DATE: June 25, 2004

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 02-33169

DECISION OF ADMINISTRATIVE JUDGE

JOSEPH TESTAN

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Department Counsel

FOR APPLICANT

Geoffrey B. Wander, Esq.

SYNOPSIS

Applicant's conviction and sentence of more than one year in prison disqualifies him from receiving a security clearance under 10 U.S.C. 986. Clearance is denied.

STATEMENT OF THE CASE

On November 7, 2003, 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 denied or revoked.

Applicant responded to the SOR in writing on December 15, 2003. The case was assigned to the undersigned on March 3, 2004. A Notice of Hearing was issued on March 17, 2004, and the hearing was held on April 20, 2004. The transcript was received on May 7, 2004.

RULINGS ON PROCEDURE

At the hearing, SOR Paragraph 5c. was amended by deleting the words, "as set forth in subparagraphs 2a., 2b., and 2c., above."

FINDINGS OF FACT

Applicant is a 51 year old paint supervisor. He has worked for the same employer for 19 years.

In 1980, applicant was convicted of Arson and sentenced to six years in prison. He served four years. Because applicant was convicted of a felony, he is precluded from arguing at the DOHA hearing that he was innocent of the charge.[(1)]

Applicant has a history of alcohol abuse. In 1980, while serving his prison sentence for the Arson conviction, he was diagnosed with "Alcoholism, Habitual Drinking" by the prison psychologist (Exhibit 14). In 1990, he was convicted of Driving Under the Influence of Alcohol (DUI). He was fined and ordered to perform community service. Applicant testified, credibly, that he has not consumed alcohol since the day he was arrested on the DUI charge. He does not intend to drink in the future (TR at 106).

At the hearing, applicant first denied that he ever smoked marijuana (TR at 83). He later admitted that he used marijuana once, while in the 8th grade (TR at 85). During a psychological evaluation performed on him in 1980 in connection with the Arson conviction, he stated he had smoked marijuana on the day he started the fire (Exhibit 14). At the hearing applicant testified that he made this untrue statement "to get a lesser sentence." When asked how this statement would get him a lesser sentence, he replied, "I have no idea" (TR at 84).

In June 2001, applicant tested positive for marijuana on two tests administered by his employer. After he failed the first test, he "immediately demanded a second test" because he "knew the first one had to be wrong." After testing positive on the second test, he talked the matter over with his son and they concluded the positive test result may have been caused by herbal tea he had been drinking to help him sleep (TR at 55-56). All other drug tests administered by his employer, both before and after June 2001, have been negative.

On July 17, 2001, applicant filed for bankruptcy because his divorce left him with more debt "than [he] could handle at the time" (Exhibit 8; TR at 59). In October 2001, the bankruptcy court discharged his debts (Exhibit 9). He has not fallen behind on any debt payments since receiving his bankruptcy discharge. Applicant testified that his current "credit status" is excellent, and Exhibit C corroborates his testimony. With respect to SOR Paragraph 4b., Exhibit A partially corroborates applicant's testimony that Citi Financial "charged off" the $9,358.00 debt and that Citi Financial agreed with him that he is not legally liable for it (TR at 60-63).

Applicant completed a Security Clearance Application (SCA) on July 30, 2001 (Exhibit 1). Applicant provided false, material information in response to two questions on the SCA. In response to Question 24, which asked, "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?" applicant stated "no." This response was false because, as noted above, applicant had been charged with and convicted of DUI in 1990. Applicant denies an intent to mislead the Government. He first testified that he responded "no" because he was operating under the mistaken belief that the SCA was "just an update." He then explained that he thought he "was just doing an upgrade for the last 10 years and that (the DUI) was longer than 10 years back." He later added as an additional excuse that he thought the DUI was a misdemeanor (TR at 64-65, 94, 125-126).

In response to Question 33, which asked, "In the last 7 years, have you filed a petition under any chapter of the bankruptcy code (to include Chapter 13)?" applicant stated "no." This response was false because, as noted above, applicant had filed for bankruptcy on July 17, 2001. Applicant denies any attempt to mislead the Government. He testified that he completed the SCA and turned it into the office secretary sometime in June 2001, before he filed bankruptcy, to be typed up. He further testified that when he got the completed SCA back from the secretary in late July 2001, he didn't review it before signing it, thereby missing his opportunity to change his answer to Question 33 from "no" to "yes" (TR at 120-121). This explanation differs from what he told a Special Agent of the Defense Security Service (DSS) during an interview in June 2002. During that interview, applicant told the Special Agent that he responded "no" to Question 33 because, although he had filed for bankruptcy, he hadn't received his discharge yet, and he was still consulting with his attorney about whether to proceed with the bankruptcy (TR at 132-133).

Applicant provided a signed, sworn statement to DSS on June 26, 2002 (Exhibit 10). In said statement, applicant provided false, material information when, after he discussed the positive drug tests of June 2001, he stated, "I have never used illegal substances." Applicant testified that he didn't mention his 8th grade marijuana use to DSS because he was a minor when he used it, and he thought he was discussing just his adult life (TR at 94, 98-99). In short, in applicant's mind, the one-time use in 8th grade didn't count (TR at 117-118). He denies any attempt to mislead the Government (TR at 100).

Testimony from two witnesses called by applicant, together with letters and performance appraisals admitted into

evidence, establish that applicant is an excellent employee.

CONCLUSIONS

With respect to Guideline F, the evidence establishes that in July 2001, applicant filed a Chapter 7 bankruptcy petition, and that in October 2001, his unsecured debts were discharged. Applicant's bankruptcy filing establishes that he "has a history of not meeting his financial obligations," and accordingly, Disqualifying Condition E2.A6.1.2.1 is applicable.

