

DATE: March 31, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-07555

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Deputy Chief Department Counsel

FOR APPLICANT

Steven Granberg, Esq.

SYNOPSIS

Applicant falsified his December 2000 security clearance application (SF-86) by deliberately omitting his March 1998 domestic violence incident and 1992 drug possession arrest and failed to correct his omissions in a good-faith and prompt way before having his memory jogged by a DSS agent in an interview over a year later. Applicant's concealment is not mitigated under any of the pertinent mitigation guidelines either and raise continuing security concerns about Applicant's judgment and reliability. Clearance is denied.

STATEMENT OF THE CASE

On July 8, 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 on July 24, 2003, and requested a hearing. The case was assigned to me on September 5, 2003, and was scheduled for hearing on January 8, 2004. A hearing was convened on January 8, 2004, 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 seven exhibits; Applicant relied on three witnesses (including himself) and no exhibits. The transcript (R.T.) was received on January 16, 2004.

PROCEDURAL ISSUES

Before the close of the hearing, Applicant requested leave to keep the record open to permit him the opportunity to supplement the record with documentation of the absence of any issued summons regarding an alleged April 1998 arrest of Applicant. There being no objection from the Government, and good cause being demonstrated, Applicant was

afforded seven days to supplement the record. The government, in turn was allowed one day to respond. Applicant timely supplemented the record with an affidavit an attached incident report (previously admitted as exhibit 3). The post-hearing submission was not objected to and is accepted as exhibit A.

SUMMARY OF PLEADINGS

Under Guideline E, Applicant is alleged to have (a) falsified his security clearance application (SF-86) of December 2000 by omitting (I) two domestic violence arrests, one in April and 1998 and the other in March 1998 and (ii) a drug-related arrest of April 1992 and (b) been terminated from his employment for consuming alcohol before reporting to a job site in May 2000 (reportedly observed by several persons at the job site to smell of alcohol. Under Guideline J, the same allegations are incorporated under 10 U.S.C. Sec. 1001.

For his answer to the SOR, Applicant admitted each of the allegations. In explanation, he claimed his SF-86 misstatements and omissions were attributable to his understanding that (a) he was never arrested for the March 1998 offense, (b) he mistakenly believed he was answering truthfully to a non-felony offense question, and (c) he mistakenly believed he need only go back seven years in listing drug-related offenses. Covering his termination for smelling of alcohol, he claimed his actions were extenuated by his being unexpectedly called into work to help the night crew on a job.

FINDINGS OF FACTS

Applicant is a 34-year-old electronic engineer technician for a defense contractor who seeks a security clearance. 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.

Married to A in 1994, Applicant and his spouse encountered marital problems around 1998 and separated. While having dinner with her in March 1998 he confronted her about an extramarital affair. After first asking her to leave the house, he reconsidered and invited her back. Still emotional over their heated exchange, A called the police, who appeared at the house shortly thereafter and arrested Applicant. To charges of domestic violence Applicant pleaded guilty and was awarded deferred adjudication by the court. Applicant, in turn, was placed on six months probation and directed to participate in domestic violence counseling. Additionally, he was ordered to stay away from A.

Following the March 1998, Applicant and A legally separated. Mindful of the court's order to stay away from A, Applicant tried to obtain permission from her to return to their house to obtain the tax forms he needed to prepare his tax returns. Unable to reach her, he repaired to the house to get the forms anyway, knowing A would not be home. He used an old key to gain entry to the house (intending A no harm) and obtained the forms he needed.

The following day Applicant received a telephone call from the police, who asked him if he had been to the house. Applicant admitted he had and was told A had obtained a restraining order that restricted his coming within 150 yards of her house (*see ex. 3*). There is no record of Applicant's ever being served with a summons on the prepared criminal complaint to appear for any hearing on any charge arising out of the March 1998 incident (*compare exs. 3 and A with R.T., at 52-57*). And there is no proof that Applicant was ever made aware of A's temporary restraining order precluding his movement within the 150 yard perimeter of the home before his exchange with the police. As the result of the incident, though, Applicant entered a six-month counseling program which he completed (*R.T., at 42*).

In a much earlier arrest, Applicant was arrested in April 1992 for possession of marijuana and drug paraphernalia. He estimates to have smoked marijuana on 20 to 30 occasions before his 1992 arrest. After his arrest he quit using marijuana altogether and never faced charges for the offense.

