

DATE: February 9, 2005

In Re:

SSN -----

Applicant for Security Clearance

ISCR Case No. 03-08040

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esquire, Department Counsel

FOR APPLICANT

Ronald Gold, Esquire

SYNOPSIS

This 50-year-old engineering manager used marijuana as a teenager and then again from 1999 to 2003. On one occasion he purchased a baggie of marijuana for \$100. He also falsified his answers to drug-related questions 27 and 28 in his 2002 Security Clearance Application by intentionally omitting any mention of his drug use. No mitigation has been established. In addition, his current drug use makes him independently ineligible to hold a security clearance under 10. U.S.C. 986. Clearance is denied.

HISTORY OF THE CASE

On April 16, 2004, 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.

By a reply to the SOR that was dated April 28, 2004, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made by a DOHA Administrative Judge after a hearing. The matter was assigned to me for resolution on August 12, 2004. A Notice of Hearing was issued on August 18, 2004, setting the hearing for September 9, 2004. At the hearing, the Government introduced three exhibits, which were marked and admitted as GX 1 -3. Applicant testified and introduced four exhibits, which were marked and admitted as Applicant's Exhibits (AX) A - D. The final transcript was received at DOHA on September 28, 2004.

FINDINGS OF FACT

Applicant is a 50-year-old engineering manager for a defense contractor. The December 4, 2003 SOR contains five allegations under Guideline H (Drug Involvement); two allegations under Guideline E (Personal Conduct); and one

allegation under Guideline J (Criminal Conduct). In his January 6, 2004 Response to the SOR, Applicant clearly admits only allegations 1.d., 2.a., and 2.b. I consider all other allegations to have been denied. The admitted allegations are accepted and incorporated herein as Findings of Fact.

After considering the totality of the evidence of record, I make the following additional FINDINGS OF FACT as to the status, past and present, of each SOR allegation:

Guideline D (Sexual Behavior)

1.a. - Applicant was arrested on or about September 15, 2000 in State A and charged with Counts I - Continuous Sexual Abuse of a Child and II Lewd or Lascivious Acts with a Child Under 14. He was found guilty on both counts and sentenced to 365 days in county jail, five year probation, register as a Sex Offender, attend and complete a Sexual Offender program, pay restitution to the victim totaling \$15, 442.00

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used marijuana with varying frequency from 1999 to at least October 25, 2002.

1.b. - Applicant "can't [couldn't] say that he would not continue to recreationally use marijuana. In fact, he continued to use marijuana until October 2003. As of his April 24, 2004 response to the SOR, he had changed his mind and expressed an intent not to use it again (GX 3). In his hearing testimony on September 9, 2004, he expressed his belief that marijuana should not be used, even recreationally (Tr at 25). On the basis of his uneven history, I find his current claim to lack support and redibility.

1.c. - Applicant purchased marijuana in approximately 1999.

1.d. - Applicant continued to use marijuana, as set forth in 1.a., above, after he had been granted a Secret security clearance by the Department of Defense on arch 31, 1999. He has expressed his regret that he did so (GX 3). But, he continued to use it even after his interview with the Defense Security Service (DSS) on October 25, 2002. In fact, he has most recently admitted that he had continued to use marijuana, perhaps three times, until October 2003 (Tr at 35). When asked about this history of use, Applicant stated that: "I think there was a perception on my behalf that it wasn't really a big issue" (Tr at 37). His most recent claim, that he has had some kind of change of heart, lacks support and credibility. His lack of consistency reveals an inability to act in his own self interest and raises the risk that he will also exercise such questionable judgment in his handling of classified information.

1.e. - Under 10 U.S.C. 986, the facts alleged in SOR 1.a and 1.b., above disqualify Applicant from having a DoD security clearance granted or renewed.

Guideline E (Personal Conduct)

Applicant intentionally falsified material facts on a September 25, 2002 Security Clearance Application (SF 86) when he:

2.a. - answered "No" to Question **26 "Your Use of Illegal Drugs and Drug Activity Offenses** Since the age of 16 or in the last seven years," and thereby knowingly omitted any mention of his use of marijuana from 1997/1998 to October 2002.

2.b. - answered "No" to Question **28 "Your Use of Illegal Drugs or Drug Activity - Use in a Sensitive Position** Have you ever . . ." and intentionally omitted any mention of his drug use since obtaining a security clearance on March 31, 1999, as alleged in 1.d., above.

Guideline J (Criminal Conduct)

3.a. - That information set forth in subparagraph 2.a. and 2.b., qualifies as felonies under 18 U.S.C. 1001.

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, 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

Drug Involvement - Applicant's statements do not establish a single credible explanation that mitigates the adverse impact of his demonstrated drug involvement. He has been inconsistent and unpersuasive in establishing his claim that he is eligible to hold a security clearance. He is almost 50, so he cannot rely on chronological immaturity as an excuse. He was in his mid-40s when his second period of marijuana involvement, as cited in the SOR, began. In his October 2002 sworn statement to the Defense Security Service (DSS) (GX 2). Applicant says that he "used marijuana in his teenage years," which would be 1978 to 1985, then "never as an adult until . . . 1997 [which he now says was actually 1999]" (*Id.*). At that latter time, he purchased "a bag of marijuana for \$100" at a concert (*Ibid.*, at 2). Thereafter he

"used marijuana six to twelve times a year until July or August 2002," two months before his sworn statement and believed he could stop "using marijuana at any time" (*Id.*).

