

DATE: October 18, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-20929

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant used marijuana causally and infrequently between 1976 and April 1997. On four separate personnel security questionnaires between November 1988 and Spring 1997, the Applicant provided false information concerning his marijuana usage. Because of his falsifications, clearance is denied.

STATEMENT OF THE CASE

On February 14, 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding ⁽¹⁾ it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On March 22, 2002, the Applicant answered the SOR and requested a hearing. The case was assigned to me on May 8, 2002. A Notice of Hearing was issued on May 16, 2002, scheduling the hearing which was held on June 18, 2002. An Amended Notice of Hearing was issued on June 6, 2002 changing the hearing's location. The Government's case consisted of seven exhibits (Gov. Ex.). The Applicant relied on his own testimony. The transcript (tr.) of the hearing was received on June 27, 2002.

PROCEDURAL MATTERS

The Applicant alleges he was granted a security clearance after his August 1998 disclosures to Defense Security Service (DSS) special agent concerning his marijuana use and his failure to report the use. (tr. 62) The Applicant argued this granting would preclude further evaluation of his suitability for a security clearance due to his falsifications. The Applicant and the DC were allowed two weeks (tr. 68) following the hearing to provide information as to: the Applicant's current clearance status; when his clearance was granted; and the granting authority. On July 3, 2002, Department Counsel (DC) made a post hearing filing, provisions having been made at the time of the hearing for the submission, which was admitted as a single government exhibit. (Gov. Ex. 8). The Applicant failed to respond to the filing.

The DOHA Appeal Board in ISCR Case No. 99-0454 (October 17, 2000) determined a federal agency (such as DOHA) is not barred from reopening and reconsidering its own security clearance decisions. After considering the Appeal Board decision, the facts, and circumstances concerning this matter, I find DOHA is not estopped from making a security clearance determination concerning the Applicant.

The copy of Security Clearance Application, Standard Form(SF) 86, dated May 12, 1997, admitted as Gov. Ex. 6, had the left margin too closely cropped, cutting off the question numbers and answers. DC was allowed two weeks (tr. 32) following the hearing to provide a more complete copy of the May 1997 SF 86. DC was unable to obtain a complete copy of the May 1997 form, but did provide a copy of the Applicant's April 3, 1997 SF 86. (Gov. Ex. 8). The Applicant failed to respond to the request for information.

FINDINGS OF FACT

The SOR alleges personal conduct (Guideline E) and criminal conduct (Guideline J). The Applicant admits he used marijuana on a casual basis and admits not telling the government of his use, but disagrees with the characterization of the allegations. In his answer to the SOR, the Applicant said,

I admit that I did in fact used [sic] Marijuana on a casual basis within the period stated. I admit to denying to the government that I had used marijuana during the period specified. I do not however, agree with the characterization as stated in this reason.

The Applicant is 42-years-old, has worked for a defense contractor since April 1993, and is seeking to maintain his security clearance. In February 1990, the Applicant was granted a Top Secret Level 6 SCI clearance. In August 1992, he was granted a Top Secret clearance. In August 1992, he was granted a "Q" level clearance. In April 1997, there was a request (Gov Ex 8) for a periodic reinvestigation of the Applicant due to his need for top secret access. In March 1998, the Applicant was given Sensitive Compartmented Information (SCI) access based on the July 1997 investigation which relied on the Applicant's May 1997 SF 86 wherein he denied illegal drug usage. In September 1997, the Applicant was interviewed and admitted using marijuana 10 times between 1976 and April 1997. (tr. 34) Between September 1992 and April 1997, the Applicant's use of marijuana occurred while the Applicant was holding a security clearance. In June 1998, the Applicant's access to SCI was denied.

In November 1988, the Applicant completed a Personnel Security Questionnaire, (PSQ) DD Form 49. (Gov. Ex. 6) The Applicant answered "no" to Question 18.a., which asked if he had ever used marijuana. In January 1992, the Applicant completed a PSQ (Gov. Ex. 5) in which the Applicant answered "no" to Question 22.a., which asked if he had ever tried, used, or possessed marijuana. In April 1993, when the Applicant completed a Questionnaire for Sensitive Positions (For National Security) Standard Form 86 (SF 86) (Gov. Ex. 4), he answered "no" to Question 25.a., which asked if he had ever used or possessed any illegal drugs during the previous five years. In April 1997, when the Applicant completed an SF86 (Gov. Ex. 8), he answered "no" to Question 27., which asked if he had ever used marijuana since age 16 or in the last seven years, whichever was shorter, and he answered "no" to Question 28, which asked if he had ever used illegal drugs while possessing a security clearance. In May 1997, the Applicant completed another SF 86. The extreme left-hand side of the copy of the SF 86 failed to copy and the Applicant's answers to questions 27 and 28 are not discernable.

After the Applicant had completed his 1988 questionnaire he provided the same false answers to similar questions concerning his marijuana usage on subsequent questionnaires so that he was consistent in the information provided the government. (tr. 37) In September 1997, the Applicant was interviewed by a special agent of the Defense Security Service (DSS) (Gov. Ex. 7, page 3). During the September 1997 interview, the Applicant decided to come forward for the first time and admit his marijuana usage. He saw the interview as an opportunity to say, "Listen. For all these years, I've been telling you I had never smoked marijuana. Here it is. I have. It has been very casual." (tr. 45)

In August 1998, the Applicant made a sworn statement to a DSS special agent (Gov. Ex. 2) in which he stated he had smoked marijuana approximately 11 to 13 times with the last time being April 1997⁽²⁾. The Applicant stated he would never use marijuana or any other illegal drug again. The Applicant considered his marijuana use so casual that he did not consider it relevant. (tr. 40) He stated, (Gov. Ex. 2, page 3)

I have never spoken of this use in the past because I did not consider my casual use to be of impact in such way that it would pose a threat to my

career. I never intended to be perceived as lying, [sic] my definition of drug use did not agree with the question as it has been presented to me, so I never thought to volunteer information I did not consider prudent or revelant, [sic] I was wrong. I would ask that I be allowed to put these actions behind me . . .

