

KEYWORD: Drugs; Personal Conduct

DIGEST: Applicant has used marijuana and cocaine, the cocaine as recently as 2003. His cocaine abuse resulted in his entering a drug treatment program, in which he was diagnosed as being cocaine dependent. Applicant's credibility is extremely suspect, as he has not been truthful or candid with information that he has furnished to the United States Government regarding his cocaine usage and his drug related convictions. Mitigation has not been shown. Clearance is denied.

CASENO: 03-18594.h1

DATE: 02/10/2005

DATE: February 10, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-18594

DECISION OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has used marijuana and cocaine, the cocaine as recently as 2003. His cocaine abuse resulted in his entering a drug treatment program, in which he was diagnosed as being cocaine dependent. Applicant's credibility is extremely suspect, as he has not been truthful or candid with information that he has furnished to the United States Government regarding his cocaine usage and his drug related convictions. Mitigation has not been shown. Clearance is denied.

STATEMENT OF THE CASE

On July 13, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed reasons 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 determine whether a clearance should be granted, denied or revoked.

Applicant filed a notarized response, dated August 5, 2004, to the allegations set forth in the SOR (RSOR), and requested a hearing before a DOHA Administrative Judge.

This case was assigned to this Administrative Judge on, November 23, 2004, to conduct a hearing and issue a written decision. A Notice of Hearing was issued to the parties on December 16, 2004, and the hearing was conducted on January 19, 2005.

At the hearing, Department Counsel offered 11 documentary exhibits (Government's Exhibits 1-11) and no witnesses were called. Applicant offered three documentary exhibit (Applicant's Exhibits A-C) and offered his own testimony. The transcript (Tr) was received on February 2, 2005.

FINDINGS OF FACT

In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline H (Drug Involvement) and Guideline E (Personal Conduct) of the Directive. The SOR contains five allegations, 1.a. through 1.e. under Guideline H and five allegations, 2.a. through 2.e., under Guideline E. As a result of evidence elicited at the hearing allegation 2.a. and Applicant's response thereto were stricken from the record. Applicant admitted all of the other SOR allegations. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the admitted documents, and testimony of Applicant, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 47 years old. He is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector. He is a high school graduate.

Paragraph 1 (Guideline H - Drug Involvement)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has abused illegal substances.

Applicant testified that he used marijuana in 1977 and 1978. He first ingested cocaine in 1991, and he claimed to have used it until as recently as approximately a year and a half ago, in 2003 (TR at 45, 51). Applicant used cocaine with varying frequency during the period that he was employed as a Corrections Officer at a Federal Prison Camp until 1994. He also used cocaine after he applied for a security clearance in 2002 (Exhibit 1). He testified that he does not intend to use illegal substances in the future (TR at 51).

In 1994, Applicant was arrested and charged with two counts (Violation of a state's controlled substance act, schedule II: Cocaine) and (Possession of a firearm or knife during commission of crime), both of which are felonies. Applicant pled guilty to the first charge and was sentenced to three years probation and \$850 in fines. As a result of this conviction, he had to resign his position as a Corrections Officer (RSOR, Exhibits 2, 7, and 8).

From November 28, 1994, until January 4, 1995, Applicant attended outpatient treatment at a health services facility, where he was diagnosed as being cocaine dependent (Exhibit 11).

In July 2001, Applicant was arrested and charged with Possession of Heroin, a felony. He was found guilty of the amended charge of Accessory after the fact. He was sentenced to 12 months in jail, which was suspended for three years, and he was ordered to pay a fine of \$50 (RSOR, Exhibits 2, 5, and 8).

Paragraph 2 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he furnished untruthful information to the Government.

Applicant completed a signed, sworn Security Clearance Application (SCA) on February 24, 2002.

Question 21 of the SCA asked, "Have you ever been charged with or convicted of any felony offense? For this item, report information regardless of whether the record in your case has been sealed or otherwise stricken from the record." Applicant answered "yes" and listed his arrest in 2001, as discussed above. Applicant did not list the 1994 drug related arrest (Exhibit 1). Applicant explained that he thought that the record was expunged, so he did not have to list this felony offense (TR at 38-39). I conclude that Applicant did knowingly give false information to the Government regarding his 1994 felony conviction, because the question specifically instructed him not to omit offenses, even if they were expunged from the record, which is precisely what he did.

Question #24 of the SCA asked, "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs? For this item, report information regardless of whether the record in your case has been sealed or otherwise stricken from the record." Applicant answered "yes" and listed his drug related conviction in 2001, as discussed above. Applicant did not list the 1994 drug related conviction (Exhibit 1). Applicant again explained that he thought that the record was expunged so he did not have to list this conviction (TR at 40-41). I conclude that Applicant did knowingly give false information to the Government regarding his 1994 conviction, because the question specifically instructed him not to omit convictions, even if they were expunged from the record. Again this is precisely what he did.

