

DATE: October 1, 1997

In re:

Applicant for Security Clearance

ISCR OSD Case No. 97-0094

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR THE GOVERNMENT

Barry Sax, 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 January 28, 1997, 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 February 13, 1997, Applicant responded to the allegations set forth in the SOR and requested a hearing. The case was assigned to me on March 18, 1997. A notice of hearing was issued on March 25, 1997, and the case was heard on April 8, 1997. At the hearing, held as scheduled, three Government exhibits (Gov Ex) and five Applicant exhibits (App Ex) were admitted into evidence. Testimony was taken from the Applicant. A transcript of the hearing was received by this office on April 22, 1997.

FINDINGS OF FACT

Applicant denied he had sold marijuana from 1978 to July 1996 [SOR subparagraphs 1.c. and 2 a.(3)]; that he purchased cocaine from 1980 to 1991 [SOR subparagraphs 1.e. and 2.a.(5)]; and denied his last usage was in 1996 [SOR subparagraphs 1.a and 2.a.(1)]. Applicant admitted all the other allegations listed in the SOR. I have accepted Applicant's admissions and incorporate them as part of my findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following findings of fact:

Applicant is a manager working for Company A. Applicant had a secret security clearance granted him on March 10, 1988. He had that clearance until December 1995. Applicant's duty performance with his company has been excellent.

On January 29, 1988, Applicant completed his Personnel Security Questionnaire (PSQ) (Gov Ex 1). In response to questions pertaining to ever having used a variety of illegal substances, including cannabis and cocaine,⁽¹⁾ and ever having been involved in the illegal purchase, possession, or sale of such substances,⁽²⁾ Applicant responded "no." He certified that his PSQ responses were true, complete, and accurate, but they were false. He had lied in an effort to conceal his true history of substance abuse.

On March 5, 1996, Applicant executed a signed, sworn statement (Gov Ex 2) in which he said he had never been involved in the purchase or use of any illegal drugs. He certified and swore that his statement was true, completed, and accurate, but it was false. He lied to the DIS to conceal his true history of substance abuse.

On November 20, 1996, when confronted with a polygraph examination, Applicant gave his history of illegal drug usage. In a signed, sworn statement (Gov Ex 3) Applicant said he had first used marijuana in 1978, when he was 18 years old. He continued to use marijuana 7 or 8 years after he got his security clearance in 1987. From 1992 to 1995 Applicant used it twice a year.

In the same statement Applicant admitted: using cocaine a few times a year from 1980 to 1991; smoking hashish a few times from 1978 to 1990; using LSD one time in high school; using magic mushrooms 3 times from 1982 to 1988; and using crystal methamphetamine a few times a year from 1980 to 1991.

At the hearing he refuted his prior sworn statement with regards to the date he last used marijuana. He testified his last usage was in July 1995 and he had been mistaken when he stated, in his sworn statement, his last use was 1996. He also refuted the prior statement concerning his cocaine and methamphetamine usage testifying he only used cocaine and methamphetamine twice in his life. I find the earlier statement to be more credible. Those admissions made in his November 20, 1996 sworn statement are more credible. I find Applicant's last use was a couple of "hits" off a marijuana cigarette in July 1996 and his next most recent use occurring during Christmas time 1994, when he took a couple of puffs off a marijuana cigarette. I find Applicant first used cocaine in 1980 and used it a few times a year through 1991. While in college, he and others shared the cost of purchasing marijuana. Applicant last purchased marijuana in 1992.

Applicant has enrolled in a 12-step program. The program will consist of meeting once a week for a class or sharing session for 12 weeks. His first session with the program was to be the Friday following the hearing. The day prior to the hearing, Applicant had a preliminary interview with the person who was going to run the program. It is Applicant's intention to never use illegal drugs again. [Tr. 66]

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:

DRUG INVOLVEMENT

(Criterion H)

Improper or illegal involvement with drugs, raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.

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

- (1) Any drug abuse
- (2) Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.

Conditions that could mitigate security concerns include:

- (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.

