

DATE: April 30, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0777

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

William S. Fields, Esq., Department Counsel

FOR APPLICANT

Pro se

STATEMENT OF THE CASE

On November 24, 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, 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. Applicant filed his Answer to the SOR on December 17, 1997.

The case was received by the undersigned on January 20, 1998. A notice of hearing was issued on February 3, and the case was heard on March 6, 1998. The Government and Applicant submitted documentary evidence. Testimony was taken from Applicant. The transcript was received on March 23, 1998.

RULINGS ON PROCEDURE

Pursuant to Enclosure 3 the Directive, Subparagraph 1a of the SOR shall be amended by replacing the word "June" with the words "the Spring of". The reason for this amendment is that in GE #3 and her testimony, Applicant refers to the Spring of 1996 as the last time she used marijuana on one occasion.

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony. The SOR alleges drug abuse and personal conduct. Applicant's admissions shall be incorporated into the factual findings. Applicant is 43 years old and employed as a software engineer/computer scientist by a defense contractor. She seeks a secret level clearance.

Applicant used marijuana at varying frequencies from the early 1970s to May 1993 and then once again in June 1996. [\(U\)](#)

Applicant used marijuana in June 1996 after being granted a security clearance on November 1, 1993.

On April 16, 1993 (subparagraph 2a), Applicant admitted falsifying a National Agency Questionnaire (DD Form 398) by answering 'no' to question 22a, asking whether the applicant had ever used or possessed any drug or mind altering substance.

On July 1, 1993 (subparagraph 2b), Applicant was asked to disclose her drug history to an agent from the Defense Investigative Service (DIS). Applicant provided false information when she stated used marijuana only a couple of times in the early 1970s.

On November 16, 1996 (subparagraph 2c), Applicant falsified a Questionnaire for National Security Positions (Standard Form 86) when she provided an incomplete history of her drug use in response to question 24a of the security form. While Applicant claimed she had forgotten about her single drug use in June 1996, I find her claim unpersuasive because the drug use occurred only five months before she submitted the security form in November 1996. Applicant's forgetfulness claim is even harder to accept when weighed against Applicant's two earlier falsifications of her drug use on April 16 (security application) and July 1993 (DIS interview).⁽²⁾

On November 16, 1996 (subparagraph 2d), Applicant also falsified question 24b of the same security application by answering 'no' to whether she had ever used drugs while holding a clearance.⁽³⁾ This finding is based on my negative finding under question 24a (subparagraph 2c). There is nothing ambiguous about question 24b to lead the reasonable person to interpret the question as applying only to individuals who are briefed or actually working on classified projects.⁽⁴⁾ Even though Applicant may not have been cleared for an active classified project, she still had a security clearance and should have realized it was against the law to use drugs while holding a security clearance.

Applicant's performance evaluations for 1993 and 1994 are outstanding. Applicant's supervisors described Applicant as a model employee. In an undated and unsigned performance evaluation for 1994/1995, Applicant was rated as a very good employee with high potential for growth, while demonstrating enthusiasm and professionalism. Applicant's resume indicates that Applicant was a social worker before returning to school to obtain degrees in engineering and technical management. Then, she became a computer scientist.

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.

Factors for Clearance:

1. The drug involvement was no recent;
2. the drug involvement was an isolated or frequent event;
3. A demonstrated intent not to abuse any drugs in the future.

Personal Conduct (Criterion E)

Factors Against Clearance:

2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal security statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, 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.

Factors for Clearance:

None.

Criminal Conduct (Criterion J)Factors Against Clearance:

1. Any criminal conduct, regardless of 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 common sense 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 G (excessive alcohol consumption) 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

The Government has established a case of drug abuse under Criterion H. Applicant used the marijuana sporadically

from the early 1970s to May 1993, and also in the Spring of 1996. Although Applicant lied about her drug use on two occasions in 1993 and two occasions in November 1996, the absence of any evidence of use since June 1996 and Applicant's stated intention not to use in the future, persuades me to ultimately find for Applicant under Criterion H.

