

DATE: May 26, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-11583

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Stephanie C. Hess, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant used marijuana less than ten times in the 1970s. In 1999, the Army gave him non-judicial punishment under the Uniform Code of Military Justice (UCMJ) and revoked his security clearance after he tested positive for marijuana. In 2001, when he completed a security questionnaire and when he gave a written statement to a DoD investigator, Applicant falsified facts about his past drug use and his prior security clearance revocation. His claims that he did so on advice of counsel are unsubstantiated, and he has failed to otherwise mitigate the resulting security concerns under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct). Clearance is denied.

STATEMENT OF THE CASE

On June 18, 2003, in accordance with DoD Directive 5220.6, as amended (Directive), the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed in the Directive under Guideline E (personal conduct) and Guideline J (criminal conduct). The SOR further informed Applicant that, based on information available to the Government, DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to continue Applicant's security clearance.⁽¹⁾

On July 11, 2003, Applicant answered the SOR (Answer); however, his submission was incomplete and he was asked to re-submit his response.⁽²⁾ He did so on September 18, 2003, wherein he admitted (with explanation) to the allegations in SOR subparagraphs 1.a, 1.b, 1.c, and 1.d.⁽³⁾ Applicant also requested a determination without a hearing.

On January 26, 2004, DOHA Department Counsel submitted a file of relevant materials (FORM) in support of the government's preliminary decision, a copy of which was sent to Applicant on February 4, 2004. Applicant received the FORM on February 13, 2004. He had until March 14, 2004, to submit any response, rebuttal, or objection to the FORM. However, Applicant did not submit anything further in his own behalf and the case was assigned to me on March 22, 2004.

FINDINGS OF FACT

Applicant's aforementioned admissions are incorporated herein as facts. After a thorough review of the pleadings and exhibits, I make the following additional findings of fact:

Applicant is 43 years old and has been employed by a defense contractor as a data collector since September 2001. He also served in the U.S. Army as an enlisted member assigned to military intelligence commands from 1979 until 1999. From at least 1985 until June 1999, he held a security clearance as part of his military duties.

At various times in his military career, Applicant submitted security clearance applications to either obtain his clearance for the first time or to provide information for periodic re-investigations for continued access.⁽⁴⁾ In February 1985, he submitted a Personnel Security Questionnaire (DD Form 398). In response to the question 20(b) therein asking whether he had ever used or been involved with illegal drugs, Applicant answered "no."⁽⁵⁾ However, when he submitted the same form in March 1990 and again in June 1995, he answered "yes" to the same questions about drug use and stated that he had used marijuana less than ten times between 1970 and 1979.⁽⁶⁾

In June 1999, while he was still in the Army, Applicant tested positive for THC (the active ingredient in marijuana) in a random urinalysis. The Army charged him with a violation of Article 112a⁽⁷⁾ of the UCMJ and he appeared at an Article 15 (non-judicial punishment) hearing in October 1999. His security clearance was suspended in June 1999 and eventually revoked in November 1999. He left the Army shortly thereafter.⁽⁸⁾

Applicant went to work for his current employer in September 2001 and submitted a Security Clearance Questionnaire (SF 86) on November 20, 2001. In response to question 32, which asked if he had ever had a security clearance denied, suspended or revoked, Applicant answered "no." Further, in response to question 25, which asked if he had ever been subject to disciplinary proceedings (including non-judicial punishment under the UCMJ), Applicant answered "no." In response to questions 27, which asked if he had used illegal drugs in the past seven years, Applicant answered "no." Finally, when asked in question 28, whether he had ever used illegal drugs while holding a security clearance, Applicant again answered "no."⁽⁹⁾

During the ensuing background investigation, Applicant was interviewed by a Defense Security Service (DSS) agent on February 8, 2002. In a signed, sworn statement he gave to DSS subsequent to that interview, Applicant challenged the June 1999 urinalysis results and stated he had "...never used any type of illegal / unlawful drug or marijuana in [his] life..."⁽¹⁰⁾

POLICIES

The Directive sets forth adjudicative guidelines⁽¹¹⁾ to be considered in evaluating an Applicant's suitability for access to classified information. The Administrative Judge must take into account both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the SOR allegations and having reviewed the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are those conditions listed under Guideline E (personal conduct) and Guideline J (criminal conduct).

BURDEN OF PROOF

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁽¹²⁾ for an Applicant to either receive or continue to have access to classified information. The government bears the initial burden of proving, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If the government meets its burden, it establishes a *prima facie* case that it is not clearly consistent with the national interest

for the Applicant to have access to classified information. The burden then shifts to the Applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, the Applicant bears a heavy burden of persuasion. [\(13\)](#)

A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. The Government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the Government. [\(14\)](#)

CONCLUSIONS

Under Guideline E (personal conduct), 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. [\(15\)](#) Department Counsel has presented sufficient evidence in the FORM to establish a *prima facie* case for disqualification under this guideline and I conclude that Guideline E disqualifying condition (DC) 2 [\(16\)](#) and DC 3 [\(17\)](#) apply here.

The Applicant has deliberately falsified relevant and material facts about his involvement with illegal drugs in two security questionnaires and in a statement to a DSS agent. In 1985, he submitted a DD Form 398 and omitted any mention of prior drug use. He subsequently disclosed in his 1990 and 1995 questionnaires that he had, in fact, used marijuana in the decade before he joined the Army. Generally, such disclosures might mitigate his initial falsifications. However, the first time Applicant applied for a clearance after leaving the Army, he tried to deliberately conceal his drug use in 1999, his drug use while holding a clearance, the fact he lost his Army-issued clearance because of his 1999 drug use, and the fact he had administered non-judicial punishment under UCMJ Article 15 for his illegal drug use. Even were I to believe (which I do not) that Applicant did not use drugs in 1999, the fact remains he decided to omit from the 2001 SF-86 any mention of his Article 15 experience and the revocation of his clearance shortly thereafter.

