KEYWORD: Drugs; Personal Conduct

DIGEST: Applicant used marijuana with varying frequency from 1972 to 1982 and 1984 to 1990. He used it three times between December 2004 and July 2005. He disclosed only two of his five arrests on his security clearance application in 1990, and he failed to disclose a felony arrest on his application in 2005. He has not mitigated the security concerns raised by his drug involvement and the falsifications of his two security clearance applications. Clearance is denied.

CASENO: 06-15424.h1

DATE: 05/22/2007

DATE: May 22, 2007

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| In re: | ) | |
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| ---------- | ) | ISCR Case No. 06-15424 |
| SSN: ---------- | ) | |
| | ) | |
| Applicant for Security Clearance | ) | |

**DECISION OF ADMINISTRATIVE JUDGE**
**LEROY F. FOREMAN**

**APPEARANCES**

**FOR GOVERNMENT**
Stephanie C. Hess, Esq., Department Counsel

**FOR APPLICANT**
*Pro se*

**SYNOPSIS**

Applicant used marijuana with varying frequency from 1972 to 1982 and 1984 to 1990. He used it three times between December 2004 and July 2005. He disclosed only two of his five arrests on his security clearance application in 1990, and he failed to disclose a felony arrest on his application in 2005. He has not mitigated the security concerns raised by his drug involvement and the falsifications of his two security clearance applications. Clearance is denied.

## STATEMENT OF THE CASE

On October 25, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive), and the revised adjudicative guidelines approved by the President on December 29, 2005, and implemented effective September 1, 2006 (Guidelines). The SOR alleged security concerns raised under Guideline H (Drug Involvement) and Guideline E (Personal Conduct).

Applicant answered the SOR in writing on November 10, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on January 26, 2007, and heard on April 19, 2007, as scheduled. DOHA received the hearing transcript (Tr.) on May 2, 2007.

## FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a 49-year-old electrical engineer employed by a federal contractor. He is married and has two children, one of whom was born in the People's Republic of China and adopted by Applicant and his wife. He holds an associate's degree in electrical engineering. He does not have a clearance at this time (Tr. 7).

Applicant's supervisor from August 2005 until April 2007, a colonel in the U.S. Marine Corps Reserve, testified that Applicant's character and loyalty are beyond reproach (Tr. 41-42). A coworker and friend from Applicant's previous private-sector employment testified Applicant was very responsible, extremely intelligent, and a person of impeccable character (Tr. 48). Applicant's supervisor in his most recent job, a lieutenant colonel in the U.S. Marine Corps Reserve, recruited Applicant to follow him to another company because of his confidence in his ability and character. He was aware of Applicant's most recent drug use (Tr. 55-56).

Applicant was previously employed by a federal contractor from 1982 to 1984 and held a clearance. In a statement executed on May 11, 1983, he admitted to a security investigator that he was arrested and charged with disorderly conduct for failing to disperse during a college campus disturbance (Government Exhibit (GX) 2). In another statement to the same investigator on May 12, 1983, Applicant admitted he started using marijuana in 1972, when he was in junior high school. He stated he used it about once a week, taking two to four puffs of a marijuana cigarette. He also admitted being detained by the police for possession of marijuana that he had purchased. The police discovered the marijuana when they arrested Applicant and his companions for trespassing in a college gymnasium. Applicant stated he never purchased marijuana again after that incident. He stated that after high school he used marijuana three or four times a year until he stopped using it in 1981 (GX 3).

On December 10, 1990, Applicant executed a National Agency Questionnaire. In response to question 18, asking if he had ever been arrested, charged, cited, held, or detained by federal, state, or other law enforcement or juvenile authorities, he disclosed two arrests for assault and battery in 1986 and 1988. He did not disclose his arrest for possession of marijuana in 1972, but he did disclose he had used marijuana in "party situations" while in college, in response to question 20. He also failed to disclose an arrest for speeding in 1974, his arrest for failing to disperse in 1979[1], and an arrest for an unpaid moving violation in 1983.

In a statement to a security investigator on April 11, 1991, Applicant again addressed his possession of marijuana in 1972. He admitted he was charged with a misdemeanor and held at the police station until he was released to his father's custody. He contradicted his May 1983 statement that he had purchased the marijuana, saying instead that it was given to him (GX 4 at 1-2). He repudiated his earlier admission of using marijuana weekly in junior high school, and insisted he used it only three times in junior high school (GX 4 at 14, 16). He stated his last use of marijuana was in Amsterdam, where he purchased and smoked it. It happened while he was on a business trip for the federal contractor for whom he had worked since July 1984 (GX 4 at 13-14; GX 8 at 2). He stated his purchase in Amsterdam was the only time he ever purchased marijuana (GX 4 at 14), contradicting his earlier admission that he purchased it in junior high school.

