

DATE: July 21, 1997

In RE:

SSN: -----

Applicant for security clearance

ISCR Case No. 97-0143

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 February 10, 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, and amended by Change 3, February 16, 1996, 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 5, 1997.

The case was received by the undersigned on April 1, 1997. A notice of hearing was issued on April 16, 1997, and the case was heard on May 8, 1997. The Government and Applicant submitted documentary evidence. Testimony was taken from Applicant. The transcript was received on May 19, 1997.

**RULINGS ON PROCEDURE**

Before the end of the hearing, the record was kept open until May 28, 1997, to allow Applicant an opportunity to submit additional documentation. No documentation was received.

**FINDINGS OF FACT**

The Following Findings of Fact are based on the documentation and testimony. The SOR alleges drug involvement, personal conduct and criminal conduct. Applicant admitted all the factual allegations but noted under subparagraph 1f, that he stopped using crack cocaine in 1993 and not 1996 as alleged in the SOR. (TR 33) Applicant's admissions shall be incorporated into the following Findings of Fact.

On November 22, 1993, Applicant falsified his National Agency Questionnaire (DD Form 398-2) when he answered "no" to question 20a, requesting information about any kind of drug use. He also provided false information in response to question 20b when he answered in the negative to purchasing drugs.

Applicant also provided false information on August 15, 1996 (GE #3) when he stated he only used marijuana until March 1996.<sup>(1)</sup> Also, Applicant furnished an incomplete picture on the quantity of marijuana used, especially between 1993 and April 1996. Even after being confronted with adverse information concerning an arrest for marijuana and other information about his drug use, Applicant understated his marijuana use a second time and denied using any other drug. He did say he began using marijuana in the middle 70s. He used the drug about once a week until 1985 when he stopped for 5 years. He resumed marijuana use in 1990 and used the drug weekly until the positive drug test in March 1996, when he stopped using drugs altogether.

In Exhibit 4 (December 3, 1996), Applicant furnished more detail about his marijuana and other drug use. He used marijuana from 1972 to 1988 at a frequency of every weekend. He paid about \$50 a month on the drug. Applicant resumed marijuana use in 1990 and used the drug four or five times a month until April 1996. He spent about \$75 dollars a month on the drug. Applicant began smoking crack cocaine in 1985. He mixed the crack with the marijuana and smoked the combination (called 'Premo') about twice a month. The last time he smoked Premo was in 1993. He spent about \$40 a month on the crack and marijuana combination. Between 1973 and 1977, Applicant used "black beauties" sporadically.<sup>(2)</sup> Applicant was arrested in April 1994 for possession of marijuana. Although the charges were dropped due to lack of evidence, Applicant had marijuana in his possession before his arrest, and cocaine was found on top of a duffle bag in the rear seat of Applicant's car. Applicant continued to use marijuana after he was granted a security clearance on June 15, 1994. On March 4, 1996, Applicant took a drug test which produced positive results for marijuana. He was suspended for eleven days. Applicant used marijuana on at least five occasions in the last three years during his lunch time hours, but, never used the drug inside his workplace. (TR 39-40)

The ----- manager has observed Applicant's good job performance as a contributing member of the team. Applicant is dependable and his compliance with security procedures has clearly improved. Applicant received a negative drug test on April 22, 1996. Applicant's two additional drug tests since April 1996 have been negative also.

Applicant stopped using drugs altogether because he does not want to lose his job and drug use is bad for his health. (TR. 30)<sup>(3)</sup> Applicant no longer associates with drug users because he no longer uses drugs and has not used drugs for over a year. (TR. 37; 41)<sup>(4)</sup> Applicant has been a substitute teacher for about seven years. (TR. 53).

## **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 use.
2. illegal drug possession,...purchase....

#### Factors for Clearance:

None.

