

DATE: May 26, 2006

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-07523

DECISION OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Constantine Marcou, Esq.

SYNOPSIS

Applicant used illegal chemical substances while possessing a security clearance. Her credibility is extremely suspect, as she has not been truthful or candid with information that she furnished to the United States Government. Mitigation has not been shown. Clearance is denied.

STATEMENT OF THE CASE

On January 6, 2006, 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 denied or revoked.

Applicant filed a notarized response, dated February 5, 2006, to the allegations set forth in the SOR, and requested a hearing before a DOHA Administrative Judge.

This case was assigned to this Administrative Judge on March 14, 2006, to conduct a hearing and issue a written decision. A Notice of Hearing was issued to the parties on April 10, 2006, and the hearing was conducted on April 28, 2006.

At the hearing, Department Counsel offered 12 documentary exhibits (Government's Exhibits 1-12) and no witnesses were called. Applicant offered one documentary exhibit (Applicant's Exhibit A) and offered her own testimony and that of one additional witness. Applicant offered four additional letters of reference (Exhibit B) and a supplement to her Security Clearance Application (SCA) (Exhibit C). Exhibit C was objected to by Department Counsel. I have overruled the objection and allowed Exhibit C into evidence. The transcript (Tr) was received on May 10, 2006.

FINDINGS OF FACT

In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline H (Drug Involvement), Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of the Directive. The SOR contains four allegations, 1.a. through 1.d., under Guideline H, one allegation, 2.a., under Guideline J., and five allegations, 3.a. through 3.e., under Guideline E.

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

Applicant is 31 years old. She is employed by a defense contractor, and she seeks a DoD security clearance in connection with her employment in the defense sector.

Paragraph 1 (Guideline H - Drug Involvement)

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

Applicant used marijuana on at least two occasions in April and May 2003. She also used amphetamines, at least one time in May 2003. Applicant used these substances while she was a member of the United States Army and while she held a Department of Defense security clearance.

On April 19, 2003, Applicant was parked in her vehicle with a friend, who was using marijuana. The local police searched her vehicle, found the marijuana and also found a military baton, that Applicant had left in her vehicle, after serving that day in her position in the Army where she was attached to the Military Police. Applicant was charged with Manufacture, Sale or Possession of Disguised Firearms or Other Deadly Weapons, a felony and Possession of Less Than One Ounce of Marijuana. She pled guilty to a reduced charge of Fighting, Causing Loud Noise or Using Offensive Words in a Public Place and was sentenced to one year probation and ordered to pay a fine of \$250.

Applicant testified that before the drug usage in 2003, she had only used marijuana one time when she was 16 years old. She contended that the reason she used the marijuana on the above stated occasions was because of her anger at being arrested in April 2003. She claimed that after she was released from jail she was so upset that she decided to use marijuana. Later when she was told that her actions may result in her being forced to leave the Army she used marijuana again. Despite her explanation, using marijuana after her arrest shows extremely poor judgement and irresponsible behavior.

When Applicant was tested for drug usage she was also found to have amphetamines in her system. She testified that she did not recall taking the amphetamines, but she did state that she may have done so during the period when she was heavily imbibing alcohol.

On July 29, 2003, Applicant was charged by the Army of Wrongful Use and Possession of dangerous Drugs. Applicant separated from the Army on September 12, 2003, in lieu of court-martial due to that charge.

Paragraph 2 (Guideline J - Criminal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because she has engaged in criminal conduct. Applicant's conduct as discussed in Paragraph 1, above, violated both civilian and military statutes and regulations.

Paragraph 3 (Guideline E - Personal Conduct)

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

Applicant completed a signed, sworn Security Clearance Application (SCA) on July 28, 2004.

Question #21 of the SCA asked if Applicant had ever been charged with or convicted of any Felony Offense(s). Applicant answered "No." Applicant did not list that she was arrested and

charged with Manufacture, Sale or Possession of Disguised Firearms or Other Deadly Weapons, which is a felony, as has been alleged in 1.d. of the SOR, and discussed above.

Question #24 of the SCA asked if Applicant had ever been charged with or convicted of any offense(s) related to alcohol or drugs. Applicant answered "No." Applicant did not list that she was arrested and charged with Possession of Less than One Ounce of Marijuana, as alleged in 1.d. of the SOR, and discussed above.