However, the evidence presented under Criterion E calls for an ultimate finding against Applicant. Applicant deliberately falsified her security clearance application in April 1993 when she denied using any drugs whatsoever. Her drug use was relevant and material information for the Government to investigate in evaluating Applicant's suitability for safeguarding classified information. Provided an opportunity to set the record straight in July 1993, Applicant instead

intentionally furnished additional false information about her drug history by indicating she used marijuana only a couple of times in the early 1970s.

In November 1996, Applicant again falsified the drug use question on her security clearance application when she intentionally provided an incomplete picture of her drug use. Considering (1) the fact that Applicant has had a clearance since November 1993; (2) Applicant was forty one years of age in November 1993 (as opposed to a person who had just reached adulthood) when she completed the application, (3) and her past history of falsifying her drug use on two occasions in 1993, Applicant's claim she did not know that simply holding a clearance precluded drug use, is not credible. Aside from the fiduciary obligations of holding a security clearance, including round-the-clock responsibilities to comply with all security rules and regulations, a security clearance holder must exercise sound judgment in not using drugs because drug use is against the law.

Of the four listed mitigating factors which correspond to acts of deliberate falsification, there are no factors that apply in Applicant's favor. Applicant's drug use is clearly pertinent to an agency's investigation into an applicant's background. Applicant's falsifications in July 1993 and November 1996, and the absence of any evidence indicating Applicant disclosed the missing drug information voluntarily, precludes favorable consideration of the second mitigating factor under Criterion E. In addition, there is insufficient evidence to find that Applicant made prompt, good-faith efforts to correct the falsification before being confronted with the facts. Only after being faced with the prospect of taking a polygraph examination in December 1996, did Applicant come forward with her entire drug history.

Applicant's intentional falsifications of her security applications in 1993 and 1996, and her intentional falsification of her interview in 1993, also represent prohibited conduct under 18 U.S.C. 1001. The criminal statute addresses intentional falsifications of material facts before a federal agency. Applicant's intentional falsifications of material information about her drug history (June 1996) reflects not only poor judgment on Applicant's part, but criminal omission in not being entirely frank during the course of the Government's background check into Applicant's security qualifications.

Applicant's impressive educational background weighs in her favor. Her job performance between 1993 and 1995 also constitutes positive character evidence. However, given the pattern of intentional falsifications from 1993 to her polygraph exam in December 1996, when Applicant finally disclosed all her drug use, Applicant's excellent job performance and outstanding educational background, is not enough to overcome the pattern of falsifications and criminal conduct.

FORMAL FINDINGS

After weighing and balancing the specific policy factors with the general policy factors (whole person concept), Formal Findings are as follows:

Paragraph 1 (**drug abuse**): FOR THE APPLICANT.

a. For the Applicant.

b. For 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.

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 a security clearance for Applicant.

Paul J. Mason

Administrative Judge

1. Applicant was married during her sporadic marijuana use until May 1993. (Tr. 13)
2. Applicant's two falsifications in 1993 undermine Applicant's credibility. As the trier of fact, I must assess the credibility or believability of what witnesses state or testify to. In accomplishing that objective, I must review statements of a witness against more recent statements and/or testimony of the witness in order to ascertain what the true facts are. Unfortunately, Applicant's two earlier falsifications in 1993, which undercut her overall credibility, must be weighed and balanced against any more recent statements/testimony (including her unequivocal statement in her November 1996 application that she had not used marijuana since May 1993) Applicant makes about drug use. (GE #3) Although Applicant claimed she did not remember her June 1996 drug use until just before her polygraph examination, her suspect credibility sufficiently convinces me to believe the opposite is true.
3. According to Applicant, the security personnel always told her that her security clearance was not active unless she was briefed on a project (Tr. 23), or briefed or working on a classified program. (GE #1)
4. The question reads, "Have you ever illegally used a controlled substance ...while possessing a security clearance?"