Question #27 of the SCA asked if, in the previous seven years, Applicant had use illegal drugs, including marijuana, etc? Applicant answered "No" to this question. He should have listed cocaine, as he was using it during the seven year period, as discussed above, before he completed the SCA in February 24, 2002 (RSOR, Exhibits 1 and 2).

Question #28 of the SCA asked if Applicant EVER had used illegal drugs, while employed as a law enforcement officer? Applicant answered "No" to this question. He should have disclosed that he used cocaine while employed as a Corrections Officer at a federal prison camp (Exhibits 1, 3, 4, and 5).

At the hearing Applicant initially testified that after his 1994 drug related arrest and subsequent treatment, he abstained from the use of cocaine until 2001, when he was again arrested. Applicant only admitted to the fact that he began using cocaine regularly again in 1997, after he was

confronted with a statement he made to a Defense Security Service agent (TR at 52-54) (Exhibit 2).

Applicant clearly was not honest with the information that he furnished to the Government on the SCA, that he completed in 2002 or during his testimony at the security clearance hearing. I do not find any of his explanations concerning his failure to give honest complete information to the Government credible or reasonable.

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents

its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case.

As set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

a. The nature, extent and seriousness of the conduct

- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence.

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in acts of drug usage, alcohol abuse and criminal conduct, and that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future."

The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance.

(Guideline H - Drug Involvement)

With respect to Guideline H, the Government has established its case. Applicant's improper and illegal drug abuse, including the use of marijuana and cocaine, is of concern, especially in light of his desire to have access to the nation's secrets. The fact that Applicant used illegal substances, while holding a security clearance, must also be considered adversely to Applicant. Applicant's overall conduct pertaining to his illegal substance abuse clearly falls within Drug Involvement DC (E2.A8.1.2.1.), any drug abuse, and DC (E2.A8.1.2.2.), illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution. DC (E2.A8.1.2.3.), diagnosis by a credentialed medical professional of drug dependence, in this case cocaine dependence, also applies.

Based on the fact that Applicant last used cocaine as recently as sometime in 2003, I cannot conclude that Applicant's conduct comes within MC (E2.A8.1.3.1.), the drug involvement was not recent. MC (E2.A8.1.3.3.) could be argued to apply because of Applicant's stated intention not to continue using marijuana or cocaine in the future. However, based on his long usage of cocaine, as recently as 2003, that he used illegal drugs for many years even after applying for a security clearance, and that he has not been candid in the information that he furnished to the Government regarding his drug usage, I find that it is far too soon, to accept his stated intention to abstain from drug use as reliable and to include it as a mitigating condition.

In this case, the Government has met its initial burden of proving by substantial evidence that Applicant used illegal drugs for many years under Guideline H. Applicant, has not introduced evidence in rebuttal, explanation or mitigation. Accordingly, Paragraph 1, Guideline H, is concluded against Applicant.

(Guideline E -Personal Conduct)

With respect to Guideline E, the evidence establishes that Applicant furnished to the Government less than complete, honest answers, regarding his marijuana and cocaine usage, in a SCA, completed on February 24, 2002.

The Government relies heavily on the honesty and integrity of individuals seeking access to our nation's secrets. When such an individual intentionally falsifies material facts or fails to furnish relevant information to a Government

investigator, it is extremely difficult to conclude that he nevertheless possesses the judgment, and honesty necessary for an individual given a clearance. In this case, there has been no reasonable explanation for Applicant's failure to inform the Government about. I conclude that Applicant knowingly and willingly failed to give complete, honest answers to the Government.

In reviewing the DCs under Guideline E, I conclude that DC (E2.A5.1.2.2.) applies because Applicant deliberately provided false and misleading information to the Government in a SCA. Applicant's conduct also falls within DC (E2.A5.1.2.3.), because of false and misleading statements made by Applicant at the security clearance hearing. No MC applies in this paragraph. Applicant's conduct, considered as a whole, including his drug usage, especially after applying for a security clearance, and the misinformation that he provided to the Government, both in the SCA and at the hearing, exhibit questionable judgement, unreliability, and a lack of candor. I resolve Paragraph 2, Guideline E, against Applicant.

FORMAL FINDINGS

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 **Paragraph 2. Guideline E: AGAINST APPLICANT**

Subparagraph 2.a.: Stricken from SOR

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: Against Applicant

Subparagraph 2.e.: Against 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.

Martin H. Mogul

Administrative Judge