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate the facts proven have a nexus to an Applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

Personal Conduct (Guideline E) 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. The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

Conditions that could raise a security concern and may be disqualifying also include:

2. The deliberate omission, concealment, or falsification 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. (E2.A5.1.2.2.)

Conditions that could mitigate security concerns include:

None Apply.

Criminal Conduct (Guideline J) The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

- a. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
- b. A single serious crime or multiple lesser offenses;

Conditions that could mitigate security concerns include:

- a. The criminal behavior was not recent.

BURDEN OF PROOF

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the Applicant who must remove that doubt and establish his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against the applicant.

CONCLUSIONS

The Government has satisfied its initial burden of proof under guideline E, (Personal Conduct). Under Guideline E, the security eligibility of an applicant is placed into question when that applicant is shown to have been involved in personal conduct which creates doubt about the person's judgment, reliability, and trustworthiness. Complete honesty and candor on the part of applicants for access to classified information is essential to make an accurate and meaningful security clearance determination. Without all the relevant and material facts, a clearance decision is susceptible to error, thus jeopardizing the nation's security. The nature of Applicant's actions, in providing false information on multiple questionnaires between 1988 and 1997, poses a serious potential risk to the nation's security precautions.

The Applicant used marijuana 10 to 13 times ending in April 1997. A portion of his usage occurred after he had been granted a top secret clearance in 1992. In 1988, when the Applicant completed his first questionnaire he chose not to reveal his marijuana usage. To be consistent, the Applicant perpetuated his lie by failing to reveal his marijuana usage on his 1992, 1993, and 1997 questionnaires. He chose not to reveal his usage because his definition of drug use did not agree with the question and he did not consider his usage relevant. The questions asked if he had ever tried or used marijuana. The Applicant did not reveal his usage until September 1997 when confronted about his drug usage during a security interview. Because of the Applicant's deliberate omission, concealment, or falsification of relevant and material facts on his security questionnaires, Disqualifying Condition (DC) 2 ⁽³⁾ applies.

In September 1997, to his credit, the Applicant finally revealed his casual and infrequent use of marijuana. This belated admission does not excuse his behavior in omitting his usage on four separate personal security questionnaires completed in 1988, 1992, 1993, and 1997. The Applicant's age is not an excuse for his behavior in that the questionnaires were completed when the Applicant was between the ages 28 and 36. The Applicant's answers on his May 1997 SF 86 concerning his illegal drug usage cannot be determined. However, the Applicant in his answer to the SOR admits denying his marijuana usage on the questionnaires. This admission coupled with the Applicant's answers to similar questions on his April 1997 SF 86, completed six weeks earlier, are sufficient to find the Applicant falsified his May 1997 SF 86. It is clear the Applicant provided false answers on a personnel security questionnaire in the Spring of 1997

None of the Mitigating Conditions (MC) apply. His illegal drug usage was pertinent to a determination of judgment, trustworthiness, or reliability. The falsifications were not an isolated incident, the individual did not provide correct information until confronted, nor did he make a prompt, good-faith effort to correct the falsification before being confronted with the facts. There is no indication his omissions were caused by improper or inadequate advice from an authorized personnel or based on advice from legal counsel. The issue is not the frequency of his use, but the fact when asked about it he repeatedly failed to reveal his use. Because of the serious and repeated nature of his falsifications, I find against the Applicant as to SOR subparagraphs 1.a., 1.b., 1.c., 1.d., and 1.e.

The Government has satisfied its initial burden of proof under Guideline J, (Criminal Conduct). Under Guideline J, the security eligibility of an applicant is placed into question when that applicant is shown to have a history or pattern of criminal activity creating doubt about his judgment, reliability, and trustworthiness. The Applicant's responses on the personnel security questionnaires were under the advisement of Title 18, Section 1001 of the United States Code. By making false statements after being so advised, he committed recent felony conduct. ⁽⁴⁾ DC a. ⁽⁵⁾ and b. ⁽⁶⁾ apply. The most recent falsification occurred in the Spring of 1997 which is more than five years ago. This conduct, although serious, is not recent making MC a. ⁽⁷⁾ applicable. I find for the Applicant as to SOR subparagraph 2.a.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

FORMAL FINDINGS

Formal Findings as required by Section 3., Paragraph 7., of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline E (Personal Conduct): AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Subparagraph 1.d.: Against the Applicant

Subparagraph 1.e.: Against the Applicant

Paragraph 2 Guideline J (Criminal Conduct): FOR THE APPLICANT

Subparagraph 2.a.: For the 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 a security clearance for the Applicant.

Claude R. Heiny

Administrative Judge

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 as amended.
2. The date is "April 1997," which could be misinterpreted as April 1999 due to the Applicant crossing his "7." (tr.69)
3. DC 2. The deliberate omission, concealment, or falsification 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. (E2.A5.1.2.2.)
4. Title 18, Section 1001 of the United States Code provides in pertinent 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.
5. DC a. Allegations or admission of criminal conduct, regardless of whether the person was formally charged.
6. DC b. A single serious crime or multiple lesser offenses.
7. MC a. The criminal behavior was not recent.