

DATE: April 29, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-20558

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esquire, Deputy Chief Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's personal conduct, drug use, and criminal conduct raise security concerns. He knowingly and willfully omitted adverse information from his security form and misrepresented information about his employment history and past and current drug use. Applicant failed to meet his duty to disclose his illegal drug use that continued until March 2000 even though he understood such marijuana use was against the government's security policies. His hard work and favorable references do not erase the security significance of these material false statements; while to his credit he has abstained from any marijuana use for three years, security concerns persist over his drug use which continued even after he applied for a security clearance. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on September 12, 2002. The SOR detailed reasons why the Government could not make the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. ⁽¹⁾ The SOR alleges specific concerns over personal conduct (Guideline E), drug use (Guideline H), and criminal conduct (Guideline J). Applicant responded to these SOR allegations in an Answer notarized November 25, 2002, where he admitted all of the allegations in paragraphs 1 and 2; he requested a hearing.

The case was assigned to Department Counsel who on December 17, 2002, attested it was ready to proceed; on that day the case was assigned to another administrative judge, but immediately re-assigned to me. Subsequently, a mutually convenient date for hearing was agreed to; a Notice of Hearing was issued on January 7, 2003, which set the matter for January 30, 2003, at a location near where Applicant works and lives. At the hearing the Government offered into evidence eight Government exhibits; all were admitted into evidence. (Exhibits 1-8) The Applicant represented himself and testified; he requested seven days to submit exhibits. I granted him seven days until February 6, 2003 and allowed the Department Counsel until February 12, 2003, to review them. (TR 28-30; 48, 55) On February 6, 2003, Applicant offered eight exhibits into evidence. Department Counsel reviewed them and offered no objection to these exhibits

being admitted into evidence. (Exhibits A-H) The exhibits were admitted into evidence and the record closed. The transcript (TR) was received on February 13, 2003.

Procedural Issues

Department Counsel moved to amend the SOR to conform to the evidence:

- 2.c. to amend the date of Applicant's arrest to conform with Exhibit 5, and
- 2.d. to amend the date that he had used marijuana during his lunch period to conform with Exhibit 8.

As Applicant did not object, I granted the technical amendments. (TR 19-21)

FINDINGS OF FACT

After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following Findings of Fact:

Applicant, 37 years old, has worked for Company #1 since November 1985; however he has had frequent layoffs. In his current job he does not need a security clearance, but he would need one to be promoted. He has also had a part-time job with Company #2 from May 1998 to present. He has also worked for Company #3 from 1994 to February 1998. He's maintained two jobs for a ten year period. (Exhibits 1, 2; TR 25-28, 45-47, 53-54) He has never held a security clearance. (TR 31) His first love is music; he has been a deejay, played in a band, recorded music, and run light shows for bands. (TR 37-38, 46-47)

Applicant has a child born in 1988. (Exhibits 1, 2; TR 38)

Personal Conduct, Drug Use, and Criminal Conduct

In February 2000 Applicant completed a Security Clearance Application (SF 86) but only disclosed part of the required adverse information. In response to Question 20 in the SF 86 concerning his employment record, he stated he left a job with Company #3 in February 1998 by "mutual agreement following allegations of unsatisfactory performance"; he failed to note that he had left this employer in February 1998 for misconduct. Also, he falsely answered "no" in response to Question 27 about illegal drug use. However, he did disclose his 1999 arrest for "possession of a weapon & pipe" and a \$98 fine. (Exhibit 1, TR 24) Applicant conceded that he "lied basically" about the "no" answer to drug use as he needed his job. At the time he filled out the security form he was still using marijuana and continued to use it through March 2000. (TR 33-35)

Finally, when he was interviewed by the Defense Security Service (DSS) in February 2001, he disclosed he used marijuana at age 11 in 1975 and he continued to use it in varying amounts until March 2000. In addition he experimented with other drugs - yellow jackets (barbiturates), robin eggs (LSD), Christmas trees (LSD), and cocaine. Also, he purchased about \$20 worth of marijuana monthly from 1984 to 2000. In September 1999 he was arrested for three charges: (1) displaying unauthorized registration plates, (2) possession of drug paraphernalia, and (3) possession of prohibited weapon. Counts 1 and 2 were dismissed and he pled guilty to Count 3 in a plea agreement; he was fined \$230. He did possess drug paraphernalia. In March 2000 he failed a drug test conducted by Company #1; he was suspended from work for three weeks and ordered to undergo drug counseling. From April to July 2000 he attended drug treatment. He stopped using marijuana in March 2000 as he did not want to lose his job or his new girlfriend. He has no intention of using any illegal drugs in the future and no longer associates with the friends with whom he used drugs. (Answer; Exhibits 1, 2, 3, 5, 6; TR 24-25, 36-42) In April 2000 Company #1 reported the adverse information regarding Applicant's positive drug test. (Exhibit 8)