Question #25 of the SCA asked if, in the last seven years Applicant had been subject to court martial or other proceedings under the Uniform Code of Military Justice (UCMJ). Applicant answered "No." She did not list that she was charged under the UCMJ with Wrongful Use and Possession of Dangerous Drugs, as alleged in 1.c. and 1.d. of the SOR, and discussed above.

In addition to the inaccurate responses to the questions that have been alleged in the SOR and discussed above, Applicant also was not truthful in other responses in her SCA.

Question #27 of the SCA asked if, in the previous seven years, Applicant had used illegal drugs, including marijuana, etc. Applicant answered "yes" and responded, that she had used marijuana on two occasions. Applicant did not list her use of amphetamines as alleged in 1.b. of the SOR, and discussed above.

Question #28 of the SCA asked if Applicant had ever used illegal drugs while possessing a security clearance. Applicant answered "No." She did not list that she had used marijuana and amphetamines while she held a security clearance as alleged in 1.a. and 1.b. of the SOR, and discussed above.

While Questions #27 and 28 were not alleged by the Government, I have considered them in determining Applicant's overall honesty and credibility. Applicant clearly did not furnish honest and complete information to the Government on the SCA that she completed on July 28, 2004.

Applicant did submit a post hearing document (Exhibit C), which was allegedly attached to Applicant's SCA. The information furnished in Exhibit C does not resolve the inaccurate and incomplete information that Applicant submitted in response to the SCA questions, which have been discussed above.

Finally, Applicant did submit four letters of reference (Exhibit B), which are extremely positive regarding Applicant.

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 amphetamines is of concern, especially in light of her desire to have access to the nation's secrets. The fact that Applicant used illegal substances, while holding a security clearance, and while a member of the United States military must also be considered adversely. Applicant's overall conduct pertaining to her illegal substance abuse clearly falls within Drug Involvement Disqualifying Condition (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.

Since Applicant last used the marijuana and amphetamines in May 2003, Applicant's conduct could be argued to come within Mitigating Condition(MC) (E2.A8.1.3.1.), the drug involvement was not recent. MC (E2.A8.1.3.3.) could also be argued to apply because of Applicant's stated intention not to continue using illegal substances in the future.

In this case, the Government has met its initial burden of proving that Applicant used illegal drugs under Guideline H. Applicant, has attempted to introduce evidence in rebuttal, explanation or mitigation. However, based on the fact that Applicant used illegal drugs while holding a security clearance, after she was arrested and charged with possession of marijuana, and that she has not been honest in the information that she furnished to the Government regarding her drug usage, I do not find that the mitigating conditions are sufficient to overcome the Government's case against her. Accordingly, Paragraph 1, Guideline H, is concluded against Applicant.

(Guideline J -Criminal Conduct)

The Government also established by substantial evidence that Applicant engaged in criminal conduct, by her use of illegal substances.

DC (E2.A10.1.2.1.), allegations or admissions of criminal conduct, regardless of whether the person was formally charged, and DC (E2.A10.1.2.2), a single serious crime or multiple lesser offenses, apply in this case. Applicant has not mitigated this allegation. Paragraph 2 is found against Applicant.

(Guideline E -Personal Conduct)

With respect to Guideline E, the evidence establishes that Applicant furnished to the Government incomplete, untruthful answers in the SCA that she executed on July 28, 2004.

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 she nevertheless possesses the judgment, and honesty necessary for an individual given a clearance. In this case, 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. No Cs apply in this paragraph. Applicant's conduct, considered as a whole, including her drug usage, especially while holding a security clearance, and the misinformation that she provided to the Government, exhibits questionable judgement, unreliability, and a lack of candor. I resolve Paragraph 3, Guideline E, against Applicant

In this case, the Government has met its initial burden of proving by substantial evidence that Applicant has ingested illegal substances while holding a security clearance (Guideline H), that she has engaged in criminal conduct (Guideline J), and she has exhibited poor judgement and untrustworthy behavior (Guideline E). Applicant, on the other hand, has not introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's case against her. Accordingly, the evidence supports a finding 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

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Paragraph 3. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

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