In May 2000, Applicant was terminated by his former employer for consuming alcohol before reporting to a job-site. Several co-workers reported smelling alcohol on his breath and reported him to management. The company's incident report recited Applicant's acknowledging alcohol consumption when confronted by his supervisor and his being told to leave the job-site (*see ex. 6*).

Applicant had consumed a couple of beers in the evening and had volunteered to help the night crew on a job.

Admitting he reported to his job site in May 2000 after consuming a couple of beers, Applicant explained he had not expected to be asked to help out the night crew and did so only at the last minute (*compare* ex. 6 with R.T., at 62-63). When he arrived several individuals smelled beer on his breath and reported him to his management. After being confronted with this report, Applicant was terminated from his employment for violating the company's rules.

Asked to complete an SF-86, Applicant omitted both his March 1998 arrest and his April, 1998 reported intrusion incident. Applicant remembered his March 1998 domestic violence arrest but assures he confused it as a felony and inexplicably omitted the incident from his answers to both questions 21 and 26, respectively of his SF-86. However, he acknowledged in his DSS interview in January 2002 to have perhaps been afraid of what impact his March 1998 offense might have on his clearance (*see* ex. 2). By contrast, he suggested nothing about being confused with the question in this statement. This initial explanation from Applicant must be considered against his hearing retraction of any attribution of clearance concerns to his SF-86 omission of his March 1998 arrest (*compare* ex. 2 with R.T., at 38-39). Without any more to ascertain the source of any Applicant confusion in answering the SF-86 question and why he didn't emphasize it earlier, his earlier expressed clearance concerns cannot be surmounted or discounted. Applicant cannot avert inferences either that his failure to acknowledge his March 1998 arrest represented knowing and wilful falsification, motivated by a desire to avoid any adverse disclosures that might jeopardize his clearance.

While Applicant did not list his April 1998 illegal entry incident there is no documented evidence he was ever arrested or served with a criminal complaint (*see* ex. A; R.T., at 39-41). With no arrest or summons of record, no inferences may fairly be drawn that he deliberately omitted the incident from his SF-86.

Besides his two domestic violence incidents, Applicant omitted his drug-related arrest of April 1992 from his December 2000 SF-86. Applicant's assurances of his confusion over the scope of the question (*i.e.*, whether seven years or more) cannot be reasonably reconciled with his omissions. Clearly aware of the arrest at the time he completed his SF-86, he provides no credible explanation for why he omitted the arrest from the SF-86 (*compare* ex. 2 with R.T., at 47-48). Inferences warrant here of knowing and wilful concealment.

Before being interviewed by DSS Agent B in January 2002, Applicant had made no attempts to contact DSS with information about his 1992 and March 1998 arrests. When interviewed in January 2002 he reported both his 1992 and March 1998 arrests after having his memory jogged by the interviewing agent. While Applicant insists his disclosures were voluntary he acknowledged, too, that he could not be certain whether Agent A first confronted him with the arrest reports about these two incidents (R.T., at 64). Without more probative assurances his corrections were unprompted he cannot avert inferences that the agent did confront him with the information before he provided the details. Applicant's explanations simply fail to demonstrate how the two incidents were disclosed to the agent without any help from the agent.

Applicant is highly regarded by his second line supervisor (D) who characterizes Applicant as reliable and trustworthy. He credits his volunteer efforts at job sites that have enhanced the success of projects he has been assigned to as indicative of his strong work ethic. Applicant's first line supervisor (E) is equally supportive of Applicant.

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These revised Guidelines require 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:

Personal Conduct

Basis: 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.

Mitigating conditions:

DC 2 The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.

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

Criminal Conduct

Disqualifying Conditions:

DC 1 Allegations or admission of criminal conduct.

DC 2 A single serious crime or multiple lesser offenses.

Mitigating Conditions:

MC 1 The criminal behavior was not recent.

MC 6 There is clear evidence of successful rehabilitation.

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's 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 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

Government's case.

CONCLUSIONS

Applicant has a good work record. He also has a record of security significant omissions in his SF-86s of a prior domestic-violence arrest/disposition and arrest for possession of marijuana and drug paraphernalia, as well as a prior removal from a job site for smelling of alcohol on his breath. These omissions in particular raise security concerns over whether he possesses the requisite judgment, reliability and trustworthiness for eligibility to access classified information.

