

DATE: May 31, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-04395

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Twenty-five year old Applicant's falsification, omission, and concealment in June 1999, made under certification, on a Security Clearance Application, regarding past illegal use of drugs or drug activity, in light of his eventual admission that he had experimented with marijuana during 1995-96, as well as his denial of more recent marijuana abuse despite testing positive for marijuana in September 1998, characterized by Applicant as a false positive, constitute violations of Federal law, Title 18, United States Code, § 1001, a felony, and raise grave questions and doubts as to his security eligibility and suitability. Clearance is denied.

STATEMENT OF THE CASE

On November 26, 2001, 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 and modified, 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 a clearance should be granted, continued, denied, or revoked.

In a sworn written statement, dated December 21, 2001, Applicant responded to the allegations set forth in the SOR, and elected to have his case decided on the written record, in lieu of a hearing. Department Counsel submitted the Government's written case on April 2, 2002. A complete copy of the file of relevant material (FORM) ⁽¹⁾ was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. He did so on May 13, 2002, when he submitted three letters of reference. The case was assigned to, and received by, this Administrative Judge on May 30, 2002.

FINDINGS OF FACT

Applicant has admitted both of the factual allegations pertaining to personal conduct under Guideline E (subparagraphs 1.a. and 1.b.); and criminal conduct under Guideline J (subparagraph 2.a.). Those admissions are incorporated herein as findings of fact.

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

Applicant is a 25 year old male employed by a defense contractor, and is seeking to obtain a SECRET security clearance. He was previously granted an interim security clearance.

Applicant was a substance abuser whose substance of choice was marijuana. He commenced experimenting with marijuana at some point during his freshman year in college, in about 1995, and continued doing so, on approximately 10 to 15 occasions during 1995-96. (2) He offered no explanation as to his motivation for doing so. Despite evidence to the contrary, discussed further below, he claimed his most recent substance abuse occurred during that same 1995-96 time-period. In February 2000, he vowed to abstain from any future illegal drug activity and to do everything in his power to avoid exposure to drug use. (3) However, there is substantial evidence to rebut Applicant's contention that he has abstained since 1996.

During the period of his marijuana "experimentation," Applicant never manufactured, purchased, transported, or sold the substance, (4) and there is no evidence to rebut his contentions.

In September 1998, Applicant was administered a pre-employment drug test by an employer which had recently hired him on a part-time basis. He flunked the test. (5) The examination registered positive for THC (marijuana). Although he denied having used marijuana prior to the test, and claimed the result was a false positive, he chose not to have a re-test performed on the original specimen sample because (1) it would have been too costly to do so, (6) and (2) the sample could have been tainted and a re-test would be "inconsequential." (7) Applicant did admit having been "exposed" to marijuana at that time during social occasions. (8) As a direct result of the positive drug test, Applicant was involuntarily terminated by the employer. (9)

On June 10, 1999, Applicant completed his Questionnaire for National Security Positions (SF 86), (10) and in response to an inquiry pertaining to ever ("since the age of 16 or in the last 7 years, whichever is shorter") having used a variety of illegal substances, including marijuana, (11) Applicant responded "no." He certified that his response was true, complete, and accurate. It was false. He had lied, falsified, omitted, and concealed the relevant portion of his true history of substance abuse, as described above. Six months later, in late January 2000, Applicant eventually admitted to an interviewing Defense Security Service (DSS) investigator that he had omitted and concealed the truth, and falsified the response. He attributed his response to a variety of vague justifications: (12)

- he had "regretfully neglected" to disclose the information;

In December 2001, Applicant modified his explanations and also acknowledged deliberately choosing not to admit his marijuana use because he feared his claim regarding the false test result would not be believed. He also expressed regret over not being fully candid in his response to the question. He now acknowledges his professional career and health can be jeopardized by substance abuse.

Applicant has been employed by another Government contractor since about May or June 1999, and was administered a drug test at that time, which he passed. (13) His performance has been characterized as outstanding and he has been recognized with several awards and a promotion.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into

those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An Administrative Judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision set forth in Section E2.2., Enclosure 2, of the Directive, are intended to assist the Administrative Judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an Administrative Judge should consider are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (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 pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

[Personal Conduct - Guideline E]: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, 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 any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(4) personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail;

(5) a pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency.

Conditions that could mitigate security concerns include:

(5) the individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or pressure.

[Criminal Conduct - Guideline 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) allegations or admissions of criminal conduct, regardless of whether the person was formally charged.

Conditions that could mitigate security concerns include:

None apply.

