

DATE: July 24, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-06573

DECISION OF ADMINISTRATIVE JUDGE

MARK W. HARVEY

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant repeatedly used and purchased various illegal drugs from October 2002 to November 2003. His pattern of questionable judgment, irresponsibility, and immature behavior especially after having been granted a security clearance, raises grave doubts about his security eligibility and suitability. In January 2006, Applicant promised not to use drugs in the future. However, in the absence of a longer period of confirmed current continuing abstinence and in light of his past conduct, his recent vow to abstain, does not constitute a "demonstrated intent" not to abuse any drugs in the future. Clearance is denied.

STATEMENT OF THE CASE

On December 29, 2003, Applicant applied for a security clearance and submitted a Security Clearance Application (SF 86).⁽¹⁾ On December 5, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, pursuant to 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.⁽²⁾ The SOR alleges security concerns under Guidelines H (Drug Involvement) and E (Personal Conduct). The SOR 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 him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.⁽³⁾

In a one-page, notarized, written answer, dated January 4, 2006, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing.⁽⁴⁾ A complete copy of the file of relevant material (FORM)⁽⁵⁾ was provided to him on May 4, 2006, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation.⁽⁶⁾ Any such submissions were due by June 3, 2006.⁽⁷⁾ He did not respond. Department Counsel submitted the FORM on June 23, 2006. The case was assigned to me on June 26,

2006.

FINDINGS OF FACT

The response to the SOR included admissions to all material factual allegations under Guidelines H (subparagraphs 1.a. to 1.g.) and E (subparagraph 2a.).⁽⁸⁾ Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

From August 1, 2002, to December 29, 2003 (the date of his SF 86), Applicant has been employed in sales, and he also began working for a defense contractor as a consultant about two months before completing his SF 86.⁽⁹⁾ He is 34-years-old,⁽¹⁰⁾ and is seeking a security clearance. From 1993 to 2003, he attended college⁽¹¹⁾ and was employed by thirteen different organizations, as well as being unemployed on several occasions.⁽¹²⁾ The quality of his employment performance has not been characterized. He received a Bachelor of Science degree on August 1, 1994.⁽¹³⁾

From October 1, 2002, until November 27, 2003, Applicant used crystal methamphetamine at least six times,⁽¹⁴⁾ as well as GHB, ecstasy and cocaine each at least three times.⁽¹⁵⁾ He also purchased ecstasy and crystal methamphetamine.⁽¹⁶⁾ His use or purchase of these same drugs continued after he was granted a United States Postal Service Sensitive Clearance on or about August 13, 2002.⁽¹⁷⁾

On January 4, 2006, Applicant articulated for the first time his recognition of the destructive nature of illegal drugs and his commitment to change his lifestyle.⁽¹⁸⁾ He explained that prior to his drug use, he was a Christian, "yet thought true happiness and fulfillment would be achieved in the homosexual lifestyle. In the midst of the homosexual lifestyle,⁽¹⁹⁾ [he] realized [he] was a fool and [] needed to surrender [his] life back to Jesus Christ for true happiness, fulfillment, and purpose in life."⁽²⁰⁾ He concluded that he had left his former lifestyle and had "no desire to return to that lifestyle or narcotics."⁽²¹⁾ Prior to his use of drugs from October 1, 2002, to November 27, 2003, he had not used narcotics, and he did not want to return to narcotics.⁽²²⁾ He did not describe any effort to start, let alone complete a drug treatment program. He did not specify the date his last use of illegal drugs and change of lifestyle occurred.

POLICIES

In their evaluation of an Applicant's security suitability, an administrative judge should consider Enclosure 2 of the Directive, which sets forth adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into Disqualifying Conditions (DC) and Mitigating Conditions (MC). An administrative judge may consider relevant DCs to deny or revoke and MCs to grant an Applicant's eligibility for access to classified information.

These adjudicative guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, an administrative judge should apply these guidelines in conjunction with the factors listed in the Adjudicative Process provision in Section E2.2., Enclosure 2, of the Directive. An administrative judge's overarching adjudicative goal is a fair, impartial and common sense decision.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," an administrative judge should consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision. Specifically, an administrative judge should consider the nine Adjudicative Process factors listed at E2.2.1 of the Directive: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable 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.

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: 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.

Guideline E - Personal Conduct: 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.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, pertaining to adjudicative guidelines are set forth and discussed in the Conclusions section below.

