

DATE: March 18, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-28921

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Deputy Chief Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a history of use of illegal substances (primarily marijuana) that he repeatedly omitted when executing security clearance applications (SF-86s) in 1996 and 2001 and first talking with DSS in a follow-up 1997 interview. Applicant's concealment of his marijuana use 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 February 14, 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 March 3, 2003, and requested a hearing. The case was assigned to me on July 2, 2003, and was scheduled for hearing on November 13, 2003. A hearing was convened on November 13, 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 three exhibits; Applicant relied on one witness (himself) and seven exhibits. The transcript (R.T.) was received on November 20, 2003.

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 personal references and performance evaluations. 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 two days to respond. Applicant timely supplemented the record with a character

reference from a work colleague and performance evaluations covering the period of July 1, 2001 through June 30, 2002. The post-hearing submissions are accepted as exhibits H and I, respectively.

SUMMARY OF PLEADINGS

Under Guideline E, Applicant is alleged to have (a) falsified his security clearance application (SF-86) of July 2001 by omitting his marijuana use in the summer of 1976, his marijuana smoking (around five times) between 1978 and 1981 while holding a secret clearance as a defense contractor employee, and smoking marijuana a couple of times a year between 1981 and 1994 while working for a defense contractor, (b) falsified facts in a DSS interview of February 1997 by failing to mention his marijuana usage, (c) falsified his SF-86 of December 1996 by (i) omitting his marijuana usage between 1981 and 1994 while holding a security clearance and (ii) failing to disclose his marijuana use when answering questions 27 and 28. Under Guideline J, the same allegations are incorporated under 10 U.S.C. Sec. 1001.

For his answer to the SOR, Applicant admitted the allegations. In explanation, he claimed his July 2001 SF-86 misstatements and omissions were attributable to fear of losing his job, which he loves very much. He claimed he misstated material facts in his February 1997 DSS interview due to intimidation by the interviewing DSS agent. He claimed to have been very embarrassed over his past use of marijuana, which he initiated while very young and perpetuated during his military service. And he claimed to be dedicated to his job and conscientious about protecting classified information.

STATEMENT OF FACTS

Applicant is a 48-year-old senior systems engineer for a defense contractor who seeks retention of a security clearance he has held since 1977. 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.

After receiving his honorable discharge in 1977, he joined a defense contractor (the predecessor of his current employer) the same year. When he started working for this defense contractor in 1977, his AF clearance was transferred over to his private employer. While working abroad for his defense contractor during the first year of his employment, he met his spouse to be, who he married in 1978 (*see ex. 3*). He separated from his spouse in 1996 and shares no community property interests with her. While he remains legally married to his spouse, he has not co-habited with her since 1996. Applicant and his spouse have no children from their marriage.

Applicant took up marijuana use in 1977 while working abroad for his employer. He smoked it periodically at parties attended by American and the local foreign residents. At no time during his deployments did his use of marijuana ever come to the attention of his company security personnel or work associates. During this period of foreign deployment he sometimes interfaced with members of both Communist and non-Communist bloc-countries. Occasionally, he would come in contact with Communist-bloc representatives at parties he attended, but tried to limit his associations to members of English-bloc countries. To the best of his knowledge he never smoked marijuana in the presence of these representatives from Communist-bloc countries (R.T., at 39). Applicant quit using marijuana altogether in 1994 and has not used it since.

Asked to complete an SF-86 in December 1996 as part of an upgrading clearance process, Applicant answered in the negative to both question 27 (inquiring about drug use while holding a sensitive position) and question 28 (use of illegal substances within the previous seven years). In denying any prior drug use, Applicant failed to disclose his use of marijuana between 1981 and 1994 while holding a security clearance. He attributes his omissions to his concerns over losing his job and clearance.

When he was first interviewed by DSS (in February 1997), he volunteered no information about his past marijuana use. When completing an SF-86 of July 3, 2001 as part of his clearance update, he again denied any prior use of illegal substances when answering questions 27 and 28. As before, he attributed his omissions to his fear of losing his job and clearance. Each of his omissions merit inferences that his withheld acknowledgments of his drug use were made knowingly and wilfully.

