DATE: April 21, 1997

In Re:

SSN: ----------

Applicant for security clearance

ISCR Case No. 97-0015

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

Appearances

FOR THE GOVERNMENT

Teresa A. Kolb, Esq.

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FOR THE APPLICANT

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STATEMENT OF CASE

On January 14, 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 February 7, 1997.

The case was received by the undersigned on March 5, 1997. A notice of hearing was issued on March 11, 1997, and the case was heard on March 26, 1997. The Government and Applicant presented documentary evidence. Testimony was taken from Applicant and one witness. The transcript was received on April 1, 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 drug involvement (Criterion H), criminal conduct (Criterion J), and personal conduct (Criterion E). Applicant admitted the subparagraphs 1a, 1b, and 1c, and essentially denied 1d because the charges were ultimately dismissed. He admitted the criminal conduct alleged in subparagraph 2a but denied he intentionally falsified any documents. The following Findings of Fact shall include Applicant's admissions.

Applicant is 38 years old and employed in the ---------- department of a defense contractor. He seeks a secret level clearance.

As reflected in GE #2, and corroborated by Applicant at the hearing (Tr. 51), he used marijuana approximately once a month from 1975 to July 1996. He only bought the drug about five or six times the entire time because the drug was primarily provided to him by friends. (GE #2). In 1976 or 1977, Applicant pled guilty to possession of marijuana. Applicant believed his involvement in the delivery of marijuana charge in January 1994 (Tr. 27-32) was illegal, but he could not explain why. (Applicant's Exhibit A; Tr. 32).

Applicant recounted his actions leading to his plea bargain for two counts of unlawful transactions with a minor (2a of the SOR). He was enticed into the sexual conduct by an underage female. (GE #3, presentence report). The indictment was originally two charges of rape and he pled guilty to one charge of rape. The charge was then amended to two counts of unlawful transaction with a minor. On September 12, 1995, he was sentenced to two years in jail. The sentence was suspended, and Applicant was placed on probation for 5 years on condition he serve 90 days in jail. He was ordered to attend a sex abuse program and pay $65 court costs along with $10 monthly administration fee.

There are five occasions where Applicant omitted information from official government documents.[(1)] All of the omissions occurred on the SF 86 (questionnaire) executed by Applicant on January 15, 1996. In response to question 21 (2a of the SOR), Applicant answered "yes" and listed his sexual misconduct charge in September 1994, but did not list the delivery of marijuana charge from 1986.[(2)] I find Applicant did not intentionally omit the 1986 charge of delivery of marijuana because (1) the charge is more than nine years old and Applicant forgot about the charge, and, (2) the record is silent as to whether the 1986 delivery charge was a misdemeanor or a felony.[(3)]

Applicant's omissions of question 24 (2b of the SOR) and question 25 (2c of the SOR) were also unintentional because his demonstrated comprehension and memory deficiencies. He was unable to understand the definition of an alcohol-related or a drug-related offense. His comprehension difficulties also frustrated his efforts in responding truthfully and completely to question 26, requiring information regarding arrests or charges or convictions not listed under questions 21, 22, 23, 24 and 25.

The evidence surrounding the "no" answer to question 27 (drug use) of the security form (2d of the SOR), suggests Applicant knew his "no" answer was wrong, but intentionally answered the question incorrectly because he did not feel comfortable about answering "yes" to the question. (GE #2). However, based on Applicant's inability to understand the purpose of the security form (Tr. 47), coupled again with his comprehension and memory deficiencies (Tr. 53-54), I am unable to find he intentionally supplied false information to question 27 of the security form.

The evidence surrounding the "no" answer to question 29 (drug purchase) of the security form (2d of the SOR), warrants a finding that Applicant did not intentionally falsify the answer to the question. The finding is based on Applicant's inability to understand the purpose of the security form (Tr. 47) and his overall comprehension and memory problems. (Tr. 53-54).

Applicant's marijuana use never caused him financial problems or family problems. In addition, he never had drug counseling. (GE #2). Applicant stopped marijuana in August 1996 because he did not want his young daughter to see him using drugs. (Tr. 57).

Applicant's attorney sent a letter to the Office of the Governor requesting no action be taken on the fugitive warrant for extradition of Applicant regarding the marijuana offense in 1986.[(4)]

In March 1986, Applicant graduated from a high school special education program. Applicant enjoyed a good attendance record while in the program. (Applicant's Exhibit B). A psychological evaluation was conducted on Applicant in March 1986. (Applicant's Exhibit C). Applicant was found to have literacy problems. A psychological evaluation was conducted on Applicant in November 1994 and found Applicant to have borderline intellectual functioning.[(5)] Applicant's high school scholastic transcript reflects average grades which were earned by displaying a docile attitude and performing menial tasks for the football coach, who also was one of Applicant's special education teachers. (Tr. 24).

The ---------- manager believes Applicant demonstrates a satisfactory job performance and also shows outstanding [(6)]

cooperation and initiative.

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 H (drug involvement)

Factors Against Clearance:

1. any drug use.

2. illegal drug...purchase....

3. failure to successfully complete a drug treatment program prescribed by a credentialed medical professional.

Factors for Clearance:

None.

Criterion J (criminal conduct)

Factors Against Clearance:

2. a single serious crime....

Factors for Clearance:

None.

Criterion E (personal conduct)

Factors Against Clearance:

2. the deliberate omission...falsification of relevant and material facts from any personnel security questionnaire...to...security clearance eligibility or trustworthiness....

