

DATE: March 6, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-16006

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esq., Department Counsel

FOR APPLICANT

Faith A. Horowitz, Personal Representative

SYNOPSIS

During her high school and early college years, Applicant, a 30-year-old employee of a defense contractor, abused drugs and shoplifted cosmetics. She continued using drugs, although to a lesser degree up to a year before her employment started. Applicant fully cooperated with investigators in trying to explain her history of drug abuse despite some omissions in her original statement about the types of drugs she used. By mitigating these personal and criminal conduct security concerns, Applicant demonstrated it is in the national interest to grant her a clearance. Clearance is granted.

STATEMENT OF THE CASE

Applicant, an employee of a defense contractor, applied for a security clearance. The Defense Office of Hearings and Appeals (DOHA), the federal agency tasked with determining an applicant's eligibility for access to classified information, declined to grant Applicant a clearance. In accordance with the applicable Executive Order,⁽¹⁾ Department of Defense Directive,⁽²⁾ and Director of Central Intelligence Directive,⁽³⁾ DOHA issued a Statement of Reasons (SOR) on 30 July 2002 detailing why a clearance was not granted and recommending Applicant's case be referred to an administrative judge to determine whether the clearance should be denied/revoked. In the SOR, DOHA alleged Applicant failed to meet the personal conduct (Guideline E) and criminal conduct (Guideline J) personnel security guidelines.

Applicant answered the SOR in writing on 23 August 2002. The case was originally assigned to Administrative Judge John Metz, was transferred to Administrative Judge Jack Burt Smith, and finally transferred to me on 22 November 2002. On 24 January 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government's case consisted of four exhibits. Applicant testified on her own behalf and submitted four exhibits at the hearing in addition to the exhibit attached to her answer. A transcript (Tr.) of the proceeding was received on 3 February 2003.

FINDINGS OF FACT

On 30 July 1999, Applicant completed a security clearance application in which she was asked if she had used illegal drugs "since the age of 16 or in the last 7 years, whichever is shorter." Ex. 1. Applicant admitted using marijuana around 30 times between 1992 and 1998 and cocaine and psilocybin three times each in 1993. Ex. 1. Applicant apparently told an investigator, on 24 November 1999, that her drug use was more extensive than originally reported on her security clearance application. She reported the following use of illegal drugs: (1) marijuana about 40 times between 1990 and 1994 and 30 times between 1994 and 1998; (2) cocaine about 10 times between 1990 and 1994, three times in 1995, and three times in 1996; (3) mushrooms (psilocybin) four times from 1991-92 and one time in 1995; (4) acid twice in 1991-92; (5) ecstasy five times from 1991-92 and once each in 1995 and 1997; (6) nitrous oxide 40 times from 1991-93 and one time in 1996; (7) opium once in 1996, (8) mescaline one time in the fall of 1990; (9) peyote once between 1992 and 1993; (10) Demerol six times between 1991 and 1992 and six times between 1994 and 1995; and (11) Percocet while traveling on an airplane (no date given). Ex. 3. She was interviewed again before being administered a polygraph at the National Security Agency to acquire access to sensitive compartmented information. The report of this interview contains similar, but not exactly the same, information about Applicant's drug use. Ex. 4.

During her high school and early college years, on a few occasions, Applicant stole cosmetics from drug stores. Tr. 56. In the fall of 1999, Applicant purchased a Halloween costume in a store. The costume was in a clear plastic bag. Because she had many items in her hand, Applicant placed a pair of \$5-socks in the clear plastic bag with her costume. After she went through the register, Applicant checked her receipt and noted that she had not paid for the socks. Although she did not deliberately try to avoid paying for the socks, neither did she return to the cashier and point out that she had not paid for them. Tr. 56-57, 68-70, 108-09.

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 judgment, 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* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 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 ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Exec. Or. 10865 § 2. *See* Exec. Or. 12968 § 3.1(b).

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. May 9, 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 ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 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 ¶ 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 § 3.1(b).

CONCLUSIONS

Guideline E-Personal Conduct

In the SOR, DOHA alleged under Guideline E that Applicant stole cosmetics and a pair of socks, and deliberately falsified facts on a security clearance application about her use of drugs.

