

DATE: April 14, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-05344

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Nygina T.Mills, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This 42-year-old owner of a computer consultant firm has a history and pattern of alcohol and drug abuse beginning more than 20 years ago and ending only in the early 2000s. He also falsified material fact about his substance abuse and treatment in a 2002 security clearance application and in a sworn statement to a Defense Security Service (DSS) agent. The numerous recommendations submitted by his colleagues is helpful but does not mitigate his history of misconduct and denial. Mitigation has not been adequately established. Clearance is denied.

STATEMENT OF THE CASE

On September 25, 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, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding required under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether a clearance should be granted, denied or revoked.

On October 16, 2003, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made by a DOHA Administrative Judge on the written record, i.e., without a hearing. Department Counsel issued a File of Relevant Material (FORM) on January 30, 2004. The Form instructed Applicant that any response to the FORM had to be submitted within 30 days of its receipt by Applicant. Any response was due by January 28, 2004, but no submission to the FORM was received as of that date. However, a response was later received by Department Counsel, dated February 24, 2004. The late response was not objected to by Department Counsel and will therefore be considered by me in making my decision. The matter was assigned to me for resolution on March 22, 2004.

FINDINGS OF FACT

Applicant is a 42-year-old owner of a computer software consulting firm (Response to FORM). The September 25, 2003

SOR contains seven allegations under Guideline H (Drugs), two allegations under Guideline G (Alcohol Consumption), and three allegations under Guideline E (Personal Conduct). In his October 15, 2003 response to the SOR, Applicant *admits* the factual basis of all of the drug-related allegations, SOR 1.a. - 1.g. both of the alcohol-related allegations, 2.a. and 2.b., and all three falsification-related allegations, 3.a.- 3.c. Applicant adds considerable explanations and arguments to his answers. The admitted allegations are accepted and incorporated herein as Findings of Fact.

After considering the totality of the evidence derived from the FORM and its attachments, including Applicant's responses to the SOR and FORM, I make the following additional FINDINGS OF FACT as to the status, past and present, of each SOR allegation:

Guideline H (Drugs)

Applicant:

- 1.a. - used marijuana, with varying frequency, from his late teens (early 1980s) to at least 1993;
- 1.b. - used cocaine while in his early 30s in, approximately, the early 1990s;
- 1.c. - resumed his use of cocaine, with varying frequency, from early 1999 to at least October 2000;
- 1.d. - abused the prescription drug Percocet from at least 1996 to 2000;
- 1.e. - abused the prescription drug Vicodin from at least 1996 to 2000;
- 1.f. - abused the prescription drug Oxycontin in 2000;

The medications cited in SOR 1.d., 1.e., and 1.f., were legally prescribed by a physician because of Applicant's herniated disk and related pain. However, Applicant's use exceeded the prescribed amounts.

1.g. - was admitted to a hospital emergency room on October 24, 2000, for alcohol, cocaine, and pain medication abuse. He had suffered an adverse reaction to the combination of substances he had taken that day. He received treatment from about October 24, 2000 to November 10, 2000 at a hospital recovery center for a problem diagnosed, in part, as Polysubstance Abuse involving cocaine, alcohol, and narcotics.

Guideline G (Alcohol)

- 2.a. - Applicant consumed alcohol, at times to excess, from mid to late adulthood. He abused alcohol in conjunction with prescription pain killers and cocaine, as set forth in SOR 1.c., 1.d., 1.e., and 1.f., above.
- 2.b. - the information set forth in allegation 1.g., above.

Guideline E (Personal Conduct)

Applicant knowingly falsified material facts on his security clearance application (SF 96) of November 26, 2002, as to Question:

- 3.a. - **30. Your Use of Alcohol** - treatment in the in the last seven years, when he answered "No" and deliberately failed to cite his treatment for alcohol abuse, as cited in SOR 1.g., above.
- 3.b. - **27. You Use of Illegal Drugs and Drug Activity - Illegal Use of Drugs** - since age 16 or in the last seven years, when he answered "Yes," and listed a one time use of cocaine in October 2000, when he deliberately failed to mention his use of cocaine prior to October 2000.

Applicant knowingly omitted material facts during his:

- 3.c. - signed sworn statement of December 18, 2002 to an agent of the Defense Security Service (DSS) when he stated

that his use of illegal drugs and misuse of prescription drugs included a one-time use of cocaine in October 2000 and use of marijuana from age 17 - 19, whereas in truth he deliberately omitted information about his history of cocaine use, marijuana use, and abuse of prescription medications other than Oxycontin.

