

DATE: October 31, 2003

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 02-05009

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant who used marijuana for an extended period of time in high school, throughout his Air Force (AF) tour of duty, and while holding a security clearance with a DoD contractor fails to mitigate security concerns over his past use of illicit substances. While Applicant is able to mitigate security risks associated with his 1997 DuI conviction and accompanying Level I education course, he is unable to absolve himself of security concerns associated with his falsification of a security clearance application (SF-86) or compounding trust concerns emanating from an earlier 1985 UCMJ violation. Clearance is denied.

STATEMENT OF THE CASE

On March 28, 2003 January 24, 2001, 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 April 28, 2003, and requested a hearing. The case was assigned to me on July 2, 2003, and was scheduled for hearing on August 28, 2003. A hearing was convened on August 28, 2003 as scheduled, 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 eight exhibits; Applicant relied on three witnesses (including himself) and no exhibits. The transcript (R.T.) of the proceedings was received on September 8, 2003.

PROCEDURAL ISSUES

At hearing, Department Counsel requested leave to amend sub-paragraphs 1.b and 2.a of the SOR to correct the site of

the arrest that occurred in the state listed. There being no objections to the amendment request, and good cause being shown, Department Counsel's amendment request was granted. In response, Applicant changed his answer to record admissions to sub-paragraphs 1.b and 2.a of the SOR.

STATEMENT OF FACTS

Applicant is a 33-year old systems programmer for a defense contractor who seeks to retain his security clearance.

Summary of Allegations and Responses

Under Guideline H, Applicant is alleged to have (1) used marijuana twice a year from 1977 to 1987 while in the Air Force (AF), and again in 1996 and 1997, and (2) been arrested for marijuana possession and possession of drug paraphernalia in August 1997 (both charges later dismissed).

Under Guideline G, Applicant is alleged to have (a) been arrested for driving while ability impaired in April 1997, to which he pleaded guilty to a lesser charge of DuI in approximately April 1998, and received 12 months unsupervised probation, 24 hours of community service, and ordered to undergo an alcohol evaluation and pay a fine and (b) received recommended Level I education for drug and alcohol abuse in June 1998 (which he completed).

Under Guideline E, Applicant is alleged to have (i) used marijuana in 1996 and 1997 while he held a DoD security clearance, (ii) falsified his Security Clearance Application (SF-86) of October 1991 by omitting his marijuana use when answering in the negative to question 22, and (iii) been charged with violation of the UCMJ, Art. 134 for being disorderly (on March 3, 1985), for which he was reduced in rank.

For his response to the SOR, Applicant admitted to being recommended for a Level I education program for drug and alcohol abuse, to using marijuana in 1996 and 1997 while holding a DoD security clearance, and to being charged with violation of the UCMJ, Art. 134, for which he was reduced in rank, but denied the balance of the allegations. For explanations, Applicant claimed he never used marijuana in the AF, and was never arrested for driving while ability impaired and possession of marijuana and drug paraphernalia in the listed locale, but rather another locale of the same state. Additionally, Applicant claimed he never used marijuana while he was in the AF (between 1979 and 1987), and only briefly experimented with the substance in high school (which he previously disclosed to an AF interviewer in 1986). And claimed his rank was restored just three months after he was reduced in rank following his 1985 UCMJ violation.

Relevant and Material Factual Findings

The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference adopted as relevant and material findings. Additional findings follow.

In high school (between 1977 and 1979), Applicant began experimenting with marijuana use. He estimates to have used the substance approximately twice a year. After he enlisted in the AF in 1979, he continued using marijuana at the rate of twice a year. He continued his twice a year use of marijuana for the duration of his AF tour of duty (which terminated in 1987 with an honorable discharge). Following his AF discharge in 1987, Applicant continued using marijuana on a twice-a-year basis when he gathered with old high school friends, a practice he continued to 1997, at which time he quit his use of marijuana altogether (*compare* answer and exs. 4 and 5 with R.T., at 22).

