

DATE: December 17, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-25438

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Department Counsel

FOR APPLICANT

Teresa Hickey

SYNOPSIS

Applicant has a history of use of illegal substances (primarily marijuana) while holding a security clearance in the Air Force that he deliberately omitted when executing security clearance applications in 2001 and 2002. This omission is not mitigated under any of the pertinent mitigation guidelines either and raise continuing security concerns about Applicant's judgment and reliability. Besides the Government's falsification and criminal conduct concerns, Applicant's history of delinquent debts raises security concerns as well. His repayment efforts have been too minimal and uncertain to make any safe predictive judgments at this time about his debt resolution prospects. Clearance is denied.

STATEMENT OF THE CASE

On February 6, 2004, 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 on April 12, 2004, and requested a hearing. The case was assigned to me on July 15, 2004, and was scheduled for hearing on August 12, 2004. A hearing was convened on August 12, 2004, 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 eight exhibits; Applicant relied on five witnesses (including himself) and five exhibits. The transcript (R.T.) was received on August 24, 2004.

PROCEDURAL ISSUES

Before the close of the hearing, Department Counsel was afforded an opportunity to provide ISCR case authority for excluding reports of investigation (ROI) relied on by an applicant. The grant was made in connection with an admitted

report of investigation from DSS (ex. E). While Department Counsel never provided any contraindicating authority, a search of past ISCR decisions confirmed that ROIs are not automatically excluded from admission in behalf of an applicant but may be considered sans an authenticating witness (hearsay notwithstanding) in the interest of promoting hearing fairness. *See* DISCR Case No. 89-2398 (July 1991)(citing DISCR OSD No. 88-2873 (September 1990) and DISCR OSD No. 88-2624 (March 1990)). The ROI in question is offered in part as a counterweight to the exhibits offered by the Government containing adverse information against Applicant (*viz.*, exhibits 3, 6, 7, and 8). Admission of Applicant's exhibit E, accordingly, is warranted for reasons of relevancy, materiality, and overall fairness, reasons fully supported by prior DISCR decisions.

Following the hearing, Applicant submitted a check payment history with one of his medical creditors not listed in the SOR. The exhibit is received and admitted as Applicant's exhibit F.

Because of the press of time to conclude the hearing, the parties agreed to submit written closing arguments. The parties' closing submissions were submitted and will be considered.

SUMMARY OF PLEADINGS

Under Guideline E, Applicant is alleged to have falsified his security clearance application (SF-86) by omitting (a) his use of illegal drugs while holding a security clearance between 1982 and March 1986 and (b) his purchases of illegal drugs from 1997 to December 1998, and to have been terminated by his former employer in January 2000 after testing positive for cocaine during a drug test administered in December 1999.

Under Guideline J, Applicant's alleged falsification of his SF-86 are incorporated. Additionally, Applicant is alleged to have been arrested in October 1991 for possession of marijuana, to which he plead guilty and was sentenced to 60 days in a local parish jail (suspended), was fined \$4,000.00 and was placed in unsupervised probation.

Under Guideline F, Applicant is alleged to have incurred numerous delinquent debts, which have either been charged off or referred to collection agencies: altogether, six creditors, totaling in excess of \$6,000.00.

For his answer to the SOR, Applicant admitted to active drug addiction, to purchasing illegal drugs in the past (unaware that it was a felony), to being terminated by his prior employer for testing positive during an administered 1999 drug test, and to being arrested for marijuana possession in October 1991 and later pleading guilty and being sentenced and fined. By contrast, he denied deliberately falsifying his SF-86, either by omitting his drug use while holding a sensitive position (claiming confusion over what is a sensitive position) or by omitting his buying and selling of marijuana from about 1997 to at least December 1998 (claiming he limited his purchases and sales to putting in with a few friends and himself for marijuana to be used for their personal benefit. In explanation, Applicant traced his long history of drug activity that culminated in drug addiction during the 80s and continued unabated until he went into treatment in March 1999, and permanently (with the aid of NA and AA) following a relapse in November 1999. He claimed his listed debts (Mostly health-related, which he disputes as insurance covered) were associated with his drug/alcohol addictions.

