

DATE: March 22, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-12279

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 intermittent marijuana use spanning the period of 1976 through February 2002 and fails to reduce risks of recurrent drug use sufficiently to mitigate the government's security concerns. Applicant's deliberate omissions of his marijuana use in both his SF-86 and subsequent interrogatory propounded by DOHA are not mitigated either and raise additional security concerns about Applicant's judgment and reliability. Clearance is denied.

STATEMENT OF THE CASE

On July 15, 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 in August 2003, and requested a hearing. The case was assigned to me on September 5, 2003, and was scheduled for hearing on November 14, 2003. A hearing was convened on November 14, 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 no exhibits. The transcript (R.T.) was received on November 20, 2003.

PROCEDURAL ISSUES

Before the close of the hearing, Applicant moved to amend his answer to the SOR by adding a denial to subparagraph 2.c of the SOR. There being no objection from the government and good cause being demonstrated, Applicant's motion was granted, and a denial to the allegations was added by inter-lineation.

SUMMARY OF PLEADINGS

Under Guideline H, Applicant is alleged to have smoked marijuana from approximately 1976 through February 2002 and used marijuana while possessing a security clearance.

Under Guideline E, Applicant is alleged to have (a) falsified his security clearance application SF-86 of October 2001 by omitting his drug use when answering question 27, (b) falsified his DOHA interrogatory of March 2003 by denying any drug use, and (c) using marijuana while possessing an interim security clearance.

For his answer to the SOR, Applicant admitted most of the allegations. He denied only his using marijuana while possessing an interim security clearance.

FINDINGS OF FACT

Applicant is a 43-year-old 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.

Between 1976 and February 2002, Applicant used marijuana intermittently, but at least once a year, with old high school acquaintances. In 1976 (while he was still in high school), friends placed marijuana in his car. When his high school principal discovered it, Applicant was expelled from school.

While employed by his defense contractor Applicant was at all times aware that marijuana use was not only illegal in his state, but prohibited by company policy as well (R.T., at 28-29). Yet he continued to use marijuana after completing his SF-86 in October 2001 and after being granted an interim security clearance.

Asked to complete an SF-86 in October 2001, Applicant denied use of marijuana at any time during the previous seven years. He attributes his misstatements to concerns that (a) the person collecting his SF-86 might gossip to others in the company and (b) discovery of his marijuana use could result in the loss of his job. Over the ensuing six months, Applicant made no attempt to contact or notify the DSS of his continuing marijuana use. When subsequently interviewed by a DSS agent in March 2002, he volunteered his marijuana history only after being asked generally about drug use. On these facts, Applicant is credited with belatedly acknowledging his marijuana use to a DSS agent without confrontation.

In March 2003, DOHA propounded an interrogatory to Applicant covering drug use. In answering the interrogatory (ex. 3), he denied any past drug use within the previous seven years. He offered no explanation as to why he answered in the negative to the question. Nor he could he explain why he claimed discontinuance of illegal substance use in December 2001 after denying any drug use when answering question 1. Even his discontinuance claim, though, did not detail the extent of his prior marijuana use and hence can't be considered a clear correction of his prior omissions.

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:

Drug Involvement

The Concern: 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.

Disqualifying Conditions:

DC 1 Any drug use.

DC 2 Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.

Mitigating Conditions: None.

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 5 A pattern of dishonesty or rule violations.

Mitigating conditions: None.

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.

Applicant's acknowledged use of marijuana intermittently over a 25-year period was sufficient to be characterized as regular use and clearly security significant. His continued use of marijuana through February 2002 while holding an interim security clearance was undertaken with the full knowledge that his smoking marijuana was not only contrary to his state's laws but DoD's drug policy as well. Applicant's abusive use of marijuana through February 2002 is sufficient to invoke two of the disqualifying conditions of the Adjudicative Guidelines for drugs (*i.e.*, DC 1 (any drug abuse) and DC 2 (illegal drug possession)).

Based on his own testimony and DSS statement, Applicant may take some advantage of MC 3 (demonstrated intent not to abuse any drugs in the future), but not enough to mitigate the government's security concerns. More time is still needed for Applicant to demonstrate he is no longer at risk to recurrent marijuana use. Considering all of the developed evidence of record, Applicant fails to mitigate security concerns over his judgment lapses associated with use of marijuana over such a prolonged period. Unfavorable conclusions warrant with respect to subparagraphs 1.a and 1.b of Guideline H.

Additional security concerns are posed by Applicant's documented omissions of his covered marijuana use from 1976 through February 2002 from the SF-86 he completed in October 2001. After voluntarily correcting his SF-86 omissions in an ensuing DSS interview, he once again denied any marijuana use in answers to DOHA's interrogatories in March 2003. Applicant's repeated omissions under the circumstances reflect knowing and wilful falsification of a security clearance application and are covered by DC 2 (deliberate falsification of a personnel security questionnaire), as well as DC 5 (pattern of dishonesty or rule violations) of the Guidelines for personal conduct. Applicant's explanations of his omissions (*viz.*, concerns about company gossip and losing his job) were not persuasive enough to avert inferences of knowing and wilful omission.

Not only was Applicant's SF-86 omission of his marijuana use never promptly and voluntarily corrected by Applicant, but it was compounded by his subsequent interrogatory denials. Under these circumstances, he may not claim the benefit of any of the available mitigating conditions of Guideline E. Security concerns raised in connection with Applicant's judgment and trust lapses associated with his SF-86 and interrogatory omissions are not mitigated and preclude favorable conclusions with respect to subparagraphs 2.a and 2.b of Guideline E.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the factors set forth in E.2.2 of the Adjudicative Process of Enclosure 2 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 H (DRUG INVOLVEMENT): AGAINST APPLICANT

Sub-para. 1.a: AGAINST APPLICANT

Sub-para. 1.b AGAINST APPLICANT

GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT

Sub-para. 2.a: AGAINST APPLICANT

Sub-para. 2.b: 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