

DATE: December 10, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-25158

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant last used marijuana in 1999 and 2000. He lied about the 1999 use on a questionnaire he filled out six months later in 2000. Insufficient mitigation is found. Clearance is denied.

STATEMENT OF THE CASE

On January 6, 2003, 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 the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on January 30, 2003, and requested a decision be made on a written record. Department Counsel requested that a hearing be held, in accordance with Paragraph E3.1.7, Additional Procedural Guidance of the Directive. The case was received by the undersigned on June 30, 2003, and a Notice of Hearing was issued the same day.

A hearing was held on July 23, 2003, at which the Government presented two documentary exhibits, and called one witness. Testimony was taken from the Applicant, who also submitted three exhibits. The transcript was received on August 1, 2003.

FINDINGS OF FACT

The Applicant is 37 and single. He is employed by a defense contractor as a communication technician, and he seeks to retain a DoD security clearance previously granted in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a continued security clearance, based upon the allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

Paragraph 1 (Guideline H - Drug abuse). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he abuses illegal drugs.

The Applicant began using marijuana in 1985. He used it on an occasional basis after that. Though the evidence is unclear, the Applicant is maintaining that he did not use marijuana between 1993 and 1999. However, the Applicant also stated that he used marijuana on special occasions between 1985 and 1999. (Transcript at 36-37.) The Applicant used marijuana in 1999 when on a cruise. The available evidence seems to indicate that he used it more than once on that cruise. (Government Exhibit 2 at 1, Transcript at 34.) The Applicant next used marijuana in approximately October 2000. (Government Exhibit 2 at 1-2, Transcript at 35.) The Applicant has not used marijuana since that time and evinces a credible intent not to use marijuana in the future. (Transcript at 37-38.)

Paragraph 2 (Guideline E - Personal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he intentionally falsified material aspects of his personal background during the clearance screening process.

On April 24, 2000, the Applicant completed an official DoD questionnaire in which he stated that he had not used marijuana within the last seven years. (Government Exhibit 1, question 27.) This statement was a false answer to a material question pertaining to the Applicant's former involvement with illegal substances.

The Applicant was subsequently interviewed by a Special Agent of the Defense Security Service (DSS) in March 2001. In that interview the Applicant described his 1999 drug use.

According to the Special Agent, the Applicant stated that he had falsified his drug information, "[D]ue to fear of being denied a security clearance, embarrassment, and concerns of possible adverse employment impact." (Government Exhibit 1 at 3.) The Applicant disputed that interpretation of his remarks. (Transcript at 29, 41-42.) Specifically, the Applicant stated that he told the Special Agent that he did not remember using marijuana at the time, and indeed forgot to set forth that he cruised outside the United States.

In his Answer to the SOR, the Applicant stated, "The two occasions [of marijuana use] occurred on a cruise outside of the United States. When I answered no to question 27 it was because I didn't believe I illegally used a controlled substance because I was not in the United States." At the hearing the Applicant testified, "I just made a mistake. I did not recall the time that I smoked marijuana." (Transcript at 34, 36.)

Mitigation.

The documentary evidence submitted by the Applicant shows that he is a valued employee. (Applicant's Exhibit A.) His current and immediate past supervisors recommend that he receive a security clearance. (Applicant's Exhibit C.)

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. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

Guideline H (Drug involvement)

Conditions that could raise a security concern:

- (1) any drug abuse;

Conditions that could mitigate security concerns:

- (1) the drug involvement was not recent;
- (3) a demonstrated intent not to abuse any drugs in the future;

Guideline E (Personal conduct)

Conditions that could raise a security concern:

- (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:

(None of the stated conditions have application in this case.)

In addition, 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 use and falsification 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 or her a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant has used illegal drugs (Guideline H); and that he intentionally made false material statements to DoD (Guideline E).

The Applicant, on the other hand, has not introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's case against him, except in part. Paragraph 1 (Guideline H) is found for the Applicant because his drug use ended almost three years before the record closed. The Applicant, on this point, was credible that he would not use illegal drugs in the future.

The Applicant gave several stories at different times concerning his failure to list his 1999 drug use on the DoD questionnaire. As the evidence stands, his explanation that he forgot the drug use six months later when he filled out the questionnaire is not accepted. That is simply not a credible answer. Given his different answers, it is impossible for me to know what is the truth. Accordingly, he has not mitigated this allegation. The Government relies heavily upon the integrity and honesty of clearance holders, and it is a negative factor for security clearance purposes where an Applicant has deliberately provided false information about material aspects of his or her personal background. Guideline E is found against the Applicant.

The Applicant's efforts at reform are noted, and he is commended for his decision to refrain from further drug use. Under the particular circumstances of this case, this evidence does not overcome the adverse information that has been presented by the Government.

On balance, it is concluded that the Applicant has failed to overcome the Government's information opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the conclusionary allegations expressed in Paragraph 2 of the Government's Statement of Reasons. As set forth above, Paragraph 1 is found for the Applicant.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1: For the Applicant.

Subparagraph 1.a.: For the Applicant.

Subparagraph 1.b.: For the Applicant.

Paragraph 2: 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 the Applicant.

Wilford H. Ross

Administrative Judge