

KEYWORD: Criminal Conduct; Drugs; Personal Conduct

DIGEST: Applicant used marijuana from about 1996 to 2004, was caught driving drunk in October 2004, and was not candid about his illegal drug involvement on his security clearance application. The illegal drug involvement concerns are mitigated by his abstention with a credible intent to refrain from future drug use. Personal conduct and criminal conduct concerns persist because of his deliberate false statements on his clearance application. Clearance is denied.

CASENO: 05-09298.h1

DATE: 05/30/2007

DATE: May 30, 2007

In re:)
)
)
 -----) ISCR Case No. 05-09298
 SSN: -----)
)
 Applicant for Security Clearance)
)
)

**DECISION OF ADMINISTRATIVE JUDGE
ELIZABETH M. MATCHINSKI**

APPEARANCES

FOR GOVERNMENT

Francisco Mendez, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant used marijuana from about 1996 to 2004, was caught driving drunk in October 2004, and was not candid about his illegal drug involvement on his security clearance application. The illegal drug involvement concerns are mitigated by his abstention with a credible intent to refrain from future drug use. Personal conduct and criminal conduct concerns persist because of his deliberate false statements on his clearance application. Clearance is denied.

STATEMENT OF THE CASE

_____The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Department of Defense Directive 5220.6 ¶ E2.1.2 (Jan. 2, 1992) as amended, DOHA issued a Statement of Reasons (SOR) on October 23, 2006,¹ detailing the basis for its decision—security concerns raised under Guideline J (criminal conduct), Guideline H (drug involvement), and Guideline E (personal conduct) of the revised Adjudicative Guidelines (AG) issued on December 29, 2005, and implemented by the Department of Defense effective September 1, 2006. The revised guidelines were provided to Applicant when the SOR was issued.

_____Applicant filed an initial answer dated November 1, 2006, that was not considered responsive in that he did not indicate whether he wanted a hearing. On December 18, 2006, Applicant submitted his original answer annotated with a request for a decision based on the written record without a hearing. The government submitted a File of Relevant Material (FORM) on January 29, 2007, consisting of nine exhibits (Items 1-9). Through correspondence dated January 30, 2007, DOHA forwarded a copy of the FORM to Applicant and instructed him to respond within 30 days of receipt. No rebuttal had been filed by Applicant as of the March 14, 2007 due date. On April 9, 2007, the case was assigned to me to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

FINDINGS OF FACT

DOHA alleged under Guideline J, criminal conduct, that Applicant was given probation before judgment for October 2004 driving under the influence and related charges (¶ 1.a) and for August 1997 possession of marijuana and drug paraphernalia charges (¶ 1.b). The drug charges were cross-referenced under Guideline H, drug involvement (¶ 2.b). In addition, Applicant was alleged under Guideline H to have used marijuana from about 1996 to at least 2004 (¶ 2.a). DOHA alleged under Guideline E, personal conduct, and Guideline J that Applicant deliberately falsified his February 2004 Questionnaire for National Security Positions (SF 86) by denying any drug-related arrests (¶ 3.a) and any use of illegal drugs within the seven years preceding his application (¶ 3.b), committing thereby a felony violation of 18 U.S.C. § 1001 (¶ 1.c).

Applicant responded “I admit” to the arrests (¶¶ 1.a, 1.b, 2.b), to the marijuana use (¶ 2.a), and to his failures to disclose the criminal drug charges (¶ 3.a) and marijuana use (¶ 3.b) on his clearance application, but provided a detailed response in which he denied the intentional falsification of his SF 86 (¶¶ 3.a, and 3.b), and therefore by inference the violation of 18 U.S.C. § 1001 (¶ 1.c). Applicant’s admissions to the criminal charges and dispositions and to the marijuana use are incorporated as findings of fact. After a thorough review of the documents before me for consideration, I make the following findings of relevant fact.

¹Applicant’s last name was misspelled in the SOR. Pursuant to the government’s motion, the SOR is hereby amended to reflect the correct spelling.

Applicant is a 33-year-old married high school graduate who seeks a security clearance for his duties with a defense contractor. After Applicant graduated from high school in June 1992, he pursued vocational/technical training for five years. In about 1996, when he was 22, he began smoking marijuana off and on. On completing his training in June 1997, he started working for his present employer as a journeyman.

Applicant continued to smoke marijuana on occasion, and in mid-August 1997, Applicant was en route home with a friend from an acquaintance's home when he was stopped for crossing the center line. Applicant responded negatively to officer's inquiries as to whether he had any illegal drugs in his possession, but he subsequently admitted he had a small bag of marijuana in the car. The officer seized a small bag containing marijuana residue (seeds and stems) and Applicant and his companion were both arrested. Applicant pleaded guilty to charges of marijuana and drug paraphernalia possession, and was sentenced to probation before judgment. As conditions of his probation, he attended three classes at a county treatment center and two Alcoholics Anonymous meetings, and was subjected to breath and urine testing twice a week for three months. He completed the requirements without incident.

