

KEYWORD: Drugs; Personal Conduct

DIGEST: Applicant, 29 years old and unmarried, is employed as a software engineer by a defense contractor. In 2001, he was granted a security clearance. In approximately 2002, he committed a security violation by failing to remove and secure computer hard drives containing classified information at the end of the work day. Applicant used marijuana intermittently from 1996 to 2004. In 2004, when he was 26 and holding a security clearance, he used marijuana with friends at a concert. While Applicant mitigated a Guideline E security violation concern, he failed to mitigate security concerns related to drug use under Guidelines E and H. Clearance is denied.

CASENO: 06-12032.h1

DATE: 05/31/2007

DATE: May 31, 2007

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In Re:)	
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-----)	ISCR Case No. 06-12032
SSN: -----)	
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
JOAN CATON ANTHONY**

APPEARANCES

FOR GOVERNMENT

Candace L. Le'i, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, 29 years old and unmarried, is employed as a software engineer by a defense contractor. In 2001, he was granted a security clearance. In approximately 2002, he committed a security violation by failing to remove and secure computer hard drives containing classified information at the end of the work day. Applicant used marijuana intermittently from 1996 to 2004. In 2004, when he was 26 and holding a security clearance, he used marijuana with friends at a concert. While Applicant mitigated a Guideline E security violation concern, he failed to mitigate security concerns related to drug use under Guidelines E and H. 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. On June 20, 2006, under the applicable Executive Order¹ and Department of Defense Directive,² DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision—security concerns raised under Guideline H (Drug Involvement) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on July 20, 2006. He requested his case be determined on the record in lieu of a hearing. The Government compiled its File of Relevant Material (FORM) on March 29, 2007. The FORM contained documents identified as Items 1 through 5. Additionally, one official U.S. Government document, an except entitled “Marijuana,” printed September 27, 2006, from the U.S. Drug Enforcement Administration website was offered for administrative notice. (See <http://www.usdoj.gov/dea/concern/marijuana.html>.)

On March 29, 2007, a copy of the FORM was forwarded to Applicant, with instructions to submit any additional information and/or objections within 30 days of receipt. Applicant received the file on April 9, 2007. On May 10, 2007, Applicant submitted additional information, consisting of a five-page Discussion and Argument and 11 exhibits.³ Department Counsel did not object to the admission of Applicant’s Discussion and Argument and exhibits. On May 22, 2007, the case was assigned to me for a decision. After a careful review, I marked Applicant’s Discussion and Argument as exhibit (Ex.) A, and I marked his 11 exhibits as Exs. B through L and admitted them to the record of this case.

FINDINGS OF FACT

The SOR contains two allegations of disqualifying conduct under Guideline H, Drug Involvement, and two allegations of disqualifying conduct under Guideline E, Personal Conduct.

¹Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.

²Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.

³Applicant’s original submission consisted of 13 exhibits. His first exhibit was a copy of the Statement of Reasons, dated June 20, 2006. His second exhibit was his Answer to the Statement of Reasons, dated July 20, 2006. Since the Statement of Reasons and Applicant’s Answer to the Statement of Reasons were already in the record, I did not admit them as Applicant’s exhibits. (See FORM, Items 1 and 3.)

(Item 1.) In his answer to the SOR, Applicant admitted all four allegations. (Item 3.) His admissions are incorporated as findings of fact.

Applicant is 29 years old and single. He graduated from college in June 2001 and in July 2001 went to work for employer A, a defense contractor, as a software engineer II. He was employed by Employer A until October 2004, when the employer closed the branch Applicant was assigned to. Rather than go with the branch to another city, Applicant elected not to move and to find a new job.

In approximately 2002, while he was employed by Employer A, Applicant committed a security violation. He and another employee failed to remove and secure computer hard drives containing classified information before leaving the workplace at the end of the work day. He and the other employee were given verbal warnings from their employer for the security violation. Applicant stated that at the time of the security violation, he and the other employee were working 12 to 14 hour days to make progress on a project that was behind schedule. Applicant stated he and his co-worker armed the proper locks when leaving the work site, even though they had not removed and secured the hard drives containing classified information as they were required to do. He speculated he and his co-worker were guilty of a practice dangerous to security but had not committed a security violation. (Item 3 at 1-2.)

In November 2004, Applicant took a job as a software engineer with another defense contractor (Employer B). He worked for Employer B until September 2006, when he returned to Employer A as a senior software engineer, in order to be closer to his fiancée. (Ex. A, Argument; Item 4; Item 5.) As an employee of Employer A, Applicant seeks eligibility for a security clearance. (Applicant's signed receipt of SOR, dated April 9, 2007.)

Applicant used marijuana, with varying frequency, from about June 1996 to at least August 2004. He was granted a security clearance in approximately November 2001. While employed by Employer A and while holding a security clearance, he used marijuana in August 2004. DOHA alleged Applicant's use of marijuana while holding a security clearance security raised security concerns not only under the Drug Involvement guideline but also under the Personal Conduct guideline.

