

DATE: September 8, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-24800

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a history of marijuana use and purchases (some while holding a security clearance) that he repeatedly omitted when executing security clearance applications (SF-86s) in 1984 and 2000 and in previous DSS interviews in 1990 and 1991. Applicant's concealment of his marijuana use until first confronted (in 1991) and later after delaying for almost two years after completing his 2000 SF-86 is not mitigated under any of the pertinent mitigation guidelines and raise continuing security concerns about Applicant's judgment and reliability. Clearance is denied.

STATEMENT OF CASE

On November 20, 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, 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 granted, continued, denied or revoked.

Applicant responded to the SOR on December 6, 2003, and requested a hearing. The case was assigned to me on June 2, 2004, and was scheduled for hearing on July 21, 2004. A hearing was convened as scheduled for the purpose of considering whether it is clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At hearing, the Government's case consisted of 10 exhibits; Applicant relied on two witnesses (including himself) and two exhibits. The transcript (R.T.) of the proceedings was received on July 28, 2004.

PROCEDURAL ISSUES

Before the close of the hearing, Applicant requested that the record be kept open to afford him the opportunity to supplement the record with a character reference. There being no objection from Department Counsel, and good cause being demonstrated, Applicant was granted 7 days to supplement the record. The Government was afforded one day to

respond. Within the time permitted, Applicant supplemented the record with a character reference, which is accepted as Applicant's exhibit C.

Before the close of the hearing, Department Counsel moved to amend subparagraph 2.b of the SOR to substitute the date of April 1984 for April 1994. There being no objection, and good cause being demonstrated, Department Counsel's motion was granted. Applicant's affirmative answer to subparagraph 2.b was accepted

SUMMARY OF PLEADINGS

Under Guideline H, Applicant is alleged to have (a) been arrested and charged with marijuana possession (less than five pounds, but more than four ounces) in November 2001, for which he received two years of deferred adjudication and was ordered to pay restitution, (b) purchased marijuana from 1994 to at least November 2001, and (c) used marijuana while attending college, and approximately 12 times from 1994 to at least 1998.

Additionally, Applicant is alleged to have (i) falsified his SF-86 by omitting his marijuana use while in college and between 1994 and 1998, (ii) deliberately misrepresenting to a DSS agent in an September 1990 signed, sworn statement that he was not a drug user, and omitting his marijuana use in high school (on four or five occasions) and college, and (iii) deliberately misrepresenting to a DSS agent in January 1991 signed, sworn statement that he last used marijuana in ay 1976.

For his response to the SOR, Applicant admitted each of the allegations while ensuring he would never do anything that might jeopardize the well being of the U.S.

FINDINGS OF FACT

Applicant is a 44-year old scheduling manager for a defense contractor who seeks to obtain a security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

Applicant was introduced to marijuana while in college (1979 to 1983) and smoked it every couple of weeks with friends, occasionally purchasing enough for his personal needs (*see ex. 7; R.T., at 44-46*). After graduating from college in 1983, Applicant abstained from marijuana use for about nine years. He resumed his marijuana use in 1994 and smoked the substance about 12 times between 1994 and 1998 after his ex-wife was diagnosed with a disorder that responded favorably to marijuana intake (*see ex. 3; R.T. 34-35*). Beginning in 1994, he started buying marijuana from his brother-in-law for his ex-wife's use. When Applicant smoked the substance it was always with her. Both his resumed use and purchases after 1994 were knowingly initiated by Applicant while he held a security clearance.

Applicant was arrested in November 2001 for possession of marijuana (less than five pounds but more than 4 ounces), a felony offense. He had purchased 3/4 of a pound for his now ex-spouse (who smoked marijuana regularly for medical reasons) while on a hunting trip and was returning home when he was stopped by police (*see exs. 3 and B; R.T., at 35-36*). Once he got home, he destroyed his drug paraphernalia and told his ex-wife about it. When he appeared in court in January 2002, he pled guilty to marijuana possession and received two years of deferred adjudication and was ordered to attend a drug offender education program (*see ex. 7*). Applicant complied with the court's conditions and completed his probation last year (*R.T., at 53*).