Following his arrest, and his marriage in 1999 to his spouse, who had a six-year-old daughter from a prior relationship, Applicant continued to smoke marijuana off and on, roughly twice a week during periods of use. He typically purchased a quarter ounce bag of marijuana every two or three weeks, and smoked it from a pipe or bowl with his brother-in-law on the weekends for recreational purposes.

On February 15, 2004, Applicant completed a Questionnaire for National Security Positions (SF 86) in application for a security clearance for his duties with the defense contractor. Applicant responded negatively to police record inquiries, including question 23d. "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?" and to illegal drug use inquiries, including question 24a. "Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.) amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.) hallucinogenics (LSD, PCP, etc.), or prescription drugs?"

In late October 2004, Applicant was pulled over by the police for failure to stay within marked lanes. He was arrested for DUI, failure to drive right of center, and negligent driving after he blew a .13% blood alcohol content on the breathalyzer. Applicant did not think he was intoxicated at the time. In late December 2004, he began attending a level I substance abuse program on the advice of his attorney. He attended two group counseling sessions weekly and one individual session per month for a total of 33 sessions, and was discharged before completing the full 39 sessions originally planned because he was an outstanding client. When he appeared in court to answer for the DUI, he was given probation before judgment.

On January 12, 2005, Applicant was interviewed by a special investigator with the Office of Personnel Management (OPM) investigations service. He detailed his drug arrest in August 1997, and admitted he had used marijuana "off and on again" since about 1996 when he was 22 years old. He continued to use marijuana "roughly twice a week" up until his arrest in October 2004. Applicant told the investigator he had stopped using marijuana in October 2004 because he wanted to be more responsible and he did not intend to use any illegal drugs in the future. There is no indication in the

record as to whether Applicant was asked about his failure to list his drug use on his SF 86. As for his alcohol consumption, he detailed the circumstances of his October 2004 arrest for DUI, admitting that he had told the arresting officer he drank only two beers when he had consumed four within three hours. Applicant disclosed that he was attending a substance abuse program twice per week on the advice of his attorney, but he denied that he had a substance abuse problem. He indicated that he typically consumed three beers once a week and so rarely to intoxication that he was unable to quantify the instances. Applicant asserted he was not susceptible to blackmail although due to embarrassment he had kept the fact of his DUI arrest from family and friends other than his spouse.

On October 23, 2005, DOHA issued an SOR to Applicant, citing in part, security concerns stemming from his failure to list his August 1997 drug offense or his involvement with marijuana on his SF 86. In his answer to the SOR, Applicant indicated he had not listed the August 1997 drug offenses based on his understanding that they were expunged and therefore he assumed he did not have to list them. Applicant did not directly address his failure to report his drug use on his clearance application. Rather, he referred to his October 2004 arrest which occurred after he had submitted the application. However, he also expressed hope that his “misguided answers” did not jeopardize his future.

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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

The adjudicative guidelines set forth potentially disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts, including the adjudicative guidelines, I conclude the following with respect to Guidelines J, E, and H:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations. AG ¶ 30. Applicant's October 2004 DUI and August 1997 marijuana possession fall within Guideline J, criminal conduct, disqualifying conditions (DC) ¶ 31(a), *a single serious crime or multiple lesser offenses*, and DC ¶ 31(c), *allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted*. The charges are substantiated (in possession of marijuana residue in August 1997 and a .13% blood alcohol content in October 2004), even though he has no formal conviction on his record since he was placed on probation before judgment in each case. Furthermore, Guideline J DC ¶ 31(c) is also implicated because of his lack of candor on his security clearance application (*see* Personal Conduct, *supra*). Applicant committed a felony violation of § 18 U.S.C. § 1001 by deliberately omitting relevant and material information concerning his illegal drug involvement from his SF 86.²

Applicant responded "No" to question 23d. on his February 2004 SF 86 concerning whether he had ever been charged with an alcohol or drug offense, even though he had been arrested and been placed on probation before judgment for August 1997 marijuana possession and drug paraphernalia possession offenses. Applicant denies any intentional omission, claiming a belief that the charges were to be expunged from his record and disclosure was not therefore required. As specified in the language of question 23, the lone exception to mandatory disclosure is for those convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. § 844 or 18 U.S.C. § 3607. Expungement by a state court pursuant to a state law would not fall within the exception, although a good faith mistaken reliance on such an expungement order could negate the willful intent required for a 18 U.S.C. § 1001 violation. Applicant presented no expungement order that would substantiate a good faith belief that he did not have to list the drug charges. Moreover, Applicant lacks credibility on this issue, given his negative response to the drug inquiries on the SF 86, including question 24a. At the time he completed his SF 86, he was still actively abusing marijuana on an occasional basis, as frequently as twice per week. He offered no explanation for his failure to disclose his drug abuse history other than he believed his October 2004 arrest for drunk driving happened after he filed his clearance form. Had Applicant no intent to conceal his illegal drug involvement from the government, he would have at a minimum responded affirmatively to question 24a. In addition to raising criminal conduct concerns as noted above, Applicant's knowing and willful concealment of his drug arrest and marijuana involvement falls within personal conduct AG ¶ 15. *Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions*

²18 U.S.C. § 1001 provides in part:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully: (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title or imprisoned not more than 5 years, or both.