Applicant was involved in drug and alcohol abuse when he attended college and obtained a B.S. in Computer Science in his late 20s. He continued his substance abuse while working for someone else, since starting his own company 13 years ago, and since obtaining a DoD security clearance in the later 1980s. Although he was aware of the extent of his alcohol and drug abuse, he did not consider himself to be an addict, because, as he sees it, his abuse did not affect his ability to function. He realized the seriousness of the problem only in October 2000, when he was being treated in an emergency room, as cited in SOR 1.g. A social worker told him about the hospital's Polysubstance Abuse program.

Since completion of the program in late 2000, he has attended Narcotics Anonymous (NA), is working on NA's Twelve-Step program, has a sponsor, and attends meeting regularly. Regular physical therapy for his back problem has taught him to manage without prescription pain medication. Applicant has successfully completed a drug and alcohol abuse program, and has not used alcohol or drugs since October 2000. He states an intent not to use drugs or to consume alcohol in the future.

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases:

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowing participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the voluntariness of participation;
- (6) the presence or absence of rehabilitation and other pertinent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence (Directive, E.2.2.1., on page 16 of Enclosure 2).

I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Because each security case presents its own facts and circumstances, it should not be assumed that the factors cited above exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable financial judgment and conduct. Because Applicant chose to have this matter decided without a hearing and without submitting any additional information in response to the FORM, all credibility determinations and findings of fact are necessarily based entirely on the contents of the FORM and applicant's response.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination based on the "whole person" concept required by the Directive, the Administrative Judge is not permitted to speculate, but can only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of

witnesses, here based solely on the written record.

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted on to safeguard classified information and material twenty-four hours a day.

The Government is therefore appropriately concerned where available information indicates that an applicant for a security clearance, in his or her private life or connected to work, may be involved in conduct that demonstrates poor judgment, untrustworthiness, or unreliability. These concerns include consideration of the potential, as well as the actual, risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either by the Applicant's admissions or by other evidence) and proves conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the Applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the Applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended, at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

CONCLUSIONS

Since this matter is being decided without a hearing, my evaluation is necessarily limited to the contents of the various documents that are found in the case file, the latest of which is Applicant's response to the FORM.

Applicant is a man of 42, born in 1961. He first received a DoD Secret-level security clearance in 1989, at age 28 (Item 4 at 31). The Government's concerns about Applicant fall into three areas: (1) drug abuse), (2) alcohol abuse, and (3) personal misconduct, specifically falsifications on his November 2002 SF 86 *and* in a December 2002 sworn statement to a DSS agent about the nature and extent of his substance abuse.

I have carefully considered Applicant's submissions. In a letter, dated October 14, 2003,

from the hospital-related treatment program cited above, the Certified Drug Abuse Counselor who worked with Applicant in 2000, states his understanding that Applicant has remained abstinent from alcohol since 2000, has remained active in his aftercare, and has returned to speak at subsequent programs as a successful graduate (Item 2 at page 11). His wife, father, and brother speak of the stress he was under when he started the company and view him now as a man who has learned to live with stress and to take control of his life, including abstinence from drugs and alcohol (*Id.*, at pages 12, 13, 14).

In one of Applicant's written submissions (Item 2 at page 19), a fellow attendee at Narcotics Anonymous meetings states that Applicant recently told him "that he was less than truthful on his [security clearance] application." Another fellow NA attendee states that Applicant told him "that he had not been forthcoming regarding the extent of his drug use prior to entering the rooms of NA," but has "recognized his errant mistake and has corrected the untruthful information" (*Id.*, at page 21). His professional colleagues and friends speak highly of his dedication and integrity (*Id.*, at pages 15 - 23). I have given consideration and significant weight to the impressive praise and recommendations from Applicant's many supporters.

However, looking at Applicant under the Directive's whole person concept, I find the following direct and objective evidence to remain of the greatest security concern.

- Applicant was an extensive user and abuser of marijuana from about 1980 (his late teens) to 1993 and cocaine in

the early 1990s (his early 30s) and again from early 1999 to October 2000.