One month after his November 2001 marijuana possession arrest, Applicant received his divorce papers from his ex-spouse. Since his separation and divorce (finalized in April 2002), Applicant has not used, possessed or purchased any marijuana or any other illegal substance. He last used marijuana in 1998, and assures he has no intention of ever using or becoming involved in illegal drugs in the future (*R.T., at 53*).

Asked to complete his SF-86 in August 2000 (*see exs. 1 and 2*), Applicant omitted his drug usage when responding to question 27. His omissions were preceded by similar drug use disclaimers when he responded to SF-86 questions about drug use in April 1984 (*see ex. 8*). Applicant attributes his omissions to embarrassment. Essentially, he didn't want the Government to know about his marijuana usage and was fearful of losing his job or clearance (*R.T., at 56-59*).

When interviewed by DSS agent A in June 1984, following completion of his SF-86, Applicant repeated his denials about any marijuana involvement (*see ex. 8*). He reiterated his denials of any prior drug use in the signed, sworn statement he executed for Agent B in November 1991 (*see ex. 4*).

Applicant continued to answer negatively to questions about his prior drug use when he was interviewed by a third DSS agent in September 1990. Only after he was polygraphed by a DSS polygrapher in January 1991 did he acknowledge his marijuana use between 1976 and 1991 (*see ex. 10*). After repeating his marijuana use omissions in his April 1994 and August 2000 SF-86s, Applicant came forward to voluntarily acknowledge his complete drug use history when he was interviewed by Agent D in September 2002 (*see ex. 2*).

Applicant is highly regarded by his production control supervisor who sees Applicant on a daily basis. His direct supervisor, coworkers and neighbor describe Applicant uniformly as trustworthy and dedicated (*see ex. A; R.T., at 64*). However, none of his character references indicate any personal knowledge of his omissions of his drug use/purchases from his clearance applications or DSS interviews.

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Drug Involvement

The Concern: 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.

Disqualifying Conditions:

DC 1: Any drug use.

DC 2: Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.

Mitigating Conditions:

MC 1: The drug involvement was not recent.

MC 3: A demonstrated intent not to abuse any drugs in the future.

Personal Conduct

The Concern: 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.

Disqualifying Conditions:

DC 2 The deliberate omission, concealment, falsification or misrepresentation 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.

DC 3 Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination.

Mitigating conditions: None.

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a

security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his

or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSIONS

Applicant has a praiseworthy civilian record, but also a history of security significant drug involvement and omissions in his SF-86s and prior DSS statements of his past use of illegal substances while holding a security clearance. This prior drug involvement and repeated omissions raise security significant questions over Applicant's ability to meet the requirements of judgment, reliability and trustworthiness necessary to continue his clearance eligibility to access classified information.

Drug issues

Between 1979 and 1983, Applicant used marijuana bi-weekly with friends, occasionally purchasing enough for his personal needs. After abstaining from the substance for a number of years following his graduation from college in 1983, he resumed his marijuana use in 1994 (while he held a security clearance) and smoked the substance occasionally (about 12 times altogether) between 1994 and 1998 after his ex-wife was diagnosed with a disorder that responded favorably to marijuana intake. He pleaded guilty to marijuana possession in 2002 after being caught with the substance he had purchased for his wife while on a hunting trip. Based on Applicant's pleading admissions and compiled evidentiary record, two disqualifying conditions (DC) of the Adjudicative Guidelines for drugs are applicable: DC 1 (any drug abuse) and DC 2 (illegal drug possession).

Since his guilty plea and accepted probation conditions, Applicant has permanently separated from his wife (the precipitating source of his return to marijuana purchases), has satisfied the conditions set by the court as a part of his

probation, and has avoided purchase of marijuana or any other illegal substance since his November 2001 arrest. Without any further evidence of his returning to drug use since 1998 or drug purchases since November 2001, he is entitled to the benefit of several mitigating conditions of the Guidelines for drugs: MC 1 (drug involvement not recent) and MC 3 (demonstrated intent not to abuse any drugs in the future). Overall, Applicant mitigates security concerns associated with his prior abuse of illegal substances (*i.e.*, marijuana). Favorable conclusions warrant with respect to subparagraphs 1.a through 1.c of Guideline H.

