



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
-----) ISCR Case No. 07-02480
SSN:-----)
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Edmunds, Esquire, Department Counsel
For Applicant: *Pro Se*

January 28, 2008

Decision

WESLEY, Roger C., Administrative Judge:

Statement of Case

On August 20, 2007, 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, issued a Statement of Reasons (SOR) to 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 clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on September 10, 2007, and requested a hearing. The case was assigned to me on October 10, 2007, and was scheduled for hearing on November 8, 2007. A hearing was held on November 8, 2007, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At hearing, the

Government's case consisted of eight exhibits; Applicant relied on one witness (himself) and one exhibit. The transcript (R.T.) was received on December 4, 2007.

Procedural Rulings and Evidentiary Issues

Prior to the hearing, Department Counsel moved to amend the SOR to (1) delete the words "alcohol dependence" from subparagraph 1.b and replace with "alcohol abuse" and (2) add Guideline E allegations to allege falsification of (a) signed, sworn statements in August and September 1990 and again in April 1997 by concealing his continued use of marijuana after his stated July 1986 cut-off and (b) a signed, sworn statement of April 1997 by denying he drank any alcoholic beverages prior to his being arrested for driving under the influence (Dul) in January 1997. There being no objection from Applicant, and good cause being demonstrated, Department Counsel's motion was granted. Applicant denied the amended allegations of the SOR.

Summary of Pleadings

Under Guideline G, Applicant is alleged to have (a) consumed alcohol to excess and to intoxication from 1969 to 1972 and until at least 2006, (b) received inpatient treatment from June 1986 until August 1986 for diagnosed alcohol dependence, and (c) been arrested in January 2007 for aggravated Dul (dismissed).

Under Guideline H, Applicant is alleged to have (i) used marijuana daily from 1977 to at least 1985, (ii) used cocaine monthly from 1977 to August 2004, (iii) received outpatient treatment for alcohol abuse and poly-pharmacy abuse, and (d) tested positive for cocaine in a random drug test in August 2004.

For his answer to the SOR, Applicant admitted each of the allegations covering his involvement with alcohol and illegal drugs. Applicant provided explanations to his covered use of alcohol and illegal drugs, acknowledging his use of alcohol and drugs as stated.

Findings of Fact

Applicant is a 38-year-old facilities technician for a defense contractor who seeks to retain his security clearance. The allegations covered in the SOR and admitted by Applicant are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

Applicant was introduced to alcohol in high school. Between 1977 and 1980 (while in the military), he consumed approximately a six-pack of beer a day. During this same period, he also used marijuana on a daily basis, and cocaine monthly (R.T., at 42-43). Contemporaneously, he tried other drugs as well. Once discharged from the military, he went to work for his father's construction company and tried tech school. He was forced to withdraw from his school studies, however, when his wife became pregnant (R.T., at 44). Over the course of the ensuing six years (between 1980 and

1986), he did not drink every day, but when he did drink, he usually drank to intoxication (R.T., at 44-45). When he felt additional pressures from his marriage, he would some times drink before going to work (R.T., at 45). Applicant admits to using marijuana daily during this six-year period, as well as cocaine (although not as much).

In June 1986, Applicant voluntarily admitted himself to an inpatient treatment facility (CU Hospital). Upon admission, he was diagnosed by a certified physician with alcohol and poly pharmacy abuse and admitted for detoxification (see ex. 8). After successful detoxification, he was transferred to adult rehabilitation, where he was treated for family dysfunction, chemical dependency, and a lack of a recovery program. While in treatment, Applicant attended all required individual and group sessions and was credited with interacting well and making considerable progress (see ex. 8; R.T., at 46). He was discharged in August 1986 with a favorable prognosis and a recommended post-discharge regimen of 90 AA/NA meetings in 90 days, sustained avoidance of alcohol and all mood altering substances, continued work on family relationships, and advised outside therapy as necessary (ex. 8; R.T., at 47).

Following his 1986 hospital discharge, Applicant utilized outpatient treatment for a brief time and maintained sobriety for 4 to 6 months before relapsing into both alcohol consumption and marijuana/cocaine use, some times binging on cocaine (R.T., at 47-48, 63). Around 1989, he was ticketed for having an open container in his vehicle and paid a fine (R.T., at 48-49). While he continued to consume alcohol on a regular basis after his discharge, he stopped using marijuana altogether around 1988 (see ex. 6).

