

DATE: December 9, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-19677

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This 42-year-old technician was involved with marijuana and/or cocaine between 1979 and 1992. In his 1999 security clearance application, he admitted the marijuana use, but omitted any mention of his cocaine involvement. He also failed to report his 2000 arrest on charges of driving while under the influence of alcohol in a December 2002 sworn statement to DSS. Although his drug use is dated, his recent falsifications make it difficult to conclude that his drug use and/or personal misconduct (the falsifications) are safely behind him. No rehabilitation or other mitigation has been shown. Clearance is denied.

STATEMENT OF THE CASE

On July 17, 2003, 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, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons

why DOHA could not make the preliminary affirmative finding required under the Directive that it

is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and

determine whether a clearance should be granted, denied or revoked.

On August 10, 2003, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made by a DOHA Administrative Judge on the written record, i.e., without a hearing. Department Counsel issued a File of Relevant Material (FORM) on May 27, 2004. The Form instructed Applicant that any response to the FORM had to be submitted within 30 days of its receipt by Applicant. The Applicant's response was due by July 1, 2004, and a timely response was received by DOHA. The matter was assigned to me for resolution on July 9, 2004.

FINDINGS OF FACT

Applicant is a 42-year-old electronic technician for a defense contractor. The contractor is seeking a security clearance for Applicant in connection with his employment. The SOR contains four allegations under Guideline H (Drug Involvement), 1.a. - 1.d., and four allegations under Guideline E (Personal Conduct), 2.a. - 2.d. In his response to the SOR, Applicant *admitted* allegations 1.a., 1.b., 1.c., 1.d., 2.a., and 2.b. He *denied* 2.c and 2.d. (Item 3). The admitted allegations are accepted and deemed to be Findings of Fact.

After considering the totality of the evidence derived from the FORM and its attachments, including but not limited to Applicant's responses to the SOR and FORM, I make the following specific FINDINGS OF FACT as to each SOR allegation:

Guideline H (Drug Involvement)

As alleged in the SOR, Applicant:

1.a. - was arrested in July 1992 for Possession of Cocaine in State A. He was placed in a one-year diversionary program, assessed a fine, and given a conditional discharge.

1.b. - tested positive for cocaine in a urinalysis given in November 1992.

1.c. - used marijuana from about 1979 to about 1986, up to twice weekly.

1.d. - used cocaine at least twice between 1979 and 1986.

Guideline E (Personal Conduct)

2.a. - In a signed sworn statement to an agent of the Defense Security Service (DSS), Applicant intentionally falsified material facts when he denied he had ever used any illicit drugs other than marijuana, when in fact he had used cocaine as alleged in SOR 1.a., 1.b., and 1.d., above.

2.b. - Applicant falsified material facts in a Security Clearance Application (SF 86), dated October 27, 1999, when he answered Question **24 Your Police Record - Alcohol/Drug Offenses**, and deliberately failed to disclose his cocaine involvement, as alleged in SOR 1.a., 1.b., and 1.d., above.

2.c. - Applicant falsified material facts in a Security Clearance Application (SF 86), dated October 27, 1999, when he answered Question **24 Your Police Record - Alcohol/Drug Offenses** and deliberately failed to disclose his arrest for Operating Under the Influence of Liquor/Drugs in December 1999.

2.d. - the information contained in SOR 1.a., 1.b., 1.c., and 1.d., above.

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant

in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding

the conduct, to include knowing 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 (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors,

individually and collectively, in reaching my overall conclusion.

Because each security case presents its own facts and circumstances, it should not be assumed

that the factors cited above exhaust the realm of human experience or that the factors apply equally

in every case. Moreover, although adverse information concerning a single guideline may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment and conduct. Because Applicant chose to have this matter decided without a hearing, all credibility determinations and findings of fact are necessarily based entirely on the contents of the FORM and applicant's response.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of

whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination based on the "whole person" concept required by the Directive, the Administrative Judge is not permitted to speculate, but can only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make

critical judgments as to the credibility of witnesses, here based solely on the written record.

In the defense industry, the security of classified information is entrusted to civilian workers

who must be counted on to safeguard classified information and material twenty-four hours a day.