His drug treatment records record that Applicant was "cooperative" in his treatment from April to July 2000. His provisional and final diagnoses were 305.20, Cannabis Dependence Features, Adjustment Disorder with Depression. (Exhibit 6)

Employment records from Company #2 disclosed he was given a misconduct discharge in February 1998 after a

series of warnings: a co-worker filed a formal complaint about Applicant's conduct in May 1996 and he was given a verbal warning; in November 1997 he was given another Conduct Warning for inappropriate touching of a co-worker; in January 1998 he was given another Conduct Warning after he was presented with a "performance warning" and used vulgar language to his supervisor; in February 1998 he received another Conduct Warning for use of inappropriate language. When he was interviewed by DSS in February 2002, he admitted that his "performance was lacking" with Employer #3 in 1998; he used inappropriate language and was given two warnings for this conduct as well as counseled on performance issues. He admitted he "was not fully truthful when answering question 20" on his security form. He should have stated that the reasons for his termination was "inappropriate conduct, using inappropriate language around co-workers and supervisor." He did not include this information as he did not want these circumstances known by the workers at Company #1. (Exhibits 1, 4; TR 31-33, 43-45)

References

An assistant manager at Company #2 who has know Applicant for five years described him as "a genuinely nice and friendly man who goes out of his way to help out" people. He is an honest and trustworthy employee. (Exhibit A)

A co-worker from Company #1, who has known him for three years, describes Applicant as "a well-respected employee who will definitely put forth the extra effort to get the job done."

A co-worker from Company #1 has seen Applicant mature over the three years he has known with him; he advised that Applicant has participated in many company charitable functions. (Exhibit C) Applicant played a key role in a United Way fund-raising effort. (Exhibits D & E)

A friend has observed "overwhelming improvement" in Applicant's attitude and discipline since the substance abuse incident. (Exhibit F)

The assistant manager at Company #2 has worked with Applicant for five years and recommends him as a "pleasant and dedicated associate who is a hard worker." He gets along with all associates. (Exhibit G)

A friend who has known Applicant for six years recommends him for a security clearance as he is a hard worker and an honest and dependable man. He has stopped using marijuana. (Exhibit H)

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. But the mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole, I weighed relevant Adjudication Guidelines as set forth below :

Guideline E - Personal Conduct

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.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

[First] Refusal to undergo or cooperate with required security processing, including medical and psychological testing; or

[Second] Refusal to complete required security forms, releases, or provide full, frank and truthful answers to lawful questions of investigators, security officials or other official representatives in connection with a personnel security or trustworthiness determination.

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;

Conditions that could mitigate security concerns include:

None

Guideline H - Drug Involvement

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.

Drugs are defined as mood and behavior altering:

[First] Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens) and

[Second] Inhalants and other similar substances.

Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

Conditions that could raise a security concern and may be disqualifying include:

1. Any drug abuse (see above definition);
2. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution;
4. Evaluation of drug abuse or drug dependence by a licensed clinical social worker who is a staff member of a recognized drug treatment program;

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;

Guideline J - Criminal Conduct

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:

- a. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
- b. A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

None

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue Applicant's access to classified information. The Applicant presents evidence to refute, explain, extenuate, or mitigate in order to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance. Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

CONCLUSIONS

Personal Conduct

The Government clearly established security concerns over Applicant's personal conduct. Applicant had opportunities on the security form to disclose his past employment and drug issues, but he failed to disclose fully all adverse information in answering questions 20 and 27. Applicant's behavior⁽²⁾ reflects questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations and could indicate that he may not properly safeguard classified information.

To rebut and overcome the Government's case, Applicant would have to demonstrate that he has mitigated⁽³⁾ this conduct. His current favorable reference letters have to be measured against his knowing and willful failure to disclose required information about his adverse employment termination with Company #2 and his drug use. He had a duty to disclose fully which he failed to meet.

