

KEYWORD: Drugs; Personal Conduct; Criminal Conduct

DIGEST: Applicant has a history of recurrent marijuana use, a loss of a security clearance and a marijuana possession arrest that he omitted in various answers to his 1999 security clearance application (SF-86). Applicant's concealment of his marijuana use, revocation of his clearance, and more recent marijuana possession arrest is not mitigated under any of the pertinent mitigation guidelines and raises continuing security concerns about Applicant's judgment and reliability. Clearance is denied.CASENO: 02-12196.h1

DATE: 07/29/2004

DATE: July 29, 2004

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In re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 02-12196

**DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

## **APPEARANCES**

### **FOR GOVERNMENT**

Rita C. O'Brien, Department Counsel

### **FOR APPLICANT**

Odiator Arugu, Esq.

## **SYNOPSIS**

Applicant has a history of recurrent marijuana use, a loss of a security clearance and a marijuana possession arrest that he omitted in various answers to his 1999 security clearance application (SF-86). Applicant's concealment of his marijuana use, revocation of his clearance, and more recent marijuana possession arrest is not mitigated under any of the pertinent mitigation guidelines and raises continuing security concerns about Applicant's judgment and reliability. Clearance is denied.

## **STATEMENT OF THE CASE**

On July 14, 2003, 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 (undated), and requested a hearing. The case was assigned to me on February 2, 2004, and was scheduled for hearing on April 29, 2004. A hearing was convened on April 29, 2004, 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 five exhibits; Applicant relied on one witness (himself) and four exhibits. The transcript (R.T.) was received on May 14, 2004.

### **SUMMARY OF PLEADINGS**

Under Guideline H, Applicant is alleged to have (a) experimented with marijuana in high school (no more than 10 times), (b) had his stop secret clearance revoked by the AF in May 1984 due to his alleged use of marijuana in 1980, which was followed by his honorable discharge from the AF, and (c) been arrested in March 1999 and charged with possession of marijuana, to which he plead guilty and was sentenced to six months of supervised probation and fined.

Under Guideline E, Applicant is alleged to have falsified his security clearance application (SF-86) of October 1999 by omitting (i) his March 1999 drug possession arrest and conviction from his answers to questions 24 and 26, (ii) his use of illegal drugs in connection with his March 1999 drug possession arrest from his answer to question 27, and (iii) his use of illegal drugs in 1999 while holding a security clearance. Under Guideline J, Applicant's alleged SF-86 omissions are incorporated by reference.

For his answer to the SOR, Applicant admitted his experimentation with marijuana in high school (less than 10 times), but denied each and every remaining allegation without explanation.

### **FINDINGS OF FACT**

Applicant is a 45-year-old senior engineer for a defense contractor who seeks to retain his security clearance. Since the completion of the hearing in April 2004, Applicant separated from his employer. Because the hearing had already convened, the separation does not in any way affect the issuance of a decision covering Applicant's continuing eligibility to hold 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.

While in high school, Applicant experimented with marijuana (about 10 times). Applicant joined the AF in 1978: Shortly after his high school graduation (at the age of 19). In September 1982 he extended his tour in order to cross-train

in another field.

Shortly after Applicant's AF enlistment, a female informant alleged that he had used illegal drugs. Applicant does admit now to using marijuana during this period, but when confronted by his AF command at the time, he declined to cooperate and pled the Fifth Amendment. Based on his failure to cooperate in addressing the drug allegation, Applicant's security clearance was revoked. At his request, he was discharged honorably from the AF in May 1984 (*see* exs. 2 and 5).

Applicant went to work for another defense contractor shortly after his AF discharge, where he received a security clearance. He joined his most recent defense contractor in 1985 and continued with the security clearance that was transferred over with him. During these first two years of working in the private sector and holding a security clearance, he smoked marijuana recreationally, knowing it was against DoD policy (R.T., at 65-66).

