana use until 1988 or 1989, when he used the drug one or two more times until 1992. He used marijuana once more some time between 1992 and 1994, when he met his current girlfriend. He also used some other antibiotics he received from his current girlfriend. (GE #7).

Applicant's supervisor for two and one-half years commended Applicant on his outstanding ratings since working in his present employment for the last two and one-half years.⁽⁷⁾ Applicant is honest and has the best judgment on the staff of 10. (Tr. 92). The supervisor's children socialize with Applicant's children every other weekend. The supervisor's 17 years of service in the military, convinces him Applicant should have a security clearance. (Tr. 104).

Mr. A has known Applicant since the early 90's when Mr. A purchased computers through Applicant's company and also employed Applicant (Tr. 77); Mr. A still keeps Applicant on a retainer at the present time. (Tr. 84). Applicant is reliable, trustworthy and displays good judgment. (Tr. 78).

Applicant took drug tests in July and December 1996, with negative results.

POLICIES

Enclosure 2 of the Directive sets forth policy factors which must be given binding consideration in making security clearance determinations. These factors must be considered in every case according to the pertinent criterion; however, the factors are in no way 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 case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the entire realm of human experience or that the factors apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Factors most pertinent to evaluation of the facts in this case are:

Criterion E (personal conduct)

Factors Against Clearance:

2. the deliberate...falsification of relevant and material facts from any personnel security questionnaire...to...determine security clearance eligibility....
3. deliberately providing false or misleading information concerning relevant and material matters to an investigator...in connection with a personnel security or trustworthiness determination.

Factors for Clearance:

None.

Criterion J (criminal conduct)

Factors Against Clearance:

1. any criminal conduct, regardless of whether the person was formally charged.

Factors for Clearance:

None.

General Policy Factors (Whole Person Concept)

Every security clearance case must also be evaluated under additional policy factors that make up the whole person concept. Those factors (found at page 2-1 of Enclosure 2 of the Directive) include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 behavioral changes; (7) the motivation for the conduct; and, (8) the likelihood of continuation or recurrence.

Burden of Proof

As set forth in the Directive, every personnel security determination must be a fair and impartial overall commonsense decision based upon all available information, both favorable and unfavorable, and must be arrived at by applying the standard that the granting (or continuance) of a security clearance under this Directive may only be done upon a finding that to do so is clearly consistent with the national interest. In reaching determinations under the Directive, careful consideration must be directed to the actual as well as the potential risk involved that an applicant may fail to properly safeguard classified information 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.

The Government must establish all the factual allegations under Criterion E (personal conduct) and Criterion J (criminal conduct), which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, objective or direct evidence is not required.

Then, the applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation which demonstrates that the past adverse conduct is unlikely to repeat itself and Applicant presently qualifies for a security clearance.

CONCLUSIONS

Applicant's repeated and intentional falsification of two security forms and four statements, and one interview, constitutes adverse conduct raising significant questions concerning Applicant's judgment, reliability and trustworthiness. Applicant's collection of explanations for supplying false information to the Government between 1984 and September 1996, is not credible, whether evaluated individually or together. Although Applicant's primary explanations have clearly changed to some degree between his Answer and the hearing, he vigorously testified he never intended to falsify any documents. In short, although he answered "no" to the drug questions on the two security forms in 1987 and 1995, he really did not intend to falsify the documents. Assuming he did not intend to falsify any government documents, what did he intend to do? Since there is no extenuating evidence showing a voluntary effort by him to disclose the full scope of his drug history, I find his first claim unpersuasive.

Applicant's second primary claim is that the external tension triggered by Agent A caused him to be less than forthright in his sworn statements of February, arch and April 1996. This claim is not credible because Applicant knew he was

providing false information and there is no evidence indicating he made any effort to come forward with truthful information until the polygraph examination process in September 1996.

Applicant's third claim emerges because of his change of position under subparagraph 1g. Although he denied subparagraph 1g in his Answer, Applicant testified he intentionally falsified 1g (and the information in GE #7) because he was exhausted from work and stressed by the length of the interview. As noted in Findings of Fact, the record contains clearly insufficient evidence to support an inference that either DIS Agent fabricated Applicant's drug history. Although tension was present during the interview/sworn statement process with Agent A in March and April 1996, and, some stress was present in the polygraph process in September 3, 1996 (1g), the tension and stress fall far short of supporting an ultimate finding that either Agent had anything to gain by inventing Applicant's drug history.