In January 1997, Applicant was arrested and charged with aggravated Dul after he failed to provide police with a sufficient breath sample. He had consumed a number of drinks at a local bar and was driving home when he was stopped by police (R.T., at 53-54). When he failed an administered sobriety test at the scene, he was escorted to the local police station for further testing. Once in court, the Dul charges were dismissed due to the likely malfunctioning of the breathalyzer. Based on his admitted three beers before his arrest, though, the incident qualifies as an alcohol-related incident, despite the dismissal of the charges.

For a number of years following his 1997 Dul arrest, Applicant continued to drink on a regular basis, sometimes to intoxication (see ex. 3; R.T., at 56). Tired of the hangovers, which could sometimes last up to one week after a week of binge drinking episodes, he began curtailing his drinking in the 2002 time period. Between 2002 and 2004, he consumed a six-pack of beer a week on average, and rarely any mixed drinks (ex. 3; R.T., at 64-65). Since his 2004 positive drug test, he not only ceased using illegal drugs, but he reduced his alcohol consumption even further: "maybe once every two weeks" he estimates (R.T., at 66).

Despite his denials of returning to any kind of sustained use of illegal substances (such as cocaine and marijuana) after giving up drugs in 1988, he is on record for testing positive for cocaine in August 2004 (see ex. 6; R.T., at 59). In a September 2006 OPM interview, he admitted to using cocaine for about two weeks before his positive

drug test and purchasing 4 to 5 lines of cocaine at a party and snorting the same a couple days before the test (see ex. 3; R.T., at 60-62). He assures that he has not used any form of illegal drugs since his positive drug test (R.T., at 64). Applicant's claims raise credibility issues that require careful consideration.

In two signed sworn statements given to a DSS investigator in August and September 1990, respectively (see exs. 4 and 5), Applicant stated that he had not used or purchased marijuana since July 1986. He admits to making these misstatements but did not know why he made them (R.T., at 51). He was just as uncertain about his denied use of any alcohol preceding his January 1997 Dul arrest when he answered questions from an OPM agent in April 1997 (see ex.6; R.T., at 56-57). Only when confronted about pre-arrest alcohol consumption by the same OPM agent in an ensuing interview in June 1997 did he admit to having three beers before his Dul arrest and attribute his omissions to concerns that his being honest about his alcohol use might hurt his case (see ex. 7; R.T., at 58).

In a more recent OPM interview in June 2006, Applicant provided a complete history of his alcohol and drug use for the interviewing agent (see ex. 3). He provided no explanations for his previous misstatements and omissions about his use of alcohol and illegal drugs. I view the 2006 OPM interview as a more credible account of Applicant's alcohol and drug history than those previously provided the DSS investigator and OPM agent who interviewed Applicant.

Applicant's series of misstatements and omissions about his alcohol and drug use in the signed, sworn statements he signed for DSS and OPM are admitted and probative of determined withholding of adverse information about his alcohol and drug use. His omissions are neither isolated nor explained and mask far more serious alcohol and drug use than he was willing to acknowledge in his earlier interviews. Considering all of the circumstances of his noted misstatements, they cannot be excused as inadvertent. They reflect a pattern of misstatements and omissions of material information about his recurrent alcohol and drug use that was material to an investigation of security eligibility, and both knowing and wilful under all of the circumstances considered.

Applicant is highly regarded by his supervisors. He is described as a skilled worker and a very reliable and dependable team member who is respected by his fellow co-workers (see ex. A).

Policies

The revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (effective September 2006) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the Mitigating Conditions, if any, before deciding whether or not a security clearance should be granted, continued

or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Alcohol Consumption

The Concern. Excessive alcohol consumption often leads to the exercise of questionable judgment, or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness (Adjudicative Guidelines, paragraph 21).

Drug Involvement

The Concern: 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 (Adjudicative Guidelines, paragraph 24).

Personal Conduct

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process (Adjudicative Guidelines, paragraph 15).

Burden of Proof

By virtue of the precepts framed by the revised Adjudicative Guidelines, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

Analysis

Applicant is a highly regarded electronics technician for a defense contractor with a history of regular alcohol consumption and illegal drug use over a 30-year period. Security concerns are raised, too, over Applicant's misstatements and omissions regarding the extent of his alcohol and drug use in a series of interviews with Government investigators.

