

DATE: February 10, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0603

DECISION OF ADMINISTRATIVE JUDGE

JOHN G. METZ, JR.

APPEARANCES

FOR GOVERNMENT

Michael H. Leonard, Esquire, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On 5 September 1997, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding⁽¹⁾ that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On 17 November 1997, Applicant answered the SOR⁽²⁾ and requested a hearing. DOHA assigned the case to a different Administrative Judge on 25 November 1997, but reassigned it to me on 3 December 1997 because of caseload considerations. On 3 December 1997, I issued a notice of hearing for 8 January 1998.

At the hearing, the Government presented eleven exhibits--admitted without objection--and one witness; Applicant presented twenty-two exhibits--admitted without objection--and the testimony of three witnesses, including himself. I received the transcript on 22 January 1998.

FINDINGS OF FACT

Applicant admitted the original allegations of the SOR, except for the allegations of paragraph 1.g.--that he possessed a smoking pipe from approximately May 1997 to June 1997 and "had thoughts of possibly smoking marijuana with this device in the event you left your current employment."⁽³⁾ Accordingly, I incorporate the admissions as findings of fact.

Applicant--a 41-year old employee of a defense contractor--seeks to retain the secret clearance he has held since 30 July 1993.

On 12 July 1993, Applicant falsified a National Agency Questionnaire (NAQ)(DD Form 398-2) when he answered "no" to questions designed to elicit his drug abuse history. Based in part on his answers, Applicant received a secret clearance on 30 July 1993.

On 26 June 1996, Applicant underwent a random drug urinalysis test at his employer. Applicant tested positive for

marijuana, and his employer notified the Defense Industrial Security Clearance Office (DISCO)⁽⁴⁾ of the positive test results (G.E. 3).⁽⁵⁾ The employer also referred Applicant to drug counseling.

On 8 July 1996, Applicant was seen by a licensed psychologist (G.E. 9).⁽⁶⁾ The psychologist diagnosed Applicant as suffering from cannabis dependence.⁽⁷⁾ The psychologist recommended that Applicant not return to work until he tested negative for marijuana, that he attend 90 Narcotics Anonymous (NA) meetings in 90 days, and participate in individual counseling. Applicant continued with counseling until 18 September 1996, and became active in NA.⁽⁸⁾

On 23 October 1996, Applicant falsified a Questionnaire for National Security Positions (QNSP)(SF 86)(G.E. 1) when he stated that he had only used marijuana ten times between June and July 1996, and had never used drugs while possessing a security clearance.⁽⁹⁾ On 14 May 1997, Applicant falsified a sworn statement to the Defense Investigative Service (DIS)--now know as the Defense Security Service (DSS)--when he stated that he had only used marijuana ten times between early June 1996 and 4 July 1996, and at no time before or after these dates. On 23 May 1997, Applicant again falsified a sworn statement to the DIS when he admitted using marijuana up to three times per week from approximately 1992 to 4 July 1996, but denied using marijuana anytime from 1978 to 1992.

Not until Applicant was confronted with the prospect of a polygraph examination on 9 July 1997, did Applicant fully disclose the extent of his drug use (G.E. 10):

I did smoke [marijuana] from 1978 until entering the [military] in [1983],⁽¹⁰⁾ initially it was sporadic but the month before I went into the [military], I smoked every day for a week or two. . . I did not do drug (sic) while in the [military], because I was in a PRP (Nuclear) program. The thirty days after getting out of the [military], I smoked [marijuana] again on a regular, daily basis. After going to work for [employer] around 1989, I only used [marijuana] sporadically, about once to twice a month, excluding about three to six months each year until about May of 1986. I hurt my back and was out of work. I guess I got to feeling sorry for myself while sitting around home being bored and I began smoking [marijuana] consuming about a joint of [marijuana] almost on a daily basis, until July 4, [19]96. That was the last time I smoked [marijuana]. When I returned to work later that month, I was confronted with my failed urinalysis and readily admitted my mistake and entered treatment.

Applicant revealed the above drug use during the pre-test phase of the polygraph. During the post-test interview, Applicant recalled finding an old marijuana pipe in his shed in approximately May 1997. Instead of throwing the pipe away, Applicant kept it, and later gave it to his brother in June 1997.⁽¹¹⁾

At the hearing, Applicant's supervisor (and co-worker for the last seven years) testified to Applicant's honesty and loyalty to the U.S. More important, he testified that in the last year and a half (since Applicant's drug problem became known at work) there had been a marked improvement in Applicant's performance at work, his dedication to his job, and his cooperation with peers and superiors (Tr. 79).⁽¹²⁾

Applicant's NA sponsor (for the last three or four months) and fellow NA member (for the last year and a half) testified extremely credibly about Applicant's involvement in NA over the last year and a half, and the progress Applicant has made in recovery (Tr. 87-90).⁽¹³⁾ He described the circumstances which lead Applicant to seek him out as a sponsor, and the conditions under which he agreed to serve as Applicant's sponsor. He described positively the extra step work Applicant undertook at his request and Applicant's active application of the principles of NA. He reported seeing Applicant at NA meetings three of the four nights per week that he himself attended.

