

DATE: October 21, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-07926

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a history of drug abuse and excessive alcohol consumption. Applicant was still using marijuana after he completed his security clearance application (SCA) and was interviewed by a Defense Security Service agent. Applicant deliberately omitted relevant and material facts from the SCA. The Department of Defense is prohibited from granting him a clearance because of his drug use. 10 U.S.C. § 986(c)(2). Applicant mitigated security concerns raised by his excessive alcohol consumption, but not the concerns raised by his drug abuse, his personal conduct, and his criminal conduct. 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 29 September 2004, DOHA issued a Statement of Reasons⁽¹⁾ (SOR) detailing the basis for its decision-security concerns raised under Guideline H (Drug Involvement), Guideline E (Personal Conduct), Guideline G (Alcohol Consumption), and Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on 5 October 2004 and elected to have a hearing before an administrative judge. The case was assigned to me on 23 May 2005. On 29 June 2005, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 14 July 2005.

FINDINGS OF FACT

Applicant is a 29-year-old utilities technician for a defense contractor.

In February 1995, Applicant was consuming alcohol at a party in a friend's home. The police were summoned by neighbors because of the loud noise emanating from the party. The police issued a summons to Applicant, charging him with being a minor in possession of alcohol. Applicant pled guilty and was given a six-month deferred judgment, and ordered to obtain Level I alcohol education and to perform 15 hours of community service. He completed all requirements and the case was dismissed.

After he turned 21 years of age in 1997, Applicant became a heavy drinker. He consumed six to nine beers an evening. He consumed beer to the point of intoxication on a weekly basis. In August 1998, while socializing with friends, Applicant drank three margaritas, seven beers, and several shots of liquor during the course of an evening. Ex. 2 at 6. He was stopped by police while operating his motor vehicle. He agreed to a breath test, the result of which was .202. Applicant was cited for driving while intoxicated (DUI) and DUI per se because his alcohol was in excess of the state statutory limit. He pled guilty to DUI, the other charge was dismissed. Applicant was sentenced to one year in jail, suspended, and ordered to pay fines and fees, perform community service, and complete a level II alcohol education program. Applicant did not complete the community service. He had hernia surgery that incapacitated him. He notified the supervisor of his inability to perform the community service. Ex. 2 at 7. Applicant no longer drinks as much. He drinks mostly on weekends and then has only a few beers.

Applicant began using marijuana in 1990 when he was in middle school. He used it 6-12 times. During his high school years, Applicant used marijuana more frequently, on a weekly or several times weekly basis. From 1996 until March 2002, he used marijuana on a monthly basis. He usually used marijuana with a small group of individuals. Applicant has purchased marijuana on many occasions, at least weekly while in high school. Applicant used hallucinogenic mushrooms on 10 occasions. He also purchased and used cocaine on a number of occasions from 1996 to 1999. In 2000, he misused the prescription medications Percocet and Vicodin by using more than the prescribed dose.

In April 2002, Applicant's roommate died as a result of a cocaine overdose. When police interviewed Applicant, they discovered there was a warrant for his arrest for failing to complete his community service from his August 1998 DUI. He was arrested, and as a result of a guilty plea was sentenced to home detention for 30 days. The case was closed in June 2002. Ex. 2 at 7.

In September 2002, Applicant was interviewed by an agent of the Defense Security Service (DSS). Applicant told the agent he did not intend to use illegal drugs in the future, except marijuana. He enjoyed the affects of marijuana, but would agree to stop using it if required to do so to hold a security clearance. He also admitted having marijuana in his home at the time of the interview. Applicant stated that he associated with others who use marijuana and he allows them to do so in his home. Applicant admitted minimizing his marijuana use and omitting reference to his use of cocaine and hallucinogenic mushrooms from his SCA because he was "fearful of the effect" the information might have on his obtaining a security clearance. Ex. 2 at 5.

The last time he used marijuana was in October 2002, approximately one month after his interview with the DSS agent. Tr. 10.

Applicant completed a security clearance application (SCA) on 22 February 2002. He certified that the information therein was "true, complete, and correct" to the best of his knowledge and belief, and acknowledged that a "knowing and willful false statement" could be punished under 18 U.S.C. ¶ 1001. Question 27 asked if, in the previous seven years Applicant had illegally used any controlled substance. Applicant answered "yes," but only admitted using marijuana 10 times between 1990 and 1999. In May 2002, Applicant caused an electronic SCA to be transmitted. Ex. 2. It included a change in his address since his previous SCA was completed in February 2002. Applicant's answer to question 27 did not change.

