

DATE: May 10, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-11907

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 44-year-old electronic technician for a defense contractor. He used marijuana for at least 22 years, continuing until a week prior to his interview with a government investigator. He failed to make material disclosures about prior arrests and marijuana use on his security clearance application. He did not mitigate the drug use and personal conduct security concerns. He did mitigate the criminal conduct security concern. Clearance is denied.

STATEMENT OF THE CASE

On July 17, 2003, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under Guideline H (Drug Involvement), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct) 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. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked.

In a signed Answer, notarized on August 12, 2003, Applicant responded to the SOR allegations. He requested his case be decided on the written record in lieu of a hearing.

On November 6, 2003, Department Counsel submitted the Department's written case. A complete copy of the file of relevant material (FORM) [\(1\)](#) was provided to the Applicant, and he was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not file a response to the FORM by the December 26, 2003 due date. The case was assigned to me on January 15, 2004.

FINDINGS OF FACT

Applicant admitted all of the SOR allegations. Those admissions to the allegations are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is a 44-year-old electronic technician employed by a defense contractor. He has two children. His marital status is unknown due to the absence of page 2 of this security clearance application (SCA) from the file. (Item 4 at 1 and 3)

Applicant completed his security clearance application on April 13, 2000. On that application Applicant answered Question 27 that in the past 7 years he had not used any illicit drugs or substances, which included marijuana. That answer was false because Applicant used marijuana from 1993 to 1995 and now admits the use. (Item 4 at 1 and 6)

Applicant began smoking marijuana at the age of 20 in 1980 and continued smoking it once a week, at least, including until a week prior to his interview with a Defense Security Service agent in January 2002. (Item 3 at 1; Item 5 at 2)

In his Answer to the SOR, Applicant admitted being arrested in February 1990 for possession of marijuana, but his statement in 2002 denies this arrest and states he cannot remember ever being arrested for any drug offense. There is no independent documentary support in the file for this allegation. (Item 3 at 1; Item 5 at 1)

Applicant was arrested in November 1995 for criminal trespass and damage to property because he threw a flower pot through the front door glass of the home of his daughter's mother. He was arraigned in the city court, and no plea or disposition on the charges was shown in the file. (Item 3 at 2; Item 6)

Applicant answered "No" to Question 24 on his October 2000 SCA, which asked him if he had ever been charged with any offense related to alcohol or drugs. Applicant stated in his investigatory statement in 2002 that he has no recollection of any such arrest, nor is there any documentary evidence in the file for such an arrest. (Item 3 at 1; Item 4 at 4)

Applicant answered "No" to Question 26 on his October 2000 SCA, which inquired whether he had been arrested in the past seven years for any offense. He did not disclose the arrest in 1995 for trespass and property damage. (Item 3 at 2; Item 6)

Applicant answered "No" in response to Question 27 on his October 2000 SCA and its request for any illegal use of any controlled substance in the past seven years. Applicant had used marijuana regularly within that time period of October 1993 to October 2000, when he completed the SCA.

Applicant answered "No" to Question 28 on his October 2000 which asked if he had ever used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official, while holding a security clearance, or in a position directly or immediately affecting public safety. Applicant admitted this allegation, but there is no evidence in the file that he fell within the purview of this question requiring an affirmative answer. (Item 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 judgement, 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* Section 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicted upon the applicant meeting the security guidelines contained in the Directive.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past

and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines that must be carefully considered according to the pertinent Guideline in making the overall common sense determination required.

Each adjudicative decision must also include an assessment of:

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation;
- (3) how recent and frequent the behavior was;
- (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 pertinent 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 (See Directive, Section E2.2.1. of Enclosure 2).

Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

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 Para E3.1.15. An applicant "has the ultimate burden of demonstrating that 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 Para. 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 Section 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

Guideline H - Drug Involvement

(A) Improper or illegal involvement with drugs, raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information

(B) Drugs are defined as mood and behavior-altering substances and include:

- (1) Drugs, materials and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens); and

(2) Inhalants and other similar substances.

(C) Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

(D) Conditions that could raise a security concern and may be disqualifying include:

(1) Any drug abuse (see above definition);

(2) Illegal drug possession, including purchase.

(E) Conditions that could mitigate security concerns include:

None

Guideline J - Criminal Conduct

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

(B) Conditions that could raise a security concern and may be disqualifying include:

(1) Allegations or admissions of criminal conduct, regardless of whether the person the person was formally charged;

(2) A single serious crime or multiple lesser offenses.

