

DATE: February 27, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-06441

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's marijuana use stopped five years ago. No possibility of recurrence. Government failed to prove that the Applicant falsified a questionnaire and a sworn statement. Sufficient mitigation is shown. Adverse inference is overcome. Clearance is granted.

STATEMENT OF THE CASE

On February 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 March 28, 2003, and requested that the case be decided without a hearing. The Government submitted its File of Relevant Material (FORM) to the Applicant on July 8, 2003. The Applicant was given 30 days from receipt of the FORM to submit any documents in rebuttal, extenuation or mitigation. The Applicant received the FORM on July 28, 2003, and submitted an additional statement dated August 25, 2003. Department Counsel did not object to the Administrative Judge considering the statement. The case was received by the undersigned on September 2, 2003.

FINDINGS OF FACT

The Applicant is 46, married and has a bachelor's degree in mechanical engineering. He is employed by a defense contractor, and he seeks to obtain a DoD security clearance in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a 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 and the exhibits.

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 first began using marijuana as an enlisted man in the service in 1976. He stopped using marijuana in 1978 because of growing maturity and the armed forces crackdown on drug use. (Government Exhibit 5 at 1.)

The Applicant resumed his drug use in 1995. At that time he had retired from the service and was attending college. About once a month he would host parties at his home where marijuana was used. Between 1995 and 1999 the Applicant used marijuana about 40 times. He occasionally purchased marijuana during this period. He stopped using marijuana in January 1999 and states that he has no intention of using it in the future. (Government Exhibit 5 at 2.)

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 September 5, 2001, the Applicant was interviewed by a Special Agent from the Defense Security Service. In a sworn statement he stated, "I have never used any illegal drug or controlled substance while holding a position of trust or security clearance." (Government Exhibit 5 at 2-3.)

The Applicant filled out a Government questionnaire on September 13, 2001, which asked, "Have you EVER illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official; while possessing a security clearance; or while in a position directly or immediately affecting public safety?" The Applicant answered, "No." (Government Exhibit 4 at question 28.) (Emphasis in original.)

The Applicant denied both of these allegations in his answer. While the Applicant did serve in the armed forces and admitted in his sworn statement using marijuana from 1976 to 1978, there is no evidence in the record that the Applicant held a security clearance during that time. Accordingly, the Government failed to make its case under this Guideline. Paragraph 2 and its subparagraphs are found for the Applicant.

Mitigation.

The Applicant submitted an extensive statement in response to the FORM. In this statement the Applicant is very open about his foolish use of marijuana both in the service and afterwards.

The statement also includes an Eagle Award Nomination Form. This form indicates that the Applicant is well thought of by his superiors.

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; ⁽¹⁾

(2) illegal drug possession, including cultivation, processing, manufacture, purchase, sale or distribution;

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:

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

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 abuse and personal conduct 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 granting 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).

The Applicant, on the other hand, has overcome the Government's case. As stated above, Paragraph 2 of the SOR is found for the Applicant because of a lack of evidence. Even assuming that the Applicant did have a security clearance in the period 1976-1978, there is little or no evidence that he intentionally falsified his questionnaire concerning his use of marijuana during that time. In his questionnaire he freely admitted his more current drug use, which ended not even two years before the questionnaire was completed. In his sworn statement the Applicant openly speaks about his entire drug abuse history. The available evidence shows that the Applicant is vague and uncertain today about whether he held a security clearance over 20 years ago. Such uncertainty is understandable and does not show an intent to deceive.

Turning to the marijuana use, the Applicant has not used marijuana for over five years. He expresses considerable remorse about his resuming marijuana use in the 1990s, when he was retired from the armed forces, a mature person, and should have known better. A demonstrated intent not to use marijuana in the future has been shown. The possibility of continuance or recurrence is virtually nil. Mitigating Conditions 1 and 3 apply to his case. Paragraph 1 is found for the Applicant.

On balance, it is concluded that the Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the Government's Statement of Reasons.

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.

Subparagraphs 1.a. through 1.c.: For the Applicant.

Paragraph 2: For the Applicant.

Subparagraphs 2.a. through 2.b.: For the Applicant.

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Wilford H. Ross

Administrative Judge

1. Under the provisions of 10 U.S.C. 986, any person who is an unlawful user of, or is addicted to, a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), may not be granted or have renewed their access to classified information.