Applicant has introduced persuasive evidence that the financial difficulties which led him to file bankruptcy were caused by a factor beyond his control; namely, his divorce. He testified credibly that the divorce decree left him with more debt that he could handle at the time. He further testified credibly that he has been current on all debt payments since receiving his bankruptcy discharge, and that his current "credit status" is excellent, a fact corroborated by Exhibit C, a current credit report. Based on these facts, Mitigating Conditions E2.A6.1.3.1 *(the behavior was not recent)*, E2.A6.1.3.2 *(it was an isolated incident),* and E2.A6.1.3.3 *(the conditions that resulted in the behavior were largely beyond the person's control, e.g., divorce)*, are applicable. Because applicant's isolated period of financial difficulties has passed and is unlikely to recur, Guideline F is found for applicant.

With respect to Guideline G, the evidence establishes that applicant has a history of consuming alcohol to excess, that he was diagnosed with "Alcoholism, Habitual Drinking" by a prison psychologist in 1980, and that he was convicted of DUI in 1990. These facts require application of Disqualifying Conditions E2.A7.1.2.1 *(alcohol-related incidents away from work)*, and E2.A7.1.2.3 *(diagnosis by a credentialed medical professional of alcohol abuse or alcohol dependence)*.

Applicant has introduced persuasive evidence that since his DUI arrest in 1990, he has not consumed any alcohol, and does not intend to consume it in the future. His ten plus years of abstinence since his one and only alcohol-related incident require application of Mitigating Conditions E2.A7.1.3.1 *(the alcohol-related incident(s) do not indicate a pattern)* and E2.A7.1.3.2 *(the problem occurred a number of years ago and there is no indication of a recent problem)*. Because I conclude that applicant is unlikely to consume alcohol to excess in the future, Guideline G is found for him.

With respect to Guideline H, the evidence establishes that applicant used marijuana on at least two occasions: when he was in the 8th grade and the night in 1979 when he burned down his house. Although the fact he tested positive for marijuana on two drug tests in 2001 raises suspicions, I found his testimony that he had not used marijuana in 2001 to be credible and worthy of belief. Applicant's testimony in general was not very credible; however, it is difficult to believe he would risk his job, a job that means a great deal to him, by using marijuana. In any event, applicant's use of marijuana, although dated, still requires application of Disqualifying Condition E2.A8.1.2.1 *(any drug abuse).* He does, however, qualify for Mitigating Conditions E2.A8.1.3.1 *(the drug involvement was not recent)* and E2.A8.1.3.3 *(a demonstrated intent not to abuse any drugs in the future)*. Because I conclude that applicant's marijuana use is unlikely to recur, Guideline H is found for him.

With respect to Guideline E, the evidence establishes that applicant intentionally provided false material information to the Government (1) about his alcohol-related criminal conduct on the SCA he executed in July 2001, (2) about his financial condition when he denied filing any bankruptcy petitions on the SCA he executed in July 2001, and (3) about his marijuana use in his signed, sworn statement he provided to DSS in June 2002. Applicant's different explanations for his multiple misrepresentations were, standing alone, difficult to believe. However, when these explanations are viewed along with applicant's numerous contradictory statements concerning material issues (e.g., he didn't burn down the house v. he did burn down the house; he never used marijuana v. he used it once, in 8th grade v. he used it on the night he burned down his house), they are simply not credible. Applicant's dishonest conduct reflects adversely on his judgment, reliability and trustworthiness. It also requires application of Disqualifying Conditions E2.A5.1.2.2 *(the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire . . .)* and E2.A5.1.2.3 *(deliberately providing false or misleading information concerning relevant and material matters to an investigator. . .)*.

Having been offered (1) no reasonable credible explanation for applicant's dishonest conduct, (2) no evidence which would qualify applicant for any of the formal Mitigating Conditions, and (3) little or no evidence from which I can

conclude applicant can now be relied upon to be truthful with the Government, Guideline E is found against him.

With respect to Guideline J, the evidence establishes that in 1980, applicant was convicted of Arson and sentenced to 6 years in prison. Other than a DUI conviction in 1990, applicant has not been involved in any other criminal activity. Under normal circumstances, the passage of time since applicant's Arson conviction (over 20 years) and last criminal activity (over 10 years) would go a long way toward mitigating his criminal conduct. However, given applicant's sentence of more than one year of prison following the Arson conviction, this incident disqualifies him from receiving a security clearance under 10 U.S.C. 986.[(2)] Accordingly, Guideline J is found against applicant.

FORMAL FINDINGS

PARAGRAPH 1: AGAINST THE APPLICANT

Subparagraph 1a: Against the Applicant

Subparagraph 1b: Against the Applicant

Subparagraph 1c: Against the Applicant

PARAGRAPH 2: FOR THE APPLICANT

Subparagraph 2a: For the Applicant

Subparagraph 2b: For the Applicant

Subparagraph 2c: For the Applicant

PARAGRAPH 3: FOR THE APPLICANT

Subparagraph 3a: For the Applicant

Subparagraph 3b: For the Applicant

Subparagraph 3c: For the Applicant

PARAGRAPH 4: FOR THE APPLICANT

Subparagraph 4a: For the Applicant

Subparagraph 4b: For the Applicant

PARAGRAPH 5: AGAINST THE APPLICANT

Subparagraph 5a: Against the Applicant

Subparagraph 5b: Against the Applicant

Subparagraph 5c: 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.

Joseph Testan

Administrative Judge

1. Accordingly, with respect to the issue of guilt or innocence, applicant's testimony that he "did not do it" (TR at 80) is irrelevant. However, because applicant has in the past admitted committing the arson (Exhibit 14, pages 2 and 3), his testimony that he "did not do it" is relevant to the issue of his credibility.

2. *See,* Footnote 1 of Disqualifying Condition c of the Criminal Conduct guideline.