The Government is therefore appropriately concerned where available information indicates that an

applicant for a security clearance, in his or her private life or connected to work, may be involved

in conduct that demonstrates poor judgment, untrustworthiness, or unreliability. These concerns include consideration of the potential, as well as the actual, risk that an applicant may deliberately

or inadvertently fail to properly safeguard classified information.

An applicant's admission of the information in specific allegations relieves the Government

of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either

by the Applicant's admissions or by other evidence) and proves conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the Applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence

of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the Applicant.

A person seeking access to classified information enters into a fiduciary relationship with the

Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended,

at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

CONCLUSIONS

Drug Involvement - In his Response to the SOR (Item 3), Applicant admits all four drug-related allegations. His response also includes a discussion of the circumstances of each allegation and his statement that he has learned his lesson and has not used any illicit drugs since 1992.

Personal Conduct (Falsifications) - I have carefully considered Applicant's explanations for the omission of the information cited in SOR 2. and 2.b., specifically the discussion in his sworn statement to DSS, and in his August 2003 Response to the SOR (Item 3). (His response to the FORM does not discuss this issue).

In his second statement to DSS, Applicant states that he had used marijuana but had "never used any other illicit drug, narcotic, or substance" (Item 3). Subsequently, after being confronted with the fact of his having tested positive for cocaine in 1992, he admitted that "I should have told [the DSS agent] about my cocaine use when initially questioned but I felt I would hinder my chance of getting a security clearance" (Item 6). In his response to the SOR, Applicant said that he should have disclosed his previous cocaine use but that not doing so "wasn't a cold calculation to conceal" (Item 3). These two statements are clearly contradictory and make it impossible to conclude that Applicant's omissions were not intentional or deliberate.

The 1999 arrest does not appear in the FBI Criminal History (Item 7) but is discussed in great detail in Applicant's November 2000 statement to DSS (Item 5, pages 3 and 4). In his response to the SOR (Item 3), Applicant first states that "I did not falsify any alcohol-related incident in October 1999 as there was no incident to report. [In] December 2002, in speaking with the DSS agent, he "checked with IDRC and verified the matter was closed, fines paid, and IDRC program completed with no further action necessary" (*Id.*). Applicant's explanations raise additional questions. He seems to be saying, firstly, that he was not arrested in 1999 as alleged in SOR 2.c. and secondly, that he was arrested and sentenced, but that he didn't have to report the matter because it was somehow completed with no further actions necessary. He also states that he "realizes he should not have just focused on the conviction part but also on the charged segment of the question at which time I discussed the incident fully" (Item 3). His claims are contradictory and, in any case, do not excuse his intentional failure to report the matter as required by the language of Question 24 in his SF 86.

Disqualifying and Mitigating Conditions

Drug Involvement - Disqualifying Conditions (DC) 1 - any drug abuse and DC 2 -illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution are clearly applicable. Mitigating Condition (MC) 1 - the drug involvement was not recent - is established by the last date of use shown by the record being in 1992. However, the weight to be give to this factor is minimized by evidence showing substance abuse (alcohol) continuing until at last 1999 (arrest for driving under the influence) and conduct showing poor judgment occurring in 1999 (falsifications in SF 86); 2000 (driving with suspended license), and December 2002 (falsifications in sworn statement to DSS); MC 2 - the drug involvement *was not* infrequent or isolated and; the factors discussed above as to MC 1 also makes it impossible to conclude that Applicant has adequately "demonstrated [an] intent not to abuse any drugs in the future" (MC 5).

Personal Conduct - Disqualifying Conditions (DC) 2 - deliberate omission of relevant and material facts from the SF 86 and DC 3 - deliberate omission of material facts from statement given to DSS; and DC 5 - a pattern of dishonesty or rule violation - are established by the record. None of the parallel mitigating conditions have been demonstrated by Applicant.

Overall, Applicant has done nothing to demonstrate that the Government's concerns have been mitigated or that he currently possesses the good judgment, reliability, and trustworthiness required of anyone seeking a security clearance.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Guideline H (Drug Involvement Against the Applicant

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. Against the Applicant

Guideline E (Personal Conduct)

Subparagraph 2.a. Against the Applicant

Subparagraph 2.b. Against the Applicant

Subparagraph 2.c. Against the Applicant

Subparagraph 2.d. 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.

Barry M. Sax

Administrative Judge