

KEYWORD: Drugs; Personal Conduct; Criminal Conduct

DIGEST: Applicant used marijuana for 20 years and cocaine for 14 years. He lied about his drug use on his security clearance application and in an interview with a special agent of the Defense Investigative Service because he feared he would lose his job if he told the truth. Clearance is denied.

CASENO: 02-19661.h1

DATE: 02/02/2005

DATE: February 2, 2005

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 02-19661

**DECISION OF ADMINISTRATIVE JUDGE**

**JOAN CATON ANTHONY**

**APPEARANCES**

**FOR GOVERNMENT**

Stephanie C. Hess, Esq, Department Counsel

**FOR APPLICANT**

**SYNOPSIS**

Applicant used marijuana for 20 years and cocaine for 14 years. He lied about his drug use on his security clearance application and in an interview with a special agent of the Defense Investigative Service because he feared he would lose his job if he told the truth. 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 August 18, 2003, under the applicable Executive Order<sup>(1)</sup> and Department of Defense Directive,<sup>(2)</sup> DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision-security concerns raised under Guideline H (Drug Involvement), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of the Directive. Applicant provided a complete written response to the SOR on October 27, 2003. He requested his case be determined on the record in lieu of a hearing.<sup>(3)</sup> The Government compiled its File of Relevant Material (FORM) on December 5, 2003. The FORM contained documents identified as Items 1 through 10. On December 12, 2003, a copy of the FORM was forwarded to Applicant, with instructions to submit any additional information and/or objections within 30 days of receipt. Applicant did not submit any information within 30 days after receiving a copy of the FORM. On February 24, 2004, the case was assigned to me for a decision.

**FINDINGS OF FACT**

The SOR contains nine allegations of disqualifying conduct. Five allegations relate to conduct alleged under Guideline H, Drug Involvement; two allegations relate to conduct alleged under Guideline E, Personal Conduct; and two allegations relate to conduct alleged under Guideline J, Criminal Conduct. In his answer to the SOR, Applicant admitted all nine allegations. His admissions are incorporated as findings of fact.

Applicant is a 54-year-old computing systems specialist employed by a federal contractor. He has never been married. He is the father of a ten-year-old child. His background was investigated by the Defense Department in 1998 for the purpose of determining his security worthiness.

Applicant has a history of illegal drug use. He used marijuana, with varying frequency, as much as two to three times weekly from 1969 to 1972. From 1979 to 1993 he used marijuana two times weekly, and from 1995 to March 1998, he used marijuana two times weekly. He also purchased marijuana. (Item 5, at 4.) He used cocaine, with varying frequency, at times two to three times monthly from approximately 1980 to 1988, two to three times monthly from 1989 to 1993, and two to three times monthly from 1995 to December 1997. He also purchased cocaine.

On August 8, 1993, Applicant was arrested and charged with possession of a narcotic schedule II controlled substance; possession of drug paraphernalia; maintaining a vehicle for keeping controlled substances; possession of a non-narcotic schedule controlled substance; carrying a concealed deadly weapon; and speeding. On September 24, 1993 Applicant pleaded guilty and was placed in a first offender program with respect to the charges of possession of marijuana and possession of cocaine. He was sentenced to three years probation and required to complete a 16-hour first offender drug rehabilitation program. All other charges were *nolle prosequi*. (Items 9 and 10) By Order dated January 30, 1998, all records of Applicant's August 8, 1993 arrest were expunged. The Order stated: "That as of the date of the Order, it shall no longer be necessary for the Petitioner to report or acknowledge that he was ever arrested on the charges of Possession of a Narcotic Schedule II Controlled Substance, Possession of Drug Paraphernalia, Maintaining a Vehicle for Keeping Controlled Substances, Possession of a Non-Narcotic Schedule I Controlled Substance, Carrying a Concealed Deadly Weapon, and Speeding...." At the time he petitioned the court for an expungement of his 1993 drug arrest, Applicant was using illegal drugs. (Items 5 and 10.)

In an interview with a special agent of the Defense Investigative Service on April 29, 1999, Applicant denied using illegal drugs during the previous seven years and denied being involved in the purchase, sale, production, manufacture, or trafficking of any controlled substances during the previous seven years. (Item 7.) In a subsequent interview with a special agent of the Defense Investigative Service, Applicant admitted deliberately falsifying his drug use in his April 29, 1999 interview. He said he was not truthful about his illegal use and purchase of marijuana and cocaine because he feared telling the truth would affect his career and his livelihood. (Item 8.)