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. DC ¶ 16(a), deliberate omission, concealment, or falsification of relevant 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, under Guideline E applies.

Applicant's abuse of marijuana from about 1996 to October 2004 raises independent concerns under Guideline H, drug involvement. As set forth in AG ¶ 24, *use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment, and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. DC ¶ 25(a), any drug abuse, and DC ¶ 25(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia, apply.*

Applicant has a heavy burden of showing mitigation, given the existence of credible adverse information in several different areas (falsification, drug use, alcohol abuse). Concerning the Guideline J concerns, mitigating conditions (MC) ¶ 32(b) *the person was pressured or coerced*, and ¶ 32(c) *evidence that the person did not commit the offense*, clearly do not apply. Although he has not been arrested on any illegal drug charges since 1997 (*see* ¶ 32(a), *so much time has elapsed since the criminal behavior happened, or has happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*) his drug-related criminal behavior continued to at least October 2004. Furthermore, the drug charges, albeit dated, cannot be viewed in isolation from his more recent DUI and felonious false statements. There is no evidence to indicate his drunk driving was other than isolated, and he was discharged early from his court-mandated counseling sessions because of his outstanding participation. However, I am unable to conclude that he is successfully rehabilitated from the criminal conduct concerns where he remains unwilling to acknowledge the deliberate falsification of his SF 86. His failure to provide a credible explanation for his negative response to the drug inquiry casts continuing doubt on his judgment and trustworthiness, and reflects a lack of remorse. Accordingly, he has also not satisfied MC ¶ 32(d) *there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.*

To his credit, Applicant discussed his illegal drug use to October 2004 and his then very recent drunk driving offense with the OPM investigator during an interview of January 12, 2005. It is not clear whether the investigator knew of the DUI before Applicant told him about it. Applicant even admitted that only his wife knew of his recent arrest as he was embarrassed about it. The Guideline E, personal conduct, concerns raised by his knowing falsification of his SF 86 may be mitigated by a prompt good faith effort at rectification (*see* ¶ 17(a) *the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts*). Assuming Applicant volunteered the DUI, his disclosures some 11 months after his SF 86 are not considered prompt. Moreover, serious judgment concerns persist because of his failure in his Answer to squarely address and candidly admit to the government that he had acted to conceal his drug involvement when he completed his SF 86. Indeed, his spurious excuse, *i.e.*, the October

2004 incident happened after he filed his clearance application, could itself raise security concerns under Guideline E (*see* ¶ 17(b) *deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative*). I am unable to conclude based on the evidence before me that Applicant can be counted on to fulfill the fiduciary obligation of candor that must be demanded of those granted access.

Despite the negative inferences that warrant for his credibility because of his SF 86 falsifications and ongoing denial of willful concealment, I accept as valid his claim of abstinence from illegal drugs since October 2004 with no intent of future involvement. While Applicant's abuse of marijuana was off and on, it was on the order of twice per week as of his decision to forswear any future involvement in October 2004, so does not fall within MC ¶ 26(a) *the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment*. However, an intent to not use drugs in the future, as demonstrated by (1) *disassociation from drug-using associates and contacts*; (2) *changing or avoiding the environment where drugs were used*; (3) *an appropriate period of abstinence*; (4) *a signed statement of intent with automatic revocation of clearance for any violation*, is a mitigating condition under ¶ 26(b). The record is silent as to whether Applicant has terminated associations with persons with whom he had used marijuana in the past. His most recent drug use was in the context of socializing with his brother-in-law on weekends, and there is no indication he no longer sees his brother-in-law. Yet, his abstinence of about 26 months as of his amended Answer is sufficiently long to prove an ability to refrain from marijuana. When coupled with his outstanding participation in the substance abuse treatment program, I find sufficient demonstration of intent to refrain from future drug use. There has been no evidence of any alcohol or drug abuse since he completed 28 group sessions and five individual sessions of substance abuse counseling in May 2005.

Whole Person Analysis

“The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance.” AG ¶ 2(a). Applicant's marijuana abuse continued after he became employed by a defense contractor and well after its illegality was brought home to him by a criminal arrest. His failure to disclose his drug involvement in February 2004 is especially troubling given his drug abuse was ongoing (*see* ¶ 2(a)(1) *the nature, extent, and seriousness of the conduct* and ¶ 2(a)(3) *the frequency and recency of the conduct*). While substance abuse counseling brought about sustained abstinence (*see* ¶ 2(a)(6) *the presence or absence of rehabilitation and other permanent behavioral changes*), his reform is incomplete where he refuses to admit that he had concealed his drug use from the government, in all likelihood to obtain the clearance needed for his job.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Paragraph 2. Guideline H:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant
Paragraph 3. Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	Against Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Elizabeth M. Matchinski
Administrative Judge