In March 1999, Applicant was arrested for marijuana possession. Applicant had eaten dinner with friends and smoked marijuana, and on his way home had stopped to sleep. He was awakened by a police officer who searched his car, found marijuana in it, arrested him at the scene, and transported him to a local police station for booking (*see* exs. 2 and B). Following his release and subsequent conferring with his lawyer, Applicant pleaded guilty to a charge of less than 2 ounces of marijuana in August 1999 and was fined and placed on supervised probation for six months. As a condition to his accepting the court's terms, adjudication of his guilt was court-deferred (*see* ex. C). Upon proof of Applicant's satisfaction of his community supervision terms of probation, his case was dismissed in February 2000 and he was released from any further community supervision (*see* ex. D).

Embarrassed by his drug arrest and ensuing probation, Applicant enlisted the services of a lawyer to have his arrest and disposition expunged. Applicant was advised by the lawyer that once the case was expunged, no one need know what happened (R.T., at 49-50,100-01). To the best of Applicant's knowledge, his case had been expunged by the court. Applicant assures he has not used illegal drugs of any kind since his March 1999 arrest and has no intention of doing so in the future. Without any evidence of further illegal substance abuse since 1999, his assurances are accepted.

Asked to complete an SF-86 in October 1999, Applicant answered in the negative to question 24 (his police record-alcohol/drug offenses) and in doing so omitted his March 1999 marijuana possession arrest. He answered **no** as well to question 26 of the questionnaire that inquired about

other arrests/charges within the previous seven years. Once again, he omitted his March 1999 marijuana possession arrest. Applicant attributes his omissions to both these questions to the assurances he received from his lawyer that once the arrest and charges emanating from his March 1999 offense were expunged he didn't need to disclose it to anyone, including the Government. Basically, no one (the Government included) needed to know of the arrest/charges following the expungement (R.T., at 108-09). Applicant's explanations preclude his avoidance of inferences his omissions were knowing and wilful.

Applicant omitted drug-related information as well when he answered questions 27 (use of illegal drugs within the past seven years) and question 28 (use of illegal drugs while holding a security clearance-no time limitation). He provided different and potentially conflicting explanations to these questions: not a user of illegal drugs with his isolated use and the feeling he was protected from disclosure by his expungement (*compare* R.T., at 49-50 and 92-94 with R.T., at 99-100). Neither explanation is persuasive: Each betrays his basic desire to avoid telling the Government anything about his past marijuana involvement out of a sense of embarrassment and concern for his job and security clearance. Inferences warrant concluding his omissions of marijuana involvement when answering questions 27 and 28 were knowing and wilful as well.

Answering question 32 of his October 1999 SF-86, Applicant answered **no** to question 32, which inquired about any clearance denials or revocations. Applicant attributed his omission to his lack notice of his ever being notified by the AF in 1984 of his clearance being revoked. Applicant's discharge records, however, contained a written notification of intention to revoke Applicant's security clearance in connection with his drug allegations and refusal to cooperate and Applicant's receipt acknowledgment of the notification (*see ex. 5*; R.T., at 56-58). Only memory lapse can provide any potentially plausible explanation for his omission, and Applicant admitted previously to awareness his clearance had been revoked when he completed a 1985 clearance application (R.T., at 59-61). Because of his other omissions of drug-related material and admitted desire to withhold as much adverse drug-related information as he could, his omission of his clearance revocation (although over 15 years previous) cannot be attributed to memory lapse and thereby avert inferences of knowing and wilful omission either.

Not until confronted by a DSS agent (Agent A) in January 2002 did Applicant admit his prior drug involvement, revocation of his security clearance by the AF, and his 1999 marijuana possession arrest and preceding use (*see ex. 2*). His acknowledgments were neither prompt nor in good faith, as those terms have been factually and legally construed by the Appeal Board.

Applicant is credited with very good performance evaluations from his defense contractor, in addition to receiving numerous commendations and letters of appreciation from colleagues (*see exs. A and B*). None of his character references were ever apprised by Applicant, though, of his prior involvement with marijuana (R.T., at 67).

## **POLICIES**

The Adjudicative Guidelines of the Directive (Change 4) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These revised 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.

### **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.

#### **Disqualifying Conditions:**

DC 1 Any drug use.

DC 2 Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.

#### **Mitigating Conditions:**

MC 1 The drug involvement was not recent.

MC 3 A demonstrated intent not to abuse any drugs in the future.

### **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.

**Disqualifying Conditions:**

DC 2 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.

**Mitigating Conditions:** None.

**Criminal Conduct**

*The Concern:* A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness

**Disqualifying Conditions:**

DC 1 Allegations or admission of criminal conduct.

