

KEYWORD: Drugs; Personal Conduct; Criminal Conduct

DIGEST: Applicant cultivated marijuana and used it from 1986 until 1988, while holding a security clearance for part of that time. On his security clearance application, he answered "no" to a question whether he ever used marijuana while holding a security clearance. Security concerns based on drug involvement are mitigated. Security concerns based on falsification of his security clearance application are not mitigated. Clearance is denied.

CASENO: 02-05275.h1

DATE: 01/14/2005

DATE: January 14, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-05275

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Kathryn Antigone Trowbridge, Esq., Department Counsel

FOR APPLICANT

William F. Savarino, Esq.

SYNOPSIS

Applicant cultivated marijuana and used it from 1986 until 1988, while holding a security clearance for part of that time. On his security clearance application, he answered "no" to a question whether he ever used marijuana while holding a security clearance. Security concerns based on drug involvement are mitigated. Security concerns based on falsification of his security clearance application are not mitigated. Clearance is denied.

STATEMENT OF THE CASE

On October 15, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its 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, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive). The SOR alleges concerns under Guidelines H (Drug Involvement), E (Personal Conduct), and J (Criminal Conduct). Under Guideline H it alleges Applicant grew marijuana for personal use and used it approximately twice per week while possessing a Top Secret clearance from about 1986 until 1988. Under Guideline E it alleges Applicant falsified material facts on a security clearance application (SF 86) by giving a negative response to a question whether he had ever illegally used a controlled substance while possessing a security clearance. Under Guideline J it alleges Applicant's falsification of his security clearance was a felony under 18 U.S.C. § 1001.

Applicant answered the SOR on November 19, 2003. He admitted the allegations under Guideline H and offered explanations, denied intentionally falsifying his SF 86 under Guidelines E and J, and requested a hearing. The case initially was assigned to another administrative judge, but it was reassigned to me on September 23, 2004, based on workload considerations. DOHA issued a hearing notice on September 23, 2004, setting the case for October 19, 2004. The hearing was conducted as scheduled. DOHA received the transcript on October 27, 2004.

FINDINGS OF FACT

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

Applicant is a 41-year-old computer engineer serving as the vice-president for a defense contractor. He received a top secret clearance in 1987. This clearance was administratively terminated when he resigned from his position to seek other employment. In 2001 he received an interim clearance when he was hired by his current employer. Applicant's co-workers, superiors, and friends regard him as honest, trustworthy, and reliable.

Applicant began smoking marijuana around 1979, while he was in high school. He smoked it about twice a week for two years. While in high school, he experimented with LSD once. He stopped using illegal substances in college, except for a single use of marijuana. In 1986, after graduating from college, he started growing marijuana and smoking it two to three times a week. He stopped growing and using marijuana before he met his wife in September 1989. He does not intend to use marijuana again, because his wife is adamantly opposed to it.

On May 26, 1987, Applicant was interviewed by a Defense Security Service (DSS) investigator. He disclosed his marijuana use during high school. He asserted he had not used marijuana since February 1983 and did not intend to use it again. He did not disclose he grew marijuana and used it after his graduation from college in 1986.

On February 5, 2001, Applicant submitted a security clearance application (SF 86). He gave a negative response to question 28, asking whether he had ever illegally used a controlled substance while holding a security clearance. He did not disclose his use of marijuana while holding a top secret clearance. He was interviewed by a DSS investigator on March 22, 2001, but again he did not disclose his marijuana use while holding a clearance. In another DSS interview on March 7, 2003, Applicant admitted he used marijuana while holding a clearance.

At the hearing Applicant testified he has difficulty recalling specific dates. When he completed his SF 86, he relied on memory and did not refer to documents and records. He testified he answered question 28 in the negative because he was uncertain whether he smoked marijuana while holding a clearance. He answered "no," believing it would be investigated and clarified. (Tr. 46, 48, 49) He later testified he thought question 28 had a seven-year limit, even though it asked if he "ever" had used marijuana while holding a clearance. (Tr. 58) He admitted he made changes in his March 2003 statement to the DSS investigator and inserted the word "approximately" before several dates. He testified he did not delete the dates about which he was uncertain because he was under the impression the investigator wanted specific dates. (Tr. 57) On questioning by the administrative judge, Applicant admitted it was more likely than not he used marijuana while holding a security clearance. (Tr. 91)

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 restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through ¶ 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (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 voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

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, that conditions exist 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. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

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 (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* Directive ¶ E2.2.2.