In his April 1991 statement, Applicant also admitted being arrested for speeding on his motorcycle in the summer of 1974, taken to the police station in handcuffs, and being fined $50 (GX 4 at 2-3). He admitted being arrested for assault and battery arising from a fight at a house party in the summer of 1984 (GX 4 at 5-6). He also admitted the arrest for an unpaid moving violation in June 1983. This arrest occurred when Applicant went to the police station to bail out a friend, and was arrested, photographed, fingerprinted, and jailed because of the unpaid violation (GX 4 at 7). Finally, he admitted the felony charge of assault and battery with a dangerous weapon in June 1987, and admitted he knew he was charged with a felony (GX 4 at 8) His admission is corroborated by court records (GX 5; GX 6; GX 7).

During the April 1991 interview, Applicant told the investigator he did not disclose all his arrests because he did not think enough about his answer to the question, and he only listed the offenses on his local arrest record (GX 4 at 10-11). At the hearing, he testified he did not disclose all his arrests on his 1990 application because he believed the government was only interested in "serious stuff" and not minor infractions (Tr. 69-70). He testified he did not disclose the arrest for possession of marijuana because he thought it had been expunged (Tr. 92). He admitted his May 1983 statement and April 1991 statement were inconsistent, and he admitted his April 1991 statement was incorrect (Tr. 87-91). He testified he was not sure why he did not disclose the arrest for failing to disperse (Tr. 95).

Applicant stopped using marijuana while working for a federal contractor between 1982 and 1984 because his employer had a random drug testing program. From 1984 to 1990, he used marijuana about six times at social events. He told a security investigator he used marijuana because he enjoyed the taste. He also told the investigator that he could not absolutely rule out the possibility he would use marijuana again (GX 4 at 15).

[1]The offense was alleged as "failure to disburse" in the SOR. On my own motion, I corrected the SOR to allege a "failure to disperse." (Tr. 96.)

In September 2000, Applicant disclosed to U.S. immigration authorities that he was arrested for assault and battery in September 1986, and for felony assault and battery in April 1988. He made the disclosures in connection with his adoption of his infant daughter (Applicant's Exhibit (AX) A).

On August 22, 2005, Applicant executed an Electronic Questionnaire for Investigations Processing (e-QIP). In Section 23, he responded "no" to the question whether he had ever been charged with a felony. He did not disclose that he was arrested and charged with assault and battery with a dangerous weapon, a felony, in April 1988. At the hearing, he testified he answered "no" to the question about felony arrests on his 2005 application because he thought it covered only the last seven years (Tr. 73-74).

In Section 24 of his August 2005 e-QIP, Applicant disclosed smoking marijuana three times in July 2005, just before beginning his employment by a federal contractor. At the hearing, he admitted smoking marijuana with his brother-in-law during a family vacation in July 2005. He also admitted smoking marijuana with family members during the Christmas season in December 2004 (Tr. 64).

## 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), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the Guidelines. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, the disqualifying conditions and mitigating conditions under each specific guideline, and the factors listed in the Guidelines ¶¶ 2(a)(1)-(9).

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in persons with access to classified information. However, 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.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The Guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein 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. *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 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Guidelines ¶ 2(b).

## CONCLUSIONS

### Guideline H (Drug Involvement)

The concern under this guideline is as follows: "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." Guidelines ¶ 24. "Drugs" include "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)." Guidelines ¶ 24(a)(1). Drug abuse is "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction." Guidelines ¶ 24(b).

Disqualifying conditions under this guideline include "any drug abuse," and "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia." Guidelines ¶ 25(a) and (c). The evidence in this case establishes these two disqualifying conditions.

Since the government produced substantial evidence to raise ¶¶ 25(a) and (c), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns raised by drug involvement may be mitigated by showing that "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 current reliability, trustworthiness, or good judgment." Guidelines ¶ 26(a). The first clause of ¶ 26(a) ("happened so long ago") focuses on the recency of drug involvement. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the totality of the evidence. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). 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." *Id*.

Applicant has used marijuana with varying degrees of frequency for most of his life, starting in junior high school. The most recent use was shortly before he submitted his e-QIP and less than two years ago. When he has abstained from marijuana in the past, his motivation has not been

respect for the law or concern for his health, but to avoid losing his job. His motivation for abstinence since July 2005 has been his pending security clearance application. I conclude that the mitigating condition in Guidelines ¶ 26(a) is not established.

