

DATE: December 6, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-00081

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR GOVERNMENT

Martin Mogul, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's past criminal conduct, drug use, and personal conduct raise security concerns. He knowingly and willfully omitted adverse information from his security form and misrepresented information about his drug use to an investigative agent. Applicant failed to meet his duty to disclose his illegal drug use that continued until December 2000 even though he understood such marijuana use was against his company's and the government's security policies. While he has a fine employment record, such excellence on the job does not erase the security significance of his repeated material false statements and his knowing drug use after applying 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 March 28, 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 criminal conduct (Guideline J), drug use (Guideline H), and personal conduct (Guideline E). Applicant responded to these SOR allegations in an Answer notarized on April 22, 2002, where he admitted all of the allegations and requested a hearing.

The case was assigned to Department Counsel who on July 8, 2002, attested it was ready to proceed; and the case was assigned to another administrative judge. On July 15, 2002, the case was re-assigned to me. Subsequently, a mutually convenient date for hearing was agreed to; and a Notice of Hearing was issued on July 24, 2002, which set the matter for August 13, 2002, at a location near where Applicant works and lives. At the hearing the Government offered a Stipulation (Exhibit I; TR 13-15) to admit into evidence four Government exhibits; all were admitted into evidence. (Exhibits 1-4) The Applicant represented himself and offered three exhibits which were admitted into evidence. (Exhibits A-C) Applicant testified and called one witness. The transcript (TR) was received on August 20, 2002.

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, 26 years old, has worked for Defense Contractor #1 in State #1 since June 1998 when he was an intern; after he completed his degree he was hired in September 1999. (Exhibit 1; TR 16-17; Exhibit A; TR 59-60) Applicant needs a security clearance to perform his job. (Exhibit A)

Applicant attended a state university in State #2 from 1994 to 1999 and received a Bachelor of Science (BS) degree. (Exhibit 1; TR 16-17) He is now enrolled in a School of Management program in State #1 and expects to receive a Masters of Business Administration (MBA) in August 2004. (Exhibit A; TR 66)

Criminal Conduct, Drug Use, and Personal Conduct

When Applicant was 19 years old, he was arrested in 1995 for possession of alcohol in his home state where the legal age to possess alcohol was 21. He had purchased the alcohol by using a fake identification (ID) card which he had purchased from a friend at school. He was found guilty and fined more than \$700 which he paid. (Exhibit 1; TR 18-21)

Again in September 1996 in State #2 where he attended school, he was arrested at a concert where he was consuming alcohol with friends; he did not have an ID to prove he was 21. Applicant got a ticket and paid a fine of \$165. (Exhibit 4; TR 22-23)

In 1998 he was arrested again in State #5 where he was walking from bar to bar with friends and was charged with public intoxication and fined \$100 which he paid. (Exhibits 1, 2; TR 24-25) Subsequently he had another alcohol-related arrest in State #1 in 2001 when he was visibly intoxicated and planned to attend a concert; an officer believed he was too intoxicated to enter the concert. Applicant was arrested, but found not guilty. (TR 25-29)

Applicant initially completed a security form (SF 86) in October 1999; after it was lost, he completed another form in December 1999. (TR 33) However, in the SF 86 in response Question 24 about his police record with respect to any Alcohol/Drug Offenses, he revealed only part of the requested adverse information. Applicant answered "Yes" and revealed the 1995 alcohol charge, conviction, and fine in State #3 and the 1996 charge in State #4 where he pled guilty and was fined. But he failed to reveal the charge in State #2 in 1996 where he pled guilty and was fined as he forgot about it; similarly when he was interviewed by a Defense Security Service (DSS) agent, he again failed to reveal it as he forgot about it. (Answer; Exhibit 1; TR 38-39; 42-43)

With respect to SF 86 Question 27 about illegal drug use, Applicant revealed he had used 15-20 times from September 1995 to April 1997 which was true when he initially signed the form in October 1999. However, after he signed the initial form he used marijuana again. Thus, when he had to re-signed in December 1999 that answer was no longer true; he should have changed his answer to Question 27 to reflect the more recent use. (Exhibit 1; TR 39-44)

Later when he was interviewed by the DSS agent in May 2001, he consciously decided only to reveal his marijuana use to April 1997. When DSS initiated another interview in June 2001, Applicant volunteered information about his subsequent marijuana use and reported that he had used marijuana five times from October 1999 to December 2000 at parties with friends. (Exhibits 2, 3; TR 44-46) However, Applicant did not contact the DSS agent himself to correct the record. Consequently, I conclude that Applicant knowingly and willfully falsified material facts by his "No" answer to Question 27 on the security clearance form and in his first DSS interview. (TR 46)

Applicant first used marijuana when he was in college in 1995 and continued to use marijuana until December 2000 even after he completed his SF 86 for access to classified information. He knew that marijuana use was illegal. He used marijuana five times after he had applied for a security clearance. (Answer; Exhibits 2, 3; TR 32-36) As Applicant interned for the company in 1998 when he was in college, he understood the strong company policy against marijuana use. When he began to work full-time in 1999, he was also required to take a drug test and was advised in writing of the company policy against drug use. He understood his company's and the Government's policy against marijuana use. (TR 49-51)