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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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.

Enclosure 2 of the Directive sets forth personnel 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 the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

Guideline H-Drug Involvement

In the SOR, DOHA alleged Applicant used marijuana from 1990 until at least March 2002 (¶ 1.a), purchased marijuana (¶ 1.b), has an intent to use marijuana in the future (¶ 1.c), is disqualified from holding a security clearance under 10 U.S.C. § 986 (¶ 1.d), abused prescribed medications Percocet and Vicodin in 2000 (¶ 1.e), used cocaine on 20 occasions from 1996 to 1999 (¶ 1.f), purchased cocaine (¶ 1.g), and used hallucinogenic mushrooms on 10 occasions from 1992 to 1996. Applicant admitted each of the allegations except for ¶¶ 1.c and 1.d. The improper or illegal involvement with drugs raises questions regarding an applicant'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. Directive ¶ E2.A8.1.1.

The Government's evidence and Applicant's admissions constitute evidence of potentially disqualifying conditions under Guideline H. Applicant abused drugs by using marijuana, cocaine, hallucinogenic mushrooms and prescription medication. DC E2.A8.1.2.1. He also purchased illegal drugs and illegally possessed marijuana at the time of his DSS interview in September 2002. DC E2.A8.1.2.2.

An applicant's drug use may be mitigated if the drug involvement was not recent (MC E2.A8.1.3.1) or the applicant has a demonstrated intent not to abuse any drugs in the future (MC E2.A8.1.3.3). Applicant asserts that he was stupid and young when he used drugs and that he does not intend to illegally use controlled substances in the future. Under the circumstances, I conclude Applicant's use of marijuana was recent-after he completed his SCA and a signed, sworn statement to the DSS agent. I failed to find persuasive Applicant's claim that he intends to remain drug free in the future. None of the mitigating conditions apply.

The Department of Defense is prohibited from granting a security clearance to an applicant who is "an unlawful user of" a controlled substance. 10 U.S.C. § 986(c)(2). Marijuana is a controlled substance. Applicant used marijuana not only after completing his SCA, but also after meeting with a DSS agent who inquired about Applicant's drug abuse. Applicant told the agent he intended to continue to use marijuana unless it inhibited his ability to get a security clearance. Under the circumstances, I conclude 10 U.S.C. § 986 applies and the Department of Defense is therefore precluded from granting Applicant a clearance. ⁽²⁾

Guideline E-Personal Conduct

In the SOR, DOHA alleged Applicant falsified material facts on his SCA by deliberately omitting the full extent of his abuse of illegal drugs (¶ 2.a); and he was convicted of failing to complete court-ordered community service. Applicant admitted both allegations, with an explanation for ¶ 2.a. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

The Government's evidence and Applicant's admissions constitute evidence of potentially disqualifying conditions under Guideline E. Applicant deliberately omitted relevant and material facts from his SCA about the full extent of his drug abuse. DC E2.A5.1.2.2. The extent of an Applicant's abuse of controlled substance is relevant and material to a determination of an applicant's security worthiness. Applicant took significant steps to reduce or eliminate his vulnerability to exploitation by admitting his conduct (MC E2.A5.1.5), albeit only after he was confronted by the DSS agent. Nevertheless, after weighing all of the facts and circumstances, I find against Applicant on ¶ 2.a.

Applicant's failure to complete his community service is unfavorable information that demonstrates unreliability. DC

E2.A5.1.2.1. Applicant mitigated security concerns raised by his failure to complete his court-ordered community service. It occurred after he notified the supervising official he was incapacitated due to hernia surgery. Thus, the information is not pertinent to a determination of judgment, trustworthiness, or reliability. MC E2.A5.1.3.1.

Guideline G-Alcohol Consumption

In the SOR, DOHA alleged Applicant consumed alcohol to the point of intoxication from 1995 until at least September 2002 (¶ 3.a), was cited for being a minor in possession of alcohol in 1995 (¶ 3.b), and was charged with and convicted of DUI in 1998 (¶ 3.c). Applicant admitted each of the allegations. Excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness. Directive ¶ E2.A7.1.1.

