

DATE: December 3, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-02988

DECISION OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has used a number of illegal substances, including marijuana as recently as May 2003. Additionally, he has had a history of alcohol abuse that resulted in his entering an in-house alcohol treatment program, in which he was diagnosed as being alcohol dependent. Applicant consumed alcohol after leaving the program, and he continues to consume alcohol. Finally, Applicant's credibility is extremely suspect, as he has not been truthful or candid with information that he has furnished to the United States Government regarding his marijuana and cocaine usage, especially during the period when he had a security clearance. Mitigation has not been shown. Clearance is denied.

STATEMENT OF THE CASE

On August 4, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the 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 a clearance should be denied or revoked.

Applicant filed a notarized response, dated August 23, 2004, to the allegations set forth in the SOR, and requested a hearing before a DOHA Administrative Judge.

This case was assigned to this Administrative Judge on October 12, 2004, to conduct a hearing and issue a written decision. A Notice of Hearing was issued to the parties on October 19, 2004, and the hearing was conducted on November 4, 2004.

At the hearing, Department Counsel offered five documentary exhibits (Government's Exhibits 1-5) and no witnesses were called. Applicant, through his counsel, offered one documentary exhibit (Applicant's Exhibit A) and offered his

own testimony and that of four additional witnesses. The transcript (Tr) was received on November 17, 2004.

FINDINGS OF FACT

In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline H (Drug Involvement), Guideline G (Alcohol Consumption), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of the Directive. The SOR contains nine allegations, 1.a. through 1.i. under Guideline H, three allegations, 2.a., through 2.c., under Guideline G, three allegations, 3.a. through 3.c., under Guideline E, and one allegation, 4.a., under Guideline J. Applicant denied SOR allegations 1.a., 1.c., 3.a., 3.b., 3.c. and 4.a., and he admitted the other allegations. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the admitted documents, and testimony of Applicant and the other witnesses, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 50 years old. He is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector. He is a high school graduate. He is married and has two sons, ages 28 and 25.

Paragraph 1 (Guideline H - Drug Involvement)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has abused illegal substances.

Applicant used marijuana with varying frequency from 1973 to at least May 2003, when he claims to have stopped his usage. He also has purchased marijuana. He testified that he does not intend to use illegal substances in the future (TR at 92-93).

Applicant ingested and purchased cocaine during various times in 1982. He also used hashish, amphetamines, and psilocybin mushrooms during a period in the mid 1970s.

Applicant used both marijuana and cocaine during the period that he had a security clearance, from 1977 to 2003 (Exhibits 3 and 4).

Paragraph 2 (Guideline G - Alcohol Consumption).

The Government alleges in this paragraph that Applicant is ineligible for clearance because he abuses alcohol to excess.

Applicant has had a history of alcohol abuse. He consumed as many as 30 drinks at one time, and experienced such symptoms as blackouts, a frequent loss of memory, and loss of control (Exhibit 3). In 1996, as a result of his wife and him believing that he was abusing alcohol, he entered a 28 day in-house alcohol treatment program, in which he was diagnosed as being alcohol dependent, by a licensed clinical social worker. He was counseled to follow, " totally and complete abstinence from all mood and mind-altering chemicals, complete a structured aftercare program, attend and participate in at least two Alcoholics Anonymous (AA) meetings a week, and get and use a strong supportive male sponsor." (Exhibit 3).

Applicant followed this basic protocol for approximately five or six months, when he again consumed alcohol . He also began using marijuana again, despite the admonition against its use. He currently regularly consumes alcohol and has no association with AA or any other alcohol related program (TR at 95-96).

Paragraph 3 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he furnished untruthful information to the Government.

Applicant completed a signed, sworn Security Clearance Application (SCA) on August 21, 1989. Question #15 a. of the SCA asked, "Have you ever used any narcotic . . . except as prescribed by a licensed physician?" Applicant answered "No" to this question. He should have listed all of the illegal substance that he used, as discussed above in paragraph 1.

Question #15 b of the SCA asked, "Have you ever been involved in the illegal purchase, possession or sale . . . hallucinogen or Cannabis?" Applicant answered "No" to this question. He should have listed all of the illegal substance that he possessed, and the marijuana and cocaine that he purchased, as discussed above in paragraph 1.

Applicant completed a second signed, sworn SCA on August 3, 2000. Question #27 of the SCA asked if, in the previous seven years, Applicant had use illegal drugs, including marijuana, etc? Applicant answered "No" to this question. He should have listed marijuana, as he was using it during the seven year period, before he completed the SCA in August 2000 (Exhibits 1, 3, 4, and 5).

Question #28 of the SCA asked if Applicant EVER had used illegal drugs, while possessing a security clearance? Applicant answered "No" to this question. He had held a security clearance from November 1977 to the time he completed the SCA, and he should have listed his usage of marijuana and cocaine, both of which occurred during the period that he retained a security clearance (Exhibits 1, 3, 4, and 5).

Applicant only admitted to his drug usage after being confronted by a Defense Security Service agent conducting a background investigation. The agent had obtained medical records from the in-house facility that Applicant had attended, in which he had previously provided to a doctor information about his drug usage (TR at 98) (Exhibit 3).

Applicant clearly was not honest with the information that he furnished to the Government on two SCAs, approximately 11 years apart. Applicant knew that he had used illegal substances during the period of concern by the Government, and he knew that he had used illegal substances while holding a security clearance. I do not find his explanation, that he did not list his drug usage on either SCA because he did not believe he had a problem with drugs, credible or reasonable (Tr at 84-87, 97-98) .

