

KEYWORD: Drugs; Personal Conduct

DIGEST: Applicant has a recurrent history of marijuana use that covers over 25 years. Following a number of years of occasional marijuana use, much of it while holding a security clearance, he tested positive for marijuana in March 2005 and was disciplined by his employer. Both his recurrent history of drug use and recent positive test weaken his assurances he will not use marijuana in the future. Considering all of the circumstances, it is still too soon to make safe predictions he will not return to using marijuana in the foreseeable future. Of security concern, too, is Applicant's understating of his marijuana use in the security clearance applications he completed in January 2006 and June 2003. His deliberate understating and omissions of his marijuana use in his clearance applications were neither extenuated nor mitigated. Clearance is denied.

CASENO: 06-21584.h1

DATE: 07/17/2007

DATE: July 17, 2007

In re:)	
)	
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SSN: -----)	ISCR Case No. 06-21584
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
ROGER C. WESLEY**

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a recurrent history of marijuana use that covers over 25 years. Following a number of years of occasional marijuana use, much of it while holding a security clearance, he tested positive for marijuana in March 2005 and was disciplined by his employer. Both his recurrent history of drug use and recent positive test weaken his assurances he will not use marijuana in the future. Considering all of the circumstances, it is still too soon to make safe predictions he will not return to using marijuana in the foreseeable future. Of security concern, too, is Applicant's understating of his marijuana use in the security clearance applications he completed in January 2006 and June 2003. His deliberate understating and omissions of his marijuana use in his clearance applications were neither extenuated nor mitigated. Clearance is denied.

STATEMENT OF THE CASE

On November 29, 2006, 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 December 14, 2006, and requested a hearing. The case was assigned to me on April 18, 2007, and was scheduled for hearing on April 24, 2007. The hearing was rescheduled for May 10, 2007. A hearing was convened on May 10, 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 one witness and four exhibits; Applicant relied on two witnesses (including (himself) and three exhibits. The transcript (R.T.) was received on May 25, 2007.

PROCEDURAL ISSUES

Before the hearing, Department Counsel moved to amend the SOR to add an additional allegation 2.c under Guideline E to the SOR to allege Applicant falsified material facts in the security clearance application (SF-86) he signed in January 2006 by deliberately failing to disclose his drug use while holding a security clearance. For demonstrated good cause, Department Counsel's motion to amend was granted. Applicant admitted the added allegation with explanations about the dates of his use.

SUMMARY OF PLEADINGS

Under Guideline H, Applicant is alleged to have (a) used marijuana from 1985 until at least March 2005, (b) used marijuana while holding a security clearance, and (c) tested positive during a random drug test in March 2005, after which he agreed to take part in an employee assistance program. Under Guideline E, Applicant is alleged to have falsified the security clearance (SF-86) he executed in July 2006 by understating his drug use, an falsified the SF-86 he executed in June 2003 by omitting any drug use within the previous seven years.

For his response to the SOR, Applicant admitted the allegations pertaining to drug use but denied any intention to falsify either of the two SF-86 forms he completed. In explanation, he claimed to be in a rush to complete the January 2006 SF-86, and mistakenly typed in the wrong date of his last use on this application. He claimed to have truthfully denied using any illegal drugs within the last seven years preceding his execution of his June 2003 SF-86 (last using marijuana as a high school student in 1985).

STATEMENT OF FACTS

_____ Applicant is a 40-year-old production assistant for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

Applicant's history of marijuana use

Applicant is married and has three children (two sons and a daughter). He was introduced to marijuana in 1984, while he was still a high school student. He continued using marijuana on an occasional basis until he was released from the Army Reserves in 1992 (R.T., at 32-33, 67-70). After assuring he did not use marijuana at all between 1992 and May 2004, he conceded to Agent A in a July 2006 interview that he used marijuana on a couple of occasions between 1992 and May 2004 (R.T., at 70-71). Asked about his use of marijuana in May 2004 by Agent A, Applicant indicated he twice smoked marijuana on two separate occasions in May 2004 at a party with friends (R.T., at 40-41, 49). At the time, he held a security clearance (granted in November 2003) and was aware he was subject to DoD's no-drug policy (R.T., at 79). On these two occasions, he smoked marijuana four to five times altogether (twice, or thereabouts, at each sitting). There is no evidentiary support for drawing inferences of his using marijuana or any other illegal drugs between May 2004 and March 2005.

In March 2005, Applicant shared a marijuana cigarette with a friend and used the same cigarette four to five times. He never reported his 2004 or 2005 marijuana use to his company facility security officer (FSO), and by all accounts, he never notified anyone within his company of his marijuana use (R.T., at 78). The following week he was randomly selected for a drug test and tested positive (*see ex. 4*). As a consequence of his positive drug test, he was (a) penalized by his employer with a loss of pay for three consecutive days, (b) referred to an employee assistance program, (c) required to meet with a substance abuse counselor for two months, and submit to random drug screening (*see exs. 4 and A*). By all accounts, he completed the conditions set by his employer. He completed his required counseling, which included narcotics anonymous sessions (NA), before he returned to work (R.T., at 66,).

