

DATE: June 29, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-16640

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Stephanie Hess, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

After using marijuana from about 1975 to 1978, Applicant remained drug-free until 1983 when he started using cocaine while he held a security clearance. "Scared straight" by his arrest and conviction of possession with intent to sell charges in 1987, Applicant has not used any illicit drug since, mitigating the drug involvement concerns. Personal conduct concerns persist because of his extremely poor judgment in using cocaine while he had a clearance and because of his failure to list that use on his February 2002 security clearance application. Clearance is denied.

STATEMENT OF THE CASE

On October 1, 2003, the Defense Office of Hearings and Appeals (DOHA) 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.⁽¹⁾ DOHA recommended referral to an administrative judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. The SOR was based on Drug Involvement (Guideline H) and Personal Conduct (Guideline E).

On October 20, 2003, Applicant answered the SOR and requested a hearing before a DOHA administrative judge. The case was assigned to me on January 15, 2004, and pursuant to notice of January 28, 2004, a hearing was scheduled for February 25, 2004. At the hearing, the Government's case consisted of five exhibits, admitted without any objection. Applicant testified on his behalf, as reflected in a transcript received on March 5, 2004.

FINDINGS OF FACT

DOHA alleged Drug Involvement (Guideline H) because of Applicant's use of marijuana from about 1975 to about 1978, and use of cocaine from 1983 to 1987 while possessing a security clearance, and his May 1987 arrest and subsequent conviction of possession with intent to distribute both marijuana and cocaine. Personal Conduct (Guideline

E) was also alleged due to Applicant's failure to disclose on his February 2002 security clearance application (SF 86) that he had used illegal drugs while possessing a security clearance.

Applicant admitted the drug allegations, which are accepted and incorporated as findings of fact. He denied the intentional falsification of his SF 86, maintaining that he misread the question. After a complete and thorough review of the evidence, I render the following findings:

Applicant is a 45-year-old assembly technician who has worked for his employer, a defense contractor, since September 1982. He seeks to retain a secret security clearance he has held since shortly after he commenced his employ.

After an initial experimentation with marijuana at about age 17 (around 1975) at a party, Applicant smoked the drug once or twice per month when socializing with his peers until 1978. On a few occasions, he contributed \$3.00 or \$4.00 to pay for the marijuana he used, although the drug was usually smoked without cost as he was passed it at parties.

In February 1980, Applicant married his first wife. Her mother and her mother's significant other were involved with cocaine and used the drug in Applicant's home around him. Applicant started using cocaine in 1983, inhaling a line approximately once per month on weekends. He continued to use cocaine until about ay 1987, while he held a secret security clearance and knowing it was against Department of Defense policy.

Acting on a tip from an informant that Applicant and his spouse were engaged in selling cocaine from their residence, the police conducted a search of Applicant's home pursuant to warrant in May 1987. The police discovered suspected marijuana (17 bags) and cocaine (one cloth with a white rock substance and two baggies with white powder residue) and drug paraphernalia (two scales and a box of baggies). Applicant and his spouse were arrested for possession with intent to distribute a class B substance (cocaine) and possession with intent to distribute a class D substance (marijuana). At the time of his arrest, Applicant told the police that the drugs found belonged to him. Applicant pleaded not guilty to both charges. In October 1987, he was convicted of possession of cocaine (the charge was nolle prossed as to intent to distribute cocaine) and possession with intent to distribute marijuana. He was sentenced to concurrent jail terms of six months, suspended, placed on one year probation, and ordered to pay \$275 in fines and costs.

Applicant stopped using illegal drugs after his arrest, in part because he wanted to set a better example for his three children, born in 1980, 1983, and 1985, respectively. He continued to socialize with individuals who used illegal drugs, and was offered illegal drugs at parties to sometime in the early 1990s. In September 1991, he was arrested for driving under the influence of alcohol (DUI). He was convicted of the offense and fined \$298.

Applicant and his first wife divorced in February 1992. In September 1997, Applicant married his current spouse, who has two children of her own born in 1984 and 1989. She does not use illegal drugs. Applicant has made an effort to establish a better life for himself and his family, purchasing his home and pursuing his bachelor's degree.

In conjunction with a periodic reinvestigation into his secret security clearance, Applicant executed a security application (SF 86) on February 26, 2002. In response to question 24 concerning any alcohol/drug offenses, Applicant listed his possession of marijuana and cocaine (mistakenly dating the offense as 1986), but did not disclose his 1991 DUI. Applicant responded negatively to question 28 concerning any use ever of an illegal drug in a sensitive position, including while possessing a security clearance.