Applicant testified credibly and with some emotion about the mess he had made of his life with his drug abuse and falsifications.⁽¹⁴⁾ He testified how his increasing involvement in NA has shaped his life and established how he must live to remain drug free. He testified about how he falsified his prior statements and security clearance applications because he feared not getting his clearance and losing his job. He testified how his increasing sobriety brought him to realize the fundamental honesty required by NA (Tr. 62-63;74-76). Finally, he testified how he has come to realize that sobriety and honesty are the keys to his recovery--a recovery he recognizes he needs for his own sake, aside from the collateral benefits of family, friends, job, or clearance that may accompany his recovery.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section F.3. and in Enclosure (2) of the Directive. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

Considering the evidence as a whole, the following adjudication policy factors are 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 . . . purchase . . .

Conditions that could mitigate security concerns include:

- (1) the drug involvement was not recent;
- (3) a demonstrated intent not to abuse any drugs in the future;
- (4) satisfactory completion of a drug treatment program prescribed by a credentialed medical professional.

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 include:

- (2) deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, . . . [or] 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 or trustworthiness determination;

Conditions that could mitigate security concerns include:

None.

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:

None.

Burden of Proof

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where 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 or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the 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."

CONCLUSIONS

The Government has established its case under criterion H; however, I find the conduct mitigated. Although the record amply documents the depths of Applicant's drug problem, the record is equally strong that Applicant has overcome his drug problem. He has been drug free for eighteen months as of the date of the hearing. More important, he is actively involved in an ongoing program of recovery. He has adopted for himself the discipline necessary for ongoing recovery, and has put into place a support system to assist in that recovery.⁽¹⁵⁾ While Applicant's counseling with the psychologist and participation in NA does not precisely meet the definitions of a formal drug treatment program as contemplated by the Directive, NA is a well-recognized vehicle for ongoing recovery from drug abuse, and was the vehicle recommended by Applicant's psychologist. I conclude on the record before me that Applicant is unlikely to use illegal drugs in the future.⁽¹⁶⁾ Accordingly, I find Criterion H. for Applicant.

The Government has established its case under Criteria E. The information sought by the Government on the security questionnaires and during the subject interviews was relevant and material to the Government's investigation of the Applicant's fitness for access to classified information, and the Applicant knowingly and wilfully falsified that information. The Applicant's failure to fully disclose his drug abuse history until he was confronted with a polygraph examination, suggests that he cannot be relied upon to speak the truth if the truth presents possible adverse consequences for his own interests. He knew the answers he provided were false; and indeed he knew the answers had to be false for him to protect his interests--in his job and security clearance. At no time before the polygraph interview did Applicant make any effort to fully disclose his drug abuse history, much less a prompt, good faith effort.

Were that the end of the inquiry, I would have to find criterion E. against Applicant. However, the Directive requires an assessment of the whole person, which involves--among other things--an assessment of the likelihood that the conduct will recur. In this case, despite Applicant's ongoing falsification through much of this investigation, I conclude that Applicant is unlikely to lie in the future.

The program of honesty that Applicant has come to realize is integral to his recovery from drug abuse is equally integral to his "recovery" from falsification. During the course of the hearing, Applicant demonstrated a previously unknown willingness to openly confront the ugly portions of his past and to candidly discuss that misconduct. He demonstrated genuine remorse for his past misconduct and a determination to refrain from misconduct in the future. Tellingly, he acknowledged in his own closing (Tr. 101) that if he viewed the case as Department Counsel viewed it, he would be unlikely to grant himself a clearance.⁽¹⁷⁾

If security clearance determinations were designed to reward or punish applicants, or were subject to *per se* rules,

resolution of this case would be simple. As clearance determination focus exclusively on an applicant's fitness for access to classified information, this case becomes more difficult. Despite Applicant's prior falsifications, I found his testimony at the hearing credible and his commitment to honesty genuine. I conclude that he is unlikely to engage in falsifications in the future. Accordingly, I find criterion E. for the Applicant.

The Government has established its case under Criteria J. The Applicant's knowing falsification to an agency of the federal government on matters within that agency's jurisdiction clearly violate 18 U.S.C. §1001. The falsifications had the potential to influence the course of the background investigation in areas of legitimate concern to the Government. However, that said, I conclude--for the reasons stated above under criterion E.--that this misconduct is unlikely to recur. I find criterion J. for the Applicant.

FORMAL FINDINGS

Paragraph 1. Criterion H: FOR THE APPLICANT

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: For the Applicant

Subparagraph e: For the Applicant

Subparagraph f: For the Applicant

Subparagraph g: For the Applicant

Paragraph 2. Criterion E: FOR THE APPLICANT

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: For the Applicant

Subparagraph e: For the Applicant

Paragraph 3. Criterion J: FOR THE APPLICANT

Subparagraph 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 or continue a security clearance for Applicant.

John G. Metz, Jr.

Administrative Judge

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992--and amended by Change 3 dated 16 February 1996 (Directive).