Security concerns arising from drug involvement also may be mitigated by evidence of "a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; [or] (3) an appropriate period of abstinence." Guidelines ¶ 26(b)(1)-(3). Applicant has not demonstrated intent not to abuse drugs in the future. To the contrary, he has admitted to security investigators that he enjoys marijuana and may use it again. His drug-using associates in December 2004 and July 2005 were family members, with whom he continues to associate. As noted above, his period of abstinence has been relatively short and motivated by his pending security clearance application. I conclude that the mitigating condition in Guidelines ¶ 26(b) is not established.

**Guideline E (Personal Conduct)**

The concern under this guideline is as follows: "Conduct involving questionable judgment, 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." Guidelines ¶ 15. The relevant disqualifying condition in this case is "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." Guidelines ¶ 16(a).

When a falsification allegation is controverted, as in this case, the government has the burden of proving it. An omission, standing alone, does not prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time of the omission. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

Applicant has given contradictory accounts of the frequency, nature, and duration of his drug involvement and multiple explanations for his failures to fully disclose his criminal record. In his security interviews, he attempted to minimize his early purchases and use of marijuana. While his contradictory responses to security investigators are not alleged in the SOR, conduct not alleged in the SOR may be considered: "(a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3." ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (citations omitted). Applicant's contradictory statements are relevant to determining the credibility of his explanations for omitting information from his two security clearance applications, determining whether any mitigating conditions apply, and making a whole-person analysis. I have considered them for those limited purposes.

Applicant listed only the two assault and battery arrests on his 1990 application, explaining to a security investigator that he did not think enough about his answer and listed only the offenses on his arrest record. At the hearing, he testified he listed only the "serious stuff." When questioned at the hearing, he was able to recall each of his arrests in detail. When asked why he did not list his arrest for possession of marijuana, which he knew from previous security investigations was "serious stuff," he testified he did not disclose it because he thought it was expunged. The evidence suggests a pattern of minimizing adverse information, falling short of the candor required by the Guidelines. Even Applicant's disclosure of marijuana use on the 2005 application tended to minimize it, disclosing only the July 2005 use but not the December 2004 use. I conclude he intentionally omitted his full arrest record on his 1990 application.

Applicant's explanation for not disclosing his felony arrest on his 2005 application was equally implausible and unpersuasive. Section 23 asks the "have you ever" questions first and then follows with two questions limited to the last seven years. Applicant is obviously very intelligent and articulate. He has previously applied for clearances and knew from his previous experience that his criminal record was a serious concern. He knew the importance of full disclosure, because he had been questioned during his previous security investigations about his failures to fully disclose his criminal record. I find Applicant's explanation that he misread the question unconvincing. I conclude he intentionally omitted his felony conviction on his 2005 application.

Based on the intentional omissions of relevant and material facts from his two applications, I conclude the disqualifying condition in Guidelines ¶ 16(a) is raised, shifting the burden to Applicant to rebut, explain, extenuate, or mitigate the facts. Security concerns raised by false or misleading answers on a security clearance application may be mitigated by showing that "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts." Guidelines ¶ 17(a).

Applicant's efforts to correct his omissions were neither prompt nor in good faith. He executed the first application alleged in the SOR in December 1990, and he did not provide the omitted information or offer an explanation for the omission of his three arrests until he was questioned about them in April 1991. He offered different explanations for the omissions at the hearing, undercutting any claim of good faith.

He executed his second application in August 2005. He did not admit his felony arrest or offer an explanation for omitting it from his application until the hearing. I conclude the mitigating condition in Guidelines ¶ 17(a) is not established.

## Whole Person Analysis

In addition to considering the specific disqualifying and mitigating conditions under each guideline, I have also considered: (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 applicant's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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. Guidelines ¶¶ 2(a)(1)-(9). Some of these factors are discussed above, but some merit additional comment.

Applicant's lifelong use of marijuana demonstrated a lifelong disregard for the law. He is now a mature adult, a talented engineer, and a devoted husband and father. However, his lack of candor negates a finding of rehabilitation and may put him in future situations where he will be vulnerable to pressure, coercion, exploitation, or duress. His lifelong marijuana use and his attitude about it makes recurrence likely.

After weighing the disqualifying and mitigating conditions under Guidelines H and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on drug involvement and personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him a security clearance.

## FORMAL FINDINGS

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

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| Paragraph 1. Guideline H: | AGAINST APPLICANT |
| Subparagraph 1.a: | Against Applicant |
| Subparagraph 1.b: | Against Applicant |
| Subparagraph 1.c: | Against Applicant |
| Paragraph 2. Guideline E: | AGAINST APPLICANT |
| Subparagraph 2.a: | Against Applicant |
| Subparagraph 2.b: | Against Applicant |
| Subparagraph 2.c: | Against Applicant |

## DECISION

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

LeRoy F. Foreman
Administrative Judge