

DATE: December 31, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0237

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Michael H. Leonard, Esq., Department Counsel

FOR APPLICANT

Michael A. Gordon, Esq.

STATEMENT OF THE CASE

On April 21, 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, as amended by Change 3, February 13, 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 may 16, 1997.

The case was received by the undersigned on June 16, 1997. A notice of hearing was issued on August 15, 1997, and the case was heard on September 15, 1997. The Government and Applicant submitted documentary evidence. Testimony was taken from Applicant and five witnesses. The transcript was received on September 26, 1997.

RULINGS ON PROCEDURE

At the hearing, Applicant argued for the admission of a private polygraph report (which Applicant passed) taken by Applicant a short time before he took the polygraph examination by the Government in January 1997. Applicant offered the report to show: (1) that Applicant passed the private polygraph even though he knew he had lied; (2) the fact that Applicant passed the polygraph test (with the explanation of expert testimony) demonstrates Applicant had a denial problem; and, (3) that because he passed the private polygraph test, his state of mind was amenable to making complete disclosure of all his drug history in a voluntary atmosphere (because he had already passed a polygraph test) rather than an atmosphere where he felt compelled to take a polygraph test. The report (AE-K) was not admitted in evidence because the report is irrelevant. There is no allegation of falsification regarding the January 24, 1997 sworn statement (GE #7). Second, the report has little or no probative value about Applicant's state of mind and what he may have been thinking prior to taking the Government polygraph test. ⁽¹⁾ Third, results of polygraph examinations are still inadmissible in evidence because they are unreliable and hearsay, and not within any exception to the hearsay rule.

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony. Applicant's admissions shall be incorporated in the Findings of Fact.

Applicant is 40 years old and employed as an engineer analyst by a defense contractor. He seeks a secret level clearance.

On April 11, 1987, Applicant falsified material facts on a Personnel Security Questionnaire (DD Form 398-2), by answering "no" to question 15a (SOR 2a), asking whether he had ever used drugs.⁽²⁾ Applicant also intentionally falsified the same form when he answered "no" to question 15b (SOR 2b), asking whether he had ever been involved in the purchase or possession of any drug. On November 10, 1995, Applicant falsified material facts on a National Agency Questionnaire (DD Form 398-2), by answering "yes" to question 20a (SOR 2c), asking whether he had ever used drugs, but then falsely indicating he had only experimented with marijuana on three occasions in the Fall of 1977.⁽³⁾ On the same questionnaire, Applicant also provided false material information when he indicated "no" to question 20b (SOR 2c), asking whether he had ever been involved in the illegal purchase or possession of any drug.

During a February 27, 1996 interview (SOR 2d), Applicant falsified material facts by denying he used illegal drugs since 1975.

Applicant falsified material facts in a sworn statement he signed on July 24, 1996 (SOR 2e). He falsely stated he had used marijuana about 12 times between 1986 and 1994, that his last use of marijuana was in 1994, and that marijuana and cocaine were the only drugs he had ever used. Applicant falsified material facts in a December 11, 1996 sworn statement (SOR 2f) when he stated he last used marijuana in November 1995.⁽⁴⁾

The actual account of Applicant's drug involvement begins when Applicant first used marijuana in 1974. (GE #7) On average, Applicant used marijuana three to four times a year until November 1995. He used marijuana again on one occasion in June 1996. Applicant first used cocaine in 1982, then four or five times between May 1994 and July 1994. Applicant used hashish three or four times between 1976 and 1984, he purchased the drug on two or three occasions between 1976 and 1984. He used and purchased LSD on four to five occasions between 1977 and 1983. He used and purchased Quaaludes one or two times in 1977. Applicant used amphetamines, dextroamphetamine, and methamphetamines on 10 to 12 occasions between 1974 and 1976; he purchased the drug on one or two occasions during the same period.