FINDINGS OF FACT

Applicant is a 44-year-old aircraft mechanic for a defense contractors 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.

Substance abuse history

Applicant used illegal drugs extensively between 1974 (when he was initiated to marijuana and later other drugs) and November 1999, when he quit using them permanently, with the help of NA and AA. While in the U.S. Air Force (USAF), between 1982 and 1986, he continued to use marijuana and other illegal drugs on a daily to weekly basis, while holding a security clearance. Discharged from the USAF in 1986, he returned to his home state and resumed his active use of marijuana, daily for the most part.

In the summer of 1986 Applicant began using cocaine and ecstasy. He continued using these drugs aggressively (at

times almost daily) to July 1997, when he self-referred himself to a drug treatment center. Once admitted to this facility's inpatient program, he was diagnosed with cocaine abuse and marijuana dependence, as well as with a depressive disorder and spousal relation problem., on the Axis I scale of the DSM-IV (*see* exs. 7 and 8). Once discharged, he returned to active marijuana and cocaine abuse before he admitted himself to another inpatient substance abuse program in March 1999 (ex. 6). During his 20-day inpatient stay at this facility he was treated for chemical dependence and discharged to the custody of his spouse.

Applicant's lone drug-related arrest occurred in October 1991, when he was arrested for marijuana possession, pled guilty as charged, and was sentenced to thirty days in jail (suspended), fined \$400.00, and placed on unsupervised probation for one year. Since this arrest he has had no further encounters with law enforcement.

After relapsing to marijuana abuse in July 1999, and cocaine abuse in November 1999, Applicant has remained abstinent with the help of NA and AA, where he has been a regular participant and sponsor to others. His past purchases of illegal drugs were solely for his personal use and friends in his accompaniment. Applicant was the intermediary designated by his friends to make the purchases with the pooled money from his friends (R.T., at 167). While his purchases of illegal drugs entailed exchanging drugs for money, his exchanges were always confined to sharing the cost of his purchased drugs with his friends. His group purchases did enable him to buy his own drugs cheaper, but he never resold them to third parties outside his circle of users (R.T., at 168).

Applicant was terminated from his former employer in January 2000 after testing positive for cocaine during a drug test administered in December 1999. He doesn't dispute his prior use of cocaine and accepts the test as accurate. His positive test was the only time he tested positive during his employment with this former employer (R.T., at 165).

SF-86 omissions

When completing his SF-86 of November 2001 (ex. 1), and again in January 2002 (ex. 2), Applicant omitted his use of marijuana while holding a security clearance in the USAF (between 1982 and 1986) when responding to question 28 on both questionnaires. He attributes his omission to confusion over what kind of jobs were considered sensitive ones and assures he did not deliberately falsify his answer to question 28 (R.T., at 174). While he was candid about his listing of the illegal substances he used (marijuana, cocaine and methamphetamine) within the previous seven years in answering question 27, he also expressed embarrassment about his years of drug abuse and addiction. Question 28 does not confine its inquiry to drug use while holding a sensitive position, but includes use while possessing a security clearance as well. And when answering question 31, he openly acknowledged his being granted a DoD security clearance in March 2002 (*see* exs. 1 and 2). Educated and familiar with the forms he was provided, he made no tangible effort to reconcile his question 28 omissions with his acknowledged grant of a security clearance in question 31. Such inconsistencies make it implausible to accept his omission explanations of confusion over what kind of job he held.. Limiting the extent of his admitted drug involvement is a manifest interest of Applicant which cannot be discounted when assessing the credibility of his falsification denials. Taking into account Applicant's claims and all of the surrounding circumstances, inferences warrant that Applicant's omissions of his illegal drug use while possessing a security clearance in the USAF were consciously and deliberately made.

Besides his question 28 omissions, Applicant also omitted his prior drug purchases and sales. He attributes these omissions to his confusion over whether his buying and sharing the costs of drug purchases with the friends with whom he used them with represented the kind of large drug transactions he believed at the time question 29 addressed (R.T., at 138-40, 172-73). He claims he never associated splitting the costs of illegal drugs with friends to constitute purchasing and selling drugs for profit (R.T., at 140, 173); even though his cost-splitting purchases enabled him to obtain his own drugs cheaper.

Concerning his question 29 purchase/sale omissions, Applicant withheld information from his mother about his buying and selling drugs (albeit, she never asked him about it) and never voluntarily told his spouse of his purchases and sales (R.T., at 171). And he had no facility clearance officer (FSO) at his company to help him through the drug-related questions (R.T., at 174). Applicant's explanations about his confusion over whether his kind of cost-splitting of marijuana represented purchases/sales of marijuana covered by question 29 are not unreasonable ones given the intended for profit qualification in the question. His cost-splitting claims are reconcilable, too, with the language

contained in his ensuing DSS statements (where he admits to buying and reselling marijuana to support his drug use without mentioning profit) and his answer to the SOR (which omits entirely any reference to buying or selling for profit). Considering the nature of Applicant's cost-splitting initiatives covering his marijuana purchases and sharing with friends, the absence of any third party sales of marijuana outside of his immediate circle of users, his confusion claims contain sufficient merit to avert inferences of deliberate falsification with respect to his negative answers to question 29 of his SF-86.

Several months after completing his SF-86 forms, Applicant was interviewed by a DSS agent (in March 2002). In his statement given to the agent (ex. 3), he detailed his entire history of substance abuse and treatment, including his continuous abuse of illegal drugs while he was in the USAF. Reconcilable are his acknowledgments of buying and reselling marijuana from 1997 to December 1998 to support his drug use without any mention of profit. Whether or not he was confronted with any adverse information about his using illegal drugs while holding a security clearance in the USAF, or later buying and reselling drugs, is unclear from his statement or hearing testimony.

Debt history

Between 1996 and 1999 Applicant accrued both consumer credit and medically related debts that he failed to address in a timely way due to a variety of reasons: unemployment, taking on a new job, moving, going through a marriage separation, and inferentially support of his drug needs (R.T., at 145). Debts he permitted to become delinquent during his heavy period of drug involvement include two consumer accounts he attributes to his spouse while they were married (*i.e.*, creditors 1.a and 1.b) and several unpaid debts for medical services that Applicant claims should have been paid by his medical insurance carrier (creditors 1.c through 1.f). Despite assuring the interviewing DSS agent in March 2002 that he would look into the listed delinquent accounts in his credit report (*see* ex. 5; R.T., at 187-90), to date he has failed to mount any sustained follow-up effort beyond a few phone calls. He provides documented payment with only one of his creditors (ex. F), and this is not a creditor identified in the SOR.

Currently, each of the covered accounts remain unpaid or otherwise resolved. Some of the bill consolidation companies he has talked to he doesn't trust, and he has no desire to pursue bankruptcy. Unable to make any tangible headway with either his consumer or medical creditors, he has channeled most of his available net monthly resources (around \$2,100.00 a month) towards maintaining his child support obligations and current household expenses (R.T., at 146-47, 158-61).

Character references

Applicant is highly regarded by his NA sponsor who lauds his commitment to a drug-free life and the progress he has made over the past five years in ensuring his continued abstinence from illegal substance abuse. Applicant is credited, too, by two former drug abusers, one of whom Applicant sponsored in NA, with a very instrumental role in keeping them committed to being drug free and job worthy. This individual places high trust and reliance in Applicant's help and characterizes Applicant as a person highly devoted to the pursuit of drug abstinence. Former and current coworkers and supervisors who are familiar with Applicant's work and drug/alcohol history credit Applicant with being reliable and trustworthy (*see* exs. A and E).

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:

Personal Conduct

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.

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:

MC 3 The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts.

MC 5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress.

Financial Considerations

Concern: An individual who is financially overextended is at risk at having to engage in illegal acts to generate funds. Unexplained influence is often linked to proceeds from financially profitable criminal acts.

Disqualifying Conditions

DC 1. A history of not meeting financial obligations.

DC 3. Inability or unwillingness to satisfy debts.

Mitigating Conditions

MC 1. The behavior was not recent.

MC 3. The conditions that resulted in the behavior were largely beyond the person's control (*e.g.*, loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation).

Criminal Conduct

Disqualifying Conditions:

DC 1 Allegations or admission of criminal conduct.