2. Applicant apparently responded sometime in September 1997, but DOHA never received that response.
3. Applicant later testified that while he possessed the smoking pipe during the dates alleged (Tr. 52), he denied having thoughts of using the pipe in the future (Tr. 56).
4. Now known as the Columbus Operations Center.
5. The employer's letter did not contain the nanogram level of the positive urinalysis. Applicant subsequently tested positive for marijuana usage on three additional tests, albeit with declining nanogram levels: 29 July 1996 (71ng/ml) (G.E. 4); 12 August 1996 (55ng/ml)(G.E. 5); 27 August 1996 (22 ng/ml)(G.E. 6). The testing methodology was sensitive to a level of 20ng/ml. Applicant has since tested negative on six tests reported to Applicant's employer: 30 August 1996 (A.E. G); 17 October 1996 (A.E. F); 28 January 1997 (A.E. E); 6 May 1997 (A.E. D); 5 September 1997 (A.E. C); 19 December 1997 (A.E. B).
6. Although the counselor's credentials are not couched in the precise terms of the Directive's "credentialed medical professional," i.e. licensed clinical psychologist, the counselor possesses a Doctor of Psychology (Pys.D.) degree, and is a member of both the American Psychological Association and the [State] Psychological Association. Accordingly, I conclude that the counselor was a "credentialed medical professional" within the meaning of the Directive, and competent to render a diagnosis in this case.
7. The psychologist recorded Applicant's history of marijuana abuse: "[Applicant] first smoked marijuana when he was in college and continued infrequent use until he joined the [military]. Four years ago, he resumed infrequent marijuana use. In the last two years frequency reportedly has increased to approximately three times per week (mostly on weekends and mostly alone). . . [Applicant] reported 'before that I could take it or leave it.' [Applicant] reported that he buys approximately one quarter of a bag every two to three weeks. . . Two years ago both parents died within three months of each other. This is about the same time that [Applicant's] marijuana use increased."
8. The psychologist noted that even before Applicant had attended his first NA meeting, he had read three chapters of the NA book and had reportedly thrown out all the marijuana and beer he had in his house.
9. Of course, the June and July 1996 dates Applicant disclosed occurred during a period when Applicant also had a clearance. If the June and July 1996 dates truly reported Applicant's drug use, I would not find Applicant's denial of drug use while possessing a clearance to have been a falsification. However, Applicant failed to report other periods of marijuana abuse which also occurred while Applicant possessed a clearance.
10. Applicant actually stated 1986, but his Discharge Certificate (DD 214)(A.E. Q) reflects 1983 as the correct year.
11. There is some dispute as to why Applicant kept the pipe. In a Certified Results of Interview (CRI) prepared by the DIS agent on 10 July 1997 (G.E. 11) the agent reported: " When asked why he kept it, [Applicant] reported thinking that he would keep it as a souvenir or to possibly use again in the event he left his current employment, which requires him to refrain from drug use." Applicant denied telling the agent he had thoughts of using the pipe (Tr. 56-57). While I believe the agent has no motive to misreport what Applicant told him during the interview, I note from the agent's testimony (Tr. 24) and Applicant's testimony (Tr. 59) that the agent did not take notes during the interview. I also note that the agent conducted the interview (Tr. 45-46, 56-59) by proposing a number of scenarios to Applicant which Applicant would then admit or deny. In any event, even the agent's reported language falls far short of a stated intent to use marijuana in the future--the alleged conclusion to be drawn from Applicant's description of why he kept the pipe.
12. He was, however, not aware of the precise reasons for the SOR.
13. The sponsor had been active in NA for 10 years, and clean and sober for 8 years. He had been involved with the more formal leadership aspects of NA, serving in a variety of local and regional volunteer positions.
14. I found Applicant's testimony credible for a number of reasons. I had the opportunity to observe his demeanor during the hearing. He made good eye contact with his questioners. He testified candidly and stayed focused on difficult topics. He squarely confronted his past misconduct and admitted all the Government's allegations--except regarding his

thoughts about possible using the marijuana pipe sometime in the future. Finally, when asked by me (Tr. 70-73), he admitted other falsifications and misconduct regarding his drug abuse in the context of his military service and present employment. This misconduct was not alleged in the SOR, and I have not considered it on the merits of this case. I have, however, considered it on the issue of Applicant's credibility and his willingness to speak the truth when confronted with disclosing the unseemly side of his life.

15. Indeed, he sought a new sponsor because he felt he was not getting the necessary support from his old sponsor (Tr. 94).

16. Applicant's one-time use of Valium (prescribed for his sister) for the back pain he was experiencing seems of little security significance. Without approving self-diagnosis, I note Applicant's use was illegal because the drug was not prescribed for him, but his use was consistent with the uses for which the drug is prescribed. In any event, the one-time abuse presented no risk of compromise of information, and given Applicant's dedication to the principles of NA, is unlikely to recur.

17. Closing argument is not evidence, and I have not considered it as such in this case, nor have I considered Applicant's argument to have conceded the ultimate conclusion in this case. In deciding this case, I have relied on the evidence of remorse and rehabilitation contained in the evidentiary portion of the hearing as well as in the exhibits which are a part of the record. Applicant's closing merely makes a strong argument that he has demonstrated remorse and rehabilitation in the presentation of his case.