

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant has a history of use, purchases and sales of illegal substances for which he was arrested and charged in one such instance sales/distribution in 1996 and placed on probation. By testing positive in a random drug test administered by his probation department in 1997 his probation was extended a year. Applicant has not been in trouble with law enforcement since his last arrest in 1997 and not been involved in illegal drugs of any kind since his 1997 arrest. Allegations covered by Guideline J are, accordingly, mitigated. However, Applicant's understatement of his cocaine use in his SF-86 is not mitigated under any of the pertinent mitigation guidelines and raise continuing security concerns about Applicant's judgment and reliability. Clearance is denied.

CASENO: 03-00923.h1

DATE: 07/16/2004

DATE: July 16, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-00923

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Department Counsel

FOR APPLICANT

Joseph A. Corsmeier, Esq.

SYNOPSIS

Applicant has a history of use, purchases and sales of illegal substances for which he was arrested and charged in one such instance sales/distribution in 1996 and placed on probation. By testing positive in a random drug test administered by his probation department in 1997 his probation was extended a year. Applicant has not been in trouble with law enforcement since his last arrest in 1997 and not been involved in illegal drugs of any kind since his 1997 arrest. Allegations covered by Guideline J are, accordingly, mitigated. However, Applicant's understatement of his cocaine use in his SF-86 is not mitigated under any of the pertinent mitigation guidelines and raise continuing security concerns about Applicant's judgment and reliability. Clearance is denied.

STATEMENT OF THE CASE

On June 11, 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 granted, continued, denied, or revoked.

Applicant responded to the SOR on June 24, 2003, and requested a hearing. The case was assigned to me on February 12, 2004, and was scheduled for hearing on April 29, 2004. A hearing was convened on April 29, 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 five exhibits; Applicant relied on four witnesses (including himself) and one exhibits. The transcript (R.T.) was received on May 14, 2004.

SUMMARY OF PLEADINGS

Under Guideline J, Applicant is alleged to have been (a) arrested in September 1996 and charged with three counts of delivery of cocaine (a felony), to which he pleaded guilty and was placed on probation (with adjudication withheld) for two years and ordered to pay \$350.00 in court costs and complete community service and (b) arrested in October 1997 and charged with probation violation following a positive test for cocaine in a random urinalysis, for which his probation was extended a year and he was ordered to complete an additional 50 hours of community service.

Under Guideline E, Applicant is alleged to have falsified his security clearance application (SF-86) of March 2001 by understating his use of illegal drugs by listing his cocaine use from July 1995 to September 1996, instead of providing his actual inclusive dates of use of cocaine: at times weekly to monthly from 1994 to 1997.

For his answer to the SOR, Applicant admitted his drug-related arrests in September 1996 and October 1997, but denied falsifying his SF-86. He claimed his life had spiraled into drug use after his divorce in 1993 and entailed his using cocaine recreationally at first, and more often during the 1995-1996 time period. He admitted to selling drugs from time to time during this period before to his September 1996 arrest to finance his addiction. Applicant claimed to have voluntarily entered a drug treatment program following his 1996 arrest. Applicant claimed, too, to have attended a party in September 1997 in which he became depressed over a fight with his girlfriend and used cocaine (for which he tested positive for) a few days later. He claimed to have returned to drug counseling (which he completed in 1998) and to have been drug-free ever since (which is corroborated by monthly drug testing) while completing the court's probation conditions. And he claimed to have recalled his inclusive dates of cocaine use to the best of his ability when answering question 27 of his SF-86.

FINDINGS OF FACT

Applicant is a 45-year-old test supporting engineer for a defense contractor 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.

Applicant married his first spouse (W1) in 1984. Soon after the birth of their first child in 1988, W1 was diagnosed with post-partem psychosis. Dealing with his wife's illness and the well being of his daughter was very difficult and stressful for Applicant. After W1 was later diagnosed with a bi-polar disorder, she was placed on medications that had to be constantly monitored. Without much help, Applicant was required to assume the burden of monitoring his wife while caring for his daughter. His marriage under these circumstances became very difficult for him, and in 1992 he and W1 separated. Applicant attributes their separation to W1's falling out of love with him. Their divorce was finalized in 1993, with custody of their daughter (about 4 to 5 years of age at the time) being granted to W1.

Stressed by the separation of his wife and his inability to see his daughter on a daily basis, Applicant began going to bars and associating with party type individuals. Around 1993 he began experimenting with cocaine on a recreational basis. For the first couple of years he used cocaine once a month. By 1996, however, he had increased his cocaine use to a weekly frequency, usually in connection with alcohol. He found the drug to act as a stimulant, allowing him to feel sober, alert, and energized. Most of the time during these first two years the cocaine was provided to him by others in social situations. Sometimes he contributed to others in the purchase of the drug, with \$50.00 being the maximum amount he ever contributed.