### **Personal Conduct (Criterion E)**

#### Factors Against Clearance:

1. the deliberate omission,...falsification of relevant and material facts from any personal security questionnaire,...to...determine security clearance eligibility or trustworthiness....
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 or 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 a case of drug involvement that has not been mitigated by Applicant. First, Applicant used marijuana for more than 20 years with only a brief hiatus between 1988 and 1989. In the period between 1972 and 1988, Applicant used marijuana every weekend. Between 1985 and 1988, he used marijuana in combination with cocaine at a frequency of about twice a month. Additionally, he purchased marijuana on a regular basis until March 1996. He purchased cocaine on a regular basis, spending approximately \$40 a month. Applicant had marijuana in his possession when he was arrested in April 1994, and he continued to use marijuana after receiving a security clearance in June 1994. Applicant's drug abuse resulted in a suspension from his job in March 1996 after testing positive for marijuana. Finally, Applicant lied about his drug use in November 1993 and August 1996.

Applicant's drug abuse is not mitigated. His drug involvement was recent because he did not stop using marijuana until March 1996. Before he stopped, his drug abuse was so serious that he was suspended from work for eleven days for testing positive for marijuana. Although Applicant states he has been drug free for a year and intends to remain drug free in the future, Applicant's two previous falsifications undercut the credibility of his future intentions. Furthermore, there is no evidence of any treatment or therapy that would provide some additional justification to accept Applicant's stated intentions not to use drugs in the future.

Applicant's two intentional falsifications of his drug use fall within the scope of Criterion E. Applicant intentionally falsified a security form in November 1993 when he answered "no" to the drug use and purchase questions. Applicant repeated his dishonest behavior in a sworn statement in August 1996 when he intentionally provided an incomplete picture of his drug history. Only when he was confronted with adverse information concerning an arrest for marijuana possession in April 1994, did he eventually come forward four months later in December 1996 with the full picture of his drug use.

Deliberately providing false information on a security form and in a sworn statement, raises serious doubts about an applicant's judgment, reliability and trustworthiness. If an applicant demonstrates poor judgment by providing false information during the course of the security investigation, he is displaying strong signals to the Government he may not be able to comply with security regulations at all times and in all places, particularly where compliance with security rules presents adverse consequences to his own interests. For example, Applicant failed to recognize the responsibilities of being a security clearance holder in April 1994 because he continued to use drugs until March 1996.

Applicant's intentional falsifications also represent criminal conduct under 18 USC 1001.<sup>(5)</sup> The intentional falsifications were recent because Applicant deliberately omitted material information in his sworn statement of August 1996. Applicant's criminal conduct was not isolated because he intentionally provided false information in November 1993, in addition to the false information furnished in August 1996. There is not enough evidence of rehabilitation because less than a year has passed since Applicant's last falsification and there is no evidence to infer or even suggest that Applicant would have come forward with his entire drug history had he not been confronted with additional, adverse facts about his drug use.

The fact that Applicant finally came forward with the honest account of his drug history, does not excuse he earlier falsifications. In addition, Applicant's claim he was trying to protect his job or his clearance, does not forgive his dishonest conduct. Finally, there is no evidence Applicant was unfairly or improperly advised by authorized personnel to provide false information to the Government.

Applicant's satisfactory job performance for the period ending in February 1997, and the compliment from the ----- manager for being a team player, constitutes positive evidence in Applicant's favor. However, Applicant's good character evidence is insufficient to outweigh the long history of drug abuse and the pattern of dishonest conduct.

### **FORMAL FINDINGS**

After a review of the specific policy factors and general policy factors (whole person concept) described 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. For the Applicant.
- i. Against the Applicant.

Paragraph 2 (Personal Conduct): AGAINST THE APPLICANT.

- a. Against the Applicant.
- b. Against the Applicant.

Paragraph 3 (Criminal Conduct): AGAINST THE APPLICANT.

- 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.

Paul J. Mason

Administrative Judge

1. Applicant furnished false information about his drug history in November 1993 and August 1996 because he did not want to lose his job. (TR. 48)
2. Subparagraph 1h is found for Applicant as there is no evidence of use of either of these drugs after 1977.
3. He discovered he had health problems between 1985 and 1988. (GE #4)
4. Applicant never enrolled in a drug treatment program because he was able to quit urge to return to drugs. (TR 44-46)
5. A Federal statute covering falsifications of material information, or information considered critical by the Government in influencing, or having the tendency to influence a decision concerning an applicant's security worthiness.