CONCLUSIONS

Guideline H (Drug Involvement)

Under Guideline H, improper or illegal involvement with drugs raises questions regarding an applicant'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. Directive ¶ E2.A8.1.1. Any illegal use of a controlled substance can raise a security concern and may be a disqualifying condition (DC 1). Directive ¶ E2.A8.1.2.1. Illegal drug possession also is a disqualifying condition (DC 2). Directive ¶ E2.A8.1.2.2. Applicant's admissions that he cultivated and used marijuana establish DC 1 and DC 2.

Security concerns based on possession and use of marijuana can be mitigated by showing it was not recent (MC 1). Directive ¶ E2.A8.1.3.1. 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 record within the parameters set by the directive." 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 the 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's testimony that he stopped cultivating and using marijuana before he met his future wife in September 1989 is uncontroverted. He is motivated to abstain from further use of marijuana by his wife's strong disapproval and his belated realization that marijuana use jeopardizes his job. I conclude MC 1 is established, and the security concerns raised by Applicant's cultivation and use of marijuana almost 15 years ago are mitigated.

Guideline E (Personal Conduct)

Under Guideline E, "Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, [or] dishonesty . . . could indicate that the person may not properly safeguard classified information." Directive ¶ E2.A5.1.1. A "deliberate omission, concealment, or falsification of relevant and material facts from any personnel security

questionnaire" can raise a security concern and may be a disqualifying condition (DC 2). Directive ¶ E2.A5.1.2.2. Information is material if it would affect a final agency decision or if incorrect information would impede a thorough and complete investigation of an applicant's background. *See* ISCR Case No. 01-06870, 2002 WL 32114535 at 6 (App. Bd. Sep. 13, 2002). To establish a falsification under Guideline E, there must be "a showing that the applicant acted with intent to mislead or deceive the government by not disclosing the information." ISCR Case No. 00-0302, 2001 DOHA LEXIS 337 at *5 (App. Bd. Apr. 23, 2001).

Applicant admits answering "no" to question 28, but he asserts he could not remember whether he had a security clearance while he was using marijuana. In his statement to the DSS investigator in March 2003 he admitted using marijuana while holding a clearance. He attempted to repudiate this admission at the hearing by testifying first that he was uncertain about the dates of his marijuana use and his receipt of a security clearance, and testifying later that he thought question 28 was limited to the past seven years. I found Applicant's testimony at the hearing to be equivocal, evasive, and not credible. I conclude DC 1 is established.

A deliberate falsification can be mitigated by showing the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts. Applicant did not disclose his marijuana use during his DSS interview in March 2001. It was not until he was confronted with the facts in March 2003 did he admit using marijuana while holding a clearance. I conclude Applicant's deliberate falsification is not mitigated.

Guideline J (Criminal Conduct)

Under Guideline J, a single serious offense can raise a security concern (DC 2). It is a felony, punishable by a fine or imprisonment for not more than five years, or both, to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of the executive branch of the Government of the United States. 18 U.S.C. § 1001. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. *See Egan*, 484 U.S. at 527. A deliberately false answer on a security clearance application is a serious crime within the meaning of Guideline J. Based on the evidence discussed above under Guideline E, I conclude DC 2 is established.

Criminal conduct can be mitigated by showing it was not recent (MC 1), an isolated incident (MC 2), or there is evidence of successful rehabilitation (MC 6). Directive ¶¶ E2.A10.1.3.1., E2.A10.1.3.2., E2.A10.1.3.6. The criteria for determining whether criminal conduct is "recent" are the same as discussed above under Guideline H. Whether criminal conduct is "recent" is related to the question of rehabilitation. The issues under both MC 1 and MC 6 are whether there has been a significant period of time without any evidence of misconduct, and whether the evidence shows changed circumstances or conduct.

Applicant falsified his SF 86 in February 2001. He did not disclose or correct his falsification during his DSS interview

in March 2001. He finally corrected the record in March 2003, but he repudiated his March 2003 statement at the hearing and was equivocal and evasive about the false answer on his SF 86. I conclude MC 1 is not established because Applicant persisted in his falsification up to and including the hearing. MC 6 is not established because his circumstances and conduct have not changed. MC 2 is not established because his falsification was not an isolated incident, but was part of a pattern of deliberate omission that began with his DSS interview in March 1987, continued through his false SF 86 in February 2001 and deliberate omission in the DSS interview in March 2001, and culminated with his evasive testimony at the hearing. I conclude the security concern raised by Applicant's criminal conduct is not mitigated.

FORMAL FINDINGS

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

Paragraph 1. Guideline H (Drug Involvement): FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Paragraph 2. Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Paragraph 3. Guideline J (Criminal Conduct): AGAINST APPLICANT

Subparagraph 3.a.: 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 a security clearance for Applicant. Clearance is denied.

LeRoy F. Foreman
Administrative Judge