Sometime in early 1996, Applicant initiated the practice of buying cocaine individually in quantities that usually did not exceed two or three grams, at a cost of \$100.00. Finding his partying (purchasing) was getting expensive, he began reselling small amounts of the cocaine he purchased to others. This allowed him to reduce his own costs. Throughout the remainder of 1996 before his arrest, Applicant sold small amounts of cocaine from the one to two grams he purchased on a weekly basis, netting from \$50.00 to \$150.00 a sale (R.T., at 75-76). These resales enabled him to reduce the expense of his cocaine purchases. Applicant's weekly purchases and sales of cocaine, as such, represent purchases and ensuing distributions of cocaine for a profit. Savings on the expense of purchasing cocaine for his own use is no less a profit than would it be were he to have purchased it solely for resale. Inferences warrant that Applicant purchased cocaine on a weekly basis in 1996, of which he resold some of his purchased drugs for profit.

In September 1996, Applicant was arrested and charged with three counts of delivery of cocaine (a felony) after selling 14 grams of cocaine to a reliable confidential informant for \$500.00, which represented more than covering of his product cost (R.T., at 76-77). When confronted by the arresting officer about where he obtained the cocaine, Applicant declined to identify his source, fearful of getting his source in trouble (R.T., at 77-78). Applicant later plead guilty to the charges and was placed on probation for two years and ordered to pay \$350.00 in court costs, complete community service, submit to drug evaluation/treatment and submit to random drug testing (*see ex. 4*; R.T., at 83-84). Applicant accepted each of the court's conditions and over the ensuing year complied with most of them (including the drug evaluation, which he had already commenced voluntarily following his his arrest).

The following year (in October 1997), Applicant attended a party in which events got out of hand and he ended up pushing and shoving current spouse (W2). Depressed and unhappy, he succumbed to accepting and using cocaine. When tested by his probation office a few days later in a random urinalysis, he tested positive for cocaine. As a result, he was arrested and charged with violation of his probation. He spent six to seven days in jail before he could obtain a court hearing on his charges. Cited for probation violation by the court, his probation was extended a year, and he was ordered to complete an additional 50 hours of community service. Applicant completed each of the conditions set by the court and satisfied his probation requirements, in addition to returning to and completing voluntary drug counseling.

Applicant has not returned to illegal drugs since his October 1997 arrest. He spends his free time now in outdoor activities (yard work and boating) with his family. He has since received a promotion to test supporting engineer II.

When asked to complete his SF-86 in March 2001, Applicant understated his use of illegal drugs in his answer to question 27. He attributes his understatement to uncertainty about the date of his separation from W1 which he aligned with his turning to cocaine use (R.T., at 85-86, 98-99). Applicant points to the question marks he placed in the space reserved for day in this electronically generated questionnaire as indicative of the uncertainty he harbored over his beginning and ending use dates. Question marks in the space reserved for filling in the day are not in and of themselves dispositive of Applicant's state of mind when he answered the question. For these question marks could just as plausibly have been the result of questions about the specific day or something more. Also to be looked at in gauging Applicant's intent is the way he responded to other pertinent questions. For instance, Applicant answered **no** to question 29, which inquired about drug purchases, trafficking and sale, *etc.* He also mischaracterized his September 1996 arrest (describing it as possession instead of sales/distribution) and failed altogether to list, in answering question 27, his 1997 arrest for probation violation following his testing positive for cocaine in a random urinalysis test conducted by his probation department (*see ex. 1*; R.T., at 87-88). And he failed to admit to the voluntary/court ordered drug counseling he participated in when answering question 19 (*see ex. 1*; R.T., at 81).

While none of Applicant's other omissions were listed in the SOR, and cannot be presumed to be material without their listing, they are important considerations in evaluating the truthfulness of Applicant's response to question 27 and may for this reason be considered. As to these latter questions, Applicant attributed his omissions and mischaracterizations to misunderstandings of terminology, plea bargain uncertainties (over his 1996 arrest), memory lapse, and lumping one arrest (his 1996 arrest) with the other (his 1997 arrest) as one in the same (*see ex. 4*).

Of some import to reconciling Applicant's understated drug use dates in answering question 27 are his statements in the general remarks section of question 43. Here, Applicant acknowledges trouble with substance abuse in 1995 to 1997. While no months or days are mentioned, the acknowledgment does show he continued to be involved in substance abuse problems in 1997. To be fair, his mention of drug use problems is not exclusively synonymous with drug use: Such an acknowledgment is consistent, too, with his imposed probation (to include random drug testing) throughout 1997. Since neither party brought up Applicant's remarks in question 43, it is difficult to anticipate either's interpretation of Applicant's use remarks in this section.

