

DATE: December 22, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-04931

DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant lied about the extent of his drug use on his security clearance application because he feared he would not be granted a security clearance if he told the truth. He intends to continue to use illegal drugs, and is thus disqualified under 10 U.S.C. § 986 (c)(2) from being granted a security clearance. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On October 2, 2003, under the applicable Executive Order ⁽¹⁾ and Department of Defense Directive, ⁽²⁾ DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision-security concerns raised under Guideline H (Drug Involvement), Guideline J (Criminal Conduct), Guideline E (Personal Conduct), and Guideline F (Financial Considerations) of the Directive. Applicant answered the SOR in writing on November 4, 2003, and requested his case be determined on the record in lieu of a hearing. The Government compiled its File of Relevant Material (FORM) on January 9, 2004. The FORM contained documents identified as Items 1 through 15. On January 12, 2004, a copy of the FORM was forwarded to Applicant, with instructions to submit any additional information and/or objections within 30 days of receipt. On February 26, 2004, Applicant filed a personal statement and two reference letters in response to the FORM. Department Counsel did not object to Applicant's submissions. They were identified as Exhibits A, B, and C and admitted to the record in this case. On March 5, 2004, the case was assigned to me for a decision.

FINDINGS OF FACT

The SOR contains 12 allegations of disqualifying conduct. Five allegations relate to conduct charged under Guideline H, Drug Involvement; four allegations relate to Guideline J, Criminal Conduct; two allegations relate to Guideline E, Personal Conduct; and one allegation relates to Guideline F, Financial Considerations. In his answer to the SOR, Applicant admitted all twelve allegations. His admissions are incorporated as findings of fact.

Applicant is a 26-year-old man who is employed by a federal contractor as a test technician. He has never been married. He has a six-year-old daughter who lives sometimes in his household.

Applicant and the child's mother do not have a formal custody arrangement for the care of the child. (Ex. 8, at 2.)

Applicant has a history of illegal drug use. He used marijuana about 200 times. In July 1997, he was cited for possession of marijuana and under-age possession of alcohol. He pled guilty to the alcohol charge and was ordered to complete a drug and alcohol awareness program. When he completed the drug and alcohol awareness program, the marijuana possession charge was expunged. In a signed sworn statement executed on June 19, 2002, Applicant stated he intended to continue to use marijuana in the future. (Item 5, at 4.)

Applicant has used Ecstasy four or five times. He says he will not use Ecstasy again because he has learned of the long-term effects the drug has on the human body.

Applicant also has a history of criminal conduct. In addition to his July 1997 citation for marijuana possession and under-age alcohol possession, Applicant was arrested in June 1997 for interfering with a police officer. The charges were dropped. In December 1996 he was charged with two counts of hit and run with property damage and one count of false report of a criminal offense. In July 1997, he was convicted of the false report of criminal offense count, placed on summary probation for three years, and required to perform 360 hours of community service.

Question 27 on the SF-86 reads as follows: "Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.) or prescription drugs?" In his response Applicant was instructed to list the duration and frequency of any illegal drug use. Applicant responded "yes" to Question 27 and then listed marijuana use three times between June 1996 and June 1997. He did not list his use of Ecstasy. Applicant admitted falsifying his response to Question 27. In a signed, sworn statement, dated June 19, 2002, to an agent of the Defense Security Service, he said he did not answer the question truthfully because he feared that if he told the truth he would not be granted a security clearance. (Ex. 5, at 4.)

Question 38 on the SF-86 reads as follows: "Your Financial Delinquencies - 180 Days. In the last 7 years, have you been over 180 days delinquent on any debt(s)?" Applicant answered 'no' to Question 38, thereby seeking to conceal he was over 180 days delinquent on three accounts placed for collection in 2000. The three accounts, owed to a hospital, totaled approximately \$3,980. In his signed, sworn statement, Applicant acknowledged the debts and stated he would pay them in the future if he had enough money. (Item 5, at 4.) In his answer to the SOR, Applicant again acknowledged the debt to the hospital and said he would make payment arrangements.

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.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. 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 that 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, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).*

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.

CONCLUSIONS

Guideline H, Drug Involvement

In the SOR, DOHA alleged under Guideline H that Applicant had used marijuana approximately 200 times (¶ 1.a.); that he used the illegal drug Ecstasy four or five times (¶ 1.b.); that he intended to continue his marijuana use (¶ 1.c.); that his continued use of marijuana disqualified him under the provisions of 10 U.S.C. § 986 (c)(2) from being granted a security clearance (¶ 1.d.); that he had been cited in July 1997 for possession of marijuana and under-age possession of alcohol, that he pled guilty to the under-age alcohol possession, that he had been ordered by the court to complete alcohol and drug awareness training, and that, after Applicant completed the required training, the marijuana possession charge was expunged. (¶ 1.e.).