Applicant insists he has not used marijuana since his positive drug test, and has no intentions of using the drug in the future. While he knows people who use marijuana, he doesn't associate with them (R.T., at 65). Given his history of recurrent marijuana use, however, his statements about prior and future use cannot be accepted at face value.

Applicant's understatement and omissions of his marijuana use in his SF-86s

Asked to complete an SF-86 in January 2006, Applicant understated his marijuana use over the previous seven years when answering question 27. He listed only his 2004 marijuana use and failed to list his more recent 2005 use. When answering question 28, he answered in the negative to using illegal drugs while holding a security clearance (*see ex. 1*).

Initially claiming he simply confused the years of 2004 and 2005, he later acknowledged that he used marijuana in both 2004 and 2005. Failing a random drug test just nine months before is not the kind of incident that could reasonably be forgotten, and Appellant makes no claim to forgetting his positive drug test, or his holding a security clearance at the time. His renewed claims that he confused the 2004 and 2005 dates cannot be squared with his admitted use in both 2004 and 2005 and cannot be considered plausible explanations (R.T., at 86-91). Nor do his explanations account for answering **no** to using marijuana while holding a security clearance.

Besides understating his marijuana use in his 2006 SF-86, Applicant also omitted his occasional marijuana use in the SF-86 he executed in June 2003¹. Applicant attributed his omissions to his confusion over the question. Because he did not consider himself a user based on his occasional use of marijuana during the previous seven years, he claims could correctly answer **no** to questions 27 and 28 (R.T., at 79-82). Applicant's claims cannot be reconciled with the plain meaning of the questions, though, which ask whether he ever used illegal drugs within the previous seven years (marijuana included). Applicant's claims represent strained interpretations that cannot be considered credible explanations under all of the circumstances considered.

Taken together, Applicant's understatement and omissions of his marijuana use while holding a security clearance and prior omissions of his occasional marijuana use during the 1996-2003 period reflect a pattern of knowing and wilful decisions on his part to withhold additional adverse information about himself. Even with all of the positive input from his first line supervisor, too many doubts about his own credibility remain to accord any reasonable doubts about his intentions associated with his understatement and omissions.

Over the course of two follow-up interviews in July 2005 with Agent A, Applicant acknowledged the extent of his marijuana use (beginning in 1984). He was not initially forthcoming about the extent of his use and had to be refreshed by Agent A with a report of investigation (R.T., at 36-37). Because Applicant had been very vague about the extent of his marijuana use, Agent A scheduled a second interview (R.T., at 37-38). In this second interview, Agent A asked Applicant about specific dates of use between 1992 and 2004. He provided her more specific dates of use during this time period, but declined to identify the friends who participated in his marijuana use during this time frame (R.T., at 40). Agent A continues to believe Applicant was evasive with her about his marijuana use, but couldn't identify any specific instances of perceived dishonesty (R.T., at 43).

¹ In the SF-86 Applicant completed in June 2003, he also omitted his debts more than 180 and 90 days delinquent, respectively. He later acknowledged delinquent debts in his follow-up interview with OPM agent in October 2003. Applicant provides no explanations for his debt omissions. While these debt omissions were not included in the SOR, they do affect overall impressions of his credibility.

Applicant is a highly regarded production assistant with his defense contractor. His direct supervisor (RH) assured he was familiar with the SOR and was aware of Applicant's positive drug test and conditional counseling, and random screening that were required as conditions of continued employment (R.T., at 103-04). RH credits Applicant with successfully completing his employer's conditions and continuing his work as a valued, trusted member of his company team (R.T., at 104-07). RH cites Applicant's acceptance of leadership assignments in his community as further evidence he has learned from his mistakes and is committed to avoiding any recurrence.

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:

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.

Personal Conduct

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Burden of Proof

By virtue of the precepts framed by the Directive, 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.

CONCLUSIONS

Applicant brings a praiseworthy civilian work record to these proceedings, in addition to a history of recurrent marijuana use. Applicant's recurrent involvement with marijuana over a twenty-year period, coupled with his drug use understatement in the SF-86 he completed in January 2006, raise security significant issues about his judgment, reliability and trustworthiness required for eligibility to access classified information.

Drug issues

While most of Applicant's use of marijuana and other illegal substances occurred between 1984 and 1992, some of acknowledged use is more recent (*i.e.*, in 2004 and 2005) and was last detected from a random drug test in March 2005. Introduced to marijuana in high school, he used marijuana occasionally between 1984 and 2005.

Applicant's recurrent use of marijuana since 1984 (with some of his use occurring after he was granted a security clearance in November 2003) are sufficient to invoke three of the disqualifying conditions of the Adjudicative Guidelines for drugs, *i.e.*, 25(a) (*any drug abuse*), 25(b) (*testing positive for illegal drug use*), and 25(g) (*any illegal drug use after being granted a security clearance*).