Further, while Applicant's supervisors and friends submitted references that they believed him to be an honest and trustworthy person, they did not testify at the hearing and were not subject to cross-examination, so I give them less weight as it is not clear that they are aware of all of the adverse circumstances. Consequently, after a review of him as a whole person, I conclude that Applicant has not mitigated his false answers on the security clearance form to the question on his past employment history and his past and current drug use. While he one year later fully disclosed his drug history to the DSS agent, there is no evidence that he did so voluntarily and before he was confronted. Further he was interviewed three times by DSS before he disclosed all of the facts about his past adverse employment history. Thus, his knowing failure to make these required disclosures raises security concerns as he neglected to give truthful answers to questions that were both relevant and material to his security eligibility. Applicant's favorable work record and references cannot erase these serious security concerns over his misleading conduct in the security clearance process. Hence, after considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule against Applicant on subparagraph 1.a. and 1.b. under SOR Paragraph 1.

Drug Use

The Government established security concerns over Applicant's intermittent marijuana use from 1975 to March 2000. He also used several other drugs on an experimental basis and had a drug paraphernalia arrest in 1999 that was dismissed. He purchased marijuana on a regular basis and continued to use marijuana even after he completed a security form in February 2000 where he was questioned about such illegal drug use and was put on notice that such drug use was inconsistent with being granted access to classified information. Indeed, he used marijuana several times after he had applied for a security clearance. In March 2000 someone observed him use marijuana on his lunch hour; he was subsequently tested; and the results were positive for marijuana use. He went to treatment as mandated by his employer and was diagnosed with Cannabis Dependency Features.

Subsequently, Applicant has made a convincing commitment in March 2000 to avoid all future drug use and was involved in a treatment program from April to July 2000. To his credit he has not use any marijuana in almost three years and no longer associates with the friends with whom he used drugs. Given his record of good work and his dedication to advance himself, I believe he has mitigated his past drug use in part under MC (1) The drug involvement was not recent; and MC (3) a demonstrated intent not to abuse any drugs in the future. On the other hand, for Applicant to use drugs as alleged in 2.d. when he knew or should have known that such illegal drug use was against the government's policies, raises ample questions about his judgment overall. Thus, after considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraphs 2.a., 2.b., 2.c., 2.e. 2.f., 2.g. 2.h., 2.i., and 2.j. but against Applicant on subparagraph 2.d. incorporated under SOR Paragraph 2.

Criminal Conduct

The Government established security concerns over Applicant's criminal conduct under Title 18 United States Code Section 1001 [\(4\)](#)

as he falsified answers to two questions on the federal security form by failing to disclose the details of his 1998 termination from Company #2 and gave misleading answers on the form about the recency and frequency of his marijuana use. Although he was never prosecuted under this statute or convicted, his conduct, as discussed above under personal conduct, falls within that statute as his false answers to the employment and drug questions were given "knowingly and willfully."

To his credit, Applicant has a good work record and favorable references which indicate partial rehabilitation. However, he should have fully disclosed his adverse employment background and his drug use on the government form. His knowing failure to make these required disclosures raises continuing concerns about his security worthiness under Title 18 United States Code Section 1001. Thus, after considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule against Applicant on subparagraph 3.a. incorporated under SOR Paragraph 3.

FORMAL FINDINGS

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1. Guideline E: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Paragraph 2. Guideline H: AGAINST APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: For Applicant

Subparagraph 2.d.: Against Applicant

Subparagraph 2.e.: For Applicant

Subparagraph 2.f.: For Applicant

Subparagraph 2.g.: For Applicant

Subparagraph 2.h.: For Applicant

Subparagraph 2.i.: For Applicant

Subparagraph 2.j.: For Applicant

Paragraph 3. Guideline J: 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 the Applicant.

Kathryn Moen Braeman

Administrative Judge

1. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), as amended by Change 4, April 20, 1999.

2. 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;

3. Conditions that could mitigate security concerns include: 1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability; 2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily; 3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts; 4. Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided; 5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress; 6. A refusal to cooperate was based on advice from legal counsel or other officials that the individual was not required to comply with security processing requirements and, upon being made aware of the requirement, fully and truthfully provided the requested information; 7. Association with persons involved in criminal activities has ceased.

4. Title 18 United States Code Section 1001. - Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 5 years, or both.