In August 1997, Applicant was stopped for speeding by a state officer, who administered a field sobriety test to Applicant at the scene. After determining that Applicant was impaired, the officer arrested Applicant at the scene for driving while ability impaired. Upon arresting Applicant, the officer searched Applicant and found one ounce or less of marijuana and a marijuana pipe on his person. With this finding, the state officer arrested Applicant for possession of marijuana and drug paraphernalia as well. At hearing, the court dismissed the drug-related charges and accepted Applicant's plea to a reduced charge of DuI on the alcohol-related charges. Applicant received 12 months of unsupervised probation and ordered to provide 24 hours of community service and undergo alcohol evaluation, in addition to paying a fine. He later completed a 2-week alcohol education program under the court's supervision. He has never been diagnosed with an alcohol problem and assures he does not have an alcohol problem. Since his 1997 arrest,

he has continued to decrease his alcohol consumption and confines his drinking to social situations. Alcohol has never affected his work in any way.

Applicant did not immediately report his 1997 drug possession and alcohol-related arrest to his facility supervisor. After coming to the conclusion that the adverse information surrounding his 1997 arrest would eventually come to light anyway, he went into see his FSO about the arrest in March 2001, some two years later. In this meeting, he reported plea bargaining his initial DWAI arrest, while apparently withholding the details of his drug-related charges associated with this same arrest (*see* ex. 2; R.T., at 28).

In March 1985 (while in the AF), Applicant was titled for being disorderly under Article 134 violation after assisting a friend explain a judgment prank on a classified computer by acknowledging the same type of lapse himself (*see* ex. 8 ; R.T., at 30-31). His command reduced his rank one grade to airman first class, forfeited seven days pay, imposed 14 days of extra duty and restriction, and assigned him 7 days of correctional custody as non-judicial punishment for his Article 134 violation (*see* ex. 8).

When asked to complete an SF-86 in October 1991, Applicant omitted his prior use of marijuana, both in high school and during his ensuing AF enlistment (*viz.*, between 1977 and 1987). Applicant attributed his omissions from previous advice he received from an AF investigator about concealing any prior drug involvement (*see* R.T., at 28-29). In an ensuing DSS interview with Agent A in August 2001, Applicant freely acknowledged his use of marijuana in high school and again in 1996 and 1997, but insisted he never used drugs during his AF enlistment. He admits to an error in judgment in omitting his more extensive marijuana use and attributes his understatement to a lapse of memory.

Applicant's explanation is difficult to reconcile with his acknowledged conscious withholding of the same omitted time of use (*i.e.*, 1986 to 1997) when sitting for a follow-up DSS interview with Agent B in July 1992 (*compare* ex. 4 with ex. 5). Asked about why he omitted this information about his more extended marijuana use in his second interview, he attributed his actions to being fearful of the consequences of being inconsistent (*see* R.T., at 36). Considering Applicant's explanations in their total context, inferences warrant that his follow-up admissions in his DSS interviews and updated SF-86 still lack the consistency and truthfulness necessary to credit him with a full, frank and accurate accounting of his illegal substance abuse history (*viz.*, between 1977 and 1997).

Applicant is considered by his direct supervisor to be conscientious and reliable in the protecting of classified information by his direct supervisor. The supervisor's support for Applicant is tempered some, though, by the apparent understated drug use history Applicant furnished him (*see* R.T., at 43). A co-worker of Applicant who testified in Applicant's behalf never saw him partake in any illegal activities, or acquit himself in any way that would make the co-worker feel Applicant is a security risk (*see* R.T., at 46-47).

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) list "binding" policy considerations to be made by judges in the decision making process covering DOHA cases. The term "binding," as interpreted by the DOHA Appeal Board, requires 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 abuse (identified as mood and behavior-altering substances and include drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended).

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.

Alcohol Consumption

The Concern: Excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness.

Disqualifying Conditions:

DC 1. Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use.

Mitigating Conditions:

MC 1. The alcohol-related incidents do not indicate a pattern.

MC 3. Positive changes in behavior supportive of sobriety.

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, 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.

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.