DC 2 A single serious crime or multiple lesser offenses.

**Mitigating Conditions:** None.

**Burden of Proof**

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's for 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. His record also includes recurrent marijuana use and possession (much of it while holding a security clearance), as well as multiple omissions in his October 1999 SF-86 concerning his past involvement with marijuana and revocation of his security clearance. This past use of marijuana by Applicant while holding a security clearance and numerous SF-86 omissions serve to impair the confidence in his judgment, reliability and trustworthiness required to continue his eligibility to access classified information.

### **Applicant's drug history**

While not established to be abusive to the point of addiction, inferences were drawn that Applicant used marijuana on a recurrent basis beginning in 1977 while Applicant was in high school. He used it again between 1978 and 1982 while in



the AF and for a brief period (1984-1985) following his AF discharge in 1984. Holding a security clearance in each of the occasions he used marijuana, Applicant was most aware of AF and DoD policies against using illegal substances. After a considerable respite from using marijuana, he returned to using it again in March 1999 and was arrested shortly thereafter for possession of marijuana.

Because his 1999 arrest was Applicant's first drug-related offense, he received withheld adjudication of guilt and placement in a supervised probation program for six months. Applicant is credited with completing his probation in January 2002, after which the court terminated his probation, dismissed his case, apparently expunged his record.

Applicant's recurrent use of marijuana over twenty plus years and ensuing 1999 possession arrest and guilty plea, are sufficient to invoke two of the disqualifying conditions of the Adjudicative Guidelines for drugs, *i.e.*, DC 1 (any drug abuse) and DC 2 (illegal drug possession, including cultivation, processing, manufacture, purchase, sale or distribution). Both his history of illegal drug use and the circumstances associated with his 1999 marijuana possession arrest make his association with illegal and controlled drugs a security concern from the standpoint of both recurrent drug abuse and criminal misbehavior.

Based on his own testimony and the probation reports since his last use of illegal drugs (almost five years), Applicant may invoke MC 1 (non recency of the drug involvement) and MC 3 (demonstrated intent not to abuse any drugs in the future). That Applicant creates his own credibility problems by virtue of his SF-86 omissions is not enough to impute continued risk of recurrent drug abuse absent evidence of recurrent use within the past five years. 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* OSD Case No. 02-08032 (May 2002).

Misconduct predictions, generally, may not be based on supposition or suspicion. *See* ISCR Case No. 01-26893 (October 2002); ISCR Case No. 97-0356 (April 1998). Applicant's use of marijuana between 1977 and 1999, while recurrent, has been interrupted by long periods of non use and has never involved more than light to experimental use. Assurances that his marijuana involvement is a thing of the past are entitled to acceptance based on the absence of any drug activity attributed to him within the past five years. In a correlative way, risks of his resuming marijuana use in the future in the face of his avoidance of use for the past five years cannot be presumed based solely on his lack of candor in his prior AF investigation and more recent security clearance application.

Considering the all of the developed evidence of record, Applicant mitigates security concerns associated with his recurrent use and possession of marijuana. Favorable conclusions warrant with respect to sub-paragraphs 1.a through 1.c 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 omissions in each of his SF-86s, as well as in his DSS interviews that followed each of his clearance application submissions. So much trust is imposed on persons cleared to see classified information that deviation tolerances for incidents of trust betrayal are calibrated narrowly.

By omitting his past marijuana arrest, use while holding a security clearance, and prior revocation of his clearance in completing his security clearance in October 1999, Applicant concealed materially important background information needed for the Government to properly process and evaluate his security updates. He makes no claim of misunderstanding the questions, which were posed in a straightforward way in the questionnaire. Applicant attributes his omissions to the advice he received from his lawyer that his arrest expungement would protect him against any duty to disclose adverse information about his drug-related arrest and use of marijuana while holding a clearance. The advice he received neither protected him from disclosure of his prior involvement in Government questionnaires nor use of marijuana, and masked his real desire to keep his prior marijuana involvement a secret out of fear of risking his job and clearance. Historically, the Appeal Board has held such explanations about how disclosure of the adverse information would impact on his employment to be unavailing as a means to avert drawn conclusions of knowing and wilful concealment.