- Applicant abused three different prescription pain killer drugs at various times between 1996 and October 2000.
- Applicant abused alcohol for a period of approximately 10 years or more ("mid to late adulthood"), often in conjunction with his use of prescription pain killer drugs (Item 5 at 2) and ending in 2000.
- Applicant was treated after August 2000 for both polysubstance abuse (alcohol, cocaine, and pain killer medications)(Item 2 at page 3) and anxiety/depression (Item 6 at page 1).
- Applicant deliberately falsified material information on his November 26, 2000 SF 86 *and* in his sworn statement to DSS in December 2002.
- Applicant's medical records show a discharge diagnosis (11/10/2000) of Axis I - Major Depression, Polysubstance Dependence, Axis III - Tendon Pull, and Axis IV - Moderate Stressors, work and marital stress. The Condition and Prognosis at Discharge currently "stable" with a "prognosis [that] is good contingent upon the patient's following through on his stated aftercare plan, i.e., 12-step attendance and out-patient individual therapy with Dr. [A]" (Item 7 at page 24). Later medical records) pertain to a "Lumbar Epidural Steroid Administration"(May 2001) on Applicant's spine; a second such procedure, after which Imetrex, Prozac, and a third drug were prescribed (June 2002) (Item 7 at page 61); a second such procedure on September 13, 2002, after which Imitrex and a second drug were prescribed (Id., at page 65) and a third such procedure on October 7, 2002 (Id., at page 67). The prescription painkillers he used included Percocet, Vicodin, and Oxycontin (Item 2 at pages 2, 3).

This case contains an unusual number of factors of security concern. This 42-year-old Applicant has come a long way in his personal and professional life, including owning his own company for about 13 years and has held a DoD Secret security clearance since March 1989 (GX 4 at page 31). At the same time, he has demonstrated a continuing pattern of bad judgment, unreliability, and untrustworthiness over a variety of problems areas.

Under *Guideline H*, the overall record shows that Applicant used illegal drugs during the period when he requested and received a DoD security clearance. In addition, Applicant abused prescribed drugs (all painkillers) during the same period. I have carefully considered Applicant's explanations for why he did not consider himself to be an alcoholic or drug abuser (Item 2 at pages 3, 4). He claims he was simply unable to believe he has such problems. Such denials are generally indicative of a state of denial and are not uncommon in DOHA adjudications. Also suspect are claims of enlightenment that suddenly make the individual a new person who can be relied upon to make a definitive break from old patterns of negative behavior. All such claims/evidence must be considered in the context of the total evidence and a conclusion as to Applicant's credibility.

Considering the evidence as a whole, I find the following specific adjudicative guidelines to be most pertinent to this case:

Under *Guideline H (Drugs)*, the Conditions that could raise a security concern and may be disqualifying include: 1. Any drug abuse; and 2. Illegal drug possession. Conditions that could mitigate security concerns include: 1. The drug involvement was not recent, since the last use was in late 2000; 3. A demonstrated intent not to abuse any drugs in the future; and 4. Satisfactory completion of a drug treatment program prescribed by a credentialed medical professional. I find however that the mitigating effect of the three cited conditions is lessened by the time span over which Applicant was a substance abuser.

Under *Guideline G (Alcohol)*, Disqualifying Condition 4. Habitual or binge consumption of alcohol to the point of impaired judgment is applicable. Mitigating Condition 3. Positive changes in behavior supportive of sobriety, is applicable but, as with Guideline H, its effect is lessened by the time span over which Applicant was a substance abuser . . .

Under *Guideline E (Personal Conduct)*, Disqualifying Conditions 2 (The deliberate omission, concealment or falsification of material facts from any personnel security questionnaire (SF 86)) is clearly applicable as is DC 3 (Deliberately providing false or misleading information concerning relevant and material matters to an investigator . . . in connection with a personal security or trustworthiness determination) and DC 5 (A pattern or history of dishonesty or rule violations). Based on all of the available evidence, I conclude that the falsifications are both highly serious and current. At the same time, Applicant has not overcome the negative impact of the evidence by any sufficient evidence of mitigation.

Overall, along with what I conclude were long term denials of his substance abuse problem, Applicant has continued a pattern of denial as to his responsibility for the falsifications alleged and established under SOR 3.a., 3.b., and 3.c. Considering his age, maturity, education, and business and security clearance experience, his explanations for (1) his omission of any mention of the 2000 alcohol-related treatment program from his answer to Question 30 on his November 2002 SF 86 (SOR 3.a.); his failure to include his cocaine use in his answer to Question 27 (SOR 3.b.); and his failure to mention his cocaine and marijuana use, and his abuse of prescribed medications other than Oxycontin, from his sworn statement to DSS in October 2002 (SOR 3.c.) are simply not credible and do not constitute a valid and acceptable excuse for his serious misconduct.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Guideline H (Drugs) Against the Applicant

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. Against the Applicant

Subparagraph 1.e. Against the Applicant

Subparagraph 1.f. Against the Applicant

Subparagraph 1.g. Against the Applicant

Guideline G (Alcohol) Against the Applicant

Subparagraph 2.a. Against the Applicant

Subparagraph 2.b. Against the Applicant

Guideline E (Personal Conduct) Against the Applicant

Subparagraph 3.a. Against the Applicant

Subparagraph 3.b. Against the Applicant

Subparagraph 3.c. Against the 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.

BARRY M. SAX

ADMINISTRATIVE JUDGE