

DATE: September 15, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-23955

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Robert Gregory, Esq.

SYNOPSIS

Applicant used marijuana frequently between 1986 and 1997. He used several other controlled substances during that time on an experimental basis. Additionally, Applicant was arrested for several minor offenses between 1993 and 1995. Applicant failed to disclose the full extent of his abuse of controlled substances in a Security Clearance Application (SF 86) he submitted, and thereafter provided false information in a statement he made during his security clearance investigation. Applicant has failed to mitigate the security concern that arises from his personal conduct in providing false answers in the SF 86 and during his interview. Clearance is denied.

STATEMENT OF THE CASE

On July 20, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline H for drug involvement, Guideline J for criminal conduct, and Guideline E for personal conduct. Applicant submitted a sworn answer to the SOR, dated August 5, 2004. Applicant admitted all SOR allegations except subparagraphs 2.b., 2.d., 2.e., 3.a., and 3.b., and requested a hearing.

This case was assigned to me on June 20, 2005. A notice of hearing was issued on June 29, 2005, scheduling the hearing for July 27, 2005. The hearing was conducted as scheduled. The government submitted 11 documentary exhibits that were marked as Government Exhibits (GE) 1-11, and admitted into the record without objection. Applicant testified at the hearing, and submitted six documentary exhibits that were marked as Applicant Exhibits (AE) 1-6, and admitted into the record without objection. The transcript was received on August 5, 2005.

PROCEDURAL MATTERS

At the hearing Applicant sought to withdraw his admissions to SOR subparagraphs 2.c., 3.c., and 3.d., and to enter denials to those subparagraphs; and to withdraw his denial of subparagraph 2.b., and to enter an admission to that subparagraph. Department Counsel did not object to those requests and they were granted.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 31 years old, and has been employed as a plumber by a defense contractor since September 2001. He previously worked as a plumber at a state university from July 1997 until September 2001, as a sales representative for two separate companies from April 1996 until July 1997, and was unemployed and living with his parents before then. Applicant was married in November 1996, and divorced in July 1999. He is presently remarried, has two children, and his wife is expecting a child in September 2005.

Applicant began using marijuana in about 1986 when he was in 8th grade and continued using it frequently until about October 1997. His estimates of how many times he used the drug have ranged from twice monthly from 1986/87 until 1990/91, and thereafter seven to eight times a day from 1990/91 until March 1997 (GE 3), to more than a thousand times (Tr. p. 32). Applicant enlisted in the U.S. Navy in 1997, and was promptly given an entry-level separation after he tested positive for having the marijuana metabolite in his system when he reported to boot camp in September 1997. He claimed in a written statement to have only used marijuana once, in approximately October 1997, after he was separated from the Navy. (GE 3) However, he testified he used it on five occasions after he left the Navy. (Tr. pp. 64-65)

Applicant used cocaine once in approximately 1994, hashish once in approximately 1995, and ingested two Rohypnol pills weekly during a three or four month period in 1994/95. (GE 3) Applicant initially testified his use of Rohypnol was unknowing because someone had put it in his drink without his knowledge. (Tr. p. 34 and 67) However, during cross-examination, and upon being confronted with his previous statement (GE 3), Applicant changed his testimony, claimed the first time he used Rohypnol was without his knowledge, and admitted using it voluntarily on subsequent occasions.

Applicant was arrested on several occasions between 1993 and 1995 for relatively minor offenses, including Criminal Trespass, Lending Plates/Registration, Disorderly Conduct, Minor in Possession of Alcohol, various traffic offenses, and Violation of Promise to Appear. He was convicted of several of the offenses and sentenced to either perform brief periods of community service or pay small fines, with the exception of the Criminal Trespass charge for which he was placed on probation for 12 months and ordered to pay a fine in the amount of \$500.00.⁽²⁾

Applicant executed a Security Clearance Application (SF 86) on October 8, 2001. He failed to disclose he had been charged with Minor in Possession of Alcohol as required in response to question 24, and had been charged with and convicted of Criminal Trespass as required in response to question 26. In response to question 27, he disclosed he had used marijuana five times between July 1996 and September 1997, but failed to disclose his much greater use of the substance as discussed above.

Applicant provided a written statement to a Special Agent (SA) for the Defense Security Service (DSS) on July 9, 2003, in which he denied ever having illegally used any controlled substance other than marijuana, and acknowledged under reporting his use of marijuana because: "I did not want to reflect how often I really used marijuana but I did want to reflect that fact that I did use marijuana." He provided a second written statement to a SA for the DSS on September 17, 2003, in which he admitted using the controlled substances in addition to marijuana noted above. Applicant also stated at that time:

I listed on my SCA that I had used marijuana five times total between Jul 96 and Sep 97. I did not list any other illegal drug usage. I admit that I deliberately falsified my SCA by not truthfully detailing my use of illegal drugs. I did not indicate the truth on my SCA because I was afraid that my DoD security clearance would be denied. If my clearance is denied than [sic] perhaps I'll lose my job at (company name omitted).

* * *

I admit that I purposely did not tell SA (name omitted) the complete truth about my illegal drug usage because I was concerned that my security clearance would be denied and I might lose my job at (company name omitted). I acknowledge that by not disclosing the complete truth about my illegal drug usage, I provided a false sworn written statement, dated 09 Jul 03.