Applicant's multiple omissions and mis-characterizations of the various aspects of his drug involvement between 1993 and 1997 are many and quite material to a clearance eligibility assessment. His omissions and misstatements cover major aspects of his drug use, his drug purchases and sales, his drug counseling, the characterization of his 1996 arrest, and his complete omission of his 1997 arrest for probation violation following a positive drug test. Neither his claims of associating his commencement of cocaine use with his divorce from W1, the question marks he placed in the day space of his answer to question 27, nor his revised answers in the general remarks section of question 43 are enough standing alone to provide plausible explanations of why he minimized his cocaine use to the 1995 to 1996 time frame.

When considered together in the context of his answers to his other related questions, Applicant's understated use in responding to question 27 cannot be reconciled with either his claimed association with his divorce from W1 or his recitation of continuing substance abuse problems in 1997 in the general remarks space of question 43. Marriage and divorce are dates that normally are not mistaken. That Applicant might mistake the actual date of finalization of his divorce (in May 1993) is certainly plausible (R.T., at 46). It is not plausible that he could lose track of the period of his separation and pending divorce which prompted his resort to cocaine by two years (*viz.*, mistaking his divorce for 1995

instead of 1993). Reciting continuous substance abuse problems between 1995 and 1997 is not the rough equivalent of acknowledging drug use spanning 1995 and 1997 either. The collective impression of Applicant's understating his cocaine use, denying any drug counseling, omitting his 1997 arrest for probation violation, mischaracterizing his 1996 arrest as an arrest for drug possession (instead of selling and distributing), and omitting his purchases and sales for profit (*i.e.*, covering his costs of the cocaine product he kept for his own use) is his manifest intention to confine the dates of his cocaine use to the narrowest period feasible by masking his counseling and arrests that might expose a use problem much larger than a year.

Common sense does not permit acceptance of Applicant's explanations without ignoring or discounting his other SF-86 misstatements covering his involvement with illegal substances. Applicant's explanations are simply not enough to enable him to avert inferences of knowing and wilful concealment of the actual inclusive dates of his cocaine use.

When interviewed by DSS agent A in November 2002, Applicant voluntarily provided the details of the extent of his drug usage over a five-year period spanning 1993 to 1997 (correcting his earlier estimate of 1995 to 1996) and his drug treatment, without the aid of any memory jogging from the agent (R.T., at 98-99). He also acknowledged the actual charges associated with his 1996 arrest and the facts surrounding his 1997 arrest. It is not clear from the record whether Applicant was prompted in any way by the DSS agent in correcting his characterization of his 1996 arrest and identifying his 1997 arrest: Applicant could not recall (R.T., at 95).

Applicant's supervisor and coworkers praise him for his dedication and strong work ethic (*see ex. A*). He is valued for his responsibility in maintaining highly valuable test assets and for assisting in the testing of highly complex and valuable defense-related products. Applicant's colleagues credit him for his integrity and honesty in executing his professional responsibilities. None of his references, though, indicate any knowledge of the falsification allegations contained in the SOR. Whether their assessments of Applicant would have been influenced by the falsification allegations contained in the SOR in any way material to a whole person evaluation of Applicant is not clear.

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 revised 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:

Criminal Conduct

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness

Disqualifying Conditions:

DC 1 Allegations or admission of criminal conduct.

DC 2 A single serious crime or multiple lesser offenses.

Mitigating Conditions:

MC 1 The criminal behavior was not recent.

MC 6 There is clear evidence of successful rehabilitation.

Personal Conduct

The Concern: conduct involving questionable judgment, untrustworthiness, unreliability, 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.

Mitigating conditions:

DC 2 The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.

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

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's for 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 evidentiary burden shifts to the applicant for to establish his case.

CONCLUSIONS

Applicant has a history of abusive use of illegal drugs (*viz.*, cocaine) over a five-year period spanning 1993 and 1997. After experimenting with cocaine for a couple of years following his divorce from his first spouse, he increased his cocaine intake to weekly use. He maintained this level of use until his arrest in September 1996 for selling and distributing cocaine.

Because his 1996 arrest was Applicant's first drug-related offense, he received withheld adjudication of guilt and placement on probation that required drug evaluation and counseling, random drug testing, community service, and payment of court costs in a drug offender probation program for two years. Applicant was making steady progress with his probation conditions when he tested positive for cocaine in a random urinalysis administered by his probation department in October 1997. As the result of his positive test, he was charged with probation violation, for which an additional year of probation and 50 hours of community service were added.