Of the Guideline E mitigating conditions only MC 4 [\(18\)](#) or MC 6 [\(19\)](#) might possibly apply. In both answers to the SOR, Applicant presents the affirmative defense that his statement to DSS and his answers to his most recent SF-86 were provided consistent with advice of legal counsel. However, because he has not provided any further information to support this defense, I cannot assign more than minimal weight to his claim in this regard. While an applicant may avail himself of reasonable and appropriate claims in mitigation or extenuation of disqualifying conduct, the Administrative Judge is not required to accept such claims without supporting information. Applicant was afforded ample opportunity to respond to the government's case as outlined in the FORM and to submit additional amplifying information about his claims; yet he has chosen to remain silent and does so at his peril. I conclude from this record he deliberately tried to mislead the government in its most recent investigation of his background. I am particularly persuaded of his intent to mislead after reading his statement to DSS, wherein Applicant implies he could have remained silent about his drug use because he believed his personnel records were inaccessible as a result of the sensitive positions he held in the Army. Absent any information indicating a flaw in the Army's urinalysis procedures in this case, I am also swayed by the fact of Applicant's illegal drug use while holding a security clearance. This conduct is wholly inconsistent with fundamental DoD personnel security program policies about illegal drug use, and it indicates a significant lack of judgment and willingness to abide by basic rules associated with his access to classified information. Combined with his initial deception in 1985, Applicant's credibility, judgment and trustworthiness are sufficiently undermined to cast doubt on his overall suitability for access. I conclude Guideline E against the Applicant.

Under Guideline J (criminal conduct), a security concern exists where it is shown an Applicant is willing to disregard the law. Such conduct indicates an inability or unwillingness to abide by rules and procedures established to protect classified information. [\(20\)](#) Department Counsel has presented sufficient evidence in the FORM to establish a *prima facie* case for disqualification under this guideline and I conclude that Guideline J DC 1 [\(21\)](#) and DC 2 [\(22\)](#) apply here. Applicant violated and was charged with a violation of the UCMJ's proscription against involvement with illegal drugs. Further, he deliberately violated Title 18 U.S.C. §1001 by signing an SF-86 in November 2001, and a written statement to DSS in February 2002, both of which he knew to contain false or misleading statements about his past drug use and

related issues.

Against these disqualifiers, I conclude there is no support in this record for application of any of the listed mitigating conditions under Guideline J. I consider his falsifications of his 2001 SF 86 and his statement to DSS to be recent in that they occurred during the most current assessment of his suitability for clearance. (23) Further, his conduct was not isolated (24) as he engaged in multiple acts of falsifications and illegal drug use. Finally, as discussed under Guideline E, there is insufficient evidence to support his claim that he acted on advice of counsel. Therefore, I cannot conclude that Applicant did not act voluntarily when he falsified his SF 86 and DSS statement. I conclude this guideline against the Applicant.

I have carefully weighed all of the evidence, and I have applied the disqualifying and mitigating conditions as listed under each applicable adjudicative guideline. I have also considered the whole person concept as contemplated by the Directive in Section 6.3, and as called for by a fair and commonsense assessment of the record before me as required by Directive Section E2.2.3. These facts raise reasonable doubts about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. Absent substantial information to resolve those doubts, which Applicant failed to provide, I cannot conclude it is clearly consistent with the national interest to grant Applicant's request for a security clearance.

FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1, Personal Conduct (Guideline E): 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

Subparagraph 1.f: Against the Applicant

Subparagraph 1.g: Against the Applicant

Paragraph 2, Criminal Conduct (Guideline J): AGAINST THE APPLICANT

Subparagraph 2.a: Against the Applicant

Subparagraph 2.b: Against 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. Clearance is denied.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. Items 3 and 4.

3. Department Counsel submits in the FORM that Applicant has admitted all of the factual allegations in the SOR; however, it appears that he has only addressed the allegations noted above. Nonetheless, taken together with his July 11, 2003 answer, I understand that he denies the remaining SOR allegations.
4. Items 13 - 17.
5. Item 13.
6. Items 14 and 15.
7. Wrongful Possession and Use of a Controlled Substance - Marijuana.
8. Items 8, 9, 10, 11, and 12.
9. Item 1.
10. Item 7.
11. Directive, Enclosure 2.
12. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
13. *See Egan*, 484 U.S. at 528, 531.
14. *See Egan*; Directive E2.2.2.
15. Directive, E2.A5.1.1.
16. Directive, E2.A5.1.2.2. 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;
17. Directive, E2.A5.1.2.3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination;
18. Directive, E2.A5.1.3.4. Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided;
19. Directive, E2.A5.1.3.6. A refusal to cooperate was based on advice from legal counsel or other officials that the individual was not required to comply with security processing requirements and, upon being made aware of the requirement, fully and truthfully provided the requested information;
20. Directive, E2.A10.1.1.
21. Directive, E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
22. Directive, E2.A10.1.2.2. A single serious crime or multiple lesser offenses.
23. Directive, E2.A10.1.3.2. The crime was an isolated incident;
24. Directive, E2.A10.1.3.1. The criminal behavior was not recent;