Applicant never sought counseling because of his marijuana use. He still attends parties where marijuana is used, but

has declined any use of marijuana since December 2000. (TR 36-37) He will never use marijuana again. (TR 52)

Job Performance

Every year that Applicant has worked at his company, including his time as an intern, he has received an outstanding performance review. He has received multiple achievement awards and has consistently received raises. He has received commendations for the quality of his work. He has taken all available training offered by his company and is now enrolled in an MBA program. His supervisor wrote a very positive letter on behalf of his application to graduate school. (Exhibits A, B, C; TR 60-69)

Reference

Applicant's friend testified on his behalf. She has known him for eight months and sees him on a daily basis. She believes him to be an honest and trustworthy person. On cross-examination, she testified that Applicant had told her of limited marijuana use which she assumed was in college; she said she would be surprised to learn that he had used marijuana subsequently as she thinks that for him to have used marijuana since he started his job would show poor judgment. (TR 73-74; 74-84) Applicant's failure to fully disclose the extent of his drug use to this witness lessens the weight given her favorable endorsement.

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 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
- b. A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

- a. The criminal behavior was not recent
- d. . . . the factors leading to the violation are not likely to recur;
- f. There is clear evidence of successful rehabilitation

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);

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 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;
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 trust-worthiness determination;

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

Criminal Conduct

The Government established security concerns over Applicant's criminal conduct from 1995 to 1998 when he had three alcohol related arrests and convictions. He acknowledged also a more recent alcohol related arrest in 2001 where he was not convicted. Further, his conduct raises a security concern under Title 18 United States Code Section 1001⁽²⁾

as he falsified answers to two questions on the federal security form by failing to disclose the details of the 1996 alcohol-related incident and gave misleading answers on the form and to a DSS agent in an interview about the recency and frequency of his marijuana use. Although he was never prosecuted under this statute or convicted, his conduct, as discussed below under personal conduct, falls within that statute as his false answers to the drug question were given "knowingly and willfully."

To his credit, Applicant has a very successful work record and favorable references which indicate partial rehabilitation. Although he revealed a 2001 alcohol-related arrest, he was not convicted. Consequently, the actions that led to his alcohol-related misdemeanor convictions may now be mitigated under condition (a) as the behavior was not recent, (d) . . . the factors leading to the violation are not likely to recur; and (f) there is clear evidence of successful rehabilitation from his outstanding work performance. Consequently, I conclude this alcohol-related criminal conduct in 1995, 1996, and 1998 can be mitigated.

However, he should have fully disclosed his drug use on the government form and to the DSS agent. 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 for Applicant on subparagraphs 1.a., 1.b. and 1.c. but against Applicant on subparagraph 1.d. incorporated under SOR Paragraph 1.

Drug Use

The Government established security concerns over Applicant's intermittent marijuana use from 1995 to 2000, which continued to use even after he successfully passed a drug test for the company and knew that such drug use was inconsistent with being granted access to classified information. Indeed, he used marijuana five times after he had applied for a security clearance.

Subsequently, Applicant has made a convincing commitment to avoid all future drug use and has not use any marijuana in over eighteen months. Given his record of excellence at work and his dedication to advance himself through further training and education, I believe he has mitigated his past drug use in part. On the other hand, for Applicant to use drugs knowing that it was against his company's and 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. but against Applicant on subparagraph 2.b. incorporated under SOR Paragraph 2.

Personal Conduct

The Government clearly established security concerns over Applicant's personal conduct. Applicant had opportunities on the security form to disclose his past criminal and drug issues, but he failed to disclose fully all adverse information in answering questions 24 and 27. While he established that he did not intend to falsify Question 24 by omitting the 1996 arrest, he should have been more careful and disclosed it. Not only did he fail to disclose fully his past drug use on the SF 86, he consciously misled the government about his drug use when he was interviewed by the DSS agent in May 2001 and also in his signed, sworn statement. Applicant's behavior⁽³⁾ 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⁽⁴⁾ this conduct. His current good work record and favorable reference letters have to be measured against his knowing and willful failure to disclose required information on his drug use both on a government form and to a government official. He had a duty to disclose fully his past convictions and to disclose all his drug use.

Further, while Applicant's friend testified that she believed him to be an honest and trustworthy person, on cross-examination she revealed that Applicant had told her only of limited marijuana use which she assumed was in college. She said she would be surprised to learn that he had used marijuana subsequently and that for him to have used marijuana after he started his job would show poor judgment and would undermine her initial favorable testimony. Hence, Applicant's failure to disclose fully the extent of his drug use to this witness lessens the force of her initial favorable endorsement.

Consequently, after a review of him as a whole person, I conclude that Applicant falsified material facts by his "No" answers on the security clearance form to the question on his past drug use and to the DSS agent. He failed to give truthful answers to questions that were both relevant and material to his security eligibility. Applicant's favorable work record is impressive but 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 for Applicant on subparagraph 3.a., but against Applicant on subparagraphs 3.b. through 3.d. 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 J: AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: Against Applicant

Paragraph 2. Guideline H: AGAINST APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: Against Applicant

Paragraph 3. Guideline E: AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.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 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. 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.

3. 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. 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.