Applicant completed a security clearance application (SF-86) on January 26, 2001. Applicant answered "no to Question 27 on the SF-86, which reads as follows:

## Your Use of Illegal Drugs and Drug Activity - Illegal Use of Drugs.

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.) hallucinogens (LSD, PCP, etc.), or prescription drugs?

Applicant signed and dated the following certification at the end of his security clearance application on January 26, 2001:

### **CERTIFICATION BY PERSON COMPLETING FORM**

My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both. (See section 1001 of title 18, United States Code)."

### **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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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.

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.

## CONCLUSIONS

### **Guideline H, Drug Involvement**

In the SOR, DOHA alleged under Guideline H that Applicant used marijuana, with varying frequency, at times two to three times weekly from 1969 to 1972; two times weekly from 1979 to 1993; and two times weekly from 1995 to March 1998 (¶ 1.a.); that he purchased marijuana (¶ 1.b.); that he used cocaine, with varying frequency, at times two to three times monthly from approximately 1980 to 1988; two to three times monthly from 1989 to 1993; and two to three times monthly from 1995 to December 1997 (¶ 1.c.); that he purchased cocaine (¶ 1.d.); that he was arrested on August 8, 1993 and charged with possession of a narcotic schedule II controlled substance, possession of drug paraphernalia, maintaining a vehicle for keeping controlled substances, possession of a non-narcotic schedule I controlled substance, carrying a concealed deadly weapon, and speeding; and that he pleaded guilty to possession of cocaine and possession of marijuana, was placed in a first offenders' program requiring three years of probation, 20 hours of community service, completion of a 16-hour drug rehabilitation program, assessment of court costs, and suspension of his driver's license for one year. (¶ 1.e.).

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 is 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. Marijuana, or cannabis, and cocaine are identified and listed in the Controlled Substances Act of 1970, as amended, as controlled substances.

Through Applicant's own admissions, the Government established a *prima facie* case that he used marijuana for 20 years, purchased marijuana, used cocaine for 14 years, purchased cocaine, and pleaded guilty to marijuana and cocaine possession in 1993. Applicant has admitted Guideline H drug involvement specified in the SOR and identified as disqualifying under ¶¶ E2.A8.1.2.1. and E2.A8.1.2.2.

The record shows that Applicant's involvement with marijuana began in 1969, when he was approximately 18 years old. His involvement with cocaine began in 1980, when he was 29 years old. He completed a court-ordered drug awareness program in the first offenders' program in 1993, but continued to use marijuana until 1998 and cocaine until December 1997. Applicant was using drugs at the time he petitioned the court to expunge his 1993 arrest for drug use.

Applicant's last drug use occurred seven and eight years ago, demonstrating that his drug involvement was not recent, and, accordingly, mitigating condition E2.A8.1.3.1. applies. However, Applicant's drug use spanned a period from 1969 to 1998, a period of almost 30 years. He began using drugs at age 18, in his young manhood, and he continued using drugs throughout a substantial portion of his adult life, until he was 47 years old. Thus, his drug involvement was neither isolated nor aberrational and represented a consistent and long-term lifestyle choice. Therefore, mitigating condition E2.A8.1.3.2. does not apply. Applicant asserted in his answer to the SOR that he has learned from his mistakes and is now a model citizen and father. In his signed, sworn statement of June 3, 1999, he stated he did not intend to use illegal drugs in the future. (Item 8, at 1-2.) However, he provided no plan or rationale for relinquishing his 30-year habit of drug use. Absent some clear demonstration of how he planned to maintain abstinence, his assurances that he will not use drugs in the future lacks credibility, and thus mitigating condition E2.A8.1.3.3 is inapplicable. Accordingly, allegations in the SOR of disqualifying conduct under Guideline H are concluded against the Applicant.

### **Guideline E, Personal Conduct**

In the SOR, DOHA alleged Applicant raised concerns under Guideline E, Personal Conduct, when he falsified his answer to Question 27 on the SF-86 by denying illegal drug use in the previous seven years, when he knew he had used cocaine and marijuana in the seven-year period prior to signing and certifying his SF-86 on January 26, 2001. (¶ 2.a.) Additionally, DOHA alleged Applicant raised Guideline E concerns when he falsified material facts on a signed, sworn statement he provided