Alcohol issues

Over the course of 30-years, Applicant consumed alcohol abusively to the point of intoxication. After a brief respite from abusive drinking following his discharged from inpatient treatment in 1986, Applicant returned to heavy drinking, that included binge drinking with hangovers that sometimes lasted as long as a week. His excessive drinking contributed to a Dul arrest in January 1997. Although the charges were subsequently dismissed, the incident qualifies as an alcohol-related incident. True, he has managed to curtail his drinking since about 2002. However, he has not obtained any kind of renewed diagnosis and prognosis to check his ability to limit his alcohol intake in the future.

On the strength of the evidence presented, several disqualifying conditions (DC) of the Adjudication Guidelines for alcohol consumption may be applied: 22(a) "alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent," and 22(c) "habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent."

Because Applicant's drinking has never received any revised diagnosis since 1986 and ensuing relapse, his previous diagnosis of alcohol abuse has some current assessment value. Accordingly, both 22(d) "diagnosis by a duly qualified medical

professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence” and 22(f) “relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program” have some application to the facts at hand.

To his credit, Applicant has curtailed his drinking for the past several years and has not been involved in any alcohol-related incident since 1997. Because his most serious periods of alcohol abuse (between 1977 and 2002) involved heavy binge drinking at times and contemporaneous use of illegal substances (mostly marijuana and cocaine), his continued drinking retains some cause for concern. However, his failure to seek a recent evaluation and enlist substance abuse counseling for any identified alcohol problem to date, his acknowledged binge drinking in the past, his understatement of his alcohol consumption, and his failure to furnish a more recent favorable prognosis create a confluence of troubling concerns that preclude application of any of the mitigating conditions of the guidelines for alcohol. Applicant’s renewed commitment to abstinence does reflect positive changes in behavior supportive of sobriety, and for these efforts Applicant is to be commended. Favorable views of his progress from work colleagues who know him are also helpful in gauging the strength of his commitment to sobriety.

Taking into account both Appellant’s history of alcohol abuse and his strong work record, his mitigation efforts to date, while encouraging, reflect insufficient evaluative information and evidence of sustained commitment to AA and its tenets of sobriety to conclude he is no longer at risk of recurrence. Without a favorable prognosis, it would be imprudent to relax the time mitigation requirements of any of the mitigating conditions of the alcohol and criminal conduct guidelines.

Considering the record as a whole, Applicant fails to make a convincing showing that he has both the maturity and resource support at his disposal to avert any recurrent problems with judgment lapses related to alcohol. Safe predictions that he is no longer at risk of judgment impairment associated with such conduct are not warranted in these circumstances. Unfavorable conclusions warrant with respect to the allegations covered by the alcohol guidelines of the SOR

Drug issues

As he acknowledges, Applicant used illegal substances (marijuana and cocaine) regularly for over 10 years between 1977 and 1988. In 1986, he was diagnosed by a certified physician with poly pharmacy abuse. And with a positive random drug test for cocaine still so recent (August 2004), it is difficult to credit Applicant with any sustained period of abstinence.

Applicant's recurrent use of cocaine (a drug he used quite regularly in the past) is sufficient to invoke four of the disqualifying conditions of the Adjudicative Guidelines for drugs, *i.e.*, DC 25(a) “any drug abuse”), DC 25(b) (“testing positive for illegal drug use,” DC 25(c) “illegal drug possession, including cultivation, processing, manufacture,

purchase, sale or distribution, or possession of drug paraphernalia,” and DC 25(d) “diagnosis of a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist.” Although Applicant was credited with successfully completing his CU inpatient program in 1986, he soon returned to illegal drugs (marijuana and cocaine). As a result, DC 25(f) “failure to successfully complete a drug treatment program prescribed by a duly qualified medical professional”) has some continuing applicability as well, especially in light of his more recent positive drug test..

Applicant assures he has not used any illegal substances since his positive drug test in August 2004. To be sure, misconduct predictions (to include return to illegal drug use), generally, may not be based on speculation or suspicion. See ISCR Case No. 01-26893 (Appeal Bd. October 2002); ISCR Case No. 97-0356 (App. Bd. April 1998). The Appeal Board has consistently held that an unfavorable credibility determination concerning an applicant is not a substitute for record evidence that the applicant used illegal drugs since his last recorded use, or based on his past use he is likely to resume drug usage in the future. See ISCR Case No. 02-08032 (Appeal Bd. May 2004).