Applicant provided a number of explanations at the hearing for not disclosing the required information, including: he thought the questions about drug use were only asking about "habitual" use (Tr. p. 51); he did not think the Minor in Possession of Alcohol charge was something that needed to be disclosed (Tr. p. 62); he couldn't remember if any of the convictions had occurred within seven years of when he submitted the SF 86 (Tr. p. 62); and the only times he could remember using marijuana within seven years of submitting the SF 86 were the five times after he was discharged from the Navy.

Applicant submitted a letter from his supervisor who wrote that Applicant has proven himself to be a very reputable person who is highly respected by his co-workers and customers. The supervisor believes Applicant is a reliable, honest, and caring individual. Applicant is striving to better himself by attending and teaching at a community college.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline H, pertaining to drug involvement, Guideline J, pertaining to criminal conduct, and Guideline E, pertaining to personal conduct, with their respective DC and MC, are most relevant in this case.

BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽³⁾ The government has the burden of proving controverted facts.⁽⁴⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁽⁵⁾ although the government is required to present substantial evidence to meet its burden of proof.⁽⁶⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁷⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽⁸⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

No one has a right to a security clearance⁽¹⁰⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹¹⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹²⁾

CONCLUSIONS

In all adjudications the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

Under Guideline H, illegal drug involvement raises questions about an individual's willingness or ability to protect classified information. Involvement with or use of an illegal drug indicates unwillingness or inability to abide by the law. Cleared employees must respect regulations whether they agree with them or not. If they do not respect the rules on illegal substances, they may not respect the rules designed to protect classified information.

Applicant used marijuana extensively from 1984 until 1997, and received an entry-level separation from the Navy in 1997 because he had the marijuana metabolite in his system when he reported for boot camp. Applicant also experimented with three other controlled substances between 1994 and 1995. Disqualifying Condition (DC) 1: *Any drug abuse* applies.

Applicant last used a controlled substance almost eight years ago. Since then, Applicant has been gainfully employed, has married and is raising a family, has attended and taught at a community college, and has earned the respect of his supervisor. Mitigating Conditions (MC) 1: *The drug involvement was not recent*; and MC 3: *A demonstrated intent not to abuse drugs in the future* apply. Applicant has mitigated the security concern caused by his abuse of marijuana and other controlled substances. Guideline H is decided for Applicant.

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

Applicant committed and was convicted of several relatively minor criminal offenses between 1993 and 1995. DC 2: *A single serious crime or multiple lesser offenses* applies. The last alleged criminal offense occurred in 1995, and, although not alleged, Applicant stopped abusing controlled substances in 1997, and executed the SF 86 in 2001. Further, Applicant has substantially changed his lifestyle and demonstrated that he has significantly matured since the last alleged offense. Accordingly, MC 1: *The criminal behavior was not recent*; MC 4: *. . . the factors leading to the violation are not likely to recur*; and MC 6: *There is clear evidence of successful rehabilitation* apply. Applicant has mitigated the criminal conduct security concern. Guideline J is decided for Applicant.

Under Guideline E, personal conduct is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. 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.

Applicant provided false answers to questions 24, 26, and 27 in the SF 86 he submitted, and false information to a SA for the DSS in a statement he provided in July 2003. Considering the minor nature of the criminal offenses, including the alcohol-related offense, and the length of time that had elapsed from their commission to when Applicant submitted the SF 86, his failure to list them is understandable and not indicative of a deliberate omission of relevant information from the SF 86. However, the same cannot be said about his failure to disclose the full extent of his marijuana abuse in the SF 86 or his abuse of other controlled substances in the July 2003 statement. Applicant's explanations at the hearing for those omissions are not credible.

Applicant's failure to disclose the extent of his marijuana abuse in the SF 86, and his use of other controlled substances in the July 2003 statement, along with the testimony he provided in an effort to justify those omissions, severely undermines the ability to place trust and confidence in him at the present time. The false answers, statements, and testimony raise significant security concerns.

DC 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;* and DC 3: *Deliberately providing false or misleading information concerning relevant and material matters to an investigator, or other official representative in connection with a personnel security or trustworthiness determination* apply in this case. I have considered all Mitigating Conditions under Guideline E and find none apply. Guideline E is decided against Applicant.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant has failed to overcome the case against him and satisfy his ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant a security clearance.

FORMAL FINDINGS

SOR ¶ 1-Guideline H: For Applicant

Subparagraphs a-e: For Applicant

SOR ¶ 2-Guideline J: For Applicant

Subparagraph a-g: For Applicant

SOR ¶ 3-Guideline H: Against Applicant

Subparagraph a: For Applicant

Subparagraph b: For Applicant

Subparagraph c: Against Applicant

Subparagraph d: 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 a security clearance for Applicant. Clearance is denied.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. The offenses alleged in SOR subparagraphs 1.c., 1.d., and 1.e. were committed by another individual who used Applicant's identity when arrested.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

5. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
10. *Egan*, 484 U.S. at 528, 531.
11. *Id* at 531.
12. *Egan*, Executive Order 10865, and the Directive.