In a follow-up DSS interview on July 5, 2001, Applicant initially stuck to his original story and denied any prior illegal

substance abuse (*see ex. 3*). After the DSS agent had essentially completed the interview, he pressed Applicant on whether he really had used illegal substances. Applicant relented and acknowledged his prior drug use. Absent the agent's pressing Applicant on his prior drug use, Applicant assures he would probably not have disclosed it. His admissions, though, prompted more questions about his drug use from the interviewing DSS agent and ultimately disclosure of his complete drug history.

Applicant is highly regarded by his supervisor and co-workers. As a senior systems engineer, he is valued for his skills and dependability. In his performance evaluations and personal reference, his supervisor, gives him high marks for his mission support, knowledge and experience, and positive attitude (*see exs. A, B, C and I*). Colleagues who have worked with Applicant describe his performance, ethics, and professional comportment in high pressure international situations as exemplary (*see exs. A and H*). He has received numerous performance awards and commemorations from his AF customer recognizing his outstanding contributions to assigned missions (*see exs. C, D and E*).

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 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.

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:

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 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 or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSIONS

Applicant has a praiseworthy civilian record, but also a record of security significant omissions in his SF-86s and DSS statement of his past use of illegal substances while holding as security clearance. These repeated omissions serve to impair the confidence in his judgment, reliability and trustworthiness required to continue his 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 drug use omissions in each of his SF-86s, as well as in his DSS interviews that followed each of his clearance application submissions. 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 his past marijuana use in each of his clearance applications, and ensuing DSS interview following submission of his 1996 SF-86, Applicant concealed materially important background information needed for the government to properly process and evaluate his security updates. 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 clearance: understandable certainly, but historically considered by our Appeal Board to be insufficient to avert drawn conclusions of knowing and wilful concealment.

But Applicant makes clear that he approached questions 27 and 28 of his respective SF-86s with the intent to withhold information about past marijuana use as he could reasonably escape with. His omissions 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) and DC 3 (providing

false information to an investigator).

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 following completion of his 1996 SF-86. 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 take advantage of an earlier DSS interview opportunity. *Compare* ISCR Case No. 97-0289 (January 1998) with DISCR Case No. 93-1390 (January 1995).

Applicant in the present case is on record with bypassing his first afforded opportunity to correct his omissions and waiting until his second DSS interview years later (in July 2001) to come forward with the true facts about his drug history. Our 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 waited months for another DSS interview before electing to come forward with corrections. *See* 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) of the Adjudicative Guidelines for personal conduct.

There can be no doubt but that Applicant has inspired confidence and trust among his defense contractor supervisor and co-workers. But in the face of his repeated acts of omission, his favorable character evidence alone is not enough to absorb security concerns extant with the Government over his failure to be truthful through both his SF-86 submissions and initial DSS interview in 1997. Mitigation is further weakened by the qualifications expressed by most of his character witnesses: lack of awareness of Applicant's omissions of material information in each of his SF-86 submissions and in his initial face-to-face DSS interview.

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. 1.a through 1.d of Guideline E.

Criminal coverage of falsification issues

That none of Applicant's SF-86 omissions 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 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 its related falsification parameters under 18 U.S.C. Section 1001.

Applicant's belated coming forward with his full disclosure of his illegal drug history in prior arrest and drug involvement in his last DSS interview represented a positive shift in his attitude about withholding drug involvement information that he had long felt could imperil his job and clearance if disclosed. His meritorious work record merits consideration, too, in weighing the extent of his exhibited rehabilitation. Given his considerable history of withholding his drug activity in clearance applications and a prior DSS interview, however, his disclosure, while commendable, is not enough to meet the mitigation requirement of evidenced clear rehabilitation to entitle him to take advantage of MC 6 (clear evidence of successful rehabilitation) of the Adjudication Guidelines at this time. More time is needed before Applicant is in a position to make the case his rehabilitation efforts are sufficient to mitigate the criminally-related features of his drug use omissions. Based on a full review of the evidence and drawn inferences from the developed record, unfavorable conclusions warrant with respect to sub-para. 2.a of Guideline J as well.

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: AGAINST APPLICANT

Sub-para. 1.d: AGAINST APPLICANT

GUIDELINE J (CRIMINAL CONDUCT): AGAINST APPLICANT

Sub-para. 2.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. Clearance is denied.

Roger C. Wesley

Administrative Judge