PERSONAL CONDUCT**(Criterion E)**

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.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

- (2) Refusal to complete required security forms, releases, or provide full, frank and truthful answers to lawful questions of investigators, security officials or other official representative in connection with a personnel security or trustworthiness determination.

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 a personnel security questionnaire . . . to . . . determine security clearance eligibility or trustworthiness . . . ;
- (3) Deliberately providing 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 Applicable

CRIMINAL CONDUCT**(Criterion J)**

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 Applicable

* * *

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, then the applicant must remove that doubt with substantial evidence in explanation, mitigation, or extenuation, or refutation, 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.

The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations at all times and in all places. If an applicant has demonstrated a lack of respect for the law in his private affairs, then there exists the possibility that an applicant may demonstrate the same attitude toward security rules and regulations.

One additional comment is worthy of note. Applicant's loyalty and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides that industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than loyalty and patriotism. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied decision as to an applicant's loyalty or patriotism.

CONCLUSIONS

The evidence establishes that Applicant abused marijuana from the 1978 to July 1996, and that during part of that time, from 1988 to December 1995, he held a Secret security clearance. He smoked hashish from 1978 to 1990. In 1980, Applicant began to use cocaine. From 1980 until 1991 he used it a few times a year. During the same period he used crystal methamphetamine. Applicant has also used magic mushrooms and LSD prior to 1988. Applicant's last use of marijuana occurred in July 1996.

His marijuana usage is not mitigated due to the extent and recency of his use and because it was used after he held a clearance. Due to the passage of time without recurrence, all other illicit drug abuse has mitigated and is of current security significance only to the extent that he was not forthright about his drug abuse history on repeat occasions.

Accordingly, I find against the Applicant under Criterion H, (Drug Involvement) as to subparagraphs 1.a. and 1.j. I find for the Applicant under Criterion H, (Drug Involvement) as to subparagraphs 1.b., 1.c., 1.d., 1.e., 1.f., 1.g., 1.h., and 1.i.

With respect to Criterion E, personal conduct, the Government has established its case. Notwithstanding his certification, oath, and affirmation that his responses were true and accurate, on his January 29, 1988 PSQ and March 5, 1996 statement, Applicant willfully falsified, omitted, and concealed material facts pertaining to his history of substance abuse. It was only when he was facing a polygraph examination, almost nine years after the initial false PSQ responses, and eight months after the previous DIS interview, that the truth became known.

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 application. Applicant's false denials of any drug usage made during his March 5, 1996 DIS interview falls within DC 3. 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, hashish, crystal methamphetamine, and cocaine abuse were on going in 1988, his drug abuse was clearly relevant and material information at the time he executed his PSQ on January 29, 1988.

During a DIS subject interview of March 5, 1996, Applicant again denied any involvement in illegal drugs. Applicant's past involvement with illegal drugs clearly is pertinent to a determination of his judgment, trustworthiness or reliability (MC 1⁽³⁾). The repeated nature of the falsifications precludes favorable consideration of MC 2.⁽⁴⁾ Nor is there evidence of a good faith effort to correct the falsification before being confronted which is required for MC 3.⁽⁵⁾ 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 his illegal drug use on November 20, 1996, his belated candor came after he had been apprised by the Agent that he was facing a polygraph examination. His subsequent disclosures cannot reasonably be viewed as prompt. Finally, with respect to MC 4,⁽⁶⁾ there is no evidence that Applicant relied in good faith to his detriment on the advice of an authorized person.

Applicant's conduct is viewed as especially serious because of the recency of the misrepresentations made during the March 1996 DIS interview. It is a negative factor for security clearance purposes where an Applicant has deliberately provided false information about the material aspects of his or her personal background. The Government relies heavily upon the integrity and honesty of clearance holders. Complete honesty and candor on the part of applicants for access to classified information is essential to make an accurate meaningful security clearance determination. Without all the relevant and material facts, a clearance decision is susceptible to error, thus jeopardizing the nation's security. In this case, the Applicant obviously knew for many years that he had not been honest when he provided false information to the Government. The Applicant has held a security clearance under false pretenses since at least 1988, and did not come forward to tell the truth until he was contacted by the Defense Department in November 1996. His acknowledgment of his wrongdoing and his contributions to the aerospace industry are not enough to overcome his demonstrated willingness to act primarily in his self-interest. Subparagraphs 2.a.(1), 2.a.(2), 2.a.(3), 2.a.(4), 2.a.(5), 2.a.(6), 2.a.(7), 2.a.(8) 2.a.(9), 2.b.(1), 2.b.(2) and 2.b.(3) are resolved against him.