Misconduct predictions (to include return to illegal drug use), generally, may not be based on supposition or suspicion. *See* ISCR Case No. 01-26893 (October 2002); ISCR Case No. 97-0356 (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 marijuana since his last recorded use, or based on his past use is likely to resume usage in the future. *See* ISCR Case No. 02-08032 (May 2004). But Applicant's admitted use of marijuana covers a wide spectrum of time over a 20-year period and is sufficiently recent (admitted use in March 2005) and shielded (disclosed only by virtue of Applicant's positive drug test) as to raise legitimate questions over whether he will return to using the substance within the foreseeable future.

To his credit, Applicant has been able to inspire considerable confidence in his judgment and reliability from his supervisor of a number of years who knows him well and vouches for his

trustworthiness. Under a whole person assessment, Applicant's supervisor's positive impressions are accorded considerable weight in making predictive judgments about his ability to avoid drugs in the future. However, based on his history of recurrent use of marijuana over a prolonged period of time, recency of his last confirmed use, and the uncertainty that surrounds prospects for recurrent use in view of his random positive test, Applicant is not in a position to invoke any of the mitigating conditions of the guidelines for drugs.

Applicant's assurances that his marijuana involvement is a thing of the past are enough to enable safe predictions at this time that he will not return to marijuana use in the foreseeable future. Considering all of the developed evidence of record, Applicant fails to mitigate security concerns associated with his recurrent use of illegal substances. Unfavorable conclusions warrant with respect to sub-paragraphs 1.a through 1.d of Guideline H.

Falsification issues

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 drug use understatements and omissions (*i.e.*, of his marijuana use after being granted a security clearance in 2003) in his January 2006 SF-86 and his less than definitive corrections of his historical use of marijuana without refreshing reminders. Agent A's overall impressions of the extent of Applicant's marijuana use remained uncertain, even after completing to interviews with Applicant over a two-week period. So much trust is imposed on persons cleared to see classified information that tolerances for candor lapses are gauged very narrowly.

By understating and omitting his past involvement with marijuana in his clearance applications and initial statements in the first of his two 2006 OPM interviews, Applicant concealed materially important background information needed for the government to properly process and evaluate his security update. His claims of confusing the dates of his use and not being a user lack substantiation. Weighing all of the circumstances surrounding his SF-86 understatement/omissions and ensuing OPM interviews, Applicant's claims lack the credibility necessary to avert drawn conclusions he knowingly and deliberately withheld material background information about his prior use of illegal substances after being granted a security clearance.

Applicant makes clear that he wanted to limit his reported marijuana use as much as he could plausibly reconcile with his stated view that he was not a user of illegal drugs. His understatement of his drug use in his 2006 SF-86, omission of his drug use while holding a security clearance, and omissions of any drug use in his earlier 2003 SF-86 reflect narrow, but implausible reading of questions 27 and 28 of the security application forms. His understated and omitted usage in the respective forms he completed were knowing, deliberate, and material to a determination about his clearance suitability. They invite application of Disqualifying Condition (DC) for personal conduct of the Guidelines: 16(a) (*the deliberate omission, concealment, falsification or misrepresentation of relevant and material 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*) and 16(b) (*deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative*).

Mitigation is difficult to credit Applicant with, since he failed to take advantage of the first available opportunity afforded him to promptly and fully correct his SF-86 drug understatements and omissions before being confronted in his ensuing OPM interviews. Not only has the Appeal Board found the use of the predecessor Mitigating Condition (MC) to 17(a) of the Guidelines for personal conduct (*the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*) to be unavailing in circumstances (as here) where the applicant was first confronted before he provided the relevant background information, but it has declined to apply the predecessor of 17©) (*the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it has happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*). Compare ISCR Case No. 97-0289 (January 1998) with DISCR Case No. 93-1390 (January 1995).

There can be no doubt but that Applicant has inspired confidence and trust with his supervisor who is familiar with his work and work ethics. But in the face of his SF-86 understatements and omissions, his favorable character evidence and positive professional contributions alone are not enough to mitigate security concerns over his failure to be completely truthful in his SF-86 submissions and ensuing OPM interviews without the need for being confronted.

Considering all of the evidence produced in this record and the available guidelines in the Directive (inclusive of the E2.2.2 factors), unfavorable conclusions warrant with respect to sub- paras. 2.a through 2.c 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, CONDITIONS, and the factors listed above, this Administrative Judge makes the following FORMAL FINDINGS:

GUIDELINE H (DRUGS):	AGAINST APPLICANT
Sub-para. 1.a:	AGAINST APPLICANT
Sub-para. 1.b:	AGAINST APPLICANT
Sub-para. 1.c:	AGAINST APPLICANT
Sub-para. 1.d:	AGAINST APPLICANT
GUIDELINE E (PERSONAL CONDUCT):	AGAINST APPLICANT
Sub-para. 2.a:	AGAINST APPLICANT
Sub-para. 2.b:	AGAINST APPLICANT
Sub-para. 2.c:	AGAINST APPLICANT

DECISION

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

Roger C. Wesley
Administrative Judge