

DATE: November 1, 2007

In Re:)
)
)
 -----) ISCR Case No. 06-22044
 SSN: -----)
)
 Applicant for Security Clearance)
)
)

**DECISION OF ADMINISTRATIVE JUDGE
MARTIN H. MOGUL**

APPEARANCES

FOR GOVERNMENT
Jeff Nagel, Esq., Department Counsel

FOR APPLICANT
Pro Se

SYNOPSIS

Applicant's credibility and trustworthiness is extremely suspect, as he has not been truthful or candid with information regarding his illegal drug usage that he furnished to the United States Government on three separate Security Clearance Applications (SCA). He also used illegal chemical substances while possessing a security clearance. Finally, he engaged in illegal sexual conduct. Mitigation has not been shown. Clearance is denied.

STATEMENT OF THE CASE

On January 10, 2007, the Defense Office of Hearings and Appeals (DOHA), pursuant to

Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the 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 a clearance should be denied or revoked.

Applicant filed a notarized response, dated March 5, 2007, to the allegations set forth in the SOR, and requested a hearing before a DOHA Administrative Judge.

This case was assigned to another Administrative Judge on May 16, 2007, to conduct a hearing and issue a written decision. It was reassigned this Administrative Judge on July 25, 2007. A Notice of Hearing was issued to the parties on October 4, 2007, and the hearing was conducted on October 17, 2007.

At the hearing, Department Counsel offered six documentary exhibits (Government's Exhibits 1-6) and no witnesses were called. Applicant offered no documentary exhibits and offered his own testimony. The transcript was received on October 25, 2007.

FINDINGS OF FACT

In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline E (Personal Conduct), Guideline J (Criminal Conduct), and Guideline D (Sexual Behavior) of the Directive. The SOR contains ten allegations, 1.a. through 1.j., under Guideline E, two allegations, 2.a. and 2.b., under Guideline J., and one allegation, 3.a., under Guideline D. Applicant admitted all of the SOR allegations with some explanations. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is 51 years old. He is separated and has three children. Applicant received a Bachelor of Science Degree in 1980 in Mechanical Engineering Technology. He is employed by a defense contractor as a Senior Mechanical Engineer, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he furnished untruthful information to the Government and engaged in conduct that exhibited poor judgement and untrustworthiness.

1.a. Applicant completed a signed, sworn SCA on April 3, 1997. Question #24 a. of the SCA asked if, since Applicant was 16 or in the previous seven years, Applicant had illegally used any controlled substance? Applicant answered "No" to this question. He should have listed the marijuana

and cocaine, discussed below as 1.b.(1) and 1.b.(6), since he used those substances within the last seven years before he completed the SCA.

1.b. Applicant admitted in his reply to the SOR, and during his testimony at the hearing that he used the following illegal substances during the periods listed.

- (1) marijuana from 1974 to 2002
- (2) hashish in the middle 1970s
- (3) psilocybin mushrooms in the middle 1970s
- (4) mescaline in the middle 1970s
- (5) LSD in the middle 1970s
- (6) cocaine between 1976 and the early 1990s
- (7) methamphetamine between 1977 and the late 1980s

1.c. Applicant completed a second SCA which he electronically submitted on April 5, 2002. Question #27 of the SCA asked if, since Applicant was 16 or in the previous seven years, Applicant had used illegal drugs, including marijuana, etc. Applicant answered "No." Applicant did not include his use of marijuana as listed in 1.b.(1) of the SOR, and discussed above.

1.d. On the April 5, 2002 SCA, Question #28 asked if Applicant had ever used illegal drugs while possessing a security clearance. Applicant answered "No." He did not list that he had used marijuana while he held a security clearance that had been granted to him on August 19, 1997, by the Department of Defense, as will be discussed further in allegation 1.g., below.

1.e. Applicant completed a third SCA which he executed on October 8, 2003. Question #27 of the SCA asked if, since Applicant was 16 or in the previous seven years, Applicant had used illegal drugs, including marijuana, etc. Applicant answered "No." Applicant again did not list his use of marijuana as listed in 1.b.(1) of the SOR, and discussed above.

1.f. On the October 8, 2003 SCA, Question #28 asked if Applicant had ever used illegal drugs while possessing a security clearance. Applicant answered "No." He did not list that he had used marijuana while he held a security clearance that had been granted to him on August 19, 1997, as will be discussed in allegation 1.g., below.

1.g. Applicant continued to use marijuana until 2002, while he held security clearances that had been granted to him, by the Department of Defense on August 19, 1997, and by the United States Air Force on August 21, 1997.

1.h. Applicant used the services of a prostitute in 2003 in Japan, while he was married and while holding a security clearance.

