

DATE: February 8, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-04976

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

While Applicant mitigated concerns over his past drug use and alleged security violations, security concerns persist over his personal conduct as he knowingly and willfully omitted adverse information about his past drug use from his security form and misrepresented information to two investigative agents. Applicant failed to meet his duty to disclose this illegal drug use while he had a security clearance. While he has a fine employment record, such excellence on the job does not erase the security significance of his omission for the security form repeated false statements. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on December 8, 2003. The SOR detailed reasons why the Government could not make the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. ⁽¹⁾ The SOR alleges specific concerns over drug use (Guideline H), security violations (Guideline K), and personal conduct (Guideline E). Applicant responded to these SOR allegations in an Answer notarized on January 9, 2004, where he admitted all of the allegations in paragraph 1. He denied the allegations in paragraph 2. He admitted the allegations in 3.a. and 3.b. and denied the allegation in 3.c. He requested a hearing. (Answer)

The case was assigned to Department Counsel who on June 7, 2004, attested it was ready to proceed; on June 8, 2004, the case was assigned to me. Subsequently, a mutually convenient date for hearing was agreed to; and a Notice of Hearing was issued on June 24, 2004, which set the matter for July 13, 2004, at a location near where Applicant works and lives. At the hearing the Government offered four exhibits (Exhibits 1-4); all were admitted into evidence. The Applicant represented himself; he testified and called three additional witnesses. The transcript (TR) was received on August 3, 2004.

FINDINGS OF FACT

After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following Findings of Fact:

Applicant, 41 years old, has worked for Defense Contractor #1 in State #1 since September 2000. In September 2000 Applicant completed a Security Clearance Application (SF 86) as he needs a security clearance to perform his job. From 1987 to 1997 he had worked for this same federal contractor until he was terminated when he needed to care for his mother who was ill and failed to call in for three days. In September 2000, he was asked to return to work. His SF 86 documents he was initially granted a Secret security clearance in September 1991; however, he remembered having a security clearance from 1987-1997. In the interim from 1997 to 2000 he worked for another company; he still works there on a part-time basis. (Exhibits 1, 2; TR 20-21) Since being rehired, he has worked in a secured area for four years. (TR 26)

Applicant attended a state university in State #1 from 1985 to 1986. He has a child born in October 1990 prior to his marriage in 1991 and was divorced in 1993. He remarried in May 1999 and divorced in December 1999. He has had custody of his son since 1996; he was granted legal custody of his son in September 1997 and again in 1999. (Exhibits 1, 2; TR 21-22) He resided with a girlfriend from July 1997 to August 2002; he had known her since grade school. (Exhibit 3) His son is now 13. (TR 21)

Drug Use and Personal Conduct

Applicant initially completed a security form (SF 86) in September 2000. However, in the SF 86 in response Question 28 about his past use of illegal drugs in a sensitive position, Applicant failed to disclose that he had used cocaine while holding a security clearance between 1988 to 1991. He certified in September 2000 that his statements on the SF 86 were "true, complete, and correct." Also he certified that he understood 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.)."(Exhibit 1) After he was re-hired in 2000, he feared answering question 28 honestly as he thought it would jeopardize his employment. (TR 25-26)

Similarly when he was interviewed by a Defense Security Service (DSS) agent in January 2002, he again failed to reveal voluntarily his past drug use. In September 2002 Applicant admits he made false statements to the DSS agency concerning his prior illegal drug use when he said he had "never used any type of drugs, to include marijuana, in my life." (Answer; Exhibits 1, 2, 3; TR 15; 25)

In December 2002 during the polygraph Applicant initially again denied his past drug use. (TR 33-34) He then admitted to DSS that while he was in high school and college from 1981 to 1984 he used marijuana 15 times. While he had no drug use from 1984 to 1988, from 1988 to 1991, he used cocaine with his spouse and friends three to four times per month. He would purchase cocaine and occasionally re-sell small amounts to friends. When in 1991 he left his wife, he left that lifestyle, so he could care for himself and his son. He gained custody of his son in 1996 and legal custody in 1997. He has not used any illegal drugs since 1991 and has not intention of using any in the future. He admitted that some of his illegal drug use was during a period (1988 to 1991) when he held a security clearance. His defense for the falsification was that he was trying to keep "all of the negative issues" of his past in the past. (Exhibit 4; TR 15, 18; 22-25) He has never attended any drug or alcohol program. (TR 25) He no longer is involved with drugs; as he has custody of his son and is trying to build a good life for him. (TR 18)