Falsification issues

Potentially serious and difficult to reconcile with the trust and reliability requirements for holding a security clearance are the timing and circumstances of Applicant's drug use omissions in each of his SF-86s completed in 1984 and 2001, respectively, as well as in his 1990 and 1991 DSS interviews. So much trust is imposed on persons cleared to see classified information that deviation tolerances for incidents of trust betrayal are calibrated narrowly.

By omitting his past marijuana use in each of his clearance applications, and separate DSS interviews before being confronted, Applicant concealed materially important background information needed for the government to properly process and evaluate his security updates. He makes no claim of misunderstanding the questions, which were posed in a straightforward way in the questionnaires and separate DSS interviews. Applicant attributes his omissions to concern about how disclosure of the adverse information would impact on his employment and clearance: understandable certainly, but historically considered by our Appeal Board to be insufficient to avert drawn conclusions of knowing and wilful concealment.

Applicant's omissions were knowing, deliberate, and material to a determination about his clearance suitability. They invite application of Disqualifying Conditions (DC) for personal conduct of the Adjudicative Guidelines: DC 2 (falsification of a security questionnaire) and DC 3 (providing false information to an investigator).

Mitigation is difficult to credit Applicant with, since he failed to voluntarily alert DSS to his omissions following both his 1984 and 2000 SF-86s or take advantage of opportunities afforded him in his 1990 and 1991 DSS interviews before being confronted with drug abuse challenges by his DSS interviewer. Not only has the Appeal Board found the use of Mitigating Condition (MC) 2 of the Adjudicative Guidelines for personal conduct (isolated, corrected falsification) to be unavailable to applicants seeking mitigation by treating the omission as isolated, but it has denied applicants availability of MC 3 (prompt, good faith disclosure) as well in circumstances (as here) where the applicant has failed to take advantage of an earlier DSS interview opportunity. *Compare* ISCR Case No. 97-0289 (January 1998) with DISCR Case No. 93-1390 (January 1995).

Applicant in the present case is on record with bypassing initial opportunities to come forward with information about his illegal drug involvement until confronted. His lone voluntary disclosure of his past drug activity came in his September 2002 DSS interview, over two years after submission of his August 2000 SF-86, and too late to satisfy the promptness prong of MC 3 (prompt, good faith disclosure) of the Guidelines for personal conduct. The Appeal Board has been quite clear for a number of years now that an applicant cannot be credited with a prompt, good faith correction where he has tacitly repeated his omissions and waited months for another DSS interview before electing to come forward with corrections. *See* DISCR Case No. 93-1390 (January 1995). Applicant, accordingly, may not take advantage of either MC 2 (isolated omissions) or MC 3 (prompt, good faith correction of the falsification) of the Adjudicative Guidelines for personal conduct.

There can be no doubt but that Applicant has inspired confidence and trust among his defense contractor supervisor and co-workers. But in the face of his repeated acts of omission, his favorable character evidence alone is not enough to absorb security concerns extant with the Government over his failure to be truthful through both his SF-86 submissions and his recorded DSS interviews. *See* ISCR Case No. 01-25466 (July 2004). Mitigation is further weakened by the qualifications expressed by several of his character witnesses: lack of awareness of Applicant's omissions of material information in each of his SF-86 submissions and his earlier DSS interviews.

Considering all of the evidence produced in this record and the available guidelines in the Directive (inclusive of the E.2.2 factors), unfavorable conclusions warrant with respect to sub-paras. 2.a through 2.d of Guideline E.

In reaching my decision, I have considered the evidence as a whole, including each of the E 2.2 factors enumerated in the Adjudicative Guidelines of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the FINDINGS OF FACT, CONDITIONS, and the factors listed above, this Administrative Judge makes the following FORMAL FINDINGS:

GUIDELINE H (DRUGS): FOR APPLICANT

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR APPLICANT

Sub-para. 1.c: FOR APPLICANT

GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT

Sub-para. 2.a: AGAINST APPLICANT

Sub-para. 2.b: AGAINST APPLICANT

Sub-para. 2.c: AGAINST APPLICANT

Sub-para. 2.d: 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 Applicant's security clearance. Clearance is denied.

Roger C. Wesley

Administrative Judge