

DATE: September 19, 1997

In Re:

Applicant for Security Clearance

ISCR OSD Case No. 95-0289

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR THE GOVERNMENT

William S. Fields, Esquire

Department Counsel

FOR THE APPLICANT

Steven J. Silverberg

STATEMENT OF THE CASE

On April 29, 1997, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, "*Safeguarding Classified Information Within Industry*," dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6 "*Defense Industrial Personnel Security Clearance Review Program*" (Directive) dated January 2, 1992, as amended by Change 3, dated February 13, 1996, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make a preliminary determination that it was clearly consistent with the national interest to grant or continue a security clearance for him.

A copy of the SOR is attached to this Decision and included herein by reference.

The Applicant responded to the SOR in writing on May 14, 1997 and requested a hearing before a DOHA Administrative Judge. The case was assigned to this Administrative Judge on May 29, 1997. On July 3, 1997, a hearing was convened for the purpose of considering whether it is clearly consistent with the national security to grant, continue, deny, or revoke Applicant's security clearance. The Government's case consisted of 3 exhibits; Applicant relied on four exhibits, on his own testimony and on the testimony of one additional witness. Applicant supplemented the record with one additional exhibit after the conclusions of the hearing. This exhibit was accepted into evidence without objection by Department Counsel. A transcript of the proceedings was received on July 23, 1997.

FINDINGS OF FACT

Applicant has admitted, without explanation, the factual allegations pertaining to drug involvement (Criterion H), falsification (Criterion E), and criminal conduct (Criterion J) set forth under paragraphs 1, 2 and 3 of the SOR.

After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is a 28 year old computer engineer employed by a defense contractor. He has worked for his current employer

since October 1995. He is seeking to retain the top secret clearance that was granted to him in February 1993 in conjunction with his employment with another defense contractor. A favorable preliminary determination could not be made on Applicant's suitability to retain his top secret clearance because of drug involvement, falsification and criminal conduct.

Applicant's involvement with illegal drugs did not begin until 1989--his second year of college. He then used marijuana as often as daily between 1989 and the summer of 1992--when he graduated from college. He also used psychedelic mushrooms on one occasion in May 1992. Believing that marijuana was just a "college thing," he stopped using it for a time after graduation.

When Applicant completed a Personnel Security Questionnaire (PSQ--DD Form 398) on October 12, 1992-- the first day of work with Employer X, he certified that:

...the entries made by me are true, complete and accurate to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both.

In response to question 22.a. which asked if he had **ever** used or possessed "any narcotic, depressant, stimulant, hallucinogen, or cannabis (to include marijuana)", Applicant answered "yes" and admitted that he had experimented with marijuana in February 1989. He added that he had "no future intentions of using any illegal drug again." (Govt. Exh. 1). In response to question 22.b. which asked if he had **ever** been involved in the purchase of "any narcotic, depressant, stimulant, hallucinogen, or cannabis," Applicant answered "no."

Applicant was granted a top secret clearance on February 4, 1993.

For several months after graduating from college and beginning his new job, Applicant did not use marijuana. However, during the summer of 1993, Applicant began to use marijuana again because of what he has described as a "social thing" (Tr. 38). He continued to use marijuana on a somewhat irregular basis from the summer of 1993 to December 31, 1995 (Govt. Exhs. 2 and 3, Tr. 38-40). While he has denied regular use during this period and has stated that there were times-- three or four month in length--when he did not use any marijuana, his testimony minimizing his use are contradicted by his admission that he both bought and sold small quantities of marijuana during this same time frame (Govt. Exhs. 2 and 3, Tr. 44-45). Applicant last used marijuana on the evening of May 22, 1996 (Tr. 40), the night before he was scheduled to be interviewed by agents of Agency X in conjunction with his application for access to sensitive compartmentalized information (SCI) (Tr. 58).