The mitigating factors under Criterion E have been thoroughly evaluated but are inapplicable to the facts in this case. The omitted information was clearly relevant and material to the Government's investigation into Applicant's security suitability. The seven falsifications were clearly not isolated because they began 13 years ago in 1984 and there is no evidence demonstrating a voluntary effort by Applicant to correct the false information before he was confronted by the polygraph. In addition, there is no evidence to infer the falsifications were the result of improper or inadequate advice from authorized legal personnel.

Applicant's intentional falsifications of material and relevant information under Criterion E, also establishes criminal conduct as set forth in Title 18 USC 1001. By concealing relevant and material information from official government documents and the interview, Applicant denied the Government the opportunity of making an informed decision (based on all available information) concerning his qualifications for holding a security clearance.⁽⁸⁾

Applicant's positive character evidence demonstrates honesty and reliability with outstanding employment performance ratings. He is devoted to his children. However, having weighed Applicant's favorable character evidence on the job as well as away from the job, with the unfavorable evidence of repeated falsifications of material information since 1984, Applicant's evidence does not meet his ultimate burden of persuasion under Criterion E and Criterion J.⁽⁹⁾

FORMAL FINDINGS

Formal Findings required under Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1 (Criterion E): AGAINST THE APPLICANT.

- a. Against the Applicant.
- b. Against the Applicant.
- c. Against the Applicant.
- d. Against the Applicant.
- e. Against the Applicant.
- f. Against the Applicant.
- g. Against the Applicant.

Paragraph 2 (Criterion J): AGAINST THE APPLICANT.

- a. Against the Applicant.

Factual support for the foregoing findings are set forth under FINDINGS OF FACT and CONCLUSIONS above.

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.

Paul J. Mason

Administrative Judge

1. Applicant's position he had no intent to deceive in his sworn statement (Tr. 130) is not persuasive when weighed against the contradictory positions Applicant furnished since February 1984 in subsequent questionnaires and sworn statements .
2. While Applicant denied subparagraph 1b (GE #2, 1987), and testified no intent to deceive anyone (Tr. 133), and that the inconsistencies (in GE #2) occurred because he was answering to the best of his ability on that day (Tr. 133), I find Applicant falsified GE #2 because he knew his "no" answers were not true. (Tr. 128).
3. Applicant testified he furnished a "no" answer to the questions on the form because he told the investigator he thought the question applied to the last three years. (Tr. 123). Applicant also provided some ambiguous testimony about interviews and a waiver. (Tr. 131). Neither of the foregoing explanations are credible because Applicant knew he had used marijuana at the time he filled out the NAQ in July 1995.
4. Applicant's primary complaint with Agent A who took the sworn statements of February, March and April, 1996, was her unprofessional manner and the tension she provoked by the end of the March and April sworn statements. (Tr. 37-40). Applicant was also dealing with collateral stress from an unfinished job task and not getting paid for the time he spent with Agent A. (Tr. 119). His tension and associated discomfort does not excuse his falsification of the three sworn statements.
5. Applicant was interviewed again on September 3, 1996 as a part of a polygraph examination he agreed to take in April 1996 . (Tr. 30; 51-55; GE #8, 9).
6. Applicant denied subparagraph 1g in his Answer. Yet, he testified he intentionally falsified GE #7 because exhaustion from working all day and the duration of the interview caused him to tell Agent B, "well, just put down whatever you want to," in an effort to get the interview finished. (Tr. 117). I find absolutely no support for Applicant's allegations that Agent B simply created Applicant's drug history. To accept Applicant's uncorroborated claims, there must be some direct or circumstantial evidence supporting a reasonable inference Agent B harbored some bias or animus against Applicant to cause Agent B to fabricate information, first in the interview and taking of the sworn statement and next, in Agent B's testimony at the hearing. Even though the interview resulting in GE #7 was long (Tr. 68-75, 117), I find the most reasonable interpretation is that Applicant was not truthful about his marijuana use in the earlier security forms, sworn statements and the September 3, 1996 interview (1g), as alleged in the SOR, and only disclosed the full history of his drug use when he was confronted by the polygraph process. (Tr. 62-67; 141).
7. The supervisor's comments are supported by Applicant's Exhibit A (performance evaluations) and Applicant's Exhibit B containing letters of appreciation (for example, the December 1994 letter noting Applicant's work as a team player showing good initiative), and Applicant's Exhibit C indicating Applicant is a devoted parent who does not use drugs.
8. The mitigating factors under Criterion J have been considered to determine whether any of the factors apply. Because the falsifications were repeated over a number of years and did not end until within the last year, Criterion E is not mitigated.
9. The general policy factors (whole person concept) have also been reviewed but all factors cannot be affirmatively found in Applicant's favor because of the frequency and recency of the falsifications, as well as Applicant's age throughout the period of falsifications.