Security Violation

Applicant volunteered to take a polygraph to establish that he had not revealed classified information. (TR 30-32; 32-33) At the December 2002 interview DSS questioned him about his having discussed classified or sensitive information with an individual who did not have a need to know. He admitted that in July 2001 he had a "social discussion" with the father of his "live-in girlfriend" regarding her father's past work duties at the same work site; Applicant shared with him some details of the launch characteristics of a missile as it exits the launcher. He has otherwise never discussed or provided classified information to any unauthorized person. He has never had a security violation during his twelve years holding a security clearance. (Exhibit 4 at 2) Applicant denies he discussed any classified information with his girlfriend's father. He stated, "it was just small talk," and "nothing that was classified at all." (TR 16-17; 34-35)

Applicant is proud of his position. He periodically receives security briefings and he is very aware of what to discuss and what not to discuss. While he discussed one classified system with his girlfriend's father, he did not reveal any of the data that was classified. (TR 28-29)

Applicant's supervisor testified that the launch characteristics of a particular missile as an input for launch would not be classified as that information is in the publicity photographs displayed at the range. Also, tourists in the area would see those characteristics if they were in the area, so that information is not classified. (TR 44-45)

Reference

Applicant's second-level supervisor testified favorably about Applicant's job performance and his acceptability as a security risk. The supervisor explained that Applicant was rehired as he had changed his work ethics after the death of his mother and they needed skilled personnel. He stated that Applicant has demonstrated reliability and trustworthiness since he returned to work for the company in 2000. The supervisor manages 76 individuals and Applicant is in the top 25%. His earlier termination was due to his inability to show up in a timely manner on a variable tour. Applicant never violated security either in his first assignment or in the current assignment with the company. Applicant has always been truthful with his supervisor and even revealed his interviews with the DSS which he did not have to reveal. The company has an informal rating system which combines peer evaluations and supervisory evaluation which relates to how bonus money is distributed. He has received a bonus every year that he's been employed in the upper one-third of the amount distributed. Also the government customer has been impressed with Applicant's work performance. (TR 37-44)

Applicant's supervisor testified that she has known Applicant for two years and that he has never demonstrated negligent behavior. She has been impressed with his work. She has never observed Applicant improperly disclose classified information. She supervises twelve people and Applicant is in the top three as far as work performance, work ethic, and responsibility. Applicant has always been truthful with his supervisor. (TR 48-52)

A co-worker testified that Applicant is very competent at the workplace and is very knowing and very capable under fire. In a "crunch-type situation" where lots of things are breaking, Applicant keeps a "cool head." When she first began working in 2000, she heard Applicant talking about "how high the actual shot went" and she believed that those facts were something he should not have been discussing. She prepared a statement as part of a security inspection where she raised a concern over his having revealed both time and elevation; however, all the conversations took place in a cleared area. She later realized that she was in error about these concerns, so when she heard Applicant talking about his security clearance hearing, she offered to testify on his behalf. (TR 53-63)

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. But the mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole, I weighed relevant Adjudication Guidelines as set forth below:

Guideline H - Drug Involvement

E2.A8.1.1. *The Concern:*

E2.A8.1.1.1 Improper or illegal involvement with drugs, raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.

E2.A8.1.1.2 Drugs are defined as mood and behavior altering:

E2.A8.1.1.2.1 Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens) and

E2.A8.1.1.2.2 Inhalants and other similar substances.

E2.A8.1.1.3. Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

Guideline K - Security Violations

E2A11.1.1. *The Concern: Noncompliance with security regulations raises doubt about an individual's trustworthiness, willingness, and ability to safeguard classified information.*

Guideline E - Personal Conduct

E2.A5.1.1. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue Applicant's access to classified information. The Applicant presents evidence to refute, explain, extenuate, or mitigate in order to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance.

Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

CONCLUSIONS

Drug Use

The Government established security concerns⁽²⁾ over Applicant's intermittent marijuana use from 1988 to 1984 and his cocaine use three to four times per months from 1988 to 1991 and intermittent purchase of cocaine. The SF 86 documents he was granted a security clearance in September 1991; he testified that he remembered having a security clearance from 1987 to 1997 which would indicated he used cocaine while he had a security clearance. For Applicant to use drugs knowing that it was against his company's and the government's policies, raises questions about his judgment overall.

To rebut and overcome the Government's case, Applicant has to demonstrate that he has mitigated⁽³⁾ these concerns. Subsequently, Applicant made a convincing commitment to avoid all future drug use and has not used any marijuana since 1984, a period of over twenty years, and has not used cocaine since 1991, a period of almost fifteen years. Given his record of excellence at work, he has mitigated his past drug use as his drug involvement was not recent and he has demonstrated his intent not to abuse any drugs in the future by his abstinence for almost fifteen years. Thus, after considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraphs 1.a. through 1.c of SOR Paragraph 1.

Security Violations

Applicant persuasively rebutted disqualifying security concerns⁽⁴⁾ over security violations. The Government provided no evidence to support the allegation that the Applicant disclosed classified information to his former girlfriend's father in violation of paragraphs 5-500 and 5-111 of the NISPOM other than an isolated admission by Applicant to DSS in December 2002. There he admitted he discussed some details of the launch characteristics of a missile as it exits a launcher. Applicant later characterized this discussion as "just small talk" and insisted that nothing he disclosed was classified. Although the system was classified, Applicant did not reveal any data that was classified.