The Government's concern with Guideline H conduct is that it raises questions regarding an individual's willingness to protect classified information. Drug abuse or dependence may impair social or occupational functioning, thereby increasing the risk of an unauthorized disclosure of classified information. ¶ E2.A8.1.1.1.

Drugs are defined under Guideline H as mood and behavior-altering substances, including drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended, and inhalants and other similar substances. ¶¶ E2.A8.1.1.2., E2.A8.1.1.2.1., E2.A8.1.1.2.2. Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction. ¶ E2.A8.1.1.3. Marijuana, or cannabis, is identified and listed in the Controlled Substances Act of 1970, as amended, as a controlled substance. A person who is a unlawful user of, or is addicted to, a controlled substance is disqualified from being granted a security clearance under 10 U.S.C. § 986 (c)(2).⁽³⁾

Through Applicant's own admissions, the Government established a *prima facie* case that he used illegal drugs in the past and intended to continue using them in the future. Applicant has admitted Guideline H drug involvement specified in the SOR and identified as disqualifying under ¶¶ E2.A8.1.2.1.

The record shows that Applicant's involvement with illegal drugs began in 1996 and 1997, when he was approximately 18 years old. He completed an alcohol and drug awareness program in 1997, but continued to use illegal drugs. In his signed, sworn statement in June 2002, he acknowledged he knew marijuana was a controlled substance, and he further asserted he would continue to use marijuana in the future, thus precluding a grant of a security clearance, pursuant to the provisions of 10 U.S.C. § 986 (c)(2). He further stated he last used Ecstasy approximately four to six months before June 2002. His drug involvement, thus, is recent and neither isolated nor aberrational. Accordingly, mitigating conditions E2.A8.1.3.1, E2.A8.1.3.2, A8.1.3.3, and E2.A8.1.3.4 do not apply, and the allegations in the SOR of disqualifying conduct under Guideline H are concluded against the Applicant.

Guideline J, Criminal Conduct

In the SOR, DOHA alleged Applicant was cited in July 1997 for possession of marijuana and under-age possession of alcohol (¶ 2.a.); he was arrested in June 1997 for interfering with a police officer (¶ 2.b.); and in July 1997 he was convicted of making a false report of a criminal offense, placed on summary probation for three years and required to

perform 360 hours of community service. (¶ 2.c.). In June 2001, Applicant deliberately falsified material facts on his security clearance application (SF-86) when he lied about his drug use and financial obligations. When he completed his SF-86, Applicant signed his name below the following statement:

CERTIFICATION BY PERSON COMPLETING FORM

My statement on this form, and any attachments to it, are true, complete and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both (See section 1001 of title 18, United States Code).

Under section 1001 of title 18 of the United States Code, it is a felony crime to make a knowing and willful false statement on the SF-86. Applicant admitted making a knowing and willful false statement in his response to Question 27 on his SF-86.

The security concern under Guideline J is that an individual's history or pattern of criminal activity raises doubts about his judgment, reliability and trustworthiness. A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. Where the facts proven by the Government or admitted by the applicant raise doubts about the applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nevertheless security worthy.

Applicant's criminal behavior related to his citation for marijuana possession and under-age alcohol possession occurred in July 1997, over seven years ago. His arrest for interfering with an officer also occurred over seven years ago, in June 1997. His conviction on one count of false report of a criminal offense occurred in July 1997. While these criminal acts were not recent, they were not isolated events but rather a pattern of criminal conduct. Thus, while ¶ E2.A10.1.3.1. of Guideline J applies in mitigation to these acts, ¶ E2.A10.1.3.2 of the Guideline does not.

Applicant's knowing and willful false statement in June 2001 on his security clearance application constitutes disqualifying conduct under ¶ E2.A10.1.2.2. of Guideline J. None of the Guideline J mitigating factors apply, and the Guideline J allegations in the SOR are concluded against the Applicant.