On October 12, 2001, Applicant completed and certified an electronic security clearance application (SF-86). Question 27 on the SF-86 reads as follows:

Your Use of Illegal Drugs and Drug Activity - Illegal Use of Drugs.

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?

Applicant responded "yes" to Question 27 and reported he had used marijuana two times between June 25, 1996 and June 26, 1996. (Item 5.)

Applicant completed a second electronic SF-86 in October 2005. On October 11, 2005, he signed and certified the following statement:

My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both. (See section 1001 of title 18, United States Code).

Section 24 on the SF-86 that Applicant completed in October 2005 uses language identical to Question 27, quoted above, to inquire about an Applicant's use of illegal drugs and controlled substances. In October 2005, Applicant responded "yes" to Section 24. He admitted he used marijuana in August 2004 once at a concert he was attending with friends. He also admitted marijuana use three times between January 2000 and June 2000, with the additional comment: "Tried it in college." (Item 4.)

In his Answer to the SOR, Applicant stated he attended a concert with three friends in August 2004. He stated he and his friends were looking forward to a good time at the concert. Before the concert began, Applicant and his friends smoked a joint that was passed around by other fans at the concert. Applicant expressed regret for using marijuana in 2004 while holding a security clearance. He stated he had used marijuana "no more than 10 times during his college years from June 1996 - June 2000." He stated he did not intend to use marijuana again, and he denied any other illegal drug use while holding a security clearance. (Item 3 at 1.)

Applicant submitted exhibits showing negative drug tests at the start of his employment in 2001 and 2006 and in May 2007. (Ex. B, Ex. C, and Ex. D.) He submitted his performance appraisals for the periods July 2001 to June 2002 (Ex. E), June 2002 to June 2003 (Ex. F), June 2003 to June 2004 (Ex. G), November 25, 2004 (Ex. H), and 2006 to 2007 (Ex. I). His employers noted Applicant exceeds job requirements in most cases, was mature and reliable, and "the ultimate team player." (Ex. A at 3.) Additionally, Applicant supplied three letters of character reference from co-workers, who praised him as reliable, competent, good-natured, honest, and capable. (Ex. J, Ex. K, Ex. L)

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 has 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). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the 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 that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. 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.

CONCLUSIONS

Guideline H, Drug Involvement

In the SOR, DOHA alleged under Guideline H that Applicant used marijuana, with varying frequency from about June 1996 to at least August 2004 (¶ 1.a.) and that he continued to use marijuana after being granted a security clearance in November 2001 (¶ 1.b.).

The Government's concern with Guideline H conduct is that it raises questions regarding an individual's ability or willingness to protect classified information. Drug abuse or dependence may impair social or occupational functioning, thereby increasing the risk of an unauthorized disclosure of classified information. ¶ E2.A8.1.1.1.

Drugs are defined under Guideline H as mood and behavior-altering substances, including drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended, and inhalants and other similar substances. ¶¶ E2.A8.1.1.2., E2.A8.1.1.2.1., E2.A8.1.1.2.2. Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction. ¶ E2.A8.1.1.3. Marijuana, or cannabis, is identified and listed in the Controlled Substances Act of 1970, as amended, as a controlled substance.

From Applicant's admissions, the Government has established a *prima facie* case that he used marijuana intermittently for over eight years between 1996 and at least August 2004 and that he used marijuana after being granted a security clearance in November 2001. Applicant has admitted

Guideline H drug involvement specified in the SOR and identified as disqualifying under Disqualifying Condition (DC) E2.A8.1.2.1., DC E2.A8.1.2.2.,⁴ and DC E2.A8.1.2.5.⁵

The record shows that Applicant's involvement with marijuana began as a college student and continued through his college and post-college years. Applicant's estimate of the amount of his marijuana use varied. On his 2001 SF-86, he admitted using marijuana only twice in a two-day period in 1996. On his 2005 SF-86, he admitted using marijuana three times between January and June 2000. He also admitted using marijuana in August 2004 while at a concert with friends. In his answer to the SOR, Applicant admitted using marijuana "no more than 10 times" during his college years. Applicant provided no explanation for his failure to list his 2000 drug use on his 2001 SF-86.

Applicant stated his last drug use occurred in August 2004, almost three years ago. Thus, his drug involvement was not recent, and, accordingly, Mitigating Condition (MC) E2.A8.1.3.1.⁶ applies. However, Applicant's marijuana use, although sometimes sporadic and intermittent, spanned a period of approximately eight years of his adolescence and young adulthood. Thus, his drug involvement was neither isolated nor aberrational and represented a lifestyle choice. Therefore, MC E2.A8.1.3.2.⁷ does not apply.

Applicant asserted he did not intend to use marijuana in the future. While this assertion appeared credible on its face, Applicant provided no plan or rationale for abstaining from the use of marijuana and how he would avoid using the drug if he continued to associate with people who use marijuana. Absent some clear demonstration of how he planned to abstain from marijuana use, and a measurable track record showing abstinence, Applicant failed to show that MC E2.A8.1.3.3.⁸ is applicable.