I have carefully considered Applicant's documentation showing negative for drug testing in July and August 2004 (AX A and AX B). While this is certainly a positive factor, the tests were performed only recently, under the pressure of the present adjudication, thereby reducing the weight to be given it relative to Applicant's drug history. I have also considered the positive comments of the security manager of Applicant's employer and another colleague (AX C and AX D), but the weight to be given them is reduced because they do not even mention Applicant's drug use and falsifications.

In the end, since Applicant now admits a last use in October 2003, it is clear that there is a doubt about when Applicant actually stopped using marijuana, or even if he did stop at all. I am unable to conclude that he has established he has stopped permanently, or even that he is in a period of remission. His use of marijuana after competing his SF 86 and after his interview with DSS raise even more questions about his maturity, judgment, reliability, and trustworthiness.

Disqualifying and Mitigating Factors:

Conditions that could raise a security concern and may be disqualifying:

1. Any drug use;
2. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution

Condition that could be mitigating:

None that are applicable under the facts of this case.

As explained below, an adverse decision is independently merited by the adverse evidence about Applicant's drug involvement and his falsifications. However, I find that Applicant is also ineligible under 10 U.S.C. 986

Applicability of Smith Amendment - Counsel for Applicant argues that the Smith Amendment (codified as 10 U.S.C. 986) is inapplicable in this case, citing *Wright v. U.S. Army*, (D. Ariz 2004) 307 F.Supp.2d 1065) (See Applicant's Trial Brief). I disagree. *Wright* involves an Air Force officer whose security clearance had been revoked by the Air Force several years before it was due to expire, under a process contained in DoD Regulation 5200.2-R. In such cases, applicable to military personnel and DoD employees, the case is referred to DOHA for a Recommended Decision *after* the military service has issued a Letter of Final Denial or *Revocation*. *Wright* concludes that the specific language of the Smith Amendment does not authorize DoD to revoke an existing clearance. As counsel cites in his hearing brief:

The Smith Amendment cannot be regarded as *ex post facto* because the statute does not permit the revocation of an existing clearance. Rather, the Amendment prohibits the Department of Defense from granting a new clearance or renewing an expiring one, after October 30, 2000 (*Wright, supra*, at p. 258, fn 11).

In the present case, Applicant is a civilian employee of a defense contractor, and the adjudication process is governed by a different set of guidelines, specifically DoD Directive 5220.6. The term "renewing an expiring one" [referring to a security clearance], as used in *Wright*, applies to the process whereby persons with longtime clearances are periodically reviewed and their clearances updated. The goal established by DoD is to review clearances every ten years for those with Secret level clearances and every five years for those with Top Secret clearances. Caseload demands sometimes cause slippage in the time needed to complete the adjudication process. In the meantime the individual generally retains his or her clearance, except in rare extreme situations not relevant here. It is not *revoked* until a final, and adverse, decision is made.

Under these circumstances, *Wright* does not bar use of 10 U.S.C. 986 in determining Applicant's eligibility. The issue is whether the evidence establishes that Applicant "is" a user of marijuana or "is addicted" to it. From the totality of the evidence, including Applicant's history of marijuana use and an admitted last use only eleven months prior to the hearing, it is simply too soon to conclude that he is no longer a user, if only because there remains a doubt about his

ability to avoid a relapse. Since Applicant "is" still considered to be a user, he is, under the language of 10 U.S.C. 986 (b) ineligible for the granting or renewal of a security clearance.

Personal Conduct - Applicant's two falsifications are serious for several reasons. Firstly, lying on a security clearance application is second only to direct violations of the rules governing protection of classified information, in going to the heart of the DoD security clearance program. Applicant's explanations for lying on the SF 86 have not been mitigated. Embarrassment may be an explanation, but it is not an acceptable excuse. Based on the contents of the record, I conclude Applicant has consistently sought to minimize the negative impact of what he did, suggesting he is still in denial about the consequences of his own actions. Admittedly, he knew he should have answered "Yes" to both questions and cited the information about his drug use. Instead, he chose to lie and did not correct the lies until confronted by the DSS agent some time later.

Disqualifying Conditions

Condition that could raise a security concern and may be disqualifying:

2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire

Conditions that could mitigate security concerns include:

None that are applicable under the facts of this case.

Criminal Conduct - A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. This refers to the two falsifications on the SF 986, each of which is a violation of 10 U.S.C. 1001, a felony.

Disqualifying and Mitigating Conditions:

Conditions that could raise a security concern and may be disqualifying:

1. Any criminal conduct

2. A serious crime or multiple lesser offenses

Conditions that could mitigate security concerns include:

None that are applicable under the facts of this case. (The criminal behavior remains recent; was not an isolated incident; and there is as yet no evidence of successful rehabilitation, under MC 1, 2, and 5, respectively).

FORMAL FINDINGS

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

Guideline H (Drug Involvement) 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

Guideline E (Personal Conduct)

Subparagraph 2.a. Against the Applicant

Subparagraph 2.b. Against the Applicant

Guideline J (Criminal Conduct) Against the Applicant

Subparagraph 3.a. 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