

DATE: June 29, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-02052

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant who was court martialled for extended unauthorized absence on one occasion and administered non-judicial punishment upon testing positive for illegal drugs on another (which was followed by administrative separation under less than honorable conditions), raises security concerns about his judgment, reliability and trustworthiness required for Government access to classified information. While Applicant continues to make good progress in avoiding drug use since his 2002 arrest, more time is needed before safe predictive judgments can be made about any risks of recurrence. Clearance is denied.

STATEMENT OF THE CASE

On November 7, 2003, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant. The SOR 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, and recommended referral to an administrative judge for determination whether clearance should be granted or continued.

Applicant responded to the SOR on December 9, 2003, and elected to have his case decided on the basis of the written record. Applicant was furnished the File of Relevant Material (FORM) on January 16, 2004, and received it on February 11, 2004. Applicant did not respond to the FORM within the 30 days provided him. The case was assigned to me March 24, 2004.

SUMMARY OF PLEADINGS

Under Guideline J, Applicant is alleged to have (a) been charged with illegal drug use on or about March 2002 under the UCMJ and received non-judicial punishment of two hours per day of extra duty for 45 days, forfeiture of \$511.00 of pay, and subsequent administrative separation from the Marine Corps and (b) went on unauthorized absence status in or about October 1999 until approximately June 2001, after which he was court martialled under the UCMJ and received 45

days hard labor without confinement and reduced in grade to E-1. The same allegations are incorporated under Guideline E.

For his response to the SOR, Applicant admitted the allegations without any explanations or qualifications.

FINDINGS OF FACT

Applicant is a 26-year-old electronic machine helper 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 enlisted in the Marine Corps in February 1999. After completing his MOS course (In October 1999) he took leave and returned home. While at home on leave his father passed away. Feeling the need to take care of his father's affairs, he attempted to get emergency leave from his Marine unit. When his request was denied, he did not report as directed by his command and did not return to his unit until June 2001 (a period of over 18 months) when he turned himself in.

When Applicant finally returned to his Marine unit, court martial charges were preferred against him for absenting himself from his organization in October 1999 and not returning until June 2001. In September 2001. Applicant pled guilty to a lesser offense of unauthorized absence in violation of Article 86 of the UCMJ. The military judge hearing the case amended the specification to comport with Applicant's plea by lining through the words "in desertion" and further changing the initial date of absence to reflect "7 Nov. 1999 *vice* 10/31/99." Applicant, in turn, was sentenced to 45 days of hard labor without confinement, and to pay grade E-1.

After completing his unauthorized sentence, Applicant (in February 2002) was offered marijuana by a friend and shared some with him. The next day the same friend returned with crystal meth, which Applicant and the friend smoked together. A few weeks later this friend returned to Applicant's home with marijuana, which he again shared with Applicant.

After smoking marijuana with the friend on the second occasion, Applicant self-reported his marijuana use to his command and voluntarily submitted himself to a urinalysis. Because the initial test results proved negative, Applicant was asked to submit to a second test. The results of his second urinalysis registered positive. Based on these positive results, Applicant's command informed him of the command's intention to administer punishment under Article 15 of the UCMJ. The Article 15 was administered in April 2002: It comprised 45 days of hard labor, 45 days restricted to base and forfeiture of \$511.00 for two months. Applicant then was informed he was being considered for a discharge under less than honorable conditions. In May 2002, Applicant was administered his discharge under less than honorable conditions.

Since his Marine Corps discharge in May 2002, Applicant has worked for his defense contractor. There is nothing in the record to suggest his work performance has been anything but satisfactory. Applicant has received high praise from his program administrator at the local business college when he takes classes. His transcript records reflect high marks for his completed courses in information technology.

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

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 5 A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency.

Mitigating Conditions:

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

MC 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 burden of persuasion shifts to the applicant for the purpose of establishing his case.

CONCLUSIONS

Applicant has a history of misdemeanor arrests/charges (two in all) while he was in military service, for which, respectively, he was court martialed and received non-judicial punishment. The first involved unauthorized absence for over 17 months spanning October 1999 through June 2001. The second was more recent (in March 2002) and involved charged use of illegal drugs (marijuana and crystal meth).

Following his testing positive in a random urinalysis in March 2002, for which he received non-judicial punishment, Applicant was administratively separated under less than honorable conditions. Taken together, the two separate offenses which resulted in court martial and non-judicial punishment, respectively, have considerable security significance and are covered by two of the disqualifying conditions (DC) of the Adjudicative Guidelines for criminal conduct: DC 1 (allegations or admission of criminal conduct) and DC 2 (a single serious or multiple lesser offenses). Applicant's two separate incidents also qualify as indicators of poor judgment and untrustworthiness and, as such, are covered by the Adjudicative Guidelines for personal conduct as well: DC 5 (pattern of dishonesty or rule violations).

To his credit, Applicant assumed more responsibility since his Marine Corps discharge and to date has not returned to drugs. He has enjoyed much success and demonstrated maturity as well in his working relationships and academic pursuits and can count almost five years now of trouble-free behavior. On the strength of his demonstrated successes in his professional and personal pursuits, Applicant may partially invoke several mitigating conditions (MC) covered by the Adjudicative Guidelines for criminal conduct: MC 1 (behavior not recent) and MC 6 (there is clear evidence of rehabilitation). Applicant may take some benefit as well from MC 5 (serious positive steps taken to significantly reduce or eliminate vulnerability to coercion, exploitation or duress) of the Adjudicative Guidelines for personal conduct.

Due to the seriousness and relative recency of his military-covered offenses, more time is required of Applicant, however, to demonstrate restoration of his judgment, reliability and trustworthiness required for eligibility to hold a security clearance. While Applicant is to be encouraged in the progress he is making in his civilian career, it is still too soon to make safe predictive judgments about his rehabilitation. Unfavorable conclusions warrant with respect to the allegations covered by Guidelines J and E.

In reaching my decision, I have considered the evidence as a whole, including each of the factors and conditions enumerated in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR in the context of the FINDINGS OF FACT, CONCLUSIONS and the FACTORS and CONDITIONS listed above, this Administrative Judge makes the following separate FORMAL FINDINGS with respect to Appellant's eligibility for a security clearance.

GUIDELINE J (CRIMINAL CONDUCT): AGAINST APPLICANT

Sub-para. 1.a: AGAINST APPLICANT

Sub-para. 1.b: AGAINST 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