Since the protection of national security is the paramount consideration, the final decision in each case is arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the government initially has the burden of producing evidence to establish a case which demonstrates, in accordance with the Directive, that 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 initial burden, the Applicant then has a heavy burden of persuasion, that is to present evidence in refutation, explanation, extenuation, or mitigation sufficient to overcome the doubts raised by the government's case, and ultimately to demonstrate it is clearly consistent with the national interest to grant or continue the Applicant's clearance. ⁽²³⁾

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.

The scope of an administrative judge's decision is limited. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the [A]pplicant concerned." Security clearance decisions cover many characteristics of an Applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon considering of all the facts in evidence, and after applying all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

Guideline H (Drug Involvement)

The government has met its initial burden under Guideline H. Applicant's improper and illegal use of marijuana is of concern, especially in light of his desire to have access to the nation's secrets. The Directive clearly expresses the government's concern regarding drug involvement in provision E2.A8.1.1.1. *"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."* Drug abuse is defined in provision E2.A8.1.1.3. as *"The illegal use of a drug or use of a legal*

drug in a manner that deviates from approved medical direction." Provision E2.A8.1.1.2.1. generally identifies and defines drugs as "*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).*"

The overall conduct pertaining to Applicant's illegal substance abuse clearly falls within Drug Involvement Disqualifying Condition (DI DC) E2.A8.1.2.1. (*any drug abuse*) and DI DC E2.A8.1.2.2. (*illegal drug possession*). The government has established his use and purchase of illegal drugs.

Applicant's actions do not support the application of Drug Involvement Mitigating Condition (DI MC) E2.A8.1.3.1. (*the drug involvement was not recent*), ⁽²⁴⁾ or DI MC E2.A8.1.3.3. (*a demonstrated intent not to abuse any drugs in the future*).

There is no "bright line" rule for determining when conduct is "recent." The determination must be based "on a careful evaluation of the totality of the record within the parameters set by the directive." ⁽²⁵⁾ If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." ⁽²⁶⁾

On January 4, 2006, in response to the SOR, Applicant stated he recognized that using drugs is destructive and he stopped his drug abuse. ⁽²⁷⁾ He did not explicitly indicate how long he had abstained from drug purchase and use, nor did he provide a detailed description of when his lifestyle changed. He did not provide any supporting evidence corroborating his asserted lifestyle, attitude or conduct changes. For example, evidence was provided from friends, family, co-workers or a myriad of other potential references, attesting to his change in behavior or attitude. In his favor, there is no evidence in the file that he used or purchased illegal drugs after November 27, 2003. One aspect that weighs against him is the nature of the drugs he abused. Cocaine and crystal methamphetamine are widely known to be addictive. ⁽²⁸⁾ He admitted he used cocaine three times and crystal methamphetamine five times. ⁽²⁹⁾ Applicant has not met his burden of showing his drug use and purchase was "not recent." Accordingly, I conclude DI MC E2.A8.1.3.1. is not established.

Applicant's promise not to use drugs in the future raised DI MC E2.A8.1.3.3. (*A demonstrated intent not to abuse any drugs in the future*). As to his future intentions, he expressed a clear and unambiguous intent to discontinue drug abuse. Applicant's promise, however, does not demonstrate intent not to abuse any drugs in the future. Based on the record evidence, I am not confident that his substance abuse will not recur. In the absence of a longer period of abstinence, and better evidence concerning his intentions, it is premature to conclude with reasonable certainty that his substance abuse is safely of the past. I conclude his promise not to abuse drugs in the future is insufficient to establish DI MC E2.A8.1.3.3.

After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the security concerns, pertaining to drug involvement.

Guideline E (Personal Conduct)

The government has met its initial burden under Guideline E. Applicant's use and purchase of illegal drugs involved questionable judgment, untrustworthiness, unreliability, and showed unwillingness to comply with federal laws prohibiting possession of illegal drugs. Under E2.A5.1.1., such conduct could indicate he may not properly safeguard classified information.

Applicant's actions in this regard fall within Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.4. (*personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail*). He is more vulnerable to coercion, exploitation or duress because of his drug involvement. It is beyond cavil that information about his drug abuse, if known, could adversely affect his personal, professional, or community standing. I conclude that his drug involvement has enhanced his susceptibility to

blackmail.

As noted above, Applicant's conduct was predominately drug-related, but also criminal. And, because it involved questionable judgment, untrustworthiness, and unreliability, personal conduct becomes an issue, however redundant. Applicant's repeated violations of the law and DoD policy, fall within PC DC E2.A5.1.2.5. (*a pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency*). Applicant did not simply experiment with drugs a few times, as a youth, out of curiosity and then quit. Rather, he repeatedly used drugs when he was already 31 years old, including drug use while holding a United States Postal Service Sensitive Clearance. His multiple uses of illegal drugs over a 14-month time period constitute a pattern of rule violations.