Falsification issues

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 domestic violence and drug arrest omissions in the SF-86 he executed in December 2000. So much trust is imposed on persons cleared to see classified information that deviation tolerances for incidents of trust betrayal are calibrated narrowly.

By omitting the domestic violence incident for which he was arrested for in March 1998 and earlier drug use/possession arrest in his 2000 SF-86, Applicant concealed materially important background information needed for the government to properly process and evaluate his security updates. His claims of some confusion over the questions were resolved factually against him and preclude him from averting deliberate falsification inferences. Applicant manifested in his prior statement (accepted over his altered version in his testimony) concern how his domestic violence and drug possession arrests would impact his security clearance. His omissions, as such, were knowing, deliberate, and material to a determination about his clearance suitability. They invite application of Disqualifying Conditions (DC) for personal conduct of the Adjudicative Guidelines: DC 2 (falsification of a security questionnaire). Only with respect to his omission of his later April 1998 incident, for which no arrest or charges are in evidence, is Applicant able to successfully refute falsification allegations.

Mitigation is difficult to credit Applicant with, since he failed to take advantage of the first obvious opportunity afforded him to correct his earlier SF-86 omissions in his initial DSS interview in January 2002 (over a year later). Not until his memory was jogged by the interviewing DSS agent did he volunteer information about his omitted arrests. Not only has our 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 volunteer the adverse information in a prompt fashion. *Compare* ISCR Case No. 02-23365 (March 22, 2004) and ISCR Case No. 97-0289 (January 1998) with DISCR Case No. 93-1390 (January 1995). Applicant, accordingly, may not take advantage of either MC 2 (isolated omissions) or MC 3 (prompt, good faith correction of the falsification).

There can be no doubt but that Applicant has inspired confidence and trust among his defense contractor supervisors. But in the face of his SF-86 omissions, his favorable character evidence alone is not enough to absorb security concerns extant with the Government over his failure to be truthful in his SF-86 submission.

Extenuated and mitigated is Applicant's forced removal from a job site in May 2000 for smelling of alcohol. His unanticipated last minute substitution for a co-worker does not indicate any wilful regard for alcohol abuse in a work environment and was isolated enough to be mitigated.

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 subparagraphs s. 1.a and 1.b of Guideline E, but not as to subparagraph 1.c.

Criminal coverage of underlying acts and falsification issues

That none of Applicant's SF-86 omissions resulted in any adverse convictions against Applicant does not mean the falsification issues may not be raised and considered anew in a clearance proceeding such as the present. Our Appeal Board has repeatedly stated that the Government can prove applicant engagement in criminal conduct, even in the absence of a criminal conviction. *Cf.* ISCR Case No. 94-1213 (June 7, 1996). Accordingly, two of the disqualifying

conditions of the Adjudication Guidelines for criminal conduct may be invoked: DC 1 (criminal conduct regardless of whether the person was formally charged) and DC 2 (a single serious crime or multiple lesser offenses).

Unlike Guideline E-covered omissions, Guideline J is designed to afford more recognition to an applicant's overall judgment and reliability history. Still, an applicant must meet the requirements of at least some of the mitigation conditions if he is to successfully mitigate both the underlying offenses and related falsification parameters under 18 U.S.C. Section 1001. While Applicant's underlying conduct and omissions reflect some pattern of judgment lapses they do not reflect any pattern of dishonesty. When considered in connection with his meritorious work record, his efforts warrant consideration of two of the mitigating conditions of the Adjudicative Guidelines for criminal conduct: MC 2 (isolated) and MC 6 (clear evidence of successful rehabilitation). Taking into account all of the evidence and circumstances in the record, Applicant is credited with mitigating any criminal implication of his actions. Favorable conclusions warrant, accordingly, with respect to subparagraphs . 2.a and 2.b of Guideline J.

In reaching my decision, I have considered the evidence as a whole, including each of the E 2.2 factors enumerated in the Adjudicative Guidelines of the Directive.

FORMAL FINDINGS

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

GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT

Sub-para. 1.a: AGAINST APPLICANT

Sub-para. 1.b: AGAINST APPLICANT

Sub-para. 1.c: FOR APPLICANT

GUIDELINE J (CRIMINAL CONDUCT): FOR APPLICANT

Sub-para. 2.a: FOR APPLICANT

Sub-para. 2.b: 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. Clearance is denied.

Roger C. Wesley

Administrative Judge