

DATE: April 29, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-31166

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

SYNOPSIS

Applicant has a history of use of marijuana that he omitted, along with his driving under the influence (DuI) arrest when executing his security clearance application in 2001. Applicant's concealment of his marijuana use and DuI arrest is not mitigated by any showing of a prompt, good faith correction under any of the pertinent mitigation conditions of the Adjudication Guidelines for personal conduct and raises continuing security concerns about Applicant's judgment and reliability. Clearance is denied.

STATEMENT OF CASE

On July 10, 2004, 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 August 23, 2004, and requested a hearing. The case was assigned to me on October 8, 2004, and was scheduled for hearing on December 8, 2004. A hearing was convened on December 6, 2004, for the purpose of considering whether it is clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At hearing, the Government's case consisted of four exhibits; Applicant relied on three witnesses (including himself) and 15 exhibits. The transcript (R.T.) of the proceedings was received on December 15, 2004.

SUMMARY OF PLEADINGS.

Under Guideline E, Applicant is alleged to have falsified his security clearance application (SF-86) of August 27, 2001, by omitting (a) his use of marijuana between the Fall of 1998 and the spring of 2001 when answering question 24 and

(b) his July 1999 DuI arrest when answering question 23. For his response to the SOR, Applicant denied each of the allegations.

FINDINGS OF FACT

Applicant is a 38-year-old associate engineer for a defense contractor who seeks a security clearance. Between the Fall of 1998 and the Spring of 2001, Applicant used marijuana approximately 10 times, initially for curiosity, and later because he liked the euphoric feeling it produced (*see ex. 2*). He used it primarily in social situations and stopped using it just before he was asked to complete an SF-86 (R.T., at 48-52).

Asked to complete an SF-86 in August 2001, he answered "no" question 24, which inquired about his marijuana use within the previous seven years. Applicant attributed his denials to concerns over the negative effect admitted use might have on his security clearance (*see ex. 2*; R.T., at 57-58). In the same SF-86, he omitted his DuI arrest of July 1999 when he answered question 23. He attributes this omission to the assurances the judge made to him when passing pre-adjudication conditions relative to his DuI charges, *i.e.*, the DuI would not appear on his record due to a lack of a fine (R.T., at 54-55). Applicant acknowledged, though, that the DuI would remain on the court's records for consideration were he to ever be arrested again for DuI (*see ex. 2*). Neither of Applicant's explanations indicate confusion or mistake about the information asked for in questions 23 and 24. Absent a persuasive showing his omissions were the result of confusion or mistake, he cannot avert inferences that his omissions were knowing and wilful.

When interviewed by DSS Agent A in July 2002, Applicant admitted both his drug use and his 1999 DuI arrest. Concerned that any drug use acknowledgments might affect his employment, Applicant initially asked the interviewing agent why he needed to know about any of the former's prior drug abuse (R.T., at 48). Assured by Agent A that any information Applicant furnished would be held in strictest confidentiality, Applicant acknowledged both his use of marijuana between 1998 and 2001 and his 1999 DuI arrest. Applicant attributed his reluctance to be completely open about his past marijuana use to his concerns about the affects an admission would have on his security clearance (*see ex. 2*; R.T., at 57-58). Applicant's answers, under the circumstances, cannot be considered either prompt or fully voluntary.

Applicant is highly regarded by his supervisor and coworkers who have worked with him on a regular basis since he joined the company in February 2001. They characterize him as a reliable colleague of good character who can always be counted on to help on team projects. Albeit, Applicant did not voluntarily disclose either his past marijuana use or his DuI arrest directly to his supervisor, or to his supportive coworkers and friends that can be determined from their testimony and letters (*see exs. D through O*).

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

The Concern: 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.

Criminal Conduct

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

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-86 of his past use of marijuana and his prior DuI arrest. These determined intentional 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 and DuI omissions in his August 2001 SF-86. So much trust is imposed on persons cleared to see classified information that little tolerance is afforded for incidents of trust betrayal (as here).

By omitting his past marijuana use and DuI arrest in his 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 clearance: understandable certainly, but historically considered by the Appeal Board to be insufficient to avert drawn conclusions of knowing and wilful concealment.

Applicant's omissions were knowing, deliberate, and material to a determination about his clearance suitability. They invite application of a Disqualifying Condition (DC) for personal conduct of the Adjudicative Guidelines: E2.A5.1.2.2 (*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*).

Mitigation is difficult to credit Applicant with, since he failed to make any prompt, good faith attempts to correct his omissions with any of the opportunities afforded him. Not only has the Appeal Board found the use of Mitigating

Condition (MC) E2.A5.1.3.2 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 E2.A5.1.3.3 (prompt, good faith disclosure) as well in circumstances (as here) where the applicant has failed to make earlier corrections of his material omissions. *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 failing to come forward to correct his omissions until he was inquired about the covered areas in DSS interview almost a year later (*i.e.*, in July 2002). The 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 waited many months before electing to come forward with corrections in a scheduled DSS interview. *See* DISCR Case No. 93-1390 (January 1995). Applicant, accordingly, may not take advantage of either E2.A5.1.3.2 (isolated omissions) or E2.A5.1.3.3 (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 coworkers. But in the face of his determined 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.

Considering all of the evidence produced in this record and the available guidelines in the Directive (inclusive of the E2.2.2 factors), unfavorable conclusions warrant with respect to subparagraphs 1.a and 1.b 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. The 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: E2.A10.1.2.1 (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*) and E2.A10.1.2.2 (*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 prior marijuana use and DuI arrest in his first and only DSS interview represented a positive shift in his attitude about withholding drug involvement and arrest information that he had felt could imperil his clearance if disclosed. His meritorious work record and overall positive impressions from his supervisor and coworkers merits consideration, too, in weighing the extent of his exhibited rehabilitation. His disclosure is enough to entitle him to take advantage of E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*) of the Adjudication Guidelines at this time. Based on a full review of the evidence and drawn inferences from the developed record, favorable conclusions warrant with respect to subparagraph 2.a of Guideline J.

In reaching my decision, I have considered the evidence as a whole, including each of the E 2.2.1 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

GUIDELINE J (CRIMINAL CONDUCT): FOR APPLICANT

Sub-para. 2.a: 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