

DATE: November 9, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-13934

ECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Jr., Esq., Department Counsel

FOR APPLICANT

Cathy Steele, Esq.

SYNOPSIS

Applicant is a 46-year-old college graduate engineer who used marijuana from 1983 to 2001 while holding a security clearance. Applicant failed to disclose pertinent and relevant information concerning his illegal drug use, and his criminal arrest and conviction history on his security clearance application in 2002. Applicant did not mitigate the drug involvement and personal conduct security concerns. Clearance is denied.

STATEMENT OF THE CASE

On February 17, 2004, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under Guideline H (Drug Involvement) and Guideline E (Personal Conduct) why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked.

In a statement, signed and sworn to on March 23, 2004, Applicant responded to the SOR allegations. He admitted the subparagraph allegations under each guideline, and denied the applicability of the guidelines themselves to his case in the SOR. He requested a hearing.

This case was assigned to me May 20, 2004. A Notice of Hearing was issued on June 1, 2004, setting the hearing for June 17, 2004. On June 17, 2004, I convened the hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government presented four exhibits which were admitted into evidence. The Applicant testified and presented eight exhibits. I received the transcript of the hearing July 7, 2004.

FINDINGS OF FACT

Applicant's admissions to the allegations are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is 46 years old and is an engineer for a defense contractor. He is divorced and has one son. Applicant's wife left him suddenly in 2002, and took money and his son with her. The divorce was acrimonious, and finally completed in August 2003. During this period, Applicant suffered from separation anxiety and depression, and took Zoloft prescribed by his physician. He continues to take Zoloft, and took Lexapro for a short time. He wore a heart monitor for 30 days during December 2002 because he suffered heart arrhythmia. Applicant has had a security clearance since 1983 and had no security violations. Applicant was promoted by his employer in 2003. During the same time period, Applicant contends he was not thinking clearly due to the Zoloft and his family mental stresses so that he could not answer truthfully four questions concerning his drug use and criminal record history on the security clearance application (SCA) completed December 20, 2002. Those answers are alleged in Paragraph 2 of the SOR. Applicant also did not disclose in answer to Question 40 his divorce and the restraining order entered against him to stay away from his wife. Applicant donates money to various charities and contributes his time and efforts to other charities. (Tr. 23 to 27, 29 to 32, 43 to 47, 50 to 52; Exhibit 1 at 6 to 8, Exhibits 3 and 4, Exhibits A, B, C, G, and H)

Applicant used marijuana from 1983 to 2001. Applicant used quantities of marijuana during those years, but the amounts are unknown and uncertain. Applicant claimed to use only small amounts from one "dime" bag. Applicant finally threw away the one "dime" bag of marijuana he had for about 20 years after his former wife told him to do so. Applicant possessed and used this marijuana during the same time period he had a security clearance. Applicant was arrested and convicted of possession of an illegal substance in 1978. Applicant did not disclose his illegal drug use on his SCA executed December 20, 2002, in response to Question 27 (illegal drug use in the past seven years). Applicant also did not disclose his illegal drug use while he held a security clearance in response to Question 28 (have you ever used a controlled substance while possessing a security clearance). Applicant tested negative for marijuana on several drug tests, only the last one taken was a random screening. Applicant says he will not use marijuana in the future. Applicant did not disclose his marijuana use on his SCA because he did not want his employer to find out about it, nor did he want to lose his security clearance. (Tr. 16, 28, 33 to 36, 56, 57; Exhibit 1 at 7, Exhibits 2 to 4, Exhibit E)

Applicant did not disclose on his SCA his two arrests for driving while intoxicated in 1981 and 1983. Question 24 on the SCA sought disclosure of any arrests or convictions of any offenses relating to alcohol or drugs. Applicant claims he did not think he had to list those arrests because they would not be on his record after he served his probationary period. (Tr. 38, 60; Exhibit 1 at 6)

Applicant did not disclose his arrest in 1997 for assault involving another motorist after Applicant's car hit the other car. Applicant was not prosecuted for this offense. Question 26 on the SCA requested any other arrests in the past seven years that Applicant had. (Tr. 39, 40, 48, 59; Exhibit 1 at 6)

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* Section 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicted upon the applicant meeting the security guidelines contained in the Directive.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk.

Enclosure 2 to the Directive sets forth adjudicative guidelines that must be carefully considered according to the pertinent guideline in making the overall common sense determination required.

Each adjudicative decision must also include an assessment of:

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation;
- (3) how recent and frequent the behavior was;
- (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 (See Directive, Section E2.2.1. of Enclosure 2).

Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the guidelines.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. See *Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a prima facie case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. See Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. See Exec. Or. 12968 § 3.1(b).

In the decision-making process, the burden of proving evidence initially falls on the Government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the Government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the Government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to

potential, rather than actual, risk of compromise of classified information.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

Guideline H - Drug Involvement

(A) 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

(B) Drugs are defined as mood and behavior-altering substances and include:

(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

(2) Inhalants and other similar substances.

(C) Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

(D) Conditions that could raise a security concern and may be disqualifying include:

(1) Any drug abuse (see above definition);

(2) Illegal drug possession, including purchase.

(E) Conditions that could mitigate security concerns include:

(1) The drug involvement was not recent;

(3) A demonstrated intent not to abuse any drugs in the future.

Guideline E - Personal Conduct:

(A) 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

(B) Conditions that could raise a security concern and may be disqualifying also include:

(2) The deliberate omission, concealment, falsification or misrepresentation 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;

(4) Personal conduct that increases an individual's vulnerability to coercion, exploitation or duress.

(5) A pattern of dishonesty or rule violations.

(C) Conditions that could mitigate security concerns include:

None

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions above, I conclude the following with respect to each allegation set forth in the SOR:

Guideline H - Drug Involvement. The Government established its case by its evidence and Applicant's admissions. I conclude Disqualifying Conditions (DC) 1, and DC 2 apply here. A security concern may exist if an applicant uses illegal drugs such as marijuana. Applicant used marijuana over a 19-year period, and during that period, from 1983 to 2002, he possessed a security clearance.

The last marijuana use was in 2001. Applicant says he will not use marijuana in the future, but after listening to his testimony and observing his demeanor, and considering his lengthy history of marijuana use and his failure to disclose his marijuana use in signed, sworn SCA, I do not find that statement believable. Applicant's marijuana use was recent when he completed the SCA. Therefore, Mitigating Conditions (MC) 1 and MC 5 are not applied in Applicant's case. I am particularly concerned that Applicant used marijuana while holding a security clearance, and then failed to disclose that use when the SCA requested the truthful answer. Accordingly, the finding is against the Applicant on Guideline H.

Guideline E - Personal Conduct: I conclude the Government established by its evidence and Applicant's admissions the apparent validity of the allegation. Applicant did not answer Questions 24, 26, 27, and 28 on the SCA in the affirmative. Applicant also did not disclose his civil actions involving his divorce and restraining order in answer to Question 40 of the SCA. Applicant admitted he did not want to disclose his marijuana use because he might lose his security clearance and his job. Applicant deliberately failed to answer truthfully five questions on the SCA. This conduct establishes a pattern of deliberate deception and falsification. This marijuana use exposes Applicant to coercion, exploitation or duress. Therefore, Disqualifying Conditions (DC) 2, DC 4, and DC 5 apply here.

Regarding mitigating conditions, I do not find any are applicable here. Applicant's pattern of falsification has not been mitigated. Applicant wanted me to believe that he was not thinking clearly in December 2002 when he completed the SCA because he was taking Zoloft for his separation anxiety and depression brought on by the failure of his marriage. These SCA questions are clear enough for anyone with a college degree, as Applicant has, to understand. Also, in August 2003, Applicant was doing so well at his job over some period of time that included the December 2002 time period that his employer promoted him. For someone who was doing a technical engineering job that resulted in a promotion to now assert at a hearing he was not thinking clearly when the Government asked him important and pertinent questions regarding his worthiness for a security clearance is neither believable nor persuasive. Therefore, I conclude this guideline against Applicant.

FORMAL FINDINGS

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline H: Against Applicant

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Paragraph 2 Guideline E: Against Applicant

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: Against Applicant

DECISION

In light of all the circumstances and facts 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.

Philip S. Howe

Administrative Judge