Applicant used marijuana on one occasion in June 1996 after indicating on his November 10, 1995 security form, that he had no intentions to use drug again. Applicant used marijuana and cocaine after receiving a secret security clearance on July 6, 1993.⁽⁵⁾

In 1994, Applicant misused a corporate credit card by obtaining cash advances for gambling purposes. (GE #9; Tr. 105) GE #2 is Applicant's petition for bankruptcy, filed on April 19, 1995, and discharged on July 26, 1995.⁽⁶⁾ The petition reflects non-priority debt \$32,971.41, including a gambling loss estimated at \$1,000.00. From June 23, 1995 to July 28, 1995, Applicant received treatment from Dr. A for a mental condition. From November 30, 1995 to February 19, 1996, Applicant received treatment for pathological gambling. Applicant's last gambling incident was in July 1996 followed by additional counseling on approximately three occasions in August and September 1996 for a gambling addiction.

Witness A, Applicant's supervisor of approximately four years, considers Applicant to be punctual and honest. Applicant's outside problems have not affected his work. According to witness A, no one else can do Applicant's job, and, although it would take a long time to replace him (Tr. 43), someone would be found to fill Applicant's position. (Tr. 59)⁽⁷⁾ Witness B believes Applicant is the best technician Witness B has ever seen. It would take about a year and one-half for a replacement to attain Applicant's skills (Tr. 69), but Applicant's work would get accomplished if he was no longer able to perform his job. (Tr. 72) Witness C believes Applicant is very valuable to the project because of his technical and fleet experience. (Tr. 82)

Applicant has been married to his wife for about 18 years. Applicant has always been a strong-willed person whose real

problem became gambling. Since moving back with the entire family in approximately March 1997, Applicant has made positive changes by returning to church, controlling his temper, and attending alcohol support meetings.

Applicant's counselor testified regarding his treatment of Applicant between October 1996 and February 1997, and progress Applicant was making by September 1997 when consultations resumed. Applicant's confrontation with all his problems and commitment to treatment in September 1997, persuaded his counselor to believe Applicant would be effectively able to control his mental condition in the future. (Tr. 167) Although the counselor was qualified to deliver expert testimony regarding his diagnosis and prognosis of Applicant, the counselor's conclusions concerning Applicant's gambling, alcohol, and overall denial problems, must be balanced against the fact that the counselor is not a licensed psychologist nor is he is not a board-certified psychiatrist. (Tr. 163) In addition, the counselor's conclusions are based on his clinical interviews and nothing more except his understanding of Applicant's participation in other counseling.⁽⁸⁾ The fragile foundation for the counselor's conclusions regarding Applicant's denial problems, does not excuse Applicant's falsifications of government documents or interviews on six occasions.

Applicant's military leadership between 1980 and 1984 is demonstrated by his imagination and professionalism. Applicant's aunt has seen nothing but positive changes since he returned to the church. Applicant's security consciousness is demonstrated by the time he found classified items in a document and alerted security. Applicant's performance evaluations from 1986 to 1994 have been fully satisfactory to excellent. Applicant's program manager believes Applicant is the most qualified engineer because of his fleet experience. It would take the program manager two to six years to train a replacement.

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 possession, purchase

Factors for Clearance:

None.

Personal Conduct (Criterion E)

Factors Against Clearance:

2. the deliberate omission, concealment or falsification of relevant and material facts from a personnel security questionnaire use to determine security clearance eligibility or trustworthiness;
3. deliberately providing false or misleading information concerning relevant and material matters to an investigator in connection with a personnel security determination.

Factors for Clearance:

None.

Criminal Conduct (Criterion J)

Factors Against Clearance:

1. any criminal conduct, regardless of whether the person was arrested or not;

Factors for Clearance:

None.

Financial Considerations (Criterion F)

Factors Against Clearance:

5. financial problems that are linked to gambling;

Factors for Clearance:

4. the person has received or is receiving counseling for the problem and there are clear indications that the problem is resolved or is under control.

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 drug involvement (Criterion H), personal conduct (Criterion E), criminal conduct (Criterion J), and financial considerations (Criterion F), 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.

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 under Criterion H. Applicant has used a variety of drugs since 1974.

Except for his cocaine and marijuana use however, there is no evidence Applicant has used hashish, LSD, Quaaludes, amphetamines, dextroamphetamines, and methamphetamines, in over 19 years, and no longer raises security concerns. Even though Applicant's use of cocaine was more than experimental, there is no evidence of use since July 1994. However, Applicant's use of marijuana still raises security concerns because his use of marijuana was more extensive and more recent. Applicant also continued to use marijuana after receiving his security clearance in 1986 and being aware of the Government policy against drug use. In view of Applicant's lengthy history of marijuana abuse, the recency of Applicant's marijuana abuse, and the five attempts to hide his drug use, Applicant has presented inadequate evidence to completely persuade me his drug use is completely behind him.