1.i. Applicant had sexual relations with a prostitute, who was a Philippine citizen, in 2004

in Japan, while he was married and while holding a security clearance.

1.j. Applicant traveled to the Philippines in June 2004 and December 2005, to meet and continue the sexual relationship that he had with the Philippine citizen, discussed in 1.i., above.

Paragraph 2 (Guideline J - Criminal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in criminal conduct.

2.a. Applicant's conduct, reviewed above in Paragraph 1, subparagraphs a., b., c., d., e., and f., constitutes a violation of Federal Law, Title 18, United States Code, Section 1001, which is a felony.

2.b. Applicant was arrested on May 5, 1992 and charged with Driving Under the Influence of Alcohol (DUI). He plead no contest to Reckless Driving and the imposition of sentence was suspended for three years. He was assessed \$1,300 in fines and penalties. No evidence was introduced to suggest that Applicant has been involved in any more than one DUI in the last 15 years.

Paragraph 3 (Guideline D - Sexual Behavior)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in sexual behavior that is either criminal, indicates a personality or emotional disorder, reflects lack of judgement or discretion, or which may subject an individual to undue influence or coercion.

3.a. Applicant's conduct, reviewed above in Paragraph 1, subparagraphs h., i., j., constitutes the kind of sexual behavior that is of concern to the Government, as it is criminal conduct, and it exhibits a lack of discretion and good judgement.

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case.

As set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General

Factors]:

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence.

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in acts of drug usage or criminal conduct, and that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue 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. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or

outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance.

(Guideline E -Personal Conduct)

With respect to Guideline E, the evidence establishes that Applicant furnished to the Government incomplete, untruthful answers on three different SCAs that he executed on April 3, 1997, April 5, 2002, and October 8, 2003.

The Government relies heavily on the honesty and integrity of individuals seeking access to our nation's secrets. When such an individual intentionally falsifies material facts or fails to furnish relevant information to a Government investigator, it is extremely difficult to conclude that he nevertheless possesses the judgment, and honesty necessary for an individual given a clearance. In this case, I conclude that Applicant knowingly and willingly failed to give complete, honest answers regarding his drug usage to the Government.

In reviewing the Disqualifying Conditions (DC) under Guideline E, I conclude that DC 16. (a) applies because of Applicant's deliberate omission, concealment, and falsification of relevant facts from personnel security questionnaires, which were used to determine security clearance eligibility. I can not find that any Mitigating Condition (MC) applies in this paragraph.

Applicant's conduct, considered as a whole, including his drug usage, especially while holding a security clearance, and the misinformation that he provided to the Government on three occasions, exhibits questionable judgement, unreliability, and a lack of candor. I resolve Paragraph 1, Guideline E, against Applicant.

(Guideline J -Criminal Conduct)

The Government also established by substantial evidence that Applicant engaged in criminal conduct, by his knowingly providing false and misleading information the Government on three security questionnaires, which is a felony. While it was not alleged as criminal conduct, his usage of illegal substances and the use of prostitutes also constitutes illegal conduct.

DC 31. (a), a single serious crime or multiple lesser offenses, applies in this case. DC 31. (c), allegations or admissions of criminal conduct, regardless of whether the person was formally charged, is also applicable to this case. There is no MC under Criminal Conduct. Paragraph 2, Guideline J is found against Applicant.

(Guideline D -Sexual Behavior)

The Government also established by substantial evidence that Applicant engaged in the kind of sexual behavior that is of concern to the Government, as it is criminal conduct, and it exhibits a lack of discretion and good judgement.

DC 13. (a), sexual behavior that is of criminal nature, whether or not the individual has been prosecuted, applies to the facts of this case. No MC can be found to apply here. Paragraph 3, Guideline D is found against Applicant.

FORMAL FINDINGS

Paragraph 1. Guideline E: AGAINST APPLICANT

- Subparagraph 1.a.: Against Applicant
- Subparagraph 1.b.: Against Applicant
- Subparagraph 1.c.: Against Applicant
- Subparagraph 1.d.: Against Applicant
- Subparagraph 1.e.: Against Applicant
- Subparagraph 1.f.: Against Applicant
- Subparagraph 1.g.: Against Applicant
- Subparagraph 1.h.: Against Applicant
- Subparagraph 1.i.: Against Applicant
- Subparagraph 1.j.: Against Applicant

Paragraph 2. Guideline J: AGAINST APPLICANT

- Subparagraph 2.a.: Against Applicant
- Subparagraph 2.b.: Against Applicant

Paragraph 3. Guideline D: AGAINST APPLICANT

- Subparagraph 3.a.: Against 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.

Martin H. Mogul
Administrative Judge