

DATE: July 3, 1997

In re:

SSN:

Applicant for Security Clearance

ISCR OSD Case No. 96-0842

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR THE GOVERNMENT

Matthew E. Malone, Esq.

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF THE CASE

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, as amended by Change 3, issued a Statement of Reasons (SOR) dated December 12, 1996, to the 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 conduct proceedings and determine whether clearance should be granted, continued, denied or revoked.

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

On January 21, 1997, Applicant responded to the allegations set forth in the SOR and requested a hearing. The case was assigned to Administrative Judge Jerome Silber on March 7, 1997, and the case was transferred to the undersigned on April 16, 1997, due to workload considerations. On April 17, 1997, a hearing was scheduled for May 22, 1997. At the hearing held as scheduled, four Government exhibits and two Applicant exhibits were admitted and testimony was taken from a Special Agent of the Defense Investigative Service (DIS) and from the Applicant. A transcript of the hearing was received by this office on June 16, 1997.

FINDINGS OF FACT

After a thorough review of the evidence in the record, and upon due consideration of same, this Administrative Judge renders the following findings of fact:

Applicant is a 54 year old ----- currently employed by company A, a defense contractor. He seeks to retain a Secret security clearance.

Applicant smoked marijuana with varying frequency, at times daily, from the 1970s until 1983. During that period, he purchased marijuana at a cost to him of \$20.00 per week.

An engineer with his Master's Degree in engineering, Applicant in November 1980 was hired by company A in its -----
-- division. In January 1981, he was granted a secret security clearance for his duties there.⁽¹⁾ Following a layoff in
about December 1982, Applicant remained unemployed until June 1984 when he was rehired by company A in its -----
-- division.

Divorced since 1976, Applicant's two grown sons moved in with him in 1984. In an effort to become "a friend," Applicant shortly thereafter began to use cocaine with his sons and their friends at the rate of a couple of times per month. On his return to work in June 1984, Applicant was advised by his employer that illegal drug use was inconsistent or compatible with his job. Applicant continued to use cocaine knowing it was against company policy but he did not consider it a problem as it was not affecting his work. Required to have a clearance for his position on the ----- program, Applicant executed a Personnel Security Questionnaire (PSQ), a Department of Defense form 48, on June 20, 1984. Applicant responded negatively to questions 15.a. ["Have you ever used any narcotic, depressant, stimulant, hallucinogen (to include LSD or PCP) or Cannabis (to include marijuana or hashish) except as prescribed by a licensed physician?"] and 15.b. ["Have you ever been involved in the illegal purchase, possession, or sale of any narcotic, depressant, stimulant, hallucinogen, or Cannabis?"]. He falsely denied any drug involvement, thereby concealing his history of use and purchase of marijuana, and his abuse, purchases and sale⁽²⁾ of cocaine because he feared loss of employment and the clearance requested. Applicant was subsequently granted, on or about December 4, 1984, a Secret security clearance.

Initially, Applicant enjoyed the therapeutic effects of cocaine as it lessened the pain from exercise. In 1985, his use of cocaine increased somewhat as "it seemed like it was kind of fun." Over the 1985/86 time frame, Applicant snorted cocaine in powder form a couple times per week (Friday and Saturdays usually) on a regular basis. After using cocaine one weekend, Applicant endeavored to abstain the next only to repeat the same pattern the following week. In 1987, Applicant noticed the abuse of cocaine was having a negative effect physically in that it caused muscle tightening, heart acceleration, insomnia and sexual dysfunction. He did not like these side effects and resolved to cease his abuse. Over the course of 1987, Applicant gradually decreased his abuse of cocaine until it stopped altogether. Over the 1984 through 1987 time frame, Applicant purchased cocaine for his personal consumption at a cost of \$40.00 per week. On occasion, Applicant sold cocaine to his son's friends, no more than \$20.00 to \$40.00 worth at a time.⁽³⁾ Applicant has not used any illegal drug since 1987 and he has no intent to use any illegal drug in the future.

Due to manpower reduction, Applicant was laid off from his job at company A in September 1993. During two years of subsequent unemployment, he lived off his savings. In August 1995, he went back to work for company A in its -----
division as an ----- and shortly thereafter, his Secret security clearance was reinstated. In November 1995, the county sheriff's department sought company A's assistance in locating Applicant as the sheriff wanted to interview Applicant regarding his alleged involvement in possible criminal activity.⁽⁴⁾ The security office filed with DIS an adverse information report, dated November 17, 1995, which instigated an update investigation into Applicant's background.