His supervisor confirmed that such data was not classified. The government offered no evidence to rebut that evidence.

Thus I conclude Applicant has met the mitigating⁽⁵⁾ conditions as even if the government had clearly established that he discussed classified information in this isolated instance, he has mitigated these concerns under MC E2.A11.1.3.1., as any discussion was inadvertent; under E2.A11.1.3.2., as this is an isolated example in a career that is otherwise unblemished on security matters according to both Applicant and his supervisor. Finally, under E2A11.1.3.4., overall Applicant has demonstrated a positive attitude towards the discharge of security responsibilities as confirmed by his supervisors and his co-worker. Thus, after considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraphs 2.a. SOR Paragraph 2.

Personal Conduct

On the other hand the Government clearly established security concerns over Applicant's personal conduct. Applicant had three opportunities to disclose his past and dated drug use but failed to do so: first on the security form in answering questions 28, he failed to disclose his drug issues. Second, in the initial DSS interview he failed to disclose this adverse information and misled the government about his drug use when he was interviewed by the DSS agent in September 2002 in his signed, sworn statement. Third, in the final DSS interview in December 2002, he initially denied any drug use at the start of the interview. Applicant's behavior⁽⁶⁾ reflects questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations and could indicate that he may not properly safeguard classified information.

To rebut and overcome the Government's case, Applicant would have to demonstrate that he has mitigated⁽⁷⁾ this conduct. His defense for the falsification was that he was trying to keep "all of the negative issues" of his past in the past. Unfortunately, while understandable, this is not a basis to mitigate this concern. In addition, his current good work record and favorable references have to be measured against his knowing and willful failure to disclose required information on his drug use both on a government form and to two government officials. He had a duty to disclose fully his past convictions and to disclose all his drug use.

Consequently, after a review of him as a whole person, I conclude that Applicant falsified material facts by his "No" answers on the security clearance form to the question on his past drug use and he also withheld this information from two DSS agents. He failed to give truthful answers to questions that were both relevant and material to his security eligibility. Applicant's favorable work record and supportive character references are impressive, but do not fit within the mitigating criteria under Personal Conduct. Thus, his excellence at work cannot erase these serious security concerns over his misleading conduct in the security clearance process over his past drug use.

On the other hand, I accept his statement that he did not reveal classified information as discussed above; and thus, I find the government did not establish that he falsified on this issue in the September 20002 DSS interview. Hence, after considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraph 3.c., but against Applicant on subparagraphs 3.a. and 3.b. under SOR Paragraph 3

FORMAL FINDINGS

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1. Guideline H: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Paragraph 2. Guideline K FOR APPLICANT

Subparagraph 2.a.: For Applicant

Paragraph 3. Guideline E: AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

Subparagraph 3.b.: Against Applicant

Subparagraph 3.c.: For 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 the Applicant.

Kathryn Moen Braeman

Administrative Judge

1. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), as amended by Change 4, April 20, 1999.
2. **Conditions that could raise a security concern and may be disqualifying include:** E2.A8.1.2.1. Any drug abuse.; E2.A8.1.2.1.2. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.
3. **Conditions that could mitigate security concerns include:** E2.A8.1.3.1. The drug involvement was not recent; E2.A8.1.3.3. A demonstrated intent not to abuse any drugs in the future.
4. **Conditions that could raise a security concern and may be disqualifying include:** E2.A11.1.2.1. Unauthorized disclosure of classified information; E2.A11.1.2. 2. Violations that are deliberate or multiple or due to negligence.
 5. **Conditions that could mitigate security concerns include actions that:** E2.A11.1.3.1. Were inadvertent; E2.A11.1.3.2. Were isolated or infrequent; E2.A11.1.3.3. Were due to improper or inadequate training; E2.A11.1.3.4. Demonstrate a positive attitude towards the discharge of security responsibilities.
 6. **Conditions that could raise a security concern and may be disqualifying also include:** E2.A5.1.2.2. The deliberate omission, concealment, or falsification 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; E2.A5.1.2.3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trust-worthiness determination.
7. **Conditions that could mitigate security concerns include:** E2.A5.1.3.1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability; E2.A5.1.3.2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily; E2.A5.1.3.3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts; E2.A5.1.3.4. Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided; E2.A5.1.3.5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress; E2.A5.1.3.6. A refusal to cooperate was based on advice from legal counsel or other officials that the individual was not required to comply with security processing requirements and, upon being made aware of the requirement, fully and truthfully provided the requested information; E2.A5.1.3.7. Association with persons involved in criminal activities has ceased.