At his administrative hearing, Applicant explained why he had not disclosed the full extent of his drug use on the PSQ which he completed on October 12, 1992. He testified that it was his first day of work, and he was afraid that he would not be allowed "keep the job" if he told the truth (Tr. 46). He attributed his more recent marijuana abuse--after being granted a top secret clearance--to youth and immaturity (Tr. 41). He is ashamed and embarrassed about his activities (Tr. 42, 47) and promises again that he will not use marijuana in the future (Tr. 40-41). He testified that he has "pretty much severed ties" with the friends whom he had smoked marijuana with since graduating from college (Tr. 41). He is now married⁽¹⁾ and committed to building a better future for himself and his family; he has come to realize that drug abuse is not compatible with those goals (Tr. 49). He was raised in a very religious home, and is committed to raising his two sons in the same type of environment (Tr. 23).

Since he began working for his current employer in October 1995, Applicant has excelled professionally. He has been assigned major responsibilities and has been promoted ahead of the time when he was normally scheduled for promotion (Tr. 33). In the two Performance Appraisals from his current employer, Applicant received an overall rating of excellent (Applicant's Exhs. B and C).

POLICIES

The Adjudicative Guidelines of the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations with reasonable

consistency that are clearly consistent with the interests of national security. In making those overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines but in the context of the factors set forth in section F.3. of the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate that the facts proven have a nexus to an applicant's lack of security worthiness.

The following Adjudicative Guidelines are deemed applicable to the instant matter.

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.

Drugs are defined as mood and behavior altering:

- (a) drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens) and
- (b) inhalants and other similar substances.

Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

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.
- (3) Failure to successfully complete a drug treatment program prescribed by a credentialed medical professional. Current drug involvement, especially following the granting of a security clearance...will normally result in an unfavorable determination.

Conditions that could mitigate security concerns include:

- (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.

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 an personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, aware benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Conditions that could mitigate security concerns include:

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

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.

Conditions that could mitigate security concerns include:

(1) The criminal behavior was not recent;

(2) The crime was an isolated incident.

Burden of Proof

The Government has the burden of proving any controverted facts alleged in the Statement of Reasons. If the Government establishes its case, the burden of persuasion shifts to the applicant to establish his security suitability through evidence which refutes, mitigates, or extenuates the disqualifying conduct and demonstrates that 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 that Court's rationale, doubts are to be resolved against an applicant.

CONCLUSIONS

Having considered the record evidence in accordance with the appropriate legal precepts and factors, this Administrative Judge concludes that the Government has established its case with regard to Criteria H, E and J.

In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Section F.3, as well as those referred to in the section dealing with the Adjudicative Process, both in the Directive.

The Government has established its case with respect to Criterion H. Applicant has admitted that he abused marijuana regularly--as often as daily--from 1989 to May 1992 when he graduated from college. He has also admitted that he used psychedelic mushrooms on one occasion in May 1992. After graduating from college, Applicant stopped using marijuana for a period of time but began using it again after 12 or 13 months of abstinence. While he has never quantified his use as being weekly or monthly, his use of marijuana--after being granted a top secret clearance on February 4, 1993-- became sufficiently regular to involve him in transactions where he purchased and sold small amounts of the illegal substance. Applicant's last purchase of marijuana was in November of 1995, and his last use of marijuana was as recently as May 22, 1996.

Under the circumstances of this case, Applicant does not benefit from his explanation that youth and immaturity had caused him to stumble and resume using marijuana. He knew that purchasing, using and selling marijuana were against the law and against DoD policy when he deliberately withheld information about his previous marijuana purchases and abuse on the PSQ which he completed on October 12, 1992. Instead of learning from this experience and avoiding

behavior which would be embarrassing to him, and which he would have to lie about in the future, he engaged in the same illegal behavior again. He did this not as a teenager or college student; he purchased, used and sold marijuana as a college graduate, a husband, a father, and as someone who was already holding a responsible position.