Guideline E, Personal Conduct

In the SOR, DOHA alleged Applicant raised concerns under Guideline E, Personal Conduct, when he admitted illegal drug use in response to Question 27 on his SF-86, but listed only three instances of marijuana use between June 1996 and June 1997, when in fact he knew he had used marijuana over 200 times in that time period . (¶ 3.a.) DOHA also alleged Applicant falsified material facts on his security clearance application when he answered "no" to Question 38, thus denying that in the past seven years he had been over 180 days delinquent on any debts, when in fact he knew he was indebted to a hospital for three delinquent accounts totaling approximately \$3,980. (¶ 3.b.) Guideline E conduct, which involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, could indicate that an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

With respect to the Guideline E conduct alleged in SOR , the Government has established its case. Applicant's failure to answer questions 27 and 38 completely, truthfully, and correctly raises a security concern under ¶ E2.A8.1.2.2. of Guideline E. In his signed, sworn statement, Applicant stated that he knew his answers to Questions 27 and 38 were not complete and correct and he had lied. He further stated he did not answer Question 27 truthfully because he feared he would not be granted a security clearance if he told the truth. His concealment of information he considered embarrassing could make him vulnerable to coercion and blackmail. ¶ E2.A5.1.2.4. His conduct raises additional concerns under ¶ E2.A5.1.2.5 because it suggests a pattern of dishonesty or rule violation. Applicant's reticence to reveal the truth about his conduct suggests that, under some circumstances, he may put his interests before those of the Government. It is well established that embarrassment is not a mitigating condition under the Directive. ISCR Case No. 99-0557 at 3 (App. Bd. Jul.10, 2000).

Mitigating condition E2.A5.1.3.1 does not apply to the facts of this case: the information Applicant withheld is pertinent to a determination of his judgment, trustworthiness, and reliability. Only one other mitigating condition under Guideline

E might be applicable to the instant case. The security concern raised by Applicant's disqualifying conduct could be mitigated if the falsification was an isolated incident, was not recent, and if the Applicant subsequently provided the correct information voluntarily. ¶ E2.A5.1.3.2. While Applicant supplied the correct information when questioned by a special agent of the Defense Investigative Service one year after he completed his SF-86, the falsifications were not isolated incidents and they are recent. Accordingly, allegations in subparagraphs 3.a. and 3.b. of the SOR are concluded against the Applicant.

Guideline F-Financial Considerations

The Government's concern under Guideline F, Financial Considerations, is that individuals who are financially overextended and unable or unwilling to pay their just debts may try to generate funds by engaging in illegal acts. Applicant has a history of not meeting his financial obligations, and this financial history suggests an inability or unwillingness to satisfy his debts, conditions which raise security concerns under subparagraphs E2.A6.1.2.1. and E2.A6.1.2.3. of Guideline F. DOHA's Appeal Board has concluded that "[a] person who is unwilling to fulfill his legal obligations does not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information." ISCR Case No. 98-0810 at 4 (App. Bd. June 8, 2000).

In the SOR, DOHA alleged Applicant had failed to pay or settle three delinquent accounts, totaling approximately \$3,980, which had been placed for collection in 2000. (¶ 4.a.) An applicant who is financially overextended is at risk of having to engage in illegal acts to generate funds. Directive ¶ E2.A6.1.1. The Government has established, through the FORM and Applicant's admissions, a *prima facie* case that Applicant is financially overextended. Applicant provided no persuasive evidence to rebut the financial concerns specified in the SOR and identified as disqualifying conditions under ¶¶ E2.A6.1.2.1. and E2.A6.1.2.3. of Guideline F.

We turn to a review of the several conditions that could mitigate the security concerns raised by Applicant's financial delinquencies. Applicant's acknowledged delinquencies involve long-standing debts which continue to be unsatisfied to this day. Thus, neither mitigating condition E2.A.6.1.3.1. nor mitigating condition E2.A6.1.3.2. applies. The record also shows that Applicant's financial difficulties were not the result of circumstances beyond his control, and thus, mitigating condition E2.A6.1.3.3. does not apply.

Applicant has not sought counseling for his financial problems, and he submits no persuasive evidence that he has developed and implemented a practical plan for resolving his indebtedness. Thus, neither mitigating condition E2.A6.1.3.4. nor E2.A6.1.3.6. applies to the facts of Applicant's case. Accordingly, the allegations of debt in subparagraph 4.a. of the SOR are concluded against the Applicant.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline H.: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e.: Against Applicant

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: Against Applicant

Paragraph 3. Guideline E.: AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

Subparagraph 3.b.: Against Applicant

Paragraph 1. Guideline F: AGAINST APPLICANT

Subparagraph 4.a.: Against Applicant

DECISION

In light of all of 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. Clearance is denied.

Joan Caton Anthony

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. This section was added by section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 and precludes granting or renewing a security clearance to a person who is an unlawful user of or addicted to a controlled substance.