Applicant has never been charged with the federal offense of making a false statement to the Federal Government, yet that conduct is viewed as serious.⁽⁷⁾ The Applicant repeatedly lied to the Government on his 1988 security clearance application and during his March 5, 1996 interview with the Defense Investigative Service. This inexcusable conduct constitutes a felony violation of federal law pursuant to Title 18, Section 1001 of the United States Code.⁽⁸⁾

Applicant satisfies none of the pertinent mitigating conditions. Criminal conduct is subject to mitigation provided it was not recent (MC 1), was isolated (MC 2.), the act was not voluntary or the factors which led to the violation are not likely to recur (MC 4.), or there is clear evidence of successful rehabilitation (MC 5.). Applicant's falsification of his 1988 PSQ was not recent, but his subsequent knowing and willful omissions in the March 1996 interview preclude favorable application of MC 1. The conduct was neither isolated in nature nor coerced. By all accounts, his decision to lie was voluntary. 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 after providing the Government false information. He made no effort between 1988 and November 1996 (during those periods when he was gainfully employed with a security clearance based on false information) to correct the record. Applicant's

candor during the November 1996 subsequent interview when facing a polygraph examination is evidence in reform, but it is not enough to overcome his repeated felonious conduct. At the hearing, his attempts to recant his prior admissions of his recent drug usage casts further doubt on his credibility.

There is no evidence of rehabilitation or other pertinent behavioral or philosophical changes to enable me to conclude that similar actions are not likely to recur. It is too soon to tell whether Applicant is successfully rehabilitated. In light of the repeated false certifications and oaths, as well as the lengthy periods following those falsifications, during which he remained silent as to the truth, under the circumstances, his security-suitability, in the face of the negative inferences to be drawn, is suspect and is to be resolved against him.

The Government can ill afford individuals dictating for themselves the timing and extent of disclosure. His intentional misrepresentations reflect an unacceptable tendency to place his personal interest in keeping his employment above his obligation to be completely frank with the Government.

Based upon his repeated falsifications, the Applicant cannot be found to be sufficiently trustworthy for access to classified information. On balance, it is concluded that the Applicant has failed to overcome the Government's prima facie case opposing his request for a continued security clearance. Accordingly, I find against the Applicant under Criterion E, (Personal Conduct) and Criterion J, (Criminal Conduct).

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 H: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: For the Applicant

Subparagraph 1.e.: For the Applicant

Subparagraph 1.f.: For the Applicant

Subparagraph 1.g.: For the Applicant

Subparagraph 1.h.: For the Applicant

Subparagraph 1.i.: For the Applicant

Subparagraph 1.j.: Against the Applicant

Paragraph 2. Criterion E: AGAINST THE APPLICANT

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

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

Subparagraph 2.a.(3): Against the Applicant

Subparagraph 2.a.(4): Against the Applicant

Subparagraph 2.a.(5): Against the Applicant

Subparagraph 2.a.(6): Against the Applicant

Subparagraph 2.a.(7): Against the Applicant

Subparagraph 2.a.(8): Against the Applicant

Subparagraph 2.a.(9): Against the Applicant

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

Subparagraph 2.b.(2): Against the Applicant

Subparagraph 2.c.(3): Against the Applicant

Paragraph 3. Criterion J: AGAINST THE APPLICANT

Subparagraph 3.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.

Claude R. Heiny

Administrative Judge

1. Question 18.a.

2. Question 18.b.

3. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability.

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

5. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts.

6. Omission of material facts was caused or significantly contributed to be improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided.

7. That he was never charged or convicted for falsification does not absolve him of his criminal conduct for purposes of assessing his clearance suitability. *See* DOHA Case No. 94-0215 (April 13, 1995).

8. 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."