

DATE: August 23, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-13389

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This 24-year-old apprentice in a shipyard has a history of drug and alcohol use and related arrests going back to when he was 16, and ending only recently. He deliberately omitted any mention of his drug and alcohol-related misconduct from his SF 86. Mitigation has not been adequately established. Clearance is denied.

STATEMENT OF THE CASE

On July 16, 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, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons

why DOHA could not make the preliminary affirmative finding required under the Directive that it

is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and

determine whether a clearance should be granted, denied or revoked.

On August 18, 2003, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made by a DOHA Administrative Judge on the written record, i.e., without a hearing. Department Counsel issued a File of Relevant Material (FORM) on October 17, 2004. The Form instructed Applicant that any response to the FORM had to be submitted within 30 days of its receipt by Applicant. Any response was due by December 10, 2003, but no submission to the FORM was received as of that date. However, a response was later received by Department Counsel, dated February 24, 2004. The matter was assigned to me for resolution on April 26, 2004.

FINDINGS OF FACT

Applicant is a 24-year-old apprentice at a shipyard. The July 16, 2003 SOR contains six allegations under Guideline H (Drugs), three allegations under Guideline G (Alcohol Consumption), one allegation under Guideline J (Criminal Conduct), and four allegations under Guideline E (Personal Conduct). In his October 15, 2003 response to the SOR, Applicant *admits* all six allegations under Guideline H, SOR 1.a. - 1.f.; one of the three allegations under Guideline G, 2.a., and denies the other two allegations, 2.b. and 2.c.; denies the single allegation under Guideline J; and denies all four allegations under Guideline E. The admitted allegations are accepted and incorporated herein as Findings of Fact.

After considering the totality of the evidence derived from the FORM and its attachments, including Applicant's response to the SOR, I make the following additional FINDINGS OF FACT as to the status, past and present, of each SOR allegation [\(1\)](#):

Guideline H (Drugs)

Applicant:

1.a. - smoked marijuana from about 1995, when he was 16, to March 2001.

1.b. - during the period from 1995 to March 2001, sold marijuana two or three times a year to support his drug habit, with the highest sale being an ounce for \$85.00.

1.c. - during the period from 1995 to March 2001, purchased marijuana an average of once a week to once a month. The average purchase was \$80.00 per ounce of marijuana. The most marijuana he ever purchased was a quarter pound for \$300.00;

1.d. - was arrested on June 3, 2000 for (1) Possession of Marijuana, a misdemeanor; (2) Possessing Alcohol under Age 21, a misdemeanor; and (3) Operating a Vehicle Under the Influence, a misdemeanor. The first two charges were dismissed by the prosecution, but Applicant was found guilty of Count III. He was fined \$100.00, lost his license for a year, and was ordered to attend an alcohol education program.

1.e. - received intensive outpatient counseling for drug abuse at a treatment center, from March 13, 2001 to April 17, 2001 (Item 8).

1.f. - "snorted" cocaine three times between October 1999 and October 2000.

Guideline G (Alcohol)

2.a. - on August 3, 2000, was found guilty of Operating a Vehicle Under the Influence, as cited in SOR 1.a.;

2.b. - on April 9, 1999, was arrested for Operating a Motor vehicle Under the Influence. He was found guilty, fined \$250.00, had his license suspended for six months, and ordered to attend an alcohol education program;

2.c. - On April 4, 1998, was arrested by and charged with (1) Reckless Driving, and (2) Operating a Motor Vehicle While having Consumed Alcohol Under the Age of 21. Subsequently, the General District Court (Traffic) of Newport News found you guilty of the first charge, fined you \$100, and suspended your driver's license for 30 days. [\(2\)](#)

Guideline J (Criminal Conduct)

3.a. - on April 4, 1998, [\(3\)](#) was arrested for Reckless Driving and Accident Property Damage.

He was found guilty, had his license suspended for 60 days, and was fined. This charge relates to the same incident as that alleged in SOR 2.c. (Item 5 at page 2).

