

DATE: June 25, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-02464

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Marc Curry, Department Counsel

FOR APPLICANT

Frederick Gisler

Personal Representative

SYNOPSIS

Applicant used marijuana monthly over a three-year period spanning 1996 and 1999, falsified his security clearance application (SF-86), and failed to correct his omissions in prompt fashion when afforded the opportunity to do so in ensuing Defense Security Service (DSS) interviews until confronted in a post-polygraph interview. He fails to extenuate or mitigate his drug use or omissions/misstatements sufficiently to overcome raised judgment, reliability and trustworthiness concerns arising under the drug, personal conduct and criminal conduct guidelines necessary to meet minimum security clearance eligibility requirements under the Adjudicative Guidelines and the E.2.3 factors. Clearance is denied.

STATEMENT OF THE CASE

On January 6, 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 in February, 2003 and requested a hearing. The case was assigned to this Administrative Judge on February March 18, 2003, and was scheduled for hearing to be held on April 9, 2003. A hearing was convened on April 9, 2003, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny or revoke Applicant's security clearance. At hearing, the Government's case consisted of four exhibits; Applicant relied on two witnesses (including himself) and two exhibits. The transcript (R.T.) of the proceedings was received on April 18, 2003.

STATEMENT OF FACTS

Applicant is a 22-year old computer researcher and technician for a defense contractor who seeks a security clearance.

Summary of Allegations and Responses

Under Guideline H, Applicant is alleged to have used marijuana on a monthly basis from Summer 1996 to about October 1999.

Under Guideline E, Applicant is alleged to have been cited on various occasions (five in all) for various traffic infractions, for which he either pleaded guilty or forfeited bond.

Under Guideline E, Applicant is alleged to have falsified his security clearance application (SF-86) of July 24, 2000, by omitting his prior use of illegal substances. Allegedly, he understated his marijuana use in ensuing DSS interviews: specifically, he limited his marijuana use to one-time use during the Summer of 1998 in DSS interviews given in November 2000, January 2001 and April 2001. By virtue of his alleged deliberate omissions and understatements of his marijuana use, Applicant is alleged to have committed felony criminal conduct under Guideline J.

For his response to the SOR, Applicant admitted several of the allegations: his receipt of the various speeding tickets listed. But he denied the balance of the allegations (including his smoking marijuana from the Summer of 1996 to about October 1999), without adding any explanations for his denials.

Relevant and Material Factual Findings

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.

Between August 1997 and February 2000, Applicant was issued four separate citations for speeding and one for following too close. He pleaded guilty to each of the violations and was fined.

Applicant was introduced to marijuana during the Summer of 1996. From the Summer of 1996 through October 1999, he smoked marijuana on a monthly basis (*see ex. 4*). His marijuana intake made him feel hungry and tired. Since joining his current employer in November 1999, he has avoided any illegal substances (marijuana included) and assures he has no intention of returning to marijuana in the foreseeable future. As a signal of support to friends who, and for no other reason, were also using illegal drugs around him, Applicant attended two sessions of NA (*see R.T.*, at 49). He does not associate with these friends any more. Periodically, he has been subjected to random drug tests by his employer. Each of his tests has produced negative results (*see, e.g., ex. B*).

When asked to complete an SF-86 in July 2000, he denied ever using any illegal drugs (marijuana included). Applicant attributed his SF-86 omissions to his simply misreading question 27 on the electronically generated form and hurrying through his answering the question, believing he was answering **no** to another question (*see R.T.*, at 26-28). Applicant's explanation for his SF-86 omission cannot be assessed in isolation from what he furnished interviewing DSS agents in ensuing signed, sworn statements.

Several months after completing his SF-86, Applicant contacted Agent of DSS to inform of her of his desire to amend his SF-86 and correct the omissions he had made on the form. Agent A arranged for an interview with Applicant in November 2000. During this initial interview, Applicant explained his drug use omissions to her. Limiting his marijuana use to a one-time experience during the Summer of 1998, he assured Agent A he had not used marijuana, or any other illegal drugs since that one time, and had no intentions of doing so in the future (*see ex. 2*). Applicant's claims of telling Agent A of more extensive use *de hors* the DSS statement he signed are not corroborated in his November 2000 DSS statement (*ex. 2*), or by Agent A, and cannot be accepted on the basis of the limited information furnished by Applicant (*see R.T.*, at 32-33, 45-46).

Afforded another opportunity to amplify his history of drug use in a January 2001 DSS interview with Agent A, Applicant reiterated the one-time marijuana use he identified in his previous November 2000 statement. Agent A returned to interview Applicant on a third occasion in April 2001. In this interview, Applicant once again confined his marijuana use to the one-time use he previously described. He insisted "I have only used marijuana on one occasion as indicated during my previous interviews and included in my previous statements" (*see ex. 3*).