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security,"⁽¹⁴⁾ or "clearly consistent with the national interest." For the purposes herein, despite the different language, I have concluded both standards are one and the same. In reaching this Decision, I have endeavored to draw only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have attempted to avoid drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the Government to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the Government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the Government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. Because of this special relationship the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides that industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, an assessment of credibility, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

With respect to Guideline E, the Government has established its case. Examination of Applicant's actions reveals a pattern of conduct involving questionable judgment, untrustworthiness, and unreliability. Initially, he admittedly violated the law, in 1995-96, by abusing an illegal substance. In September 1998, when confronted with the positive results of a drug test, Applicant denied using marijuana at the time. Subsequently, in June 1999, when required to be truthful during the completion of an SF 86, he intentionally lied, and offered a variety of justifications for his action, and attributed the "false positive" result to a lack of accuracy and efficiency in the testing process.⁽¹⁵⁾ As recently as December 2001, Applicant contended the test was a false positive resulting not from his substance abuse but because he had been "exposed" to marijuana during social occasions. His position lacks credibility. Also, it is interesting to note when he was offered the opportunity to have a re-test of the original specimen, he declined. In this instance, I have no evidence of unintentional or careless oversight, but rather calculated and deliberate omissions of information which Applicant chose not to reveal simply because he felt it necessary to protect his interests.

Applicant's ensuing forthrightness regarding his early history of substance abuse, only upon being interviewed by a DSS investigator, in late January and early February 2000, does not lessen or minimize, much less erase or nullify, the impact of his falsification, omission, and deception. Applicant's overall questionable personal conduct in this regard clearly falls within Personal Conduct Disqualifying Condition (DC) E2.A5.1.2.2., DC E2.A5.1.2.4., and DC E2.A5.1.2.5. Likewise, while his eventual partial frankness does not qualify as a "prompt, good-faith effort" to correct his falsifications before being confronted with the facts under Personal Conduct Mitigating Condition (MC) E2.A5.1.3.3., it does reveal a positive step to significantly reduce or eliminate vulnerability to coercion, exploitation, or pressure, under

MC E2.A5.1.3.5.

Complete honesty and candor on the part of applicants for access to classified information is essential to make an accurate, meaningful security clearance determination. Without all the relevant and material facts, a clearance decision is susceptible to error, thus jeopardizing the nation's security. The nature of Applicant's actions and activities therefore pose a serious potential risk to the nation's security precautions which go to the very heart of the nation's security system. An applicant's responsibilities associated with the granting of a security clearance are considerable in terms of protecting the national security and in maintaining appropriate personal conduct. Along with the responsibilities is accountability. In this instance, while Applicant may be highly regarded by his current employer, he is also now accountable for those past actions and activities.

I do not take this position lightly, but based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my evaluation of the evidence, and my application of the pertinent factors and conditions under the Adjudicative Process, I believe Applicant has failed to mitigate or overcome the Government's case. The evidence leaves me with grave questions and doubts as to Applicant's security eligibility and suitability. Accordingly, allegations 1.a. and 1.b. of the SOR are concluded against Applicant.

With respect to Guideline J, the Government has established its case. Statements made by an applicant for access to classified information encompass matters within the jurisdiction of the Department of Defense, and are provided under Title 18, United States Code, Section 1001. Applicant's explanations for failing to accurately relate his correct history of substance abuse simply will not justify or exonerate such actions. I conclude, therefore, Applicant's felonious conduct -- misrepresentation, falsification, omission, and concealment (deception) of his substance abuse history, was material and made in a knowing and willful manner in contravention of Title 18, United States Code, Section 1001. That criminal conduct clearly falls within Criminal Conduct DC E2.A10.1.2.1. None of the Mitigating Conditions apply.

While a person should not be held forever accountable for misconduct from the past, without a clear indication of subsequent reform, remorse, or rehabilitation, I am unable to determine with reasonable certainty the probability such conduct will not recur in the future. Without more, I simply do not believe the period of time from the most recent acknowledged falsification--which occurred in June 1999--to the closing of the record, is sufficient to persuade me recurrence of such criminal conduct is unlikely. Consequently, I conclude Applicant has failed to mitigate or overcome the Government's case. Accordingly, allegation 2.a. of the SOR is concluded against Applicant.

For the reasons stated, I conclude Applicant is not eligible for access to classified information.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline E: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Paragraph 2. Guideline J: AGAINST THE APPLICANT

Subparagraph 2.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 or continue a security clearance for Applicant.

Robert Robinson Gales
Chief Administrative Judge

1. The Government submitted five items in support of its contentions.

2. *See* Item 5 (Statement of Subject), dated February 8, 2000) at 2.

3. *Id.*, at 3.

4. *Id.*, at 2-3.

5. *See* Item 4 (Security Clearance Application, dated June 10, 1999) (SF 86), at 6. *See also, Id.*, at 2.

6. The testing laboratory indicated a re-test could be done at Applicant's own expense of about \$100.00.

7. *See* Item 5, *supra* note 2, at 2.

8. *See* Item 3 (Response to SOR, dated December 21, 2001), at 2.

9. *See* Item 4, *supra* note 5, at 6.

10. Item 5.

11. Question 24a.

12. *See* Item 5, *supra* note 2, at 2.

13. *See* Item 3, *supra* note 8, at 2.

14. *See*, Executive Order 12968, "*Access to Classified Information*;" as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995, and further modified by memorandum, dated November 10, 1998. However, the Directive, as amended by Change 4, dated April 20, 1999, uses both "clearly consistent with the national interest" (*see*, Sec. 2.3.; Sec.2.5.3.; Sec. 3.2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), and "clearly consistent with the interests of national security" (*see*, Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (*see*, Enclosure 2, Sec. E2.2.2.)

15. *See* Item 4, *supra* note 5, at 6.