Applicant's intentional falsifications of two security forms, one interview and two sworn statements, establish a deliberate pattern of dishonest conduct within the scope of Criterion E. Although Applicant's original falsification of his military application may have been extenuated by his youth in 1977, there is no excuse for Applicant's six falsifications between 1987 and December 1996. The omitted information was clearly relevant and material to Applicant's suitability for access to classified information. Applicant's history of falsifications and disclosure of his entire drug history during a polygraph/interview process, raises lingering doubts about Applicant's overall judgment to tell the truth in all matters involving his security clearance or responsibilities to security.

Criterion J addresses a history or pattern of criminal activity that creates doubt about a person's judgment, reliability and trustworthiness. Applicant's pattern of intentional falsifications over a nine year period, constitutes a violation of 18 USC 1001, because the conduct was an intentional omission of material information, or that information the Government has a legitimate right to investigate in order to make an informed decision concerning an applicant's security qualifications.

Applicant's gambling problem clearly reached addictive proportions because in 1994, he illegally withdrew money on his corporate credit card to gamble. The gambling problem played at least a minor role in his bankruptcy in April 1995. However, I am sufficiently convinced that Applicant's family and individual counseling has effectively resolved Applicant's gambling addiction.

Applicant's ongoing family and individual therapy, and the absence of any evidence of gambling since July 1996, constitutes sufficient evidence to conclude Applicant has resolved his financial problems. However, Applicant's evidence in mitigation and extenuation is not enough to meet his burden of persuasion under Criterion H, Criterion E and Criterion J.

FORMAL FINDINGS

Having weighed the specific policy factors with the general policy factors (whole-person concept), Formal Findings required by paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1 (**drugs**): AGAINST THE APPLICANT.

- a. Against the Applicant.
- b. Against the Applicant.
- c. For the Applicant.
- d. For the Applicant.
- e. For the Applicant.
- f. For the Applicant.
- g. For the Applicant.
- h. For the Applicant.

i. For the Applicant.

j. For the Applicant.

k. For the Applicant.

l. For the Applicant.

m. For the Applicant.

n. Against the Applicant.

o. Against the Applicant.

p. 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.

Paragraph 3 (**criminal conduct**): AGAINST THE APPLICANT.

a. Against the Applicant.

Paragraph 4 (**financial considerations**): FOR THE APPLICANT.

a. For the Applicant.

b. For the Applicant.

c. For the Applicant.

d. For the Applicant.

e. For the Applicant.

f. For 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. Also, he could testify at the hearing about what his state of mind was during the Government polygraph examination.
2. Applicant was advised when he applied for the service in 1977 that he should not answer the drug use question in the positive because he would not get the ratings he was qualified for. Applicant's youth may have extenuated the falsification in 1977 but Applicant continued to furnish the Government with false information on five separate occasions between 1987 and December 1996.
3. While he acknowledged in his response to the SOR he was not truthful on this form or the other forms and statements, he testified with less certainty. He said he was told by someone to review the questionnaire quickly before he signed it. So, he neglected to read the questions completely. (Tr. 100)
4. At the hearing, Applicant's counselor testified that Applicant suffers from a mental condition which caused Applicant to deny the existence of his drug, alcohol and gambling problems (AE-H; Tr. 151-158). Also, Applicant trivialized his adverse behavior to a level where he really believed the adverse behavior did not happen or was insignificant.
5. Applicant also used marijuana between 1986 and 1993, while possessing a security clearance. (Tr. 126)
6. Applicant has been paying his bills regularly since his discharge in 1995, and he has only a car loan and department store debt at the present time. (Tr. 124)
7. Witness A noted a college degree was not required for Applicant's job. (Tr. 51)
8. When asked for the foundation of his opinions, the counselor stated, "I base my opinion on the significance of the turning point in [Applicant's] life, where for the first time since he was a young man he's acknowledged that he does have significant problems, that these go beyond occasional substance abuse and the has swallowed his pride and has addressed these issues and gotten as substance abuse evaluation and essentially has come clean. " (Tr. 165)