Factors for Clearance:

2. the falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.

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 J (criminal conduct), and Criterion E (personal 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, with respect to the sufficiency of proof of a rational connection, objective or direct evidence is not required to establish a preliminary showing it is not clearly consistent with the national interest to grant or continue as security clearance for Applicant.

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

A case of drug involvement has been established against Applicant under Criterion H. Applicant used the drug once or twice a month from 1975 to July 1996, and purchased the drug about five or six times. He pled guilty to possession of marijuana in 1976 or 1977. Although he could not explain why his involvement in the marijuana delivery charge was illegal, I believe there is sufficient testimony by Applicant demonstrating his knowing participation. Other than his statement about not wanting his daughter seeing him using marijuana, Applicant has presented little evidence supporting the nature and depth of his commitment to remain drug free in the future. In addition, the mere passage of approximately seven months, especially without evidence of some kind of drug treatment or therapy, is insufficient to effectively mitigate Applicant's 19 year history of marijuana abuse.

Applicant's sexual misconduct was clearly a very serious crime because it involved the sexual exploitation of an underage female. Applicant's sentence reflects he will remain on probation until at least September 1999. The absence of any criminal infractions since his sentencing in September 1995 must be weighed and balanced against the fact that Applicant must comply with the terms of probation or face probable imposition of the original sentence. Even though the criminal conduct occurred over 2 years ago and was isolated in nature, an insufficient amount of time has passed to confidently conclude there will be no recurrence in the future.

The five falsifications made by Applicant on his security form in January 1996 are found to be unintentional for several reasons.[(7)] First, the presentence report of GE #3 refers to Applicant's impaired intellectual functioning. Second, Applicant's borderline intellectual functioning is documented by a complete psychological evaluation conducted in November 1994. (Applicant's Exhibit C, D). Third, Applicant did not fully understand and could not fully explain the illegal nature of his involvement in the marijuana case in 1986 or his sexual misconduct in 1995.[(8)] Fourth, Applicant did not fully understand the significance of the security form or his signature on the form. In short, without any evidence demonstrating an understanding of his adverse conduct, I am unable to make ultimate findings that Applicant intentionally falsified his security form in January 1996.[(9)]

Applicant's evidence in rehabilitation has been thoroughly considered. His satisfactory job performance, trustworthiness, and good attendance, together with his efforts to raise his child in a drug free environment, constitute positive character evidence. But, the positive employment and family evidence is insufficient to outweigh the 19 years of marijuana abuse and the serious sexual misconduct which Applicant will be on probation for until September 1999.

FORMAL FINDINGS

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

Paragraph 1 (drug involvement): AGAINST THE APPLICANT.

a. Against the Applicant.

b. Against the Applicant.

c. Against the Applicant.

d. Against the Applicant.

Paragraph 2 (criminal conduct): AGAINST THE APPLICANT.

a. Against the Applicant.

b. For the Applicant.

Paragraph 3 (personal conduct): FOR THE APPLICANT.

a. For the Applicant.

b. For the Applicant.

c. For the Applicant.

d. For the Applicant.

e. For the Applicant.

Factual support and 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. After a careful assessment of Applicant's demeanor and deportment during his testimony at the hearing, I find Applicant's impairments in comprehension and memory hampered his ability to provide full and complete answers to the five questions identified in paragraph 3 of the SOR. This credibility finding is based on Applicant's inability to explain his involvement in marijuana delivery charge in 1984 (Tr. 32); his inability to understand the illegality of his sexual misconduct in 1995 (Tr. 37-39); and, his inability to understand the significance of the January 1996 security form. (Tr. 47). This credibility finding is supported by the presentence evaluation report in GE #3, Applicant's Exhibit C describing a learning disability, and, Applicant's Exhibit D referring to borderline intellectual functioning,

2. Applicant had considerable trouble furnishing information on GE #1, as he could not read and had trouble understanding some of the questions on the form. (Tr. 41-51). He received assistance from a security guard at work, his mother, and a secretary at work. The secretary asked him questions appearing on the form and typed his responses on the form.

3. A misdemeanor charge would mean no falsification of question 21 (2a of the SOR).

4. The charge was ultimately dismissed as set forth in the SOR.

5. See also, GE #3 (presentence evaluation report).

6. Applicant has been employed by his present employer since July 1985. (Tr. 60).

7. Mitigating factor #2, although listed in the policy section above, does not apply to the facts of this case because the factor assumes a knowing falsification in the first instance. Mitigating factor #4 does not apply as there is no evidence Applicant was improperly influenced by anyone. The other mitigating factors are inapplicable as well because of a lack of evidence demonstrating a knowing falsification.

8. However, the court docket in GE #3 reflects Applicant had a full and fair opportunity to challenge the criminal indictment and decided to enter a plea of guilty rather than proceed with trial. Under the doctrine of collateral estoppel, his guilty plea constitutes an admission to all elements of the crime to which he pled guilty. The guilty plea must be given preclusive effect and may not be modified or disregarded in a subsequent administrative proceeding involving the same material issues, even though there is some evidence suggesting an element of the crime may not have been present when the guilty plea was entered.

9. The ultimate finding in Applicant's favor under paragraph 3 also requires an ultimate finding in Applicant's favor under subparagraph 2b as the requisite mental element of 18 USC 1001 has not been established.