In connection with this background reinvestigation, Applicant executed a Questionnaire for National Security Positions, a Standard Form 86 (SF 86), on February 9, 1996. Applicant responded negatively to question 24.b. ["Have you ever illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official; while possessing a security clearance; or while in a position directly and immediately affecting the public safety?"] on the form despite the fact that he had knowingly used marijuana and cocaine in the past while in possession of a security clearance. Applicant's denial of any intentional falsification is not credible. When initially asked on cross-examination about his false response to question 24.b., Applicant responded, "When I read that question and put the answer to it, the semicolon between courtroom official and while possessing a security clearance, I didn't really see that so much." (Transcript, p 64). He subsequently testified, "I wasn't completely certain that it was a false answer. After reading the legality of this sentence several times, I thought maybe I was in the gray area." (Transcript, p. 65). Applicant indicated that he felt he fell in the "gray area" because he did not do the drugs while he was doing the work. (Transcript, p. 65). His initial response suggests that he did not read the question accurately which is not consistent with either his education level or his subsequent testimony where he admitted reading the sentence several times. A well educated professional

with a documented record of having concealed his past drug use from the Government, the more credible explanation is that Applicant deliberately responded no in order to maintain his employment and security clearance.

On August 12, 1996, Applicant was interviewed by a Special Agent of the Defense Investigative Service (Special Agent B) concerning his involvement with illegal drugs. At the time of the interview, the Special Agent had reviewed the contents of the adverse information report filed by company A which indicated only that Applicant had been interviewed by a sheriff's deputy. During the interview, Applicant intentionally denied any involvement, to include use of, or trafficking in, illegal drugs. Asked about the sheriff's office interview, Applicant responded that the interview strictly concerned a prior murder investigation of which he had no knowledge or involvement.

Following the August 12, 1996 subject interview, Special Agent B went to the county sheriff's office and obtained a copy of the department's investigative report in which Applicant is alleged to have been the source of a large amount of cocaine. On August 15, 1996, Special Agent B reinterviewed Applicant, advising him of his rights under the Privacy Act and informing him that the Government had reason to believe he had not been honest during his prior interview concerning his involvement with illegal drugs. She stated she was present to offer him an opportunity to rectify the record. The Agent then proceeded to discuss specific drugs with the Applicant. Applicant admitted the use of cocaine, indicating that it was limited to the 1984/87 time frame and used in order to be accepted by his sons. He denied any major trafficking, but admitted selling leftover small amounts to his son's friends. Applicant initially denied any use of marijuana. After some discussion concerning the circumstances of his divorce, Applicant subsequently admitted to the use of marijuana from the 1970s until 1983. At the conclusion of the interview, Special Agent B obtained from Applicant a statement attesting to his involvement with marijuana and cocaine and his failure to be forthright about his drug use. This written statement was signed and the accuracy sworn to in the presence of Special Agent B and a witness, another DIS Special Agent.

A productive and conscientious worker for company A, Applicant's contributions have merited formal recognition since at least 1989 in the form of certificates of achievement, letters of commendation and outstanding performance awards.

POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the seriousness, recency, frequency and motivation for an applicant's conduct; the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the circumstances or consequences involved; the age of the applicant; the absence or presence of rehabilitation, the potential for coercion or duress, and the probability that the conduct will or will not recur in the future. *See* Directive 5220.6, Section F.3. and Enclosure 2. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

PERSONAL CONDUCT

Conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

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

(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 proving 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 personnel security or trustworthiness determination.

(5) a pattern of dishonesty or rule violations

Conditions that could mitigate security concerns include:

None.

CRIMINAL CONDUCT

A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

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

(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 include:

None.

* * *

Under the provisions of Executive Order 10865 and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets its burden and establishes conduct cognizable as a security concern under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of criterion conduct, 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 the Court's rationale, doubts are to be resolved against the Applicant.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the

credibility and demeanor of those who testified, this Judge concludes that the Government has established its case with regard to criteria E and J.

The evidence establishes that Applicant abused marijuana, at times daily, from the 1970s to 1983, and that during part of that time, from January 1981 to December 1982, he held a Secret security clearance. In 1984, Applicant began to use cocaine with his sons, initially a couple of times a month. He enjoyed its effects and increased his abuse to twice per week about every other week over the 1985/86 period. When the physical effects no longer proved pleasurable, he gradually tapered his use in 1987 until it ceased all together. In addition to the abuse of powdered cocaine, he purchased the drug for his own consumption and resold small quantities to friends of his sons. Due to the passage of time without recurrence, his illicit drug abuse is of current security significance only to the extent that he was not forthright about his drug abuse history on repeat occasions. Applicant falsely denied any drug use, purchase and sale on his June 20, 1984 PSQ. He was granted a Secret security clearance on or about December 4, 1984. In connection with his 1995/96 background reinvestigation, Applicant falsely denied on his SF 86 any use of drugs while he held a security clearance when he in fact had used cocaine. During a DIS subject interview of August 12, 1996, Applicant again denied any involvement in illegal drugs. Moreover, three days later, on August 15, 1996, Applicant initially denied any abuse of marijuana, notwithstanding he had been advised of the Privacy Act and Title 18, Section 1001 of the United States Code and confronted with the fact that the Government had information which provided reason to believe he had not been honest about his drug abuse history.

In assessing the current security significance of these deliberate misrepresentations, this Administrative Judge must consider the Adjudicative Guidelines pertaining to personal conduct. Disqualifying condition (DC) 2. applies by virtue of his failure to be candid on his security clearance applications. Applicant's false denials of any drug use during his August 12, 1996 DIS interview and his continued disavowal of marijuana abuse until later in his second interview fall within DC 3.⁽⁵⁾ Furthermore, Applicant's efforts at active concealment are sufficiently repeated to consider a pattern of dishonesty as set forth in DC 5.

Of the seven listed mitigating conditions (MC) under the personal conduct guidelines, the first four have potential application in cases of intentional misrepresentation. None of these conditions apply in Applicant's favor. Whereas Applicant's marijuana abuse had continued to 1983 and he had commenced cocaine use, his drug abuse was clearly relevant and material information at the time he executed his PSQ on June 20, 1984. With respect to his failure to reveal his cocaine abuse from 1984 through 1987 on his February 9, 1996 SF 86, or his marijuana and cocaine involvement during his August 12, 1996 interview, the absence of any recurrence of illegal drug involvement since 1987 may serve in mitigation of that drug involvement, but it does not render immaterial for criterion E purposes his abuse, purchases and sales of controlled dangerous substances, as the information not revealed had the potential to influence an agency's adjudicative or investigative decisions. In this case, the DIS Special Agent conducted a second interview of the Applicant based on her review of a sheriff's office report which alleged Applicant had engaged in drug trafficking/dealing back in 1987. Applicant's past involvement with illegal drugs clearly is pertinent to a determination of his judgment, trustworthiness or reliability. The repeated nature of the falsifications precludes favorable consideration of MC 2. Nor is there evidence of a good faith effort to correct the falsification before being confronted which is required for MC 3. Applicant made no independent attempt to correct the record. When provided the opportunity to tell the truth to the DIS Special Agent, Applicant continued to deny any abuse of drugs. While he eventually admitted to the abuse of cocaine and marijuana on August 15, 1996, his belated candor came after he had been apprised by the Agent that she had information which gave her reason to believe he had not been honest. Although not alleged by the Government, Applicant elected to falsely deny any abuse of marijuana when first questioned. As he testified to at the hearing, "it was about a two hour session, and by the time the session was over, then [he] admitted to [his] wrongdoing." (Transcript, p. 67). His subsequent disclosures cannot reasonably be viewed as prompt. Finally, with respect to MC 4, there is no evidence that Applicant relied in good faith to his detriment on the advice of an authorized person. To the contrary, Applicant testified that he did not seek advice before he completed his SF 86. (Transcript, pp. 65-66). Applicant's conduct is viewed as especially serious because of the recency of the misrepresentations made on his SF 86 and during his August DIS interviews. His acknowledgment of his wrongdoing and his contributions to the ----- program are not enough to overcome his demonstrated willingness to act primarily in his self-interest. Subparagraphs 1.a.(1), 1.a.(2), 1.a.(3), 1.a.(4), 1.a.(5), 1.b.(1) and 1.c. are resolved against him.

Whereas Applicant's criterion E conduct involved deliberate misrepresentations on documents presented to the

Government and included in person misrepresentations to a representative of the Government, his conduct constitutes a felony violation of federal law pursuant to Title 18, Section 1001 of the United States Code.⁽⁶⁾ DCs 1. (any criminal conduct) and 2. (a single serious crime or multiple lesser offenses) of the criminal conduct guidelines must also be considered in evaluating Applicant's current security worthiness.