Applicant was scheduled for a polygraph by DSS Agent B in May 2001 (*see ex. 4; R.T., at 51, 56-57*). In his pre-polygraph interview with Agent B, he told the agent he had used marijuana more than once but couldn't recall specific dates (*see R.T., at 55-56*). When pressed during a post-polygraph interview by Agent B, Applicant was more specific about his prior marijuana use than he had been in his opening interview: He admitted to his monthly use of marijuana from the Summer of 1996 through October 1999 (*ex. 4*). Before signing the prepared statement furnished him by Agent B, Applicant checked the inclusive dates included in the prepared statement and signed the statement believing the indicated dates of use to be accurate (*see R.T., at 60*). Based on the statement and Applicant's testimony, the inclusive dates identified in Applicant's post-polygraph statement are accepted as the best account of Applicant's marijuana use.

When considered contextually with his ensuing insistence on once-only marijuana use in the three interviews he sat for with Agent A and his insistent denials of any regular drug use in his response to the SOR, Applicant's good faith mistake explanations for his SF-86 omissions can not be accepted. Applicant had ample opportunities to disclose this more extensive drug history in each of the DSS statements he signed for Agent A, but chose to misrepresent his involvement by confining his use to one-time experimentation. Only after being confronted by Agent B in a post-polygraph interview did Applicant elect to be forthcoming with his regular monthly use over a three-year period (*compare ex. 4 with R.T., at 47-52, 56-60*). Applicant's repeated understatements of his marijuana use in the series of interviews he had with Agent A and his SOR response, as well as in any pre-polygraph interview he had with Agent B, cannot avert drawn inferences of knowing and wilful omissions of his marijuana use.

Applicant is regarded as an exemplary employee by his supervisor, work colleagues and military customers who regularly interface with him (*see ex. A; R.T., at 63-70*). He is uniformly characterized by those who work with him as skilled, hard working, dependable and reliable. He is regularly consulted by both his peers and subordinates for his professional advice on computers.

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) require that each decision be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2. In making their decisions, judges must 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 E2.2 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

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, 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

Criminal Conduct

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability or trustworthiness

Disqualifying Conditions:

DC 1 Allegations or admission of criminal conduct.

DC 2 A single serious crime or multiple lesser offenses.

Mitigating Conditions:

MC 6 There is clear evidence of rehabilitation.

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for 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 decision after appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's suitability 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 by substantial evidence any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing on the applicant's eligibility to obtain or maintain a security clearance. The required showing of materiality, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or misused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of accessible 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

proof 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 is a computer researcher for his defense contractor (praised for his skills and work habits) who regularly used marijuana from the Summer of 1996 through October 1999. Although the evidence does not suggest Applicant used marijuana after his stated cut-off date, his omissions and understatement of his prior use are too inconsistent to absolve him of lingering doubts about the extent of his prior marijuana use. These doubts fuel concerns about the strength of his commitments to avoid illicit drug use in the foreseeable future. On the strength of the presented evidence, the Government may invoke two disqualifying conditions (DC) of the Adjudication Guidelines for drugs: DC 1 (any drug use) and DC 2 (possession and purchases of drugs).

With such a sustained history of regular marijuana use over a three-year period and the absence of any reliable indicators of likely marijuana avoidance in the foreseeable future (considering both his unambiguous denials and contradictory accounts he provided DSS and DOHA), Applicant raises too much doubt and uncertainty about his past use of marijuana to enable safe predictive judgments about his ability to avoid recurrence in the future. More time is needed to safely season his commitment to discontinuance of marijuana use. While Applicant may take some advantage of mitigating condition (MC) 1 (drug involvement not recent), safe assessments can not be made at this time about the likelihood of his return to illicit drug activities in the future. Consequently, unfavorable conclusions warrant with respect to the allegations covered by sub-paragraph 1.a of Guideline H.

Applicant's accumulated traffic violations reflect both criminal conduct and poor judgment and, as such, are covered by both the Criminal Conduct and Personal Conduct Guidelines. Government may invoke two of the disqualifying conditions (DC) of the Adjudicative Guidelines covering criminal conduct: DC 1 (allegations or admission of criminal conduct) and DC 2 (a single serious crime or multiple offenses), as well as the predicate of the Personal Conduct Guideline: questionable judgment, unreliability and untrustworthiness. His violations, all of which resulted in convictions, reflect considerable disregard of state traffic laws over a compressed period of just four years. But Applicant has averted any further such violations since his last offense in February 2000 and shows increased responsibility and respect for state traffic laws in general. With over three years of seasoned adherence to state traffic laws, he may claim the benefit of one of the mitigating conditions of the Adjudicative Guidelines for criminal conduct: MC 6 (clear evidence of successful rehabilitation). All together, Applicant's exhibited poor judgment and disregard of state traffic laws reflected in his accumulated traffic citations are mitigated by Applicant's demonstrated renewed respect for his state's traffic laws. Favorable conclusions warrant with respect to sub-paragraphs 2.a through 2.e of Guidelines E and J (incorporated by reference).