Applicant makes clear that he approached questions 24 through 27 of his SF-86, as well as question 32 (covering revocations of a security clearance) with the intent to withhold information about past marijuana involvement as much as he could reasonably escape with. His omissions were knowing, deliberate, and material to a determination about his clearance suitability. They invite application of Disqualifying Condition (DC) for personal conduct of the Adjudicative Guidelines: DC 2 (falsification of a security questionnaire).

Mitigation is difficult to credit Applicant with, since he failed to make any visible attempt to correct his omissions within the first six months of his executing his SF-86, before acknowledging his omissions in a January 2002 DSS statement (over two years later). Not only has the Appeal Board found the use of mitigating Condition (MC) 2 of the Adjudicative Guidelines for personal conduct (isolated, corrected falsification) to be unavailable to applicants seeking mitigation by treating the omission as isolated, but it has denied applicants availability of MC 3 (prompt, good faith disclosure) as well in circumstances (as here) where the applicant has failed to correct his omissions much earlier in a good-faith way. *Compare* ISCR Case No. 97-0289 (January 1998) with DISCR Case No. 93-1390 (January 1995). The Government must be able to repose a high degree of trust and confidence in persons granted access to classified information, and Applicant by his omissions does not satisfy those high standards at this time. *See Snapp v. United States*, 444 U.S. 507, 511n.6 (1980).

In the face of Applicant's repeated acts of omission, his favorable character evidence and employment contributions are not enough to absorb security concerns extant with the Government over his failure to be truthful in his executed SF-86 submission. Mitigation is further weakened by the lack of any demonstrated knowledge of Applicant's prior drug involvement and SF-86 omissions in any of the admitted character references.

Considering all of the evidence produced in this record and the available guidelines in the Directive (inclusive of the E.2.2 factors), unfavorable conclusions warrant with respect to sub-paras. 1.a through 1.d of Guideline E.

### **Criminal coverage of falsification issues**

That none of Applicant's SF-86 omissions resulted in formal charges and adjudication against him does not mean that the falsification issues may not be raised and considered anew in a clearance proceeding such as the present. The Appeal Board has repeatedly stated that the government can prove applicant engagement in criminal conduct, even in the absence of a criminal conviction. *Cf.* ISCR Case No. 94-1213 (June 7, 1996). Accordingly, two of the disqualifying conditions of the Adjudication Guidelines for criminal conduct may be invoked: DC 1 (criminal conduct regardless of whether the person was formally charged) and DC 2 (a single serious crime or multiple lesser offenses).

Unlike Guideline E-covered omissions, Guideline J is designed to afford more recognition to an applicant's overall judgment and reliability history. Still, an applicant must meet the requirements of at least some of the mitigation conditions if he is to successfully mitigate its related falsification parameters under 18 U.S.C. Section 1001.

Applicant's belated coming forward with his full disclosure of his illegal drug history, prior arrest and drug involvement in his last DSS interview represented a positive shift in his attitude about withholding drug involvement information that he had long wanted no one (including the Government) to know about. His meritorious work record merits consideration, too, in weighing the extent of his exhibited rehabilitation. Given his past history of withholding his drug activity in the AF (*viz.*, during a 1982 investigation of allegations he was seen using marijuana) and in his most recent clearance application, however, his disclosures, while commendable, are not enough to meet the mitigation requirement of evidenced clear rehabilitation to entitle him to take advantage of MC 6 (clear evidence of successful rehabilitation) of the Adjudication Guidelines at this time.

More time is needed before Applicant is in a position to make the case his rehabilitation efforts are sufficient to mitigate the criminally-related features of his drug involvement omissions. Based on a full review of the evidence and drawn inferences from the developed record, unfavorable conclusions warrant with respect to sub-para. 3.a of Guideline J as well.

In reaching my decision, I have considered the evidence as a whole, including each of the E 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): FOR APPLICANT**

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR APPLICANT

Sub-para. 1.c: FOR 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

Sub-para. 2.d: AGAINST APPLICANT

### **GUIDELINE J (CRIMINAL CONDUCT): AGAINST APPLICANT**

Sub-para. 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 or continue Applicant's security clearance. Clearance is denied.

Roger C. Wesley

Administrative Judge