On May 1, 2002, Applicant was interviewed by a special agent of the Defense Security Service (DSS) about his use of illegal drugs. Applicant disclosed his use of marijuana for about two or three years, starting when he was about 17, and his use of cocaine "from about 1983, 1984, or 1985" until his arrest in 1987. Regarding the circumstances of his arrest, Applicant indicated his then mother-in-law's boyfriend dealt cocaine from Applicant's residence, fronting cocaine to a couple who turned out to be informants. Applicant acknowledged the police found marijuana in a closet of his home, kept despite its poor quality because his spouse smoked it occasionally. Applicant denied the drug paraphernalia found belonged to him, denied any illicit substance involvement since his arrest, and denied any intent to use illegal drugs in the future. He maintained he had not knowingly been present where others were using any illegal substance since May 1997. When asked why he had not revealed on his SF 86 that he been involved with illegal drugs while holding a security clearance, Applicant responded:

I intentionally did not list my drug use and drug involvement while holding a security clearance. When I filled out the [SF 86], I did so rather quickly. After filling it out, I realized that I should have listed the drug use, since I held a clearance at the time of the arrest, but I did not go back and change the information. I guess I just didn't want to bring it out after 15 years. I realize that it was a mistake not to list it. (Ex. 2).

On October 1, 2003, DOHA issued an SOR to Applicant alleging, in part, that he had deliberately falsified his SF 86 when he failed to disclose that he had used cocaine while possessing a security clearance. In his Answer, Applicant indicated he must have inadvertently assumed there was a seven year time limit on his responses, and he interpreted the question as not applying to him since he was not a law enforcement officer, prosecutor, or courtroom official.

At his hearing, Applicant denied criminal responsibility for the drug transactions out of his residence in 1987, maintaining he "took the fall" for his mother-in-law's boyfriend, and denied any intentional omission of his drug use from his SF 86 ("I may have been thinking it was referring to the last, past seven years, you know, and it was just a mistake. I didn't look at it close enough, you know." Tr. 35). Asked about his failure to list his 1991 DUI in response to the inquiry concerning alcohol/drug offenses (question 24), Applicant initially testified it was due to oversight and then to his belief that question had a seven year scope as well. When confronted with the fact that he had listed his earlier illegal drug possession in response to question 24, Applicant testified, "I just didn't think it was necessary at the time." Applicant provided inconsistent testimony as well as to whether he had been offered any illegal drug since 1987:

Q: Have you been offered any drugs since, any illegal drugs since 1987?

A: No. If I had, I'd have said no, absolutely.

Q: Well, if you had. In other words, what's your testimony here, today? Have you been offered any illegal drugs since 1987?

A: Yes, I may have. (Tr. 43).

The inconsistency in his explanations, and his reluctance to admit to drug involvement which could negatively impact his clearance lead me to find that he intentionally falsified his SF 86 when he did not reveal that he used cocaine while holding a security clearance.

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.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of

the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *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.

Considering the evidence as a whole, I find the following adjudicative guidelines to be most pertinent to this case:

Drug Involvement

E2.A8.1.1. The Concern:

E2.A8.1.1.1. 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.

E2.A8.1.1.2. Drugs are defined as mood and behavior-altering substances, and include:

E2.A8.1.1.2.1. 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

E2.A8.1.1.2.2. Inhalants and other similar substances.

E2.A8.1.1.3. Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

E2.A8.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A8.1.2.1. Any drug abuse (see above definition); [\(2\)](#)

E2.A8.1.2.2. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.

E2.A8.1.3. Conditions that could mitigate a security concern include:

E2.A8.1.3.1. The drug involvement was not recent;

E2.A8.1.3.2. A demonstrated intent not to abuse any drugs in the future.

Personal Conduct

E2.A5.1.1. 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.

E2.A5.1.2. Conditions that could raise a security concern and may be disqualifying also include:

E2.A5.1.2.2. The deliberate omission, concealment, or falsification 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.

E2.A5.1.2.3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination.

E2.A5.1.3. Conditions that could mitigate security concerns include:

None.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility of the Applicant, I conclude the Government established its case with respect to Guideline H, Drug Involvement, and Guideline E, Personal Conduct. While Applicant successfully mitigated the Drug Involvement concerns by maintaining abstinence from illegal drugs since 1987 and committing himself to a drug free lifestyle, Personal Conduct concerns persist.

Applicant smoked marijuana from about 1975 to 1978 and cocaine from about 1983 to 1987 while possessing a security clearance and in knowing disregard of the DoD prohibition against illegal drug use. Moreover, in October 1987, Applicant was sentenced to six months in jail, a fine, and one year probation, for illegal possession of cocaine and illegal possession with intent to distribute marijuana in May 1987. Applicant maintains he had no involvement in the illegal drug transactions that took place within his residence, and that he "took the fall" for his then mother-in-law's boyfriend. The amount of drugs and paraphernalia found in his residence make it especially difficult to believe he was not involved in any drug sales. Even if Applicant did not participate in the drug transactions himself, he clearly condoned the activity and possessed a known quantity of marijuana in a closet in his home. Disqualifying conditions E2.A8.1.2.1. and E2.A8.1.2.2. under Guideline H, drug involvement, apply in this case.