In mitigation, Applicant is credited with 13 months of abstinence since his last use of marijuana on May 22, 1996, and with 5 months of abstinence since his last use previous to that. His one-time use of psychedelic mushrooms in 1992 is found to be mitigated by the passage of time. Favorable consideration has been given to Applicant's repeated assurances that he will not use marijuana or any other illegal substance in the future. Favorable consideration has also been given to his excellent work record and to the many positive comments in his two Performance Appraisals. Applicant's testimony that he is embarrassed about his marijuana use during the past four years appears to be sincere. Unfortunately, Applicant's embarrassment and the favorable considerations noted above are not sufficient to outweigh the security concerns raised by his purchase, use and sale of marijuana after being granted a top secret clearance on February 4, 1993. Subparagraph 1.a, 1.b., 1.c., 1.e. and 1.f. of Criterion H are concluded against Applicant.

Criterion E applies to "the deliberate omission...of relevant and material facts from any personnel security questionnaire..." Facts are considered relevant and material when they are capable of influencing a federal agency's decision, e.g., a decision to grant or deny a security clearance. In this instance, Applicant's regular use of marijuana while in college and his one-time use of psychedelic mushrooms in May 1992 fall well within the definition of materiality. Because he knew this information was relevant to his security clearance suitability, Applicant willfully withheld this information when he completed his PSQ in October 1992. He withheld information about prior marijuana abuse because he was afraid that he would not be able to "keep" his job if he told the truth. Also falling within the definition of materiality, and also omitted from the October 1992 PSQ was Applicant's purchase and sale of marijuana while in college.

Mitigation for Applicant's falsification of his October 1992 PSQ is found in the fact that this appears to be an isolated incident. There is no evidence that he has lied to the DoD on any other occasion. Also mitigating this misconduct is the five years that have passed since this falsification occurred. However, the conditions for mitigating an isolated instance of falsification are conjunctive not disjunctive: The falsification must have been an isolated incident, it should not have been recent, **and** the individual must have subsequently provided correct information voluntarily. Here Applicant made a full disclosure of his marijuana use--during and subsequent to college--in a letter to Agency X **after** an interview which resulted in Agency X denying SCI access. Insufficient information is known about the events that transpired during that interview to conclude that Applicant's disclosures in Government Exhibit 3 were voluntary.

Criterion E also applies to behavior which involves "questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations." More is involved in this case than Applicant's lying about past marijuana use. Ultimately, it is Applicant's judgment, trustworthiness and reliability which determine his suitability to access classified information. He may not use marijuana in the future, and thus would not have to lie to conceal his conduct. However, he has already demonstrated very poor judgment by engaging in behavior which he knew could jeopardize his livelihood. He also demonstrated that he had no qualms about engaging in behavior which he knew was morally wrong, against the law and DoD policy--when it was the expedient and "social" thing to do. He purchased, used, and sold marijuana as a husband, father, and college graduate. Subparagraph 2.a. and 2.b. of Criterion E are concluded against Applicant.

The government has established its case under Criterion J. Applicant's willfully withholding information from the DoD on matters that were clearly relevant and material to his security clearance eligibility violated 18 U.S.C. §1001. The information withheld by Applicant when he completed his PSQ in October 1992 had the potential to influence the course of his background investigation in areas of legitimate concern to the DoD.

Because it has been five years since Applicant falsified his PSQ, and there is no evidence of involvement in any similar criminal misconduct, his criminal conduct is found to be mitigated. Subparagraph 3.a. of Criterion J is concluded for Applicant.

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. Against the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. For the Applicant

Subparagraph 1.e. Against the Applicant

Subparagraph 1.f. Against the Applicant

Paragraph 2 (Criterion E) AGAINST THE APPLICANT

Subparagraph 2.a. Against the Applicant

Subparagraph 2.b. Against the Applicant

Paragraph 3 (Criterion J) FOR THE APPLICANT

Subparagraph 3.a. 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 Applicant's security clearance.

John R. Erck

Administrative Judge

1. Applicant married in 1994 (Tr. 53-54).