Based on Applicant’s long history of sustained marijuana and cocaine use, his poly-pharmacy abuse diagnosis, his recent positive drug test, his past minimizing of the extent of his use in his statements to Government investigators, and his return to illegal substances following his 1986 inpatient treatment discharge, it is simply too soon to enable him to claim the benefits of any of the mitigating conditions of the guideline for drug involvement.

Applicant’s assurances that his drug use is a thing of the past must be balanced against his considerable history of recurrent use (at times quite heavy), his positive drug test with his current employer, his poly-pharmacy diagnosis, his understatements when asked about his drug use, and the relatively short amount of time that has elapsed since his failed drug test. Considering all of the developed evidence of record, Applicant fails to mitigate security concerns associated with his recurrent use and possession of illegal substances. Unfavorable conclusions warrant with respect to sub-paragraphs 2.a through 2.d of Guideline H.

Falsification concerns

Potentially serious and difficult to reconcile with the trust and reliability requirements for holding a security clearance are the timing and circumstances of Applicant’s misstatements and omissions he made in the series of interviews he participated in with DSS and OPM agents between August 1990 and April 1997. So much trust is imposed on persons cleared to see classified information that deviation tolerances for candor lapses are gauged very narrowly.

Applicant’s misstatements and omissions about his alcohol and drug use in the signed, sworn statements he signed for DSS and OPM are admitted and probative of his withholding of adverse information about his alcohol and drug use. His omissions are neither isolated nor explained and mask far more serious alcohol and drug use than

he was willing to acknowledge in his earlier interviews. Considering all of the circumstances of his noted misstatements, they cannot be excused as inadvertent. They reflect a pattern of misstatements and omissions of material information about his recurrent alcohol and drug use that was material to an investigation of security eligibility, and both knowing and wilful under all of the circumstances considered.

Mitigation is difficult to credit Applicant with, since he failed to accurately describe the extent of his alcohol and illegal drug use following his 1986 discharge from inpatient treatment. In the past, the Appeal Board has denied applicants availability of the predecessor mitigating condition of MC 17(a) ("the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts") where the applicant has waited many months to timely correct a known omission. *Compare* ISCR Case No. 97-0289 (Appeal Bd. January 1998) with DISCR Case No. 93-1390 (Appeal Bd. January 1995). Not until interviewed by an OPM agent in June 2006 (almost 10 years since his last DSS interview in April 1997) did Applicant voluntarily come forward with a full and complete history of his illegal substance and alcohol use.

By minimizing his past involvement with illegal substances in his SF-86, Applicant concealed materially important background information needed for the government to properly process and evaluate his security updates. His lack of plausible reasons for understating his drug and alcohol use are not sustainable grounds for averting inferences of falsification. Weighing all of the circumstances surrounding his substance understatements/omissions and lack of any prompt, good faith corrections, Applicant's claims lack the necessary probative showing to avert drawn conclusions that he knowingly and deliberately withheld material background information about his prior use of illegal substances and alcohol.

From a whole person standpoint, Applicant is highly regarded by his supervisors and co-workers as reliable and dependable. His overall reputation for reliability and dependability in the work place is not enough, however, to overcome repetitive misstatements and omissions about his drug and alcohol use in his background investigations.

Considering all of the evidence produced in this record and the available guidelines in the Directive (inclusive of the E2.2 factors), unfavorable conclusions warrant with respect to added sub-paragraphs 3.a through 3.d of Guideline E.

In reaching my decision, I have considered the evidence as a whole, including each of the E2 2.2 factors enumerated in the Adjudicative Guidelines of the Directive.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, and conditions and the factors listed above, I make the following formal findings:

GUIDELINE G (ALCOHOL):	AGAINST APPLICANT
Sub-paras. 1.a through 1.c	AGAINST APPLICANT
GUIDELINE H (DRUGS):	AGAINST APPLICANT
Sub-paras. 1.a through 1.d:	AGAINST APPLICANT
GUIDELINE E (PERSONAL CONDUCT):	AGAINST APPLICANT
Sub-paras 3.a through 3.d:	AGAINST APPLICANT

Conclusion

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 Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge