

DATE: December 17, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-21071

DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

APPEARANCES

FOR GOVERNMENT

Nygina T. Mills, Esq, Department Counsel

FOR APPLICANT

Richard Murray, Esq.

SYNOPSIS

In his high school and college years, Applicant used many illegal drugs, including marijuana, cocaine, mushrooms (psilocybin), LSD, PCP, nitrous oxide, hashish, and crack. He sold marijuana and contributed to the purchase of cocaine, psilocybin, and LSD. Applicant falsified his security clearance application in 2000 by answering "no" to questions asking if he had used, purchased, or sold illegal drugs within seven years of executing his security clearance application. Applicant falsified his answers because he didn't want his employer to know of his past drug use. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On May 2, 2003, under the applicable Executive Order ⁽¹⁾ and Department of Defense Directive, ⁽²⁾ DOHA issued a Statement of Reasons (SOR), detailing the basis for its decision-security concerns raised under Guideline H (Drug Involvement) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on May 22, 2003, and elected to have a hearing before an administrative judge. The case was assigned to me on June 30, 2003. On July 3, 2003, a Notice of Hearing was issued setting a hearing for Applicant on July 24, 2003. As a result of a scheduling problem, it was necessary to issue an Amended Notice of Hearing setting the hearing for July 25, 2003. On July 25, 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the transcript (Tr.) of the proceeding on August 5, 2003.

FINDINGS OF FACT

The SOR contains 16 allegations of disqualifying conduct. Fourteen allegations relate to conduct charged under Guideline H, Drug Involvement, and two allegations relate to conduct charged under Guideline E, Personal Conduct. Applicant admitted all factual allegations of illegal drug involvement except those set forth in subparagraphs 1.c. and 1.l. of the SOR. Applicant denied the allegation in subparagraph 1.c. of the SOR. At his hearing, Applicant stated that

his last purchase of marijuana occurred in 1997/1998. This statement was not inconsistent with the Government's allegation at 1.c. of the SOR that "[f]rom 1991 to at least 1997, [Applicant] purchased or contributed money towards the purchase of marijuana." Applicant stated that he denied the allegation in subparagraph 1.i. of the SOR because it contained a typographical error, (3) and he admitted that he used Percocet one time without a prescription, which is consistent with allegation 1.i. of the SOR. (Tr. 21, 28.) Applicant denied the factual allegations of disqualifying personal conduct as set forth in subparagraphs 2.a. and 2.b of the SOR. Applicant's admissions are incorporated as findings of fact.

Applicant was born in 1974. He holds a bachelor of science degree in finance and is studying for a master's degree in management information systems. He is currently employed as a financial analyst by a government contractor.

In 1991, as a 17-year-old high school student, Applicant began purchasing and using marijuana. In 1993 and 1994 he also sold marijuana. He repeatedly purchased for resale one-half to one pound quantities of marijuana, valued at approximately \$700 to \$1600. His largest purchase of the drug for resale was approximately three pounds and was valued at \$4800. Applicant made his last purchase of marijuana for resale in 1997/1998. He last used marijuana in 1999 (Ex. 2, at 3.)

Applicant admitted to using PCP one time. He used crack once, between 1992 and 1993. Applicant began to use cocaine in 1993/1994. He snorted cocaine 15 to 20 times. In 1993/1994 Applicant also used mushrooms (psilocybin) 4-5 times, LSD 2-3 times, hashish 2-3 times, and nitrous oxide 2-3 times. He used the prescription drug Percocet illegally once in 1993 or 1994. He contributed money toward the purchase of cocaine. He purchased and contributed money toward the purchase of mushrooms, and he contributed money toward the purchase of LSD.

Applicant completed, signed, and certified a security clearance application (SF-86) on December 5, 2000. Question 27 on the SF-86 reads as follows: "Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?" Applicant responded "no" to Question 27.

Question 29 on the SF-86 reads as follows: "In the last 7 years, have you been involved in the illegal purchase, manufacture, trafficking, production, transfer, shipping, receiving, or sale of any narcotic, depressant, stimulant, hallucinogen, or cannabis for your own intended profit or that of another?" Applicant responded "no" to question 29.

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.

CONCLUSIONS

Guideline H, Drug Involvement

In the SOR, DOHA alleged Applicant had purchased marijuana for resale and had sold marijuana multiple times in 1993 and 1994 (1.a.); that he used marijuana from 1991 to December 1999 (1.b.); that he contributed money to the purchase of marijuana from 1991 to 1997 (1.c.); that he used cocaine 15 to 20 times from 1993 to 1994 (1.d.); that he contributed money toward the purchase of cocaine from 1993 to 1994 (1.e.); that he used mushrooms (psilocybin) on 4 to 5 occasions from 1993 to 1994 (1.f.); and that he contributed to the purchase of mushrooms (psilocybin) from 1993 to 1994 (1.g.). The SOR also alleged that Applicant used LSD 2 to 3 times from 1993 to 1994 (1.h.); that he used PCP one time from 1993 to 1994 (1.j.)⁽⁴⁾; that he used nitrous oxide 2 to 3 times from 1993 to 1994 (1.k.); that he used the prescription drug Percocet without a prescription one time from 1993 to 1994 (1.l.); that he used hashish 2 to 3 times from 1993 to 1994 (1.m.); and that he used crack one time between 1992 and 1993.

The Government's concern with Guideline H conduct is that it raises questions regarding an individual's willingness to protect classified information. Drug abuse or dependence may impair social or occupational functioning, thereby increasing the risk of an unauthorized disclosure of classified information. ¶ E2.A8.1.1.1.

Drugs are defined under Guideline H as mood and behavior-altering substances, including drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended, and inhalants and other similar substances. ¶¶ E2.A8.1.1.2., E2.A8.1.1.2.1., E2.A8.1.1.2.2. 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.A8.1.1.3.

Through Applicant's own admissions, the Government established a *prima facie* case that he used, purchased, and sold illegal drugs. Applicant has admitted Guideline H drug involvement specified in the SOR and identified as disqualifying under paragraphs E2.A8.1.2.1. and E2.A8.1.2.2 of Guideline H. The record shows that Applicant purchased and used cocaine, mushrooms (psilocybin), and LSD in 1993 and 1994; that he used crack one time in 1992 to 1993; and that his use of PCP, nitrous oxide, Percocet, and hashish occurred no later than 1994. He used marijuana from 1991 to 1999. These facts show that Applicant's drug involvement was not recent, and mitigating condition E2.A8.1.3.1 applies. In his signed, sworn statement of February 27, 2002, Applicant averred that he has no future intent to use or sell illegal drugs. (Ex. 2, at 5.) I find his statement credible when weighed with his testimony and demeanor at his hearing. Thus, I conclude that mitigating condition E2.A8.1.3.3 applies to Applicant's Guideline H conduct. However, the fact remains that Applicant's serious illegal drug involvement occurred over a period of more than eight years, during most of his late adolescent and early adult life, making it neither an aberrational nor isolated part of his life. Accordingly, mitigating condition E2.A8.1.3.2 does not apply to the facts of Applicant's case. I find against the Applicant on the Guideline H allegations in the SOR.

Guideline E, Personal Conduct

In the SOR, DOHA alleged that Applicant's illegal drug use, as alleged in subparagraphs 2.a.

and 2.b. raised security concerns under Guideline E, Personal Conduct. Guideline E conduct, which involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, could indicate that an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

With respect to Applicant's Guideline E conduct, the Government has also established its case. In subparagraph 2.a. of the SOR the Government alleged that, in executing his response to Question 27 on the SF-86, Applicant deliberately failed to disclose the drug use identified in subparagraphs 1.b., 1.d., 1.f., 1.h., 1.j., 1.k., 1.l., 1.m., and 1.n. of the SOR. In subparagraph 2.b. of the SOR, the Government alleged that, in executing his response to Question 29 on the SF-86, Applicant deliberately failed to disclose his illegal sale, purchase, and contribution to the purchase of drugs, as identified in subparagraphs 1.a., 1.c., 1.e., 1.g., and 1.i. of the SOR. On December 5, 2000, Applicant completed the certification at the end of the SF-86 and attested, with his signature, that his responses to all questions on the form were true, complete and correct to the best of his knowledge and belief and that he understood that a knowing and willful false statement made in response to any of the questions was punishable under section 1001 of Title 18, United States Code.

Applicant's failure to answer questions 27 and 29 completely, truthfully, and correctly raises a security concern under subparagraph E2.A8.1.2.2. of Guideline E. In his testimony, Applicant stated that he knew his answers to Questions 27 and 29 on the SF-86 were not correct. (Tr., 23, 37.) He said he was afraid to answer the questions correctly. He said his employer gave him no guidance in completing the SF-86, but told him that a security clearance was necessary for his employment. (Tr. 23-24.) Applicant's concealment of information he considered embarrassing could make him vulnerable to coercion and blackmail. ¶ E2.A5.1.2.4. His reticence to reveal the truth about his conduct suggests that, under some circumstances, he may put his interests before those of the Government.

Only one mitigating condition under Guideline E might be applicable to the instant case. The security concern raised by Applicant's disqualifying conduct could be mitigated if the falsification was an isolated incident, was not recent, and if the Applicant subsequently provided the correct information voluntarily. ¶ E2.A5.1.3.3. While Applicant supplied the correct information when questioned by a special agent of the Defense Investigative Service, the subject falsifications on Applicant's SF-86 were not isolated incidents and they are recent. Accordingly, allegations in subparagraphs 2.a. and 2.b. of the SOR are concluded against the Applicant.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline H.: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: Against Applicant

Subparagraph 1.h.: Against Applicant

Subparagraph 1.i.: Against Applicant

Subparagraph 1.j.: Against Applicant

Subparagraph 1.k.: Against Applicant

Subparagraph 1.l.: Against Applicant

Subparagraph 1.m.: Against Applicant

Subparagraph 1.n.: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

DECISION

In light of all of 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.

Joan Caton Anthony

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. The SOR allegation read: "From 1993 to 1994, you used Percocet, without a prescription, on time." Applicant correctly pointed out that the allegation should have read: "From 1993 to 1994, you used Percocet, without a prescription, one time."
4. In a signed, sworn statement made to a special agent of the Defense Investigative Service on February 27, 2002, Applicant stated that his only use of PCP was between 1992 and 1993. In his answer to the SOR, Applicant admitted allegation 1.j., which states that he used PCP one time from 1993 to 1994. At his hearing, Applicant acknowledged in direct examination that the SOR was correct with regard to his drug use. (Tr. 21.) He did not dispute the alleged date of his use of PCP in the SOR.