

DATE: March 24, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-08052

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esq., , Department Counsel

FOR APPLICANT

Joseph W. Kirby, Esq.

SYNOPSIS

Although this 38-year-old software engineer voluntarily admitted failing to list his marijuana use on his 1988, 1999, and 2000 security clearance applications, Applicant failed to accept full responsibility for deliberately falsifying the applications. Applicant failed to demonstrate that it is in the national interest to grant him a clearance. Clearance is denied.

STATEMENT OF THE CASE

Applicant, an employee of a defense contractor, applied for a security clearance. The Defense Office of Hearings and Appeals (DOHA), the federal agency tasked with determining an applicant's eligibility for access to classified information, declined to grant the Applicant a clearance. In accordance with the applicable Executive Order ⁽¹⁾ and Department of Defense Directive, ⁽²⁾ DOHA issued a Statement of Reasons (SOR) on 17 July 2002 detailing why a clearance was not granted and recommending Applicant's case be referred to an administrative judge to determine whether the clearance should be denied/revoked. In the SOR, DOHA alleged Applicant failed to meet the personal conduct (Guideline E) and criminal conduct (Guideline J) personnel security guidelines.

Applicant answered the SOR in writing on 28 August 2002. The case was originally assigned to Administrative Judge John Erck on 22 October 2002, was transferred to Judge Paul Mason on the same date, and transferred to me on 7 January 2003. On 25 February 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government's case consisted of three exhibits. Applicant testified on his own behalf, called two witnesses, and submitted 12 exhibits at the hearing. A transcript (Tr.) of the proceeding was received on 4 March 2003.

FINDINGS OF FACT

Applicant is a 38-year-old software engineer for a defense contractor. Ex. 1; Tr. 12. He has been married 15 years and

has two children. Tr. 13.

Applicant used marijuana several times between 1981 and 1987 while attending high school and college. Ex 3 at 1, 2. After graduation from college, Applicant used marijuana four to five times. Ex. 3 at 2.

Applicant applied for a security clearance in 1988. One of the questions on the application asked if he had ever used marijuana. Applicant answered that he had not. Tr. 20. In 1998, while still holding a security clearance, Applicant used marijuana while attending a NASCAR race. Ex. 3 at 2. Applicant caused another security clearance application to be electronically submitted on 1 July 1999 in which he asserted that he had not used illegal drugs in the past seven years or while possessing a security clearance. *See* Ex. 2 at 8 (question 28).

On 26 May 2000, Applicant completed another security clearance application as part of the process to upgrade his secret clearance to top secret. Tr. 21. He again denied using marijuana in the previous seven years or while holding a security clearance. Ex. 1 at 7. Because he was applying for a top secret clearance, Applicant was interviewed by a Defense Security Service (DSS) agent. As she was wrapping up the interview, the agent asked Applicant if he had anything else to say. Applicant then admitted "mistakenly" answering questions about his drug use. Tr. 22. On 25 July 2000, Applicant completed a statement detailing his illegal use of marijuana. Ex. 3.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. Directive ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Exec. Or. 10865 § 2. *See* Exec. Or. 12968 § 3.1(b).

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Exec. Or. 12968 § 3.1(b).

CONCLUSIONS

Guideline E-Personal Conduct

The Government alleged in the SOR that Applicant falsified material facts about his drug use in security clearance applications submitted in 1988, 1999, and 2000.

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. Directive ¶ E2.A5.1.1. Under Guideline E, the following applicable conditions raise security concerns that may be disqualifying:

(1) 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. Directive ¶ E2.A5.1.2.2.

(2) Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail. Directive ¶ E2.A5.1.2.4.

The sole applicable mitigating condition is that Applicant took positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress. Directive ¶ E2.A5.1.3.5.

By admitting his use of marijuana, Applicant took positive steps to eliminate his vulnerability to coercion, exploitation, or blackmail. He also expressed an intent not to use marijuana again. Ex. 3 at 3. Nevertheless, he still has not come to terms with his deliberate falsification of his security clearance applications. In a statement given to a DSS agent on 27 July 2000, Applicant suggested he deliberately falsified his 1988 security clearance application. He claimed jobs were hard to find, he was getting married, and he did not know he would be required to answer questions about his use of drugs. He admitted failing to account for his marijuana use on the 1988 security clearance application because he was naive, foolish, and he did not know if it would get him and his friends in trouble, which he did not want to do. Ex. 3 at 2. Although perhaps not an explicit admission of falsification, Applicant appeared to be owning up to his misconduct. Yet, at his hearing, Applicant tried to rationalize his failures. He asserted he did not think the question required him to report casual drug use. Tr. 20. Applicant stated that he answered the question on his 1999 security clearance application in the same way because he didn't want to contradict what he had said before, so he "mistakenly answered it the same way" as he did in 1988. *Id.* It took sharp questioning by department counsel before Applicant admitted that he deliberately falsified his security applications.

While it is commendable that Applicant came forward and admitted using illegal drugs and providing incorrect information on his security clearance applications, his inability to take full responsibility for deliberately falsifying the applications militates against granting him a clearance. Under the circumstances, Applicant failed to demonstrate it is in the nation interest to grant him a clearance.

Guideline J-Criminal Conduct

In the SOR, the Government alleged Applicant had committed criminal conduct by deliberately falsifying his security clearance applications in violation of 18 U.S.C. § 1001.

A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. Directive ¶ E2.A10.1.1. The following applicable conditions create a security concern and may be disqualifying in this case:

(1) Allegations or admission of criminal conduct, regardless of whether the person was formally charged. Directive ¶ E2.A10.1.2.1.

(2) A single serious crime or multiple lesser offenses. Directive ¶ E2.A10.1.2.2.

The only applicable listed condition that possibly could mitigate the security concern is evidence of successful

rehabilitation. Directive ¶ E2.A10.1.3.6.

By deliberately falsifying his security clearance applications, Applicant violated 18 U.S.C. § 1001. Applicant failed to demonstrate true rehabilitation. He never fully accepted his responsibility for deliberately falsifying the applications. Finding is against Applicant.

FORMAL FINDINGS

Conclusions as to each of the allegations in the SOR as required by Executive Order No. 10865 § 3, ¶ 7 and the Directive ¶ E3.1.25, are as follows:

Paragraph 1. Guideline G: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

DECISION

In light of all of 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 Applicant.

James A. Young

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.