The Government's evidence and Applicant's admissions constitute evidence of potentially disqualifying conditions under Guideline G. Applicant consumed alcohol to the point of intoxication and impaired judgment on a weekly basis in the late 1990s. DC E2.A7.1.2.5. He has two alcohol-related incidents away from work (DC E2.A7.1.2.1)-being a minor in possession of alcohol in 1995 and a DUI in 1998. Applicant has cut back on his drinking. Although he continues to drink, he has not had any problems for several years as a result of his drinking and there is no indication of a recent problem. MC E2.A7.1.3.2. After considering all of the facts and circumstances, I find for Applicant on ¶ 3.

Guideline J-Criminal Conduct

In the SOR, DOHA alleged Applicant violated 18 U.S.C. § 1001 by deliberately falsifying his SCA. ¶ 4.a. Applicant did not answer the allegation. A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

It is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the executive branch of the Government of the United States. 18 U.S.C. § 1001. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. *See Egan*, 484 U.S. at 527. A violation of this statute carries a penalty of confinement up to five years. Applicant knowingly and willfully made materially false statements in his SCA about his drug use. An applicant's drug use is relevant and material to a determination of an applicant's security worthiness.

The Government's evidence and Applicant's admissions constitute substantial evidence of potentially disqualifying conditions under Guideline J. Applicant admitted criminal conduct (DC E2.10.1.2.1) which amounted to a serious crime (DC E2.A10.1.2.2)-a violation of 18 U.S.C. § 1001. Applicant's testimony suggests three mitigating conditions apply-the criminal behavior was not recent (MC E2.A10.1.3.1), the crime was an isolated incident (MC E2.A10.1.3.2), and he was pressured into committing the offense by his supervisor who told him not to fully explain his drug abuse in his SCA (MC E2.A10.1.3.3).

The crime was recent. Although he completed it more than three years ago, the SCA is part of the security clearance process under which the adjudication and hearing were held. I conclude MC E2.A10.1.3.1 does not apply. The crime was not an isolated incident. Although it may be the only charge of falsification, and the only allegation of criminal conduct under Guideline J, Applicant had several other criminal incidents-his involvement with drugs and his alcohol-related offenses. MC E2.A10.1.3.2 does not apply.

I also considered Applicant's allegation that he was pressured into committing the offense. But his story seems to have changed between his interview with the DSS agent and his testimony at the hearing. In his signed, sworn statement, Applicant alleged his supervisor handed him the SCA and told Applicant to fill it out and "make it look pretty." Applicant admitted omitting his use of cocaine and hallucinogenic mushrooms from his SCA because he "was fearful of the effect" the information would have on his ability to obtain a clearance. Ex. 2 at 5. At the hearing, he claimed he completed an SCA that accurately reported his drug use, but that the supervisor, who has since left his company's employ, underlined the drug use and told him to omit it from his SCA. I found this testimony to be incredible. None of the mitigating conditions apply, including MC E2.A10.1.3.4. Under all the circumstances, Applicant failed to convince me that he did not knowingly and willfully falsify his SCA. I find against Applicant on ¶ 4.

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

Subparagraph 1.f: Against Applicant

Subparagraph 1.g: Against Applicant

Subparagraph 1.h: Against Applicant

Paragraph E. Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: For Applicant

Paragraph 3. Guideline G: FOR APPLICANT

Subparagraph 3.a: For Applicant

Subparagraph 3.b: For Applicant

Subparagraph 3.c: For Applicant

Paragraph 4. Guideline J: AGAINST APPLICANT

Subparagraph 4.a: Against Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

James A. Young

Administrative Judge

1. As required by Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).

2. The Appeal Board has determined that Congress meant 10 U.S.C. §986(c)(2) to apply to persons who are "currently" unlawful users of controlled substances. *See* ISCR Case No. 03-25009 at 4 (App. Bd Jun. 28, 2005). As the issue was not squarely before them, the Board did not decide what "currently" means. Should the administrative judge measure

currency from the time the applicant completes his SCA, his statement to a government investigator, his answers to the SOR, the time of the hearing, or the time the administrative judge issues the decision? As a matter of due process, an applicant must be put on notice of the allegations against him. It makes no sense to limit the applicability of the prohibition to cases where the applicant admits at the hearing he is still using controlled substances. It appears clear to me Congress meant the prohibition to apply to any applicant who was a current user of a controlled substance at the time he completed his application for a security clearance.