Posing more serious concerns for the Government are Applicant's omissions and understatement of his marijuana use. His omissions and ensuing misstatements are difficult to reconcile with the trust and reliability requirements for holding a security clearance. So much trust is imposed on persons cleared to see classified information that deviation tolerances for incidents of trust betrayal are calibrated narrowly.

While Applicant claimed mistake in omitting his marijuana use on his SF-86, he made no such claims in understating his marijuana use in his DSS interviews with Agent A. Credibility assessments were made against Applicant, and both his omissions and misstatements were found to be have been made knowingly and wilfully. With the subject matter being drugs, the determined falsifications are clearly material to a clearance eligibility decision. Applicable disqualifying conditions under the Adjudicative Guidelines for personal conduct are twofold: DC 2 (falsification of a personnel security questionnaire) and DC 3 (deliberately providing false information concerning relevant and material matters to an investigator).

Mitigation is difficult to credit Applicant with, since he failed to take advantage of any of the initial opportunities afforded him by DSS to correct his earlier SF-86 omissions. Not only has DOHA's 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).

Besides standing pat with his initial story of one-time use of marijuana when asked about it in follow-up interviews with the same agent, Applicant failed to disclose his full drug history until later confronted by a DSS polygrapher. DOHA's 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/or understated his drug use and waited over six months for another DSS interview before electing to come forward with corrections when confronted. Applicant's corrections, as such, cannot be characterized as either prompt or made in good faith. *See* DISCR Case No. 93-1390 (January 1995). Applicant, accordingly, may not take advantage of either C 2 (isolated omissions) or MC 3 (prompt, good faith correction of the falsification) of the Adjudicative Guidelines for personal conduct.

From a whole person perspective, Applicant pitches his strongest case in the excellent performance evaluations he has accumulated. Work history does certainly have a role in making a clearance eligibility determination, but it is not dispositive. DOHA's Appeal Board has repeatedly emphasized that the negative security significance of an applicant's actions is not negated by an applicant's job performance in making a whole person evaluation. *See* ISCR Case No. 00-0622 (August 28, 2001). No question but that Applicant has inspired confidence and trust among his defense contractor supervisor, colleagues and customer representatives. But in the face of his repeated acts of omission and understatement, his favorable character evidence alone is not enough to overcome security concerns extant with the Government over his failure to be truthful through his SF-86 and ensuing DSS interviews, and in his response to the SOR.

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.f through 2.I of Guideline E.

That neither Applicant's SF-86 omissions nor ensuing DSS understatements of his marijuana use resulted in formal charges and adjudication against Applicant does not mean that the falsification issues may not be raised and considered anew in a clearance proceeding. DOHA's Appeal Board has repeatedly held that the Government can prove applicant engagement in criminal conduct, even in the absence of a criminal conviction. ISCR Case No. 94-1213 (June 7, 1996). Applicant's omissions and misstatements are covered not only by the Adjudicative Guidelines for personal conduct, but the Guidelines for criminal conduct as well. His acts of concealment are neither isolated nor dated. Because these acts were both deliberate and repeated, it is too soon to credit him with rehabilitation (notwithstanding his favorable work record) or satisfaction of any of the other mitigating conditions of the criminal conduct Guidelines. Unfavorable conclusions warrant with respect to the allegations covered by sub-paragraphs 2.f through 2.i of Guideline J as well.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the factors set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive.

FORMAL FINDINGS

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

GUIDELINE H: AGAINST APPLICANT

Sub-para. 1.a: AGAINST APPLICANT

GUIDELINE E: AGAINST APPLICANT

Sub-para. 2.a FOR APPLICANT

Sub-para. 2.b: FOR APPLICANT

Sub-para. 2.c: FOR APPLICANT

Sub-para. 2.d: FOR APPLICANT

Sub-para. 2.e: FOR APPLICANT

Sub-para. 2.f: AGAINST APPLICANT

Sub-para. 2.g: AGAINST APPLICANT

Sub-para. 2.h: AGAINST APPLICANT

Sub-para. 2.I: AGAINST APPLICANT

GUIDELINE J: AGAINST APPLICANT

Sub-para. 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 Applicant's security clearance.

Roger C. Wesley

Administrative Judge