DC 5 A pattern of dishonesty or rule violations.

Mitigating conditions:

MC 3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts.

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 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 mere 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 presents as a meritorious systems programmer who brings to these proceedings a long history of marijuana abuse, much of it incurred throughout the eight years of his AF enlistment spanning 1979 and 1987. Knowledge of DoD's drug avoidance requirements is clearly imputed to Applicant at all times relevant during his AF enlistment and period (1996-1997) of his holding a DoD security clearance. Although marijuana and drug paraphernalia possession charges covered by his 1997 arrest were ultimately dismissed, Applicant does not dispute his possessing marijuana and an a pipe when arrested. Possession of both is imputed to him irrespective of the dismissal of the pending charges in 1998.

Applicant's failure to abstain from marijuana use after accepting a position with his current defense contractor in 1988 (which required a security clearance) reflected a deliberate choice on his part to continue his use of marijuana in social situations, irrespective of existing DoD drug policy strictures in place at all times relevant.

Whether or not Applicant can consistently refrain from active marijuana involvement and/or use of other illegal substances in the foreseeable future remains the principal security concern For Applicant to fully mitigate his occasionally revisited marijuana use, he necessarily needs to demonstrate a seasoned intention not to abuse marijuana in the future.

To help him convince that he should be trusted on his hearing assurances that he will never use marijuana or other illegal substances as long as he holds a security clearance, Applicant places great stress on his highly valued work and military achievements. Applicant's meritorious civilian and military work history are certainly favorable considerations to factor into a whole person evaluation of his drug-free commitments. But it is not dispositive either. Our Appeal Board has consistently drawn bright distinctions between an applicant's value to his employer and his suitability to be cleared to access classified defense information. *Cf* ISCR Case No. 98-0370 (January 28, 1999); ISCR Case No. 96-0710 (June 20, 1997). Predictability judgments about an applicant's likelihood to return to drugs are more heavily weighted by the applicant's prior substance abuse history.

Although Applicant has expressed his strong intentions not to use illicit drugs in the future, this is not the first time he has expressed such intentions. He made implicit assurances in 1991 when he completed his first clearance application, only to continue his marijuana use unabated for another six years (*i.e.*, until 1997). With such a sustained period of uninterrupted marijuana use in his track history and so many inconsistent explanations about his substance abuse when asked about it, Applicant's current commitments to abstain cannot be fully accepted at this time. Too much doubt and uncertainty exist to make safe predictable judgments about his ability to avoid recurrent

drug involvement. More seasoning of his most recent commitments to abstain from illicit drug use are needed before necessary safe assessments can be made about his unlikely return to illicit drug abuse in the future. In the face of such uncertainty about his abstaining from marijuana use in the future, potentially available mitigating conditions of the

Adjudicative Guidelines for drugs are not available to Applicant: specifically, MC (non-recency) and MC 3 (demonstrated intent not to abuse drugs in the future).

Taking into account Applicant's long history of illegal substance abuse, contradictory explanations about his past use, and still unresolved risks of recurrence, unfavorable conclusions warrant with respect to the allegations covered by Guideline H.

By contrast, Applicant's cited abuse of alcohol appears to be much more limited and confined in scope and does not pose any current security risks. As the result of his 1997 DuI conviction, he accepted Level I education on the dangers of alcohol and has managed to avoid any recurrent instances of alcohol-related incidents or abuse. So, while DC 1 (alcohol-related incidents away from work) of the Adjudication Guidelines for alcohol may be invoked, Applicant is able to avail himself of several mitigating conditions on the strength of the evidence: MC 1 (lack of a pattern of alcohol abuse), MC 2 (problem occurred a number of years ago) and MC 3 (positive changes in behavior supportive of sobriety) of the same Adjudicative Guidelines. Overall, Applicant mitigates security concerns relative to his past abuse of alcohol. Favorable conclusions warrant with respect to the allegations covered by Guideline G.

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 SF-86 omissions of his extensive history of marijuana use. So much trust is imposed on persons cleared to see classified information that deviation tolerances for incidents of trust betrayal are calibrated narrowly.