Applicant's abusive use and purchase/sale of cocaine between 1993 and 1997 are sufficient to invoke two of the disqualifying conditions of the Adjudicative Guidelines for criminal conduct: DC 1 (allegations or admission of criminal conduct) and DC 2 (a single serious crime or multiple lesser offenses). Both his history of illegal drug use and the serious circumstances associated with his purchasing and reselling illegal drugs make his association with illegal and controlled drugs a serious security concern from the standpoint of both prolonged drug abuse and criminal misbehavior.

The 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).

Applicant's cocaine sales (most of which he was never prosecuted for) are difficult to reconcile with tenets of judgment, reliability, and trustworthiness required for security clearance eligibility. His initial resort to cocaine use in 1993 came when he was struggling to come to grips with his wife's illness and the well being of his young daughter (then in his wife's custody). Still, his positive drug test and admitted recurrent use which prompted his 1997 arrest for probation violation are relatively aged: almost seven years ago. His documented sales were for the most part in small quantities to cover his own expenses and did not represent drug trafficking. Based on his own testimony and the passage of time since his last reported arrest (almost seven years), Applicant may invoke MC 1 (not recent) of the Guidelines for criminal conduct.

Seven years of demonstrated rehabilitative behavior manifest in his work and personal life is very encouraging and

places Applicant on a positive trajectory of trust restoration. His rehabilitative efforts are sufficient to enable safe predictive judgments he will not repeat these mistakes in the foreseeable future. Considering all of the developed evidence of record, Applicant mitigates security concerns associated with both his abuse of illegal substances and his engagement in criminal behavior. Favorable conclusions warrant with respect to sub-paragraphs 1.a and 1.b of Guideline J.

Potentially serious and difficult to reconcile with the trust and reliability requirements for holding a security clearance are the timing and circumstances of Applicant's understated drug use in his answer to question 27 of his 2001 SF-86. Applicant claims uncertainty over the inclusive dates of use and cites to the question marks in the space reserved for the day as proof of his good faith uncertainty at the time of the actual dates of use. Inferences were drawn against him on his uncertainty claims.

By understating his use of cocaine by several years when answering question 27 of his SF-86, Applicant revealed an intention to narrow the appearance of his cocaine involvement to as short a time span compatible with his 1996 arrest for sales and distribution and accepted two year probation. By narrowing his use to just a year (1995 to 1996) while omitting other aspects of his charges and probation conditions and violation, he created a cleaner profile for himself and examining investigators, and in doing so, increased the time and expense of the Government to fully vet Applicant on his involvement with illegal substances. Applicant's understatements of time in cocaine use are in this respect quite material to a security clearance eligibility determination. His understatements were knowing, deliberate, and material to a determination about his clearance suitability. They invite application of Disqualifying Conditions (DC) for personal conduct of the Adjudicative Guidelines: DC 2 (falsification of a security questionnaire) and DC 3 (providing false information to an investigator).

Mitigation is difficult to credit Applicant with, since he failed to take advantage of any opportunities to correct his SF-86 understatements before meeting with the DSS agent in November 2002: over 19 months later. Not only has the Appeal Board found the use of Mitigating Condition (MC) 2 of the Adjudicative Guidelines for personal conduct (isolated, corrected falsification) to be unavailable to applicants seeking mitigation by treating the misstatement or omission as isolated, but it has denied applicants availability of MC 3 (prompt, good faith disclosure) as well in circumstances (as here) where the applicant has failed to take advantage of an earlier DSS interview opportunity to correct prior misstatements and omissions. *Compare* ISCR Case No. 97-0289 (January 1998) with DISCR Case No. 93-1390 (January 1995). Applicant, accordingly, may not take advantage of either MC 2 (isolated omissions) or MC 3 (prompt, good faith correction of the falsification) of the Adjudicative Guidelines for personal conduct.

There can be no doubt but that Applicant has inspired confidence and trust among his defense contractor supervisor and co-workers. But in the face of his concerted minimizing of his cocaine use, his favorable character evidence alone is not enough to mitigate security concerns extant with the Government over his failure to be truthful in answering his SF-86. Mitigation is further weakened by the qualifications expressed by most of his character witnesses: lack of awareness of Applicant's omissions of material information in his SF-86.

Considering all of the evidence produced in this record and the available guidelines in the Directive (inclusive of the

E.2.2 factors), unfavorable conclusions warrant with respect to sub-paragraph 1.a of Guideline E.

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 J (CRIMINAL CONDUCT): FOR APPLICANT

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR APPLICANT

GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT

Sub-para. 2.a: 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