Guideline E (Personal Conduct)

Applicant knowingly falsified material facts on his security clearance application (SF 86) of February 25, 2000, as to Question:

4.a. - **24. Your Police Record - Alcohol/Drug Offenses**, when he answered "No" and deliberately failed to cite his treatment for alcohol abuse, as cited in SOR 2.c., above.

4.b. - Deleted on motion by Department Counsel

4.c. - **27. Your Use of Illegal Drugs and Drug Activity**, since the age of 16 or in the last seven years, when he answered "No," and deliberately failed to mention the offenses alleged in SOR 1.a. and 1.f., above.

4.d. - **29. Your Use of Illegal Drugs and Drug Activity**, in the last seven years, when he answered "No," and deliberately failed to mention the offenses alleged in SOR 1.b. and 1.c., above.

Applicant's last word on these allegations is that he has "no recollection of answering this question on 2-24-00" [actually 2-25-00] (Item 3). This latter date is when he signed the SF 86 in question (Item 4).

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant

in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing participation; (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 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 (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Because each security case presents its own facts and circumstances, it should not be assumed

that the factors cited above exhaust the realm of human experience or that the factors apply equally

in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable financial judgment and conduct. Because Applicant chose to have this matter decided without a hearing and without submitting any additional information in response to the FORM, all credibility determinations and findings of fact are necessarily based entirely on the contents of the FORM and applicant's response.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of

whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination based on the "whole person" concept required by the Directive, the Administrative Judge is not permitted to speculate, but can only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make

critical judgments as to the credibility of witnesses, here based solely on the written record.

In the defense industry, the security of classified information is entrusted to civilian workers

who must be counted on to safeguard classified information and material twenty-four hours a day.

The Government is therefore appropriately concerned where available information indicates that an

applicant for a security clearance, in his or her private life or connected to work, may be involved

in conduct that demonstrates poor judgment, untrustworthiness, or unreliability. These concerns include consideration of the potential, as well as the actual, risk that an applicant may deliberately

or inadvertently fail to properly safeguard classified information.

An applicant's admission of the information in specific allegations relieves the Government

of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either

by the Applicant's admissions or by other evidence) and proves conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the Applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence

of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the Applicant.

A person seeking access to classified information enters into a fiduciary relationship with the

Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended,

at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

CONCLUSIONS

Since this matter is being decided without a hearing, my analysis is necessarily limited to the contents of the various documents that are found in the case file, the latest of which is Applicant's response to the SOR.

Drugs - It is not disputed that Applicant has a history of drug use, purchase and sale that began at age 16 (about 1995) and continued until at least March 2001. His marijuana use began in 1995 and he moved on to using cocaine on three occasions from October 1999 to October 2000. Since Applicant's SF 86 (Item 4) was signed on February 25, 2000, it is clear that his drug use continued even during the adjudication period that led to the SOR being issued in the matter on July 16, 2003. In addition, Applicant told an agent of the Defense Security Service (DSS) (Item 5, at page 4) that he stopped using cocaine because he "did not see anything special about [it]," and not because he had come to realize that it was illegal, dangerous, might prevent him from obtaining a security clearance, or simply was not in his own best interests. It appears that Applicant stopped using marijuana only after he failed a company-required random drug test in March 2001 (Item 5 at page 3).

Disqualifying Conditions (DC) 1 (any drug abuse) and DC 2 (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution) are clearly applicable. Considering possible Mitigating Conditions (MC), I conclude that none are established by the evidence or record. It is basic to the security clearance adjudication process that holding a clearance is a privilege and not a right, and that the ultimate burden of proof is on an applicant to establish eligibility, and not on the Government to prove to the contrary. In the present case, since Applicant has not provided any evidence to the contrary since responding to the SOR, I conclude that his drug use remains "recent," as that term is used in MC 1. His drug involvement is certainly not infrequent or intermittent (MC 2) and he has failed to demonstrate an

intent not to use drugs in the future, as is required by MC 3.

