

November 13, 1997

In Re:

SSN:

Applicant for Security Clearance

ISCR Case No. 97-0092

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On January 28, 1997, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued the attached 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 the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on February 19, 1997, and requested to have his case determined on a written record in lieu of a hearing. Department Counsel submitted the Government's File of Relevant Material (FORM) to the Applicant on April 18, 1997. The Applicant was instructed to submit information in rebuttal, extenuation or mitigation within 30 days of receipt. The Applicant received the Government's written case on April 24, 1997, and submitted an additional statement dated May 14, 1997 (Applicant's Exhibit "A"). The case was received by the undersigned for resolution on May 28, 1997.

FINDINGS OF FACT

The Applicant is 37 and married. He is employed by a defense contractor as an electronic technician, and he seeks to retain a Secret-level DoD security clearance previously granted in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a continued security clearance, based upon the allegations set forth in the attached Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and criterion in the SOR. They are based on the Applicant's Answer to the SOR and the exhibits.

Paragraph 1 (Criterion H - Drug involvement). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he abuses illegal drugs.

The Applicant first began using marijuana in the late 1970s while in the service. While in the service he used marijuana twice a month from 1977 until 1981. From 1981 until 1988, the Applicant used marijuana on a monthly basis.

The evidence is mixed as to when the Applicant stopped using marijuana. In a sworn statement dated August 17, 1995, the Applicant stated, "In 1988 I quit using marijuana and I have no further intentions of ever using marijuana again." (Government Exhibit 6 at 4.) On January 23, 1996, the Applicant filled out a "Questionnaire for National Security Positions." In that Questionnaire the Applicant admitted using marijuana within the past seven years, however, he did not recall the last date of use. (Question 24.a., Government Exhibit 4 at 8.) In a subsequent sworn statement dated July 23, 1996, he stated, "I use marijuana at parties perhaps twice a year but this is not a major expense as I have no medical or psychiatric problems associated with the use of marijuana. I have never used other drugs at any time. I may use marijuana in the future but am beginning to mature and realize it may not be good for me and may be an unnecessary expense for me." (Government Exhibit 5 at 3.) The Applicant stated in his Answer to the SOR, dated April 19, 1997, "my involvement with drugs was, for the most part, not recent and was documented and admitted to at the time I was granted a clearance. Any use of marijuana subsequent to that would have been an isolated and infrequent event. As of this writing (sic) I have no plans or intentions of continued drug use." (Government Exhibit 3 at 1.) Finally, in Applicant's Exhibit "A," he stated, "My past drug use is just that, a thing of the past. There is no place in my life now for drugs, nor will there be in the future as I am now in the responsible position of a husband and father at home, and a supervisor working to cultivate a professional career at work." Based on the totality of the evidence, I find that the Applicant used marijuana on a twice yearly basis from approximately 1988 until approximately 1995-1996.

Paragraph 2 (Criterion J - Criminal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in criminal acts.

The Applicant admits that he did not file his 1994 Federal tax return in a timely manner. The Applicant submits, "For the record; my return for the tax year of 1994 is filed, and for that year I owed no tax. I am currently waiting for a refund of more than \$2,000.00." (Applicant's Exhibit "A".) The Applicant did not submit a copy of the completed return.

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 and Section F.3. of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent criterion. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

Criterion H (Drug involvement)

Conditions that could raise a security concern:

- (1) any drug abuse;

Conditions that could mitigate security concerns:

- (1) the drug involvement was not recent;
- (2) the drug involvement was an isolated or infrequent event;
- (3) a demonstrated intent not to abuse any drugs in the future.

Criterion J (Criminal conduct)

Conditions that could raise a security concern:

(1) any criminal conduct, regardless of whether the person was formally charged;

Conditions that could mitigate security concerns:

(2) the crime was an isolated incident;

(5) there is clear evidence of successful rehabilitation.

In addition, as set forth in Enclosure 2 of the Directive at page 2-1, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors (General Factors):

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence."

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in acts of drug abuse and failure to file income tax returns that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue 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. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a *prima facie* case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or

mitigation which is sufficient to overcome or outweigh the Government's *prima facie* case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by *prima facie* evidence that the Applicant has used marijuana from 1977 until approximately 1995-1996 (Criterion H); and that he has failed to file his Federal income tax return for 1994, in violation of a Federal criminal statute (Criterion J).

The Applicant, on the other hand, has successfully mitigated the Government's case. The evidence is clear that the Applicant's marijuana use was very infrequent in nature. Most of it occurred while he was in the service. In the past several years it has decreased to one to two times yearly, ending approximately a year before the record closed in this case. Under the particular facts of this case, I find that the drug use was not recent and the Applicant has shown a demonstrated intent not to abuse any drugs in the future. Paragraph 1 and its subparagraphs will be found for the Applicant.

The Applicant is alleged to have failed to file one year's Federal income tax return. His un rebutted statement is that the return has now been filed. This incident of criminal activity is an isolated incident and there is clear evidence of successful rehabilitation. Paragraph 2 and its subparagraph will be found for the Applicant.

The statements by the Applicant in the file show that he has matured, and now understands the importance of his security clearance and that he must follow security rules. On balance, it is concluded that the Applicant has successfully overcome the Government's *prima facie* case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the Government's Statement of Reasons.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1: For the Applicant.

Subparagraphs 1.a. through 1.f.: For the Applicant.

Paragraph 2: For the Applicant.

Subparagraph 2.a.: For the Applicant.

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Wilford H. Ross

Administrative Judge