Guideline E - Personal Conduct

In the SOR, DOHA alleged Applicant raised concerns under Guideline E, Personal Conduct, when he committed a security violation in approximately 2002, while working for Employer A, by failing to remove and secure hard drives containing classified information before leaving the office at the end of the work day. Applicant and another employee received verbal warnings from their employer for this security violation. (SOR ¶ 2.a.) DOHA also alleged that Applicant's use of marijuana in 2004, after having been granted a security clearance in November 2001, raised security concerns under Guideline E. (SOR ¶ 2.b.)

⁴DC E2.A8.1.2.1 reads, in pertinent part: "Any drug abuse." DC E2.A8.1.2.2. reads: "Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, and distribution."

⁵DC E2.A8.1.2.5. reads, in pertinent part: "*Recent* drug involvement, especially following the granting of a security clearance, or an expressed intent not to discontinue use, will *almost invariably* result in an unfavorable determination."

⁶MC E2.A8.1.3.1. reads: "The drug involvement was not recent."

⁷MC E2.A8.1.3.2. reads: "The drug involvement was an isolated or aberrational event."

⁸MC E2.A8.1.3.3. reads: "A demonstrated intent not to abuse any drugs in the future."

Guideline E conduct, which involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, could indicate an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

With respect to the Guideline E conduct alleged in the SOR, the Government has established its case. The Government established, and Applicant admitted, that he committed a security violation in 2002 and used marijuana in 2004, while holding an active security clearance granted in 2001. Applicant's conduct raises concerns under Disqualifying Condition (DC) E2.A5.1.2.5. because it suggests a pattern of rule violation. His failure to follow rules for protecting classified information in 2002 resulted in a security violation and a verbal warning from his employer. His willingness to break rules and violate laws by using marijuana while holding a security clearance suggests that, under some circumstances, he may put his interests before those of the Government.

Applicant's security violation was a one-time event, early in his employment with a Defense contractor. Applicant presented credible evidence showing he had developed into a responsible professional and had not been charged with any additional security violations since his first and only one in 2002. Further, his laudable employment record indicated it was unlikely he would commit a security violation in the future. Accordingly, I conclude that Guideline E Mitigating Condition (MC) E2.A5.1.3.1. is applicable.⁹ Applicant's use of marijuana in 2004, while holding a security clearance granted in 2001, occurred while he was a young professional of 26. It is unclear from the record whether he continues to associate with individuals who use marijuana or to visit places where illegal drugs are openly used, thus exposing himself to the possibility of coercion, exploitation, or duress and ignoring the reality that illegal drug use is criminal behavior. Thus Mitigating Condition (MC) E2.A5.1.3.5.¹⁰ is inapplicable. No other Guideline E mitigating conditions apply.

Whole Person Analysis

Paragraph E2.2 of the Directive requires that the adjudicative process in a security clearance case not only assess conduct under the adjudicative guidelines, but it must also reflect a careful weighing of a number of variables known as the whole person concept. The factors to be considered in a whole person analysis include the nature, extent, and seriousness of the conduct (E2.2.1.1); the circumstances surrounding the conduct, to include knowledgeable participation (E2.2.1.2); the frequency and recency of the conduct (E2.2.1.3); the individual's age and maturity at the time of the conduct (E2.2.1.4.); the voluntariness of participation (E2.2.1.5.); the presence or absence of rehabilitation and other pertinent behavioral changes (E2.2.1.6); the motivation for the conduct (E2.2.1.7); the potential for pressure, coercion, exploitation, or duress (E2.2.1.8.); and, the likelihood for continuation or recurrence (E2.2.1.9).

Applicant voluntarily admitted his marijuana use in adolescence and college and while holding a security clearance. His drug use, while intermittent, was habitual and spanned a period from 1996

⁹MC E2.A5.1.3.1. reads, in pertinent part: "The information was . . . not pertinent to a determination of judgment, trustworthiness, or reliability."

¹⁰MC E2.A5.1.3.5. reads: "The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress."

to 2004. His last drug use occurred when he was 26 years old and holding a security clearance, suggesting a pattern of rule violation and unreliability.

I have reviewed and considered all of the evidence. After weighing the applicable Guideline H and E disqualifying and mitigating conditions, and after considering all relevant factors in the whole person analysis, I conclude Guideline H allegations 1.a. and 1.b against Applicant, Guideline E allegation 2.a. for Applicant, and Guideline E allegation 2.b. against Applicant.

In all adjudications, the protection of our national security is the paramount concern. Security clearance decisions are not intended to assign guilt or to impose further punishment for past transgressions. Rather, the objective of the security clearance process is the fair-minded, common sense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of his or her acts and omissions, including all disqualifying and mitigating conduct. Having done so, I conclude Applicant should not be entrusted with a security clearance. In reaching my decision, I have considered the evidence as a whole, including the appropriate factors and guidelines in Department of Defense Directive, 5220.6., as amended

FORMAL FINDINGS

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

Paragraph 1. Guideline H.: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Paragraph 2. Guideline E.: AGAINST APPLICANT

Subparagraph 2. a.: For Applicant

Subparagraph 2.b.: Against Applicant

DECISION

In light of all of 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.

Joan Caton Anthony
Administrative Judge