DC 2 A single serious crime or multiple lesser offenses.

Mitigating Conditions:

MC 6 There is clear evidence of successful rehabilitation.

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an applicant's 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.

CONCLUSION

Security concerns are raised in this case over Applicant's omissions of his prior drug use while possessing a security clearance in the USAF and his cost-sharing of illegal drugs over a 1997-1998 time period. The Government also raises security concerns over Applicant's termination by his previous employer over a positive drug test, his prior arrest and conviction for marijuana possession, and the delinquent debts he accrued, which he has not taken care of.

Personal Conduct Issues

Of particular security concern to the Government are Applicant's documented omissions of his drug use while in the USAF and his more recent purchases and resales of marijuana among his co-users over two year period spanning 1997 and December 1998. He attributes his omissions to his mistaken reading of questions 28 and 29. Specifically cited by Applicant is his confusion over what kind of position he held with the USAF and whether his splitting activities represented buying and selling illegal drugs for a profit. Applicant's explanations of his drug purchasing/selling omissions (confusion over the meaning of purchasing and selling for a profit) were persuasive enough to avert inferences of knowing and wilful omission of drug purchases/sales for a profit and enable him to refute the allegations of falsification of question 29 of his SF-86 forms covered in subparagraph 2.b (governed by Guideline E) and reincorporated in subparagraph 3.a (governed by Guideline H).

By contrast, Applicant's explanations for omitting his use of marijuana while possessing a security clearance in the USAF (question 28) were not persuasive. Disqualifying Condition (DC) 2 (falsification of a personnel security form) of the Adjudicative Guidelines for personal conduct is fully applicable, and is not mitigated by any prompt, good-faith correction. Without clear evidence of a prompt, good-faith disclosure of the adverse information when interviewed by DSS a few months later, he cannot take advantage of the mitigation benefits covered by MC 3 (prompt, good-faith disclosure) of the Guidelines. As a consequence, he is unable to mitigate the falsification allegation covered by subparagraph 1.a. So, while favorable conclusions warrant with respect to the falsification allegations covered by subparagraph 1.b of Guideline E, unfavorable conclusions issue with respect to subparagraph 1.a of the Guideline.

Because of the isolated nature of his positive drug test in January 2000 and the sustained commitment he has maintained towards avoiding illegal drugs since this first and only positive drug test with his former employer, safe predictions can be made that he will not succumb to illegal drug use in the foreseeable future. Applicant is, accordingly, absolved of any potential manifestation of pattern dishonesty or rule violations. Favorable conclusions warrant with respect to subparagraph 1.c of Guideline E.

Financial Issues

Applicant and his spouse accrued considerable delinquent consumer and medical debts between 1996 and 1999.

Altogether, Applicant and his spouse accumulated consumer and medical debts in excess of \$6,000.00, which Applicant has failed to make any tangible progress in addressing. The Government's security concerns center on the amount of delinquent debt he compiled between 1996 and 1999, which he has been unable to repay.

Applicant remains exposed to potential debt collection efforts on some of his debts, while facing charge offs on the others, which in the past he has either been unwilling or unable to pay. On this record, two of the Disqualifying Conditions (DC) of the Adjudicative Guidelines for financial considerations apply: DC 1 (history of not meeting financial obligations) and DC 3 (inability or unwillingness to satisfy debts).

While Applicant's accrued debts are accompanied by some extenuating circumstances (*viz.*, unemployment, moving, taking on a new job, going through a marriage separation, and active drug use that required considerable money to support), for the most part, his finances have permitted modest attempts to address not only his consumer debts but his medical debts (which he continues to claim are disputed sans any documentation).

Applicant's debts are neither extenuated nor mitigated enough to enable him to take advantage of any of the mitigating conditions at this time. His combined income is sufficient to enable him to address his old debts, either directly or through arranged debt consolidation. Extenuation is not demonstrated sufficiently to invoke MC 3 (conditions largely beyond the person's control) of the Guideline. His overall repayment efforts consist essentially of continued promises to contact his old creditors and remain a work in progress: insufficient at this time to invoke any of the mitigating conditions of the Guidelines, primarily MC 6 (initiated good-faith effort to repay overdue creditors) based on his repayment efforts to date. The Appeal Board has counseled against according much weight to general promises to pay which are not accompanied by positive repayment efforts. *See* ISCR Case No. 02-30304 (April 2004); ISCR Case No. 99-0012 (December 1999). Put differently, an applicant's promises to achieve resolution of his outstanding debts in the future are not a substitute for a documented track record of remedial actions. *See* ISCR Case No. 98-0188 (April 1999).

