

DATE: December 17, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-12857

DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

APPEARANCES

FOR GOVERNMENT

Nygina T. Mills, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant admitted to marijuana use from 1986 to 1999 on his security clearance application, which he signed in December 2001. In an interview in April 2002 with an agent of the Defense Security Service, Applicant prepared a signed sworn statement in which he said he used marijuana until the summer of 2001. Applicant offers no credible explanation for his lack of candor and for falsifying the dates of his marijuana use on his security clearance application. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On May 2, 2003, under the applicable Executive Order ⁽¹⁾ and Department of Defense Directive, ⁽²⁾ DOHA issued a Statement of Reasons (SOR), detailing the basis for its decision-security concerns raised under Guideline H (Drug Involvement) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on May 23, 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on June 30, 2003. On July 3, 2003, a Notice of Hearing was issued setting the hearing for July 25, 2003. As a result of a scheduling problem, it was necessary to issue an Amended Notice of Hearing rescheduling the hearing for July 24, 2003. On July 24, 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the transcript (Tr.) of the proceeding on August 1, 2003.

FINDINGS OF FACT

The SOR contains two allegations of disqualifying conduct. One allegation relates to conduct under Guideline H, Drug Involvement, and one allegation relates to conduct under Guideline E, Personal Conduct. Applicant admitted the factual allegation of illegal drug involvement as set forth in subparagraph 1.a. of the SOR. He denied the falsification allegation in subparagraph 2.a. of the SOR. Applicant's admission is incorporated as a finding of fact.

Applicant, who is single and 38 years old, has been employed for three years as a computer programmer analyst by a defense contractor. Between the ages of 21 and 35, he used marijuana intermittently in social settings. After the terrorist attacks of September 11, 2001, Applicant's employer invited him and other employees in the organization to apply for security clearances. Although he had no immediate need for a security clearance to perform his assigned duties,

Applicant completed and signed a security clearance application (SF-86) on December 31, 2001. ⁽³⁾ (Ex. 1, at 9.)

Applicant stated during his hearing that he had no need for a security clearance to carry out his current duties. (Tr. 26-27.) At his hearing, Applicant acknowledged, with ambivalence, marijuana use in the summer of 2001. (Tr. 29-33.) He denied using marijuana or any other illegal drug since 2001. (Tr. 36.)

Question 27 on the SF-86 reads as follows: "Since the age of 16 or in the last 7 years, whichever, is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?" Applicant answered "yes" to Question 27. On the form he stated that he had used marijuana 10 times from January 1986 to January 1999. (Ex. 1, at 9.)

Applicant was interviewed by an agent of the Defense Investigative Service in April 2002. On April 4, 2002, he executed a signed sworn statement, which reads: "The last time I remember smoking marijuana was with people from the previous house I lived in about one year ago, around summer 2001."

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.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. 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, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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.

CONCLUSIONS

Guideline H, Drug Involvement

In the SOR, DOHA alleged Applicant had used marijuana approximately 10 times between 1987, when he was

approximately 21 years old, and the summer of 2001, when he was 35 years old. Applicant admitted this allegation. ⁽⁴⁾

The Government's concern with Guideline H conduct is that it raises questions regarding an individual's willingness to protect classified information. Drug abuse or dependence may impair social or occupational functioning, thereby increasing the risk of an unauthorized disclosure of classified information. ¶ E2.A8.1.1.1.

Drugs are defined under Guideline H as mood and behavior-altering substances, including drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended, and inhalants and other similar substances. ¶¶ E2.A8.1.1.2., E2.A8.1.1.2.1., E2.A8.1.1.2.2. Drug abuse in the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction. E2.A8.1.1.3.

