

DATE: December 15, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-00367

ECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Jerry W. Monroe, Esq.

SYNOPSIS

Applicant used marijuana four to six times and used LSD once during 1998-2000, while he was married to a woman involved in the drug culture. He divorced his wife in November 2000 and stopped using drugs. He became deeply religious, and in October 2002 he married a woman he met at church. In 2001, he answered "no" to a question on a security application about use of drugs or marijuana during the past seven years. He denied intentional falsification. Security concerns based on marijuana and drug use are mitigated. Deliberate falsification was not proven. Clearance is granted.

STATEMENT OF THE CASE

On March 12, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to not grant a security clearance to Applicant. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive). The SOR alleges security concerns under Guideline E of the Directive. It alleges use of marijuana (SOR ¶¶ 1.a. and 1.b.) and falsification of a security clearance application (SOR ¶ 1.c.).

Applicant answered the SOR in writing on April 2, 2004. He denied the allegations in SOR ¶¶ 1.a. and 1.b. in part and admitted them in part, denied the allegation in SOR ¶ 1.c., and requested a hearing. The case originally was assigned to another Administrative Judge and reassigned to me on August 20, 2004, based on workload considerations. On August 25, 2004, DOHA issued a notice of hearing setting the case for October 6, 2004. Applicant appeared as scheduled. DOHA received the transcript (Tr.) on November 18, 2004.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I also make the following findings:

Applicant is a 38-year-old senior engineer for a defense contractor. He has worked for his current employer since June 1990. He has held a clearance since 1991 and a top secret clearance since 1995.

When Applicant was about eight years old, his parents were divorced. He and his three younger siblings were in their mother's custody for about two years. His mother was an alcoholic, and the burden often fell on Applicant to care for his siblings. His mother became involved with a man who sexually abused Applicant and his siblings. Applicant felt guilty because he was unable to protect them.

When Applicant was about 10 years old, his father gained custody of the children. With the encouragement of his father and stepmother, Applicant began to enjoy successes in numerous fields, including model car building, sports, and academics. In 1984 he received an appointment to the U.S. Air Force Academy, where he excelled in academics, leadership, and military training. He resigned from the Academy in June 1986. He completed his college education at a civilian university in December 1990, receiving a degree in computer science.

In 1991 Applicant applied for a security clearance. He gave an affirmative answer to the question asking if he had used drugs. He explained he had smoked marijuana twice in December 1986, and he asserted, "I don't smoke it now, nor do I intend to in the future." In 1995, when he applied for a top secret clearance, he repeated his 1991 assertion verbatim.

Applicant underwent psychological counseling from December 1993 to June 2000 to help him deal with the sexual abuse he and his siblings had suffered as children. He was working for his current employer at the time. Part of his therapy dealt with the defense mechanisms he had developed as a child. The therapy required him to relive unpleasant experiences from his past and let go of his defense mechanisms. He found himself in emotional turmoil.

During this time of turmoil, he met his first wife. They were married in August 1998. He and his wife had an "open marriage," in which each had extramarital sexual relations with others. He tried LSD once and used marijuana four to six times at parties with his wife. During this time, he held a top secret clearance.

Applicant's wife lived "in her little fantasy world." She "wanted to be Peter Pan and never grow up and have fun all the time." (Tr. 35) At some point, Applicant realized the drug-and-party scene was not consistent with his values and goals. He divorced his wife in November 2000.

When he divorced his wife, he broke away from the drug-and-party lifestyle. Before his divorce he had long hair and multiple body piercings. He wore black clothing and rode a motorcycle. (Tr. 141) After his divorce he cut his hair, cleaned up his appearance, and bought a nice car. (Tr. 102) His sister referred to Applicant's change of lifestyle as "coming home." Applicant became interested in religion, due in part to the influence of his brother. He started attending church regularly, where he met the woman who is now his wife. He married her on October 26, 2002.

Applicant and his second wife are deeply religious. He now believes marijuana use is not only illegal but damaging, affecting the brain "like a dimmer switch on a light." (Tr. 91) At the hearing he disavowed a statement in his answer to the SOR comparing marijuana use to a minor traffic violation. (Tr. 81)

On July 18, 2001, Applicant submitted an application to continue his top secret security clearance. His security officer had filled in much of the information from previous applications, and Applicant filled in only those items that had changed. The application did not reflect his use of marijuana and LSD between 1998 and 2000.

On March 7, 2002, a Defense Security Service (DSS) investigator interviewed him about his application. He asked about the therapy sessions and the divorce, and he asked for the telephone number for Applicant's ex-wife. The investigator did not mention drug or marijuana use.

On April 26, 2002, the DSS investigator again interviewed Applicant. By this time, the investigator had talked to Applicant's ex-wife and learned about his marijuana use during their marriage. The investigator asked Applicant about his marijuana use, and Applicant readily admitted it. At the hearing, Applicant again admitted using marijuana four to six times, and he spontaneously admitted using LSD once, in response to an open-ended question from Department Counsel.

Applicant has an extreme distaste for filling out forms, and he is a very poor proofreader. Applicant's 2001 security application misstated his father's first name, substituting his own. It incorrectly listed his father's date of birth. Applicant did not notice that the middle names of his sister, brother, and stepmother were incorrectly listed as "unknown." He had similar problems with his insurance forms at work.