(C) Conditions which could mitigate security concerns include:

(1) The criminal behavior was not recent;

(6) There is clear evidence of successful rehabilitation.

Guideline E - Personal Conduct:

(A) 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. The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

Refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials or other official representatives in connection with a personal security or trustworthiness determination.

(B) Conditions that could raise a security concern and may be disqualifying also include:

(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;

(4) 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;

(5) A pattern of dishonesty;

(C) Conditions that could mitigate security concerns include:

The Department of Defense is prohibited from granting or continuing a clearance of any employee of a defense contractor who is an "unlawful user of . . . a controlled substance." 10 USC § 986(c)(2).

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions above, I conclude the following with respect to each allegation set forth in the SOR:

Guideline H - Drug Involvement. The Government established its case by its evidence and Applicant's admissions. Under Guideline H, an applicant's illegal involvement with drugs raises questions regarding his willingness to protect classified information. I conclude Disqualifying Conditions (DC) 1 and 2 apply here. A security concern may exist if an applicant uses or purchases illegal drugs such as marijuana. The last alleged drug use was a week prior to his interview with a government investigator in January 2002. Applicant stated he liked the feeling marijuana gave him, so he continued to use it. There is no statement or indication that Applicant will not use marijuana in the future. From the context of his statement in 2002, it appears he intends to continue to use it. Under 10 U.S. C. § 986(c)(2) an Applicant's current use of a controlled substance prohibits the issuance of a security clearance. Applicant admitted his current use of marijuana, a controlled substance, as recently as a week prior to his investigative interview. Therefore, I find Applicant is a current user of a controlled substance by his own admissions, and 10 U.S.C § 986 (c) (2) applies.

I do not find any Mitigating Conditions (MC) applicable in this case under this guideline. I find against Applicant on this Guideline H.

Guideline J - Criminal Conduct. The Government established its case by the evidence it presented and Applicant's admissions on Paragraph 2. DC 1 (Allegations or admissions of criminal conduct, regardless of whether the person the person was formally charged) and DC 2 (A single serious crime or multiple lesser offenses) apply. Applicant admitted the arrest in 1990 for possession of marijuana. Applicant committed the trespass and damage to property offenses in 1995 as alleged, by his admission and the supporting documentation.

The MC 1 (the conduct was not recent) applies. These arrests were 14 and nine years ago. Therefore, the finding is for Applicant on Guideline J.

Guideline E - Personal Conduct: I conclude the Government established by its evidence and Applicant's admissions the validity of the allegations as set forth in Paragraph 3 of the SOR. Applicant did not disclose his arrest in 1990 for possession of marijuana. Nor did he disclose his arrest in 1995 for trespass and criminal damage to property as part of his answer to Question 26. He should have done so because that arrest, regardless of the disposition, is directly relevant to the information the question seeks. Furthermore, Applicant deliberately failed to disclose his marijuana use on the SCA submitted in response to Question 27. Applicant did not disclose his use of marijuana while he had a security clearance, as he should have done in response to Question 28.

Under Guideline E 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. A security concern may exist when an applicant deliberately omits, conceals, or falsifies relevant and material facts from his personnel security questionnaire or deliberately provides false or misleading information concerning relevant and material matters to an investigator in connection a personnel security determination. Through Applicant's admissions, the Government established a prima facie case that Applicant deliberately falsified his security clearance application in 2000. Therefore, Disqualifying Conditions (DC) 2 (omission of information), DC 4 (concealment of information which increases a person's vulnerability to coercion and

exploitation), and DC 5 (a pattern of dishonesty) apply.

I do not find any MC which apply in this case. There is a pattern of falsification of information by Applicant concerning his use of controlled substances. Therefore, I find against Applicant on Guideline E.

FORMAL FINDINGS

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline H: Against Applicant

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Paragraph 2 Guideline J: For Applicant

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

Paragraph 3⁽²⁾ Guideline E: Against Applicant

Subparagraph 3.a.: Against Applicant

Subparagraph 3.b.: Against Applicant

Subparagraph 3.c.: Against Applicant

Subparagraph 3.d.: Against Applicant

DECISION

In light of all the circumstances and facts 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. Clearance is denied.

Philip S. Howe

Administrative Judge

1. The Government submitted six documents organized into four items in support of the SOR.
2. The SOR numbers the third set of allegations as "2" by error. For the Formal Findings I number it "3" which it should have been numbered for clarity.