Through Applicant's own admissions, the Government established a *prima facie* case that he used the illegal drug marijuana over a period of approximately 14 to 15 years and that his last use of the drug was in the summer of 2001, thus raising a security concern under subparagraph E2.A8.1.2.1. These facts show that Applicant's drug involvement was recent, and mitigating condition E2.A8.1.3.1 therefore does not apply. In his signed, sworn statement of April 4, 2002, Applicant averred that he has no future intent to use illegal drugs. (Ex.3, at 3.) Applicant's testimony at his hearing was often vague about dates and the nature of events and locations in which he used marijuana. He was reluctant to acknowledge his drug use, suggesting evasiveness, and he alternately admitted and denied using marijuana in the summer of 2001. (Tr. 32-34.) Thus, I do not find his statement that he has no future intent to use drugs credible when weighed with his testimony and demeanor at his hearing, and I conclude that mitigating condition E2.A8.1.3.3 does not apply to Applicant's Guideline H conduct. Additionally, Applicant's illegal drug involvement occurred over a period of approximately 14 to 15 years, during most of his adult life, making it neither an aberrational nor isolated part of his life. Accordingly, mitigating condition E2.A8.1.3.2 does not apply. I find against the Applicant on the Guideline H allegation in the SOR.

Guideline E, Personal Conduct

In the SOR, DOHA alleged that Applicant's illegal drug use, as alleged in subparagraph 1.a.,

raised security concerns under Guideline E, Personal Conduct, because he deliberately failed to report the full extent of his drug use on his SF-86. Guideline E conduct, which involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, could indicate that an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

With respect to Applicant's Guideline E conduct, the Government has also established its case. In subparagraph 2.a. of the SOR the Government alleged that, in answering Question 27 on the SF-86, Applicant deliberately failed to disclose his drug use in the summer of 2001. On December 31, 2001, Applicant completed the certification at the end of the SF-86 and attested, with his signature, that his responses to all questions on the form were true, complete, and correct to the best of his knowledge and belief and that he understood that a knowing and willful false statement made in response to any of the questions was punishable under section 1001 of Title 18, United States Code. The record shows that Applicant acknowledged his drug use in the past but failed to report drug use that occurred less than six months before he executed and signed his SF-86.

Applicant offered three documents that he said mitigated his Guideline E conduct. Applicant's Exhibit A was a copy of an e-mail sent to him by his mother, dated 22 October 2001, which listed and identified documents she planned to send him regarding his place and date of birth. Applicant's Exhibit B was a letter, addressed "to whom it may concern," from a co-worker stating that he had submitted his SF-86 at approximately the same time as Applicant and that the information on his form was submitted on December 31, 2001. Applicant's Exhibit C was a memorandum from his Facilities Security Officer stating, in relevant part, that Applicant's EPSQ file is date-stamped 12/31/01.

Applicant's concern over the date he submitted his SF-86 electronically is misplaced. His failure to answer question 27 completely, truthfully, and correctly raises a security concern under subparagraph E2.A8.1.2.2. of Guideline E. Applicant provides no credible evidence to explain why he omitted his marijuana use in the summer of 2001 from his SF-86 or why as an adult he exhibited questionable judgment by participating for 14 to 15 years in conduct he knew was

in violation of the law. Applicant's concealment of information he considered embarrassing could make him vulnerable to coercion and blackmail. ¶ E2.A5.1.2.4. His reticence to reveal the truth about his conduct suggests that, under some circumstances, he may put his interests before those of the Government.

Only one mitigating condition under Guideline E might be applicable here. The security concern raised by Applicant's disqualifying conduct could be mitigated if the falsification was an isolated incident, was not recent, and if the Applicant subsequently provided the correct information voluntarily. ¶ E2.A5.1.3.3. While the falsification is singular and isolated, it is recent. Applicant supplied the correct information only when questioned by a special agent of the Defense Investigative Service. Accordingly, the allegation in subparagraph 2.a. of the SOR is concluded against the Applicant.

FORMAL FINDINGS

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

Paragraph 1. Guideline H.: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

DECISION

In light of all of 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 Applicant. Clearance is denied.

Joan Caton Anthony

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. The printed version of the SF-86 submitted as the Government's Exhibit 1 contains at the top of the first page the printed notation that "[s]ubject signed the form 2001/12/28." Applicant's actual signature, certifying the truth, completeness, and correctness of his answers to the SF-86 is dated December 31, 2001.
4. On his SOR, Applicant admitted to using marijuana during the period January 1986 to January 1999.