Applicant enjoys a reputation with his employer as a hard-working, dedicated, honest, trustworthy employee. His supervisor would grade him as an "A" for character, dedication, work ethic, and compliance with security procedures. She would grade him as a "C" for administration. Based on her personal experience with him, she would give him a "very low grade" in filling out forms.

Applicant has difficulty with recalling and organizing factual details. At the hearing he could not recall the exact date of his second marriage, which preceded the hearing by less than two years.

Applicant's employer has an anti-drug policy. It is set out in the employees' handbook, and employees are required to certify in writing that they have read and understand it. Drug users risk losing their clearance and face possible disciplinary action. (Tr. 118-20)

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.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through ¶ 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

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 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, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

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 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Under Guideline E (Personal Conduct), "Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, [or] dishonesty . . . could indicate that the person may not properly safeguard classified information." Directive ¶ E2.A5.1.1. A disqualifying condition is established under Guideline E by personal conduct that increases an individual's vulnerability to coercion, exploitation, or duress (DC 4), or by a pattern of rule violations, including violation of a written or recorded agreement between the individual and the agency (DC 5).

The SOR ¶ 1.a. alleges Applicant used marijuana "from at least 1998 to 1999" while holding a top secret security clearance. Applicant denied the allegation to the extent it suggests continuous or repeated use of marijuana, but he admitted using marijuana four to six times during that period. Applicant's marijuana use violated his employer's anti-drug policy. It could have cost him both his security clearance and his job, and it made him vulnerable to coercion, exploitation, or duress by anyone who threatened to disclose it. I conclude DC 4 and DC 5 are established.

Applicant's use of illegal substances was serious misconduct. However, he was not a habitual drug user. He experimented with LSD only one time, and he used marijuana only four to six times in a period of about two years, even though he and his wife were associating with drug users. Directive ¶¶ E2.2.1., E2.2.1.2., E2.2.1.3. His use of illegal substances during this two-year period was an aberration from his lifestyle before 1998 and after 2000. In 2000 Applicant decided the drug-and-party culture and "open marriage" environment were not consistent with his values and goals. He divorced his first wife and left the drug culture. He became interested in religion and met a deeply religious woman whom he married in October 2002. He has not used any illegal substances since he left his first wife four years ago. He believes marijuana and drugs are physically and mentally harmful. The evidence shows Applicant is rehabilitated, and the likelihood of further drug or marijuana use is nil. Directive ¶¶ E2.2.1.6., E2.2.2.9. I conclude his use of illegal substances is mitigated.

The SOR ¶ 1.b. alleges Applicant continued to use marijuana until 1999 after stating in 1991 he did not intend to smoke marijuana in the future. It is unclear whether the SOR ¶ 1.b. was intended to allege falsification of the 1991 application, a breach of the promise of the 1991 promise to not use marijuana again, or to allege facts showing Applicant intended to deliberately omit material facts from the 2001 application, as alleged in the SOR ¶ 1.c. Department Counsel treated SOR ¶ 1.b. as alleging facts proving SOR ¶ 1.c. by showing intent to deliberately omit material facts. (Tr. 171-74) Accordingly, I have treated SOR ¶¶ 1.b. and 1.c. together.

A "deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire" can raise a security concern and may be a disqualifying condition (DC 2). Directive ¶ E2.A5.1.2.2. To establish a falsification under Guideline E, there must be "a showing that the applicant acted with intent to mislead or deceive the government by not disclosing the information." ISCR Case No. 00-0302, 2001 DOHA LEXIS 337 at *5 (App. Bd. Apr. 23, 2001).

Applicant denied intentionally falsifying his 2001 security clearance application. Since the allegation of deliberate falsification was controverted, the burden of proof was on the government. Directive ¶ E3.1.14. "Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred." ISCR Case No. 02-07026 at 3 (App. Bd. Dec. 7, 2004), citing ISCR Case No. 02-23133 (App. Bd. Jun. 9, 2004). An Administrative Judge must consider all the evidence of record to determine an Applicant's intent or state of mind when the omission occurred. *Id.* at 4.

I find deliberate falsification was not proven. The evidence shows Applicant has difficulty with forms. He enjoys a reputation for honesty and integrity, but he is an abysmal proofreader. He relied on his security officer to enter information on his application that was unchanged from previous applications. The application was replete with errors.

Applicant also has difficulty with factual details. On cross-examination at the hearing, he could not recall the exact date

of his current marriage. (Tr. 60)

At the hearing Applicant blurted out an admission of LSD use in response to an open-ended question from Department Counsel, even though there was no other evidence of LSD use in the record. He disavowed a statement in his answer to the SOR minimizing the seriousness of marijuana. The answer was drafted by his father, a lawyer who represented him at the hearing. His father was visibly surprised when Applicant disavowed the statement. Based on Applicant's testimony and demeanor at the hearing, along with all the other evidence of record, I find Applicant's denial of deliberate falsification plausible and credible.

FORMAL FINDINGS

Paragraph 1. Guideline E (Personal Conduct): FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant a security clearance to Applicant. Clearance is granted.

LeRoy F. Foreman

Administrative Judge