

DATE: July 8, 1997

In Re:

SSN: -----

Applicant for security clearance

ISCR OSD Case No. 96-0897

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

Appearances

FOR THE GOVERNMENT

Michael H. Leonard, Esq.

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF CASE

On January 30, 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, 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 March 10, 1997.

The case was received by the undersigned on March 31, 1997. A notice of hearing was issued on April 16, 1997, and the case was heard on May 7, 1997. The Government and Applicant submitted documentary evidence. The Government called two witnesses. Testimony was taken from Applicant. The transcript was received on May 21, 1997.

RULINGS ON PROCEDURE

Prior to the commencement of the hearing, Department Counsel filed a Motion in Limine to remove 3 documents (a portion of Applicant's character evidence) attached to Applicant's Answer because: (1) the documents are hearsay, not within any exception to the hearsay rule; and (2) the documents are normally offered at the hearing during the Applicant's case-in-chief, rather than attached to the Answer. The motion was granted. (TR 5) On May 23, 1997, the Government notified the undersigned that Applicant's post-hearing documentary submissions had been received on May 21, 1997. The Government did not object to any of the documents in the group of documents, which shall be marked and admitted in evidence as Applicant's Exhibit D.

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 illegal drug involvement (Criterion H), personal conduct (Criterion E), and criminal conduct (Criterion J). Even though Applicant admitted he was charged for possession of marijuana plants in July 1981, there is enough evidence to find that Applicant was found guilty to charge and the marijuana plants belonged to Applicant.⁽¹⁾

While he admitted subparagraph 1h, he claimed the test result was inaccurate. In his sworn statement (GE #5) dated August 6, 1996, Applicant stated he did not know why the test would return with a positive result. Although two letters were submitted on appeal in support of the inaccurate drug test, the letters do not explain why the test result was positive. Considering all the evidence under subparagraph 1h, I find Applicant tested positive for cocaine use from a sample of his urine drawn on January 17, 1995, and was terminated from his employment on January 25, 1995, as a result of the positive test result. (GE #9)⁽²⁾

Applicant used cocaine from approximately 1975 to about April 1995, and he purchased the drug with varying frequency in the same time period. (GE #6, #7) Applicant used marijuana from about 1975 to at least 1990 and purchased the drug until the middle 80's. (GE #6, #7) Applicant used THC on one occasion in the early 70's. (GE #6) He used cocaine after being awarded a clearance on January 8, 1993.⁽³⁾

On November 26, 1984 (2a), Applicant falsified a Personnel Security Questionnaire (PSQ) (DD Form 48) when he answered "no" to questions 15a regarding use of drugs and question 15b regarding purchase of drugs. On May 22, 1985 (2b), Applicant falsified a sworn statement when he denied he had ever purchased or used drugs. On June 1, 1988 (2c), Applicant falsified a PSQ when he replied he had never used or purchased drugs. On December 19, 1991 (2d), Applicant falsified another PSQ when he denied using or purchasing drugs.

On August 6, 1996 (2e), Applicant falsified a sworn statement when he stated he had never used or purchased drugs. On October 7, 1996 (2f), Applicant provided false information in an interview when he stated he had never used or purchased drugs. (TR 60) However, there is no evidentiary support that on October 7, 1996 (2g), Applicant provided false information in an interview when he denied using illegal drugs after 1980. On October 7, 1996 (2h), Applicant falsified a sworn statement by understating his knowing and unknowing use of drugs, and by denying any drug purchases. (Tr 61-66; GE #6) Applicant also provided false information in an interview on October 8, 1996 (2i), by denying he used cocaine more than once and by denying he used cocaine more than once since January 1995. (TR 63; 69)⁽⁴⁾

Applicant's character exhibits have been closely evaluated. However, Exhibit D does not show that the positive drug test resulted from the dental medication or the herbal treatment or the dermatological medication. Furthermore, Applicant's medical condition since 1988, and the several proclamations against drug use by Applicant to his doctors in Exhibit D, are insufficient evidence to confidently find Applicant has not used drugs, particularly because of Applicant's drug history set forth in GE #8.

Applicant's character statements include the chief of the department, who indicated Applicant has performed well in the last 13 months. He has worked many overtime hours and has always completed his assignments in a competent manner. Dr. B has treated Applicant for the past 4 years and observed Applicant is not presently on any medication. Because they saw no signs of drug use, neither Dr. B nor Dr. C believed Applicant was a drug user.

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:

Drug Involvement (Criterion H)

Factors Against Clearance:

1. any drug abuse.
2. illegal drug possession,...purchase....

Factors for Clearance:

None.

Personal Conduct (Criterion E)

Factors Against Clearance:

1. the deliberate omission, concealment, falsification of relevant and material facts from any personnel security questionnaire,...used to...determine security clearance eligibility....
2. 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.

Criminal Conduct (Criterion J)

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 H (drug involvement), 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

The Government has established its case under Criterion H. Applicant has purchased and used cocaine at varying frequencies from approximately 1975 until April 1995. Applicant has used marijuana at varying frequencies, at times twice monthly, from approximately 1975 to 1990. He purchased marijuana until the late 80's. In addition to being found guilty for possessing marijuana plants in July 1981, Applicant used some THC in the 70's. Applicant used cocaine after being awarded a security clearance in January 1993. Finally, Applicant was terminated from his former employer in January 1995 for testing positive for cocaine.

One or more of the mitigating factors under Criterion H may apply where the drug involvement was neither recent nor infrequent. Additionally, an applicant's demonstrated intent not to use drugs in the future or satisfactory completion of a treatment program, may mitigate his past drug abuse. The above four factors have been considered but none of the factors apply. Applicant's drug use did not end until April 1995 and his drug use was clearly periodic. The pattern of falsifications undermines Applicant's credibility and the persuasiveness of his resolve to forego drug use in the future.

Applicant's repeated and intentional falsifications of the full scope of his drug history on eight different occasions between November 1984 and October 1986, establishes adverse conduct under Criterion E, and raises significant doubt about Applicant's judgment, reliability and trustworthiness. The information sought by the Government on the security forms, the interviews and the sworn statements, was relevant and material to the security investigation of Applicant's qualifications for a security clearance. Applicant's explanations for intentionally furnishing false information regarding his drug history, simply are not credible. Applicant's frustration claim would have some probative value if there were some evidence of motive by the Agent to pressure or unduly influence Applicant into fabricating his drug own history. Having carefully examined the record, I am unable to identify a convincing reason indicating what the Agent gained by having Applicant invent his drug history in the interviews and the sworn statements.

Because of the pattern of falsifications and the absence of any evidence showing a good-faith effort to forthrightly come forward with the true drug history, Applicant's intentional falsifications are not mitigated.

Applicant blames the reopened security investigation in August 1996 on the positive drug test in January 1995. The fact that Applicant's positive test result in January 1995 launched the security investigation is one of many precipitating events that can trigger an investigation. Security investigations begin when adverse information indicates an applicant's security suitability should be re-examined to determine whether it is clearly consistent with the national interest to grant an applicant access to classified information. Applicant's positive test result shows that Applicant used cocaine before the test was administered. Applicant's dental medication claim, his dermatological medication claim, and his other medication claim, that the medications created a positive response for cocaine, has not been established. His claim that because of his medical condition, it would be senseless for him to use drugs, has not been established. Finally, there is no evidence in the record to support his claim that the test was defective or administered in a defective or improper manner.

Applicant's intentional falsifications of his security forms, interviews and sworn statements, also establishes criminal conduct as defined by Title 18, Section 1001 of the United States Code Annotated. By concealing relevant and material information from the government security forms, sworn statements, and interviews, Applicant deprived the Government the opportunity to make an informed decision (based on all available information) about his qualifications for holding a security clearance. [\(S\)](#)

Applicant's letter from his supervisor about his job performance and the letters from Dr. B memorializing Applicant's opposition to drugs, weigh in Applicant's favor. However, Applicant's drug abuse between 1975 and April 1995, and the repeated falsifications of the his drug use from 1984 to October 8, 1996, call for the denial of Applicant's security clearance application.

FORMAL FINDINGS

After a review of the specific policy factors and the general policy factors (whole person concept) identified in POLICIES, Formal Findings required by Paragraph 25 of Enclosure 3 are:

Paragraph 1 (Drug Involvement): 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.
- h. Against the Applicant.

Paragraph 2 (Personal Conduct): 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. For the Applicant.
- h. Against the Applicant.
- i. Against the Applicant.

Paragraph 3 (Criminal Conduct): AGAINST THE APPLICANT.

- a. Against the Applicant.

Factual reasons for the foregoing findings are set forth in 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 admitted in GE #4 he paid the fine to get the matter behind him. Applicant told the Agent the plants belonged to him. (TR 73)
2. In GE #5, Applicant stated that pain medication from the dentist in early January 1995, or herbs he was taking for his health, probably were the reason why he tested positive. Applicant's Exhibit D (consisting of letters from Applicant's dentist and Dr. B, sent to the employee relations supervisor to overturn Applicant's positive test result in January 1995; and, medical records identifying treatment Applicant received for a car accident in May 1993 and elevator accident in July 1993, and for a medical condition identified in 1988), contains a letter from the dentist (Dr. C) dated January 31, 1995, addressed to Applicant's former employer relations supervisor. In the letter, the dentist indicated he had been treating Applicant since 1988, and, on January 12, 1995, Applicant was treated for dental restoration but the dentist could not say whether the materials contained anything which would affect the drug screening. The letter from Dr. B (Applicant's primary doctor) to the employer relations supervisor on January 26, 1995, and one day after Applicant was terminated, reflected that Dr. B was Applicant's treating doctor for a back and neck injury, and, identified the medications. Dr. B also advised that Applicant told Dr. B about the positive test result. Dr. B had never seen any clinical sign of drug use by Applicant and, Applicant always expressed his feelings against drugs. While Applicant stated in GE #5 that Dr. B told him either the dental medication or the herbs could have caused the false positive test result, Dr. B indicated in his letter of January 26, 1995 that he was uncertain as to whether any of Applicant's medications would have any impact on the test result. In addition, there is no indication Applicant pursued Dr. B's recommendation to see a toxicologist.
3. These findings are based on Applicant's sworn statements dated October 7 and October 8, 1997. Applicant swore to the truthfulness of each statement and then signed each statement. (TR 65-66;74) There is insufficient evidence to infer or suggest the Agent coerced or pressured Applicant to generate and sign GE #6 or #7. Even though the interview and statement process for GE #6 and #7 was long (TR 66;74), the most reasonable explanation was that Applicant had not been truthful in previous security forms, sworn statements, and interviews, and only disclosed additional portions of his drug history when confronted with the polygraph examination.
4. Applicant claims GE #5 is actually a true account of his drug use and that GE #6 and #7 (and implicitly, the interview on October 7, 1996 and the interview on October 8, 1996) were the product of frustration (TR 116) caused by the Agent's undue influence and taunting (TR 129) Applicant to provide some information about his drug use. In short, the sworn statements (GE #6 and #7) and the interviews, according to Applicant, are nothing more than complete fabrications. (TR 135) Having carefully evaluated the Agent's testimony (TR 55-92) with Applicant's allegations of serious misconduct by the Agent, I am unable to identify what the Agent could possibly gain by pressuring Applicant to create his drug history and then lying about his drug use at the hearing.
5. The mitigating factors under Criterion J have been considered but are inapplicable to the facts of this case because of the repeated nature of the falsifications as well as the fact the falsifications did not end until October 1996.