Applicant submits in mitigation that he was "scared straight" by his arrest and ceased all illegal drug use in May 1987. While Applicant's credibility is suspect (*see* Personal Conduct, *supra*), there is no evidence of any illegal drug involvement on his part since May 1987.⁽³⁾ Nor has he been in the presence of anyone using any controlled dangerous substance since the early 1990s. Divorced from his first wife in 1991, he no longer has an intimate relationship with drug users. Applicant's current spouse is not involved with illegal drugs. His purchase of his residence and pursuit of higher education are not alone proof of a drug-free lifestyle, but they reflect stability and an intent to make a better life for his family. E2.A8.1.3.1. and E2.A8.1.3.3. apply to mitigate his now remote, albeit serious, drug abuse history. Subparagraphs 1.a., 1.b., and 1.c. are found for Applicant.

However, his change to a drug-free lifestyle does not mitigate the concerns for his judgment caused by his use of cocaine while he possessed a security clearance. Moreover, security significant Personal Conduct, Guideline E, concerns are raised when an applicant has not been completely candid with the Government about matters relevant and material to his or her personnel security application and investigation. (*See* DC E2.A5.1.2.2). On his SF 86 signed on February 26, 2002, Applicant falsely denied that he had ever used any illegal drugs while possessing a security clearance. By virtue of the grant to him of a secret security clearance, Applicant stood in a fiduciary relationship with the Government that he clearly violated by not revealing on his SF 86 that he had used cocaine while in a sensitive position--or for that matter, not revealing that he had been convicted of DUI in 1991.⁽⁴⁾

None of the mitigating conditions apply. Evidence of falsification is not limited to the negative response to question 28 on his SF 86. During his subject interview, Applicant denied to the DSS agent that he had been present where drugs were being used since his arrest ["Since my arrest, I do not knowingly associate with drug dealers and was never knowingly present at any place drugs were present. I was never present when drugs were being used."]. When asked by the undersigned at his hearing whether he had been offered any illegal drugs since 1987, Applicant initially responded, "No. If I had, I'd have said no, absolutely." Yet on being asked a second time, he answered, "Yes, I may have," and admitted he had been offered an illegal drug at parties to sometime in the early 1990s. (Tr. 63-64). A deliberate false statement made to an investigator, security official or other representative in conjunction with his background investigation for a clearance is conduct of security concern in its own right (*See* E2.A5.1.2.3.).

Reform requires taking responsibility for making the false statements, and demonstrating compliance with laws and regulations for a sufficient period of time to conclude one's representations can be relied on. As the following exchange with Department Counsel illustrates, Applicant continues to deny intentional falsification of his SF 86, even after being

confronted directly with the inconsistencies inherent in his testimony:

Q: You also stated that after filling out the security questionnaire, you realized that you should have listed the drug use, since you held a clearance at the time of the arrest, but you did not go back and change the information? Do you recall saying that?

A: Yes.

Q: And then you stated that you guess you just didn't want to bring it out after 15 years?

A: I may have--yes, yes, I guess so.

Q Well, this is your signed, sworn statement, and it's initialed throughout. I mean your initials appear following that sentence, or/and the sentence after that.

A: Yes.

Q: Okay, so, which is it, [Applicant]. Did you think it said seven years, or did you intentionally not answer that because it had been 15 years previously and you intentionally didn't list it, and then didn't go back and change it?

A: I think I meant to go back and change it but I didn't. I might have forgot to or I meant to go back and change it, and it wasn't intentional, and I think I just meant it was the last seven years. (Tr. 37-38).

The Government can ill afford having individuals decide for themselves the timing and extent of disclosure, and Applicant has shown little appreciation for his obligation to be candid with the Government. An adverse finding is returned as to subparagraph 2.a. of the SOR.

FORMAL FINDINGS

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

Paragraph 1. Guideline H: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Paragraph 2. Guideline E: AGAINST THE APPLICANT

Subparagraph 2.a.: 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. Clearance is denied.

Elizabeth M. Matchinski

Administrative Judge

1. The SOR was issued under the authority of Executive Order 10865 (as amended by Executive Orders 10909, 11328, and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4).
2. Under the provisions of 10 U.S.C. 986, any person who is an unlawful user of, or is addicted to, a controlled

substances as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), may not be granted or have renewed their access to classified information.

3. The DOHA Appeal Board has held that a finding of illegal drug involvement cannot be based solely on a negative credibility assessment. *See, e.g.*, ISCR Case No. 02-08032, May 14, 2004, at p. 6.

4. Although his omission of his 1991 DUI was not alleged by the Government, it is relevant in assessing the nature and seriousness of his falsification.