Paragraph 4 (Guideline J - Criminal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in criminal conduct. Applicant's conduct involved furnishing information to the Government in the form of written, signed, and sworn completed questionnaires, which were less than complete and truthful, as alleged in the SOR as 3.a., 3.b., and 3.c. These misrepresentations are a violation of Federal Law, Title 18, United States Code Section 1001, a felony.

Mitigation

Applicant had four individuals testify for him, including his wife and co workers. They spoke quite highly of him. He also submitted three positive letters of reference (Exhibit A).

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents

its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case.

As set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence.

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in acts of drug usage, alcohol abuse and criminal conduct, and that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future."

The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance.

(Guideline H - Drug Involvement)

With respect to Guideline H, the Government has established its case. Applicant's improper and illegal drug abuse, including the use of marijuana and cocaine, is of concern, especially in light of his desire to have access to the nation's secrets. The fact that Applicant used illegal substances, while holding a security clearance, must also be considered adversely to Applicant. Applicant's overall conduct pertaining to his illegal substance abuse clearly falls within Drug Involvement DC (E2.A8.1.2.1.), any drug abuse, and DC (E2.A8.1.2.2.), illegal drug possession, including cultivation,

processing, manufacture, purchase, sale, or distribution.

Based on the fact that Applicant last used marijuana as recently as May 2003, I cannot conclude that Applicant's conduct comes within MC (E2.A8.1.3.1.), the drug involvement was not recent. MC (E2.A8.1.3.3.) could be argued to apply because of Applicant's stated intention not to continue using marijuana or cocaine in the future. However, based on his long usage of marijuana, as recently as May 2003, that he used illegal drugs for many years while holding a security clearance, and that he has not been candid in the information that he furnished to the Government regarding his drug usage, I find that it is far too soon, to accept his stated intention to abstain from drug use as reliable and to include it as a mitigating condition.

In this case, the Government has met its initial burden of proving by substantial evidence that Applicant used illegal drugs for many years under Guideline H. Applicant, has attempted to introduce evidence in rebuttal, explanation or mitigation. However, the mitigation is not sufficient to overcome the Government's case against him. Accordingly, Paragraph 2, Guideline H, is concluded for Applicant.

(Guideline G -Alcohol Consumption)

The Government has established, by substantial evidence, that Applicant engaged in habitual or binge consumption of alcohol to the point of impaired judgment, DC (E2.A7.1.2.5.). DC (E2.A7.1.2.4.) also applies because Applicant was diagnosed by a licensed clinical social worker as alcohol dependent. MC (E2.A7.1.3.2.), the problem occurred a number of years ago and there is no indication of a recent problem, could be argued to apply. However, since Applicant continues to consume alcohol, despite the very strong admonition against his ever consuming alcohol again by the treating medical facility, I cannot find that there is no current alcohol problem. Paragraph 2 is found against Applicant.

(Guideline E -Personal Conduct)

With respect to Guideline E, the evidence establishes that Applicant furnished to the Government less than complete, honest answers, regarding his marijuana and cocaine usage, in two SCAs, completed on August 21, 1989, and eleven years later, on August 3, 2000.

The Government relies heavily on the honesty and integrity of individuals seeking access to our nation's secrets. When such an individual intentionally falsifies material facts or fails to furnish relevant information to a Government investigator, it is extremely difficult to conclude that he nevertheless possesses the judgment, and honesty necessary for an individual given a clearance. In this case, there has been no reasonable explanation for Applicant's failure to inform the Government about his 1998 and 1999 alcohol related arrests. I conclude that Applicant knowingly and willingly failed to give complete, honest answers to the Government.

In reviewing the DCs under Guideline E, I conclude that DC (E2.A5.1.2.2.) applies because Applicant deliberately provided false and misleading information to the Government in two SCAs. No MC applies in this paragraph. Applicant's conduct, considered as a whole, including his drug usage, especially while holding a security clearance, and the misinformation that he provided to the Government, exhibits questionable judgement, unreliability, and a lack of candor. I resolve Paragraph 3, Guideline E, against Applicant

(Guideline J -Criminal Conduct)

The Government also established by substantial evidence that Applicant engaged in criminal conduct in 1989 and 2000, as he furnished information to the Government which was less than complete and truthful, which is a violation of Federal Law, Title 18, United States Code Section 1001.

DC (E2.A10.1.2.1.), allegations or admissions of criminal conduct, regardless of whether the person was formally charged, and DC (E2.A10.1.2.2), a single serious crime or multiple lesser offenses, apply in this case. Applicant has not mitigated this allegation. Paragraph 4 is found against the Applicant.

In this case, the Government has met its initial burden of proving by substantial evidence that Applicant has ingested illegal substances while holding a security clearance (Guideline H), used alcohol to excess (Guideline G), exhibited

poor judgement and untrustworthy behavior, (Guideline E), and that he has engaged in criminal conduct (Guideline J). Applicant, on the other hand, has not introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's case against him. Accordingly, the evidence supports a finding against Applicant.

FORMAL FINDINGS

Paragraph 1. Guideline H: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: Against Applicant Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: For Applicant

Subparagraph 1.h.: For Applicant

Subparagraph 1.i.: For Applicant

Paragraph 2. Guideline G: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Paragraph 3. Guideline E: AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

Subparagraph 3.b.: Against Applicant

Subparagraph 3.c.: Against Applicant

Paragraph 4. Guideline J: AGAINST APPLICANT

Subparagraph 4.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 a security clearance for Applicant.

Martin H. Mogul

Administrative Judge