Applicant satisfies none of the pertinent mitigating conditions. Applicant's falsification of his 1984 PSQ was not recent, but his subsequent knowing and willful omissions in 1996 preclude favorable application of MC 1. His conduct was neither isolated in nature nor coerced. By all accounts, his decision to lie to protect his job was voluntary. While Applicant eventually provided the details of his marijuana and cocaine involvement, it took a second two-hour long DIS interview over the course of which Applicant came to feel ashamed at his lack of honesty. Whether or not an applicant has reformed and rehabilitated himself depends not only on recognition and acknowledgment of the criminality of his conduct, but also on whether he demonstrates by conduct over a measurable period of time that he is willing and able to adhere to applicable laws and regulations. Applicant was granted security clearance at least twice after providing the Government false information. He made no effort between 1984 and 1992 or from 1985 to August 1996 (during those periods when he was gainfully employed with a security clearance based on false information) to correct the record. His effort at rectification during the August 15, 1996 interview is assessed positively, but it is too soon to tell whether Applicant is successfully rehabilitated. Subparagraph 2.a. is found against him.

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 E: AGAINST THE APPLICANT

Subparagraph 1.a.(1): Against the Applicant

Subparagraph 1.a.(2): Against the Applicant

Subparagraph 1.a.(3): Against the Applicant

Subparagraph 1.a.(4): Against the Applicant

Subparagraph 1.a.(5): Against the Applicant

Subparagraph 1.b.(1): Against the Applicant

Subparagraph 1.c.: Against the Applicant

Paragraph 2. Criterion J: AGAINST THE APPLICANT

Subparagraph 2.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 grant or continue a security clearance for Applicant.

Elizabeth M. Matchinski

Administrative Judge

1. Applicant testified at his hearing that he was required to complete a security clearance application and that while he could not recall the specific questions on the form, he was sure it asked about drug use and he responded negatively. Applicant may well have falsified his first application, but it cannot be determined with sufficient degree of certainty to find as a fact that he concealed his drug involvement. There is no evidence as to the specific nature of the inquiry.

2. The record is not specific as to the dates on which Applicant sold cocaine. His admission to subparagraph 1.a.(5) is binding on him.

3. In October 1985, a prison inmate implicated Applicant in major drug sales back in 1987. (Govt. Exhibit 4). This inmate reported to the local sheriff's office that Applicant in 1987 fronted him sixteen ounces of cocaine with the promise of money after the sale, twelve ounces of which this inmate then sold to another party for \$8,000.00 in a drug deal that went sour when the individual pulled a gun on him. The Applicant acknowledges the inmate was a former acquaintance of one of his sons, but denies having ever been a drug dealer:

"I saw this person once or twice. And he would hang out with my son and they would play with cocaine together and stuff. And I told my son that it looked like this was a bad person to befriend because he was probably on his way to jail, and he could end up there himself. Sometimes my son listened to me, and eventually he did leave this person behind. I just mention these observations because the real bad allegations against me contained in this document are false. I never was a drug dealer. The only use that I had was for a few years that I occasionally used a little bit. And sometimes--It says here that I sold cocaine. Well, only to the extent of using small quantities of it. Nothing in this document is true. . .

(Transcript, pp. 56-57). During the course of the sheriff department's investigation into the alleged offenses committed by the inmate back in 1987, Applicant was interviewed on November 3, 1995, by a deputy sheriff. The deputy sheriff's record of the interview indicates Applicant admitted to selling cocaine to his own son and to being aware that his son was in turn selling cocaine to the acquaintance who later implicated Applicant in drug dealing. Neither Applicant nor his son recalled any large drug deal involving this inmate. The evidence is not sufficient to establish Applicant was engaged in drug trafficking other than the sale of cocaine on occasion in small quantities to his son and his son's friends.

4. *See* footnote 3.

5. Although the Government did not allege any falsification during the August 15, 1996 subject interview, the DIS Special Agent testified credibly that Applicant initially denied any use of marijuana. This Judge is not free to ignore the active concealment of material facts concerning his illegal drug abuse history. Pursuant to Section F.3. of the Directive, "[e]ach clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information. . . "

6. 18 U.S.C. §1001 provides in pertinent part: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up a . . .material fact. . .shall be fined not more than \$10,000 or imprisoned not more than five years, or both."