Alcohol Consumption - The evidence establishes the validity of the three alcohol-related criminal matters alleged in SOR 2.a., 2.b., and 2.c. Applicant admits 2.a., the August 2000 matter, without comment. As to 2.b., the April 9, 1999 matter, Applicant's denial is aimed at the nature of the punishment imposed and not his arrest and conviction, which is, in this case, independently shown by court records (Item 7); As to SOR 2.c., as revised, the Government's evidence supports the validity of the allegation and Applicant has not submitted any evidence to the contrary. In addition, it does not help Applicant's position that he was "annoyed" when alcohol safety course personnel criticized him for his drinking (Item 5 at page 3). It is also a negative factor that the Applicant's last alcohol-related arrest occurred five months after he completed his security clearance application (Item 3 and Item 8).

Disqualifying Condition 1 (alcohol-related incidents away from work) and DC 2 (alcohol-related incidents at work) are applicable but none of the possible mitigating conditions are established by the record evidence.

Criminal Conduct - The single allegation under this Guideline arises out of the same incident alleged in 2.c., above. However, taking into consideration the other criminal matters alleged under Guideline G (Alcohol), I conclude that DC 1 (any criminal conduct) and 2 (a single serious crime or multiple lesser offenses) are applicable, but that none of the possible mitigating conditions have been established, e.g., not MC 1 since the behavior is still recent; not MC 2 since the crime is not an isolated incident; and not MC 5, since there is no clear evidence of successful rehabilitation.

Personal Conduct - Applicant's most recent explanation for the four falsifications on his SF 86 (that he was not aware he had answered these questions) is questionable on its own. Applicant's sworn statement to DSS on June 7, 2001, makes his position even worse:

Regarding the fact that my Security Forms do not reflect any drug use and a No response to drug use since the age of 16, I admit I was not truthful on my security forms. The omission was due to my concern that I would not be able to keep my job at [Company X] if I admitted my use of drugs. I did not consider the security forms as Government forms (Item 5 at page 2)

From the above and other language in the sworn statement, it is not clear if Applicant is referring only to his employment forms at Company X, or if he is including the SF 86. In any case, it is clear that Applicant did intend to deceive his employer, and it is reasonable to conclude that he simply continued the deception when he completed the SF 86. Each of the four cited questions on the SF 86 bears a "No" response, and there is no reason to believe that these questions, out of all those on the SF 86, were answered incorrectly solely by accident or coincidence. For these reasons, I conclude that DC 2 (deliberate omission, concealment, or falsification from any personnel security questionnaire. . .) is applicable but that no mitigating conditions have been established.

Overall, Applicant's youth (24), his history of drug involvement, alcohol abuse, four drug and/or alcohol-related arrests between 1998 to 2001, the lack of any demonstrated rehabilitation, and his continuing denial of responsibility for the falsifications on his SF 86 establish a fundamental lack of good judgment, reliability and trustworthiness. At the same time, Applicant has not overcome the negative impact of the evidence by any sufficient evidence of mitigation. There is simply no basis for concluding that Applicant is unlikely to repeat the past misconduct cited in the SOR.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Guideline H (Drugs) Against the Applicant

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. Against the Applicant

Subparagraph 1.e. Against the Applicant

Subparagraph 1.f. Against the Applicant

Guideline G (Alcohol) Against the Applicant

Subparagraph 2.a. Against the Applicant

Subparagraph 2.b. Against the Applicant

Subparagraph 2.c. Against the Applicant

Guideline E (Criminal Conduct) Against the Applicant

Subparagraph 3.a. Against the Applicant

Guideline E (Personal Conduct) Against the Applicant

Subparagraph 4.a. Against the Applicant

Subparagraph 4.b. Against the Applicant

Subparagraph 4.c. Against the Applicant

Subparagraph 4.d. Against the 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 a security clearance for Applicant.

Barry M. Sax

Administrative Judge

1. The FORM contains a motion to amend the SOR at several places to conform to the evidence of record. Applicant has not submitted any objection, and I have verified Department Government's concerns. The SOR is amended as requested, and the following evaluation and my decision is based on the corrected information.
2. This language replaces the original language of SOR 2.c. It was added to the SOR at the request of Department Counsel, to conform to the evidence. The Applicant did not submit any objection, and I concur that the new language is supported by the evidence
3. The April 13 ,1998 date cited in the SOR is found in the Case file (Items 5, 6, and 7). April 13 appears to be the court date rather than the date of the incident.