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. Directive ¶ E2.A5.1.1. The following conditions could raise a security concern in this case and could be disqualifying:

- (1) Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances. Directive ¶ E2.A5.1.2.1.
- (2) The deliberate omission, concealment, or falsification of relevant and material facts from a personnel security questionnaire. Directive ¶ E2.A5.1.2.2.
- (3) Deliberately providing false or misleading information to an investigator in connection with a personnel security determination. Directive ¶ E2.A5.1.2.3.
- (4) Personal conduct, such as engaging in activities which, if known, may affect the person's personal or community standing or render her susceptible to blackmail may also be a disqualifying condition. Directive ¶ E2.A5.1.2.4.

The fact that Applicant took positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress may be a mitigating condition in this case. Directive ¶ E2.A5.1.3.5.

By her own admission, Applicant was a significant drug abuser. Answer at 3. However, most of her drug abuse occurred before she was a junior in college and more than seven years before her security clearance application. She insists that despite the different versions she gave of her drug abuse, she did not deliberately omit or attempt to mislead about the depth or breadth of her involvement with illegal drugs. She claims the discrepancies are due to three factors: (1) The security clearance application asked for her drug history over the previous seven years, while the investigators asked her to include longer periods of her life; (2) She discussed her drug usage with friends who were able to help stimulate her recollection of more events; and (3) At least one investigator made her count every puff of marijuana as opposed to every occasion on which she used the drug.

After carefully examining the exhibits, carefully listening to Applicant's testimony, and observing her demeanor, I am convinced that Applicant did not deliberately omit facts or attempt to mislead the Government about the depth or breadth of her drug use. It appears Applicant fully cooperated with the investigators in trying to determine the full extent of her drug use. Applicant's inability to recall each drug use without the prodding of investigators or the assistance of those with whom she used drugs is reasonable given the extent of her drug use. Applicant's voluntary disclosure of her use of marijuana, cocaine, and psilocybin undermines the allegation of deliberate falsification.

Applicant has admitted stealing cosmetics and leaving a store with a pair of socks she knew she hadn't purchased. By removing the socks from the store, knowing she had not paid for them, Applicant committed the offense of theft. Nevertheless, by fully revealing her misdeeds, I am convinced Applicant has taken steps that significantly reduce her vulnerability to coercion, exploitation, or duress. Directive ¶ E2.A5.1.3.5. Despite her wild younger years, it appears Applicant has matured into an honest and reliable woman. The likelihood that Applicant would commit such conduct in the future is remote.

Guideline J-Criminal Conduct

In the SOR, DOHA alleged under Guideline J that Applicant's falsification of the facts of her drug abuse history on the security clearance application violated 18 U.S.C. § 1001.

Under Guideline J, a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. Directive ¶ E2.A10.1.1. A single serious crime or multiple lesser offenses could raise a disqualifying security concern in this case. Directive ¶ E2.A10.1.2.2. None of the listed mitigating conditions applies in this case.

Under 18 U.S.C. § 1001, it is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation, or to make or use any false writing "in any matter within the jurisdiction of the executive branch of the Government of the United States." The granting of security clearances is a function of the executive branch of Government. *See Egan*, 484 U.S. at 527. The term "false," as used in § 1001, means "more than simply incorrect or untrue. An intent to deceive or mislead is required under the act . . ." *United States v. Lange*, 528 F.2d 1280, 1286 n.10 (5th Cir. 1976). As noted earlier, after reviewing all of the evidence, listening to Applicant's testimony, and observing her demeanor, I am convinced she did not intend to deceive or mislead about her use of illegal drugs.

FORMAL FINDINGS

Conclusions as to each of the allegations in the SOR as required by Exec. Or. 10865 § 3, ¶ 7 and the Directive ¶ E3.1.25, are as follows:

Paragraph 1. Guideline G: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.c.(1): For Applicant

Subparagraph 1.c.(2): For Applicant

Subparagraph 1.c.(3): For Applicant

Subparagraph 1.c.(4): For Applicant

Subparagraph 1.c.(5): For Applicant

Subparagraph 1.c.(6): For Applicant

Subparagraph 1.c.(7): For Applicant

Subparagraph 1.c.(8): For Applicant

Subparagraph 1.c.(9): For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.a.: For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

James A. Young

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. Director of Central Intelligence Directive 6/4, *Personnel Security Standards and Procedures Governing Eligibility for Access to Sensitive Compartmented Information (SCI)* (13 Oct. 1999).