Applicant falsified his October 1991 SF-86 in several material respects: omitting his two alcohol-related arrests, his past use and purchases of cocaine and his history of in-patient counseling and treatment for illegal substance abuse. He makes no claim of misunderstanding the questions, which were posed in a straightforward way in the questionnaire. Applicant attributes his omissions to concern about how disclosure of the adverse information would impact on his employment and cites suggestions by a previous AF investigator that he omit adverse drug-related information when completing his initial SF-86. Applicant's SF-86 omissions, 1985 UCMJ violation, and continued use of marijuana while holding a DoD security clearance, collectively raise clearance questions about his level of judgment, reliability and trustworthiness.

Afforded several opportunities to disclose his drug history in DSS interviews, Applicant acknowledged his using marijuana in high school and the AF, but no more: again fearful of the consequences and motivated by a desire to be consistent. When completing an updated SF-86 in December 2000, he retreated even from his DSS acknowledgments, admitting only his use of marijuana in 1996 and 1997. And when afforded the opportunity to respond to SOR allegations about his using marijuana in the AF, he denied any marijuana use in the AF. All of these inconsistent accounts Applicant attributed at hearing to fear over the consequences of furnishing inconsistent explanations about the extent of his illegal substance history. Taken together, these accounts reveal an Applicant determination to conceal his prior marijuana use out of fear of adverse job and

clearance consequences. Such a disposition for concealment precludes any justifiable reliance by Applicant on any omission advice furnished him by the former AF investigator.

Applicant's SF-86 omissions and failed efforts to provide a prompt, good faith disclosure of the correct dates and frequency of his marijuana use cannot be reconciled with acceptable levels of good judgment, reliability and trustworthiness (the core predicate of Guideline E) required to satisfy the minimum personal conduct requirements of security clearance worthiness sufficiently, using any of the Adjudication Guidelines' mitigating conditions for personal conduct, to enable Applicant to refute, extenuate or mitigate his omissions and misstatements.

Judgment/reliability/trustworthiness deficiencies associated with Applicant's SF-86 omissions are compounded by his earlier UCMJ violation and continued use of marijuana while holding a DoD security clearance, all reflective of falsification covered by DC 2 (omissions in a personnel security questionnaire) and DC 3 (omissions made to an investigator), and rule violations covered by DC 5 (pattern dishonesty and rule violations) of the Adjudication Guidelines for personal conduct.

Turning to whole person analysis, Applicant pitches his strongest case in meritorious performance assessments he has

received at work. Work history does certainly have a role in making clearance eligibility determination, but it is not dispositive. Our 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).

Taking into account Applicant's SF-86 omissions, his unreliable and untrustworthy corrections of his marijuana use history, and his continued use of marijuana while holding a DoD security clearance, as well as his good performance evaluations, in making an overall person assessment of Applicant's judgment, reliability and trustworthiness under Guideline E, Applicant's presented explanations of his SF-86 omissions and continued use of marijuana while holding a security clearance are insufficient, considered in their entirety, to enable him to overcome doubts raised about the level of his judgment, reliability and trustworthiness compatible with security clearance eligibility. Because of the age of Applicant's 1985 UCMJ non-judicial punishment, this action is mitigated. Unfavorable conclusions warrant with respect to the allegations covered by subparagraphs 3.a and 3.b of Guideline E. Favorable conclusions warrant with respect to subparagraph 3.c.

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, I make the following FORMAL FINDINGS:

GUIDELINE H (DRUGS): AGAINST APPLICANT

Sub-para. 1 .a: AGAINST APPLICANT

Sub-para. 1 .b: AGAINST APPLICANT

GUIDELINE G (ALCOHOL): FOR APPLICANT

Sub-para. 2.a: FOR APPLICANT

Sub-para. 2.b: FOR APPLICANT

GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT

Sub-para. 3.a: AGAINST APPLICANT

Sub-para. 3.b: AGAINST APPLICANT

Sub-para. 3.c: FOR 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