Because of his considerable drug history, it is especially important for Applicant to be able to demonstrate steady progress in stabilizing his finances. Yet for the most part, he has not made any tangible progress in addressing his delinquent debts. Taking into account all of the circumstances of Applicant's accumulated debts, his considerable history of substance abuse, the absence of sufficient attention he has shown with his debts in the past, and the still uncertain results associated with his recent efforts of contacting his creditors to address his old debts, more time is needed for Applicant to demonstrate his finances are under control. While he is to be commended by the significant efforts he has made in his own behalf and in behalf of others to promote drug abstinence, it is still too soon to make safe predictive judgments about his ability to address his old debts. Applicant's repayment efforts to date in addressing his old debts are insufficient at this time to mitigate the Government's financial concerns. Unfavorable conclusions warrant with respect to subparagraphs 2.a through 2.f of the allegations governed by the Adjudicative Guidelines pertinent to Guideline F.

Criminal Conduct Issues

That none of Applicant's SF-86 omissions resulted in formal charges and adjudication against Applicant does not mean that the falsification issues may not be raised and considered anew in a clearance proceeding such as the present. Our Appeal Board has repeatedly stated that the government can prove applicant engagement in criminal conduct, even in the absence of a criminal conviction. *Cf.* ISCR Case No. 94-1213 (June 7, 1996). Accordingly, two of the disqualifying conditions of the Guidelines for criminal conduct may be invoked: DC 1 (criminal conduct regardless of whether the person was formally charged) and DC 2 (a single serious crime or multiple lesser offenses).

Unlike Guideline E-covered omissions, Guideline J is designed to afford more recognition to an applicant's overall judgment and reliability history. Still, an applicant must meet the requirements of at least some of the mitigation conditions if he is to successfully mitigate its related falsification parameters under 18 U.S.C. Section 1001.

Applicant's failure to disclose his daily drug use while holding a USAF clearance, when coupled with his 1991 marijuana possession arrest and conviction, establishes a sufficient pattern of criminal conduct to preclude him from showing isolated circumstances. While his meritorious work record and positive efforts in overcoming drug abuse warrant favorable consideration in weighing the extent of his exhibited rehabilitation, these considerations are not sufficient to meet the mitigation requirement of evidenced clear rehabilitation to entitle him to take advantage of MC 6 (clear evidence of successful rehabilitation) of the Adjudicative Guidelines at this time. More time is needed before

Applicant is in a position to make the case his rehabilitation efforts are sufficient to mitigate the criminally-related features of his drug use omissions and earlier marijuana possession arrest that together comprise a pattern of criminally-related conduct. Based on a full review of the evidence and drawn inferences from the developed record, unfavorable conclusions warrant with respect to subparagraph 3.a and 3.b of Guideline J as well.

In reaching my decision, I have considered the evidence as a whole, including each of the E 2.2 factors enumerated in the Adjudicative Guidelines 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 E (PERSONAL CONDUCT): AGAINST APPLICANT

Sub-para. 1.a: AGAINST APPLICANT

Sub-para. 1.b: FOR APPLICANT

Sub-para. 1.c: FOR APPLICANT

GUIDELINE F (FINANCIAL): AGAINST APPLICANT

Sub-para. 2.a: AGAINST APPLICANT

Sub-para. 2.b: AGAINST APPLICANT

Sub-para. 2.c: AGAINST APPLICANT

Sub-para. 2.d: AGAINST APPLICANT

Sub-para. 2.e: AGAINST APPLICANT

Sub-para. 2.f: AGAINST APPLICANT

GUIDELINE J (CRIMINAL CONDUCT): AGAINST APPLICANT

Sub-para. 3.a: AGAINST APPLICANT

Sub-para. 3.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