Once the government produced substantial evidence of a disqualifying condition, the burden shifted to Applicant to produce evidence and prove a mitigating condition under E3.1.15. (*to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision*). The burden of disproving a mitigating condition never shifted to the government.⁽³⁰⁾

The evidence Applicant produced is insufficient to justify the application of PC MC E2.A5.1.3.5. (*the individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*). He stated on January 4, 2006, that he recognized the deleterious effect of drugs, had changed his lifestyle, and did not intend to use drugs in the future. He emphasized his return to religion, and a change in his sexual activities.⁽³¹⁾ I conclude, however, that Applicant's use of illegal drugs was knowing and voluntary. He used or purchased illegal drugs while holding a United States Postal Service Sensitive Clearance. The timing of his conduct reflect a high degree of questionable judgment, untrustworthiness, unreliability, and showed unwillingness to comply with laws prohibiting possession of illegal drugs.

In addition to the enumerated disqualifying and mitigating conditions, I have considered the general adjudicative guidelines related to the whole person concept under Directive provision E2.2.1. As noted above, Applicant's repeated illegal drug purchase and use was a serious violation of the law. E2.2.1.1. His drug involvement was knowledgeable and voluntary, and it occurred while he held a security clearance. E2.2.1.2. He was 31 years old, sufficiently mature to be fully responsible for his conduct. E2.2.1.4. The likelihood of recurrence cannot yet be determined because his period of abstinence from drug use is not established and the corroborating evidence of a change of lifestyle is sparse. E2.2.1.9. After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the security concerns pertaining to drug involvement and personal conduct.

The evidence leaves me with grave questions and doubts as to Applicant's security eligibility and suitability. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"⁽³²⁾ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under Enclosure 2 of the Directive. He has failed to mitigate or overcome the government's case.

For the reasons stated, I conclude Applicant is not eligible for access to classified information.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

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

Paragraph 2., Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: 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. Clearance is denied.

Mark W. Harvey

Administrative Judge

1. Item 4 (Security Clearance Application (SF 86), signed by Applicant on December 29, 2003).
2. Item 1 (Statement of Reasons (SOR), dated December 5, 2005) at 1.
3. *Id.*
4. Item 3 (Applicant's response to SOR, dated January 4, 2006) at 1.
5. Seven items were included in the FORM.
6. DOHA transmittal letter.
7. *Id.* The DOHA transmittal letter informed Applicant that he had 30 days after receipt to submit information.
8. Item 3, *supra* note 4, at 1.
9. Item 4, *supra* note 1, at questions 6.1. and 6.2., respectively at 3.
10. Item 5 (Electronic SF 86, dated December 29, 2003), question 1 at 1.
11. *Id.* at question 5.2., at 2.
12. *Id.* at questions 6.1. to 6.17., at 3 to 6.
13. *Id.* at question 5.2., at 2.
14. *See* Item 1, *supra* note 2, ¶ 1.e. at 2, and Item 3, *supra* note 4, ¶ 1.e. at 1.
15. *See* Item 1, *supra* note 2, ¶¶ 1.g., 1.b., and 1.d., respectively at 2, and Item 3, *supra* note 4, ¶¶ 1.g., 1.b., and 1.d., respectively at 1.
16. *See* Item 1, *supra* note 2, ¶¶ 1.c. and 1.f., respectively at 2, and Item 3, *supra* note 4, ¶¶ 1.c. and 1.f., respectively at 1.

17. See Item 1, *supra* note 2, ¶ 1.g. at 2, and Item 3, *supra* note 4, ¶ 1.g. at 1 and Item 5, *supra* note 8, question 31, at 10.
18. Item 3, *supra* note 4, at 1.
19. Applicant's sexual orientation is not relevant to this security clearance determination.
- 20.
- ⁰*Id.*
- 21.
- ⁰Item 3, *supra* note 4, at 1.
22. ⁰*Id.*
23. "The Administrative Judge [] consider[s] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).
24. Directive ¶ E2.A8.1.3.1. "Recent drug involvement" is also addressed as a disqualifying condition in E2.A8.1.2.5. This disqualifying condition applies only in the context of failure to successfully complete a drug treatment program. ISCR Case No. 02-24452 (App. Bd. Aug. 4, 2004) at 3.
25. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).
26. *Id.*
27. Item 3, *supra* note 4, at 1.
28. Brief of Department Counsel, dated Apr. 26, 2006, at page 5.
29. Item 5, *supra* note 10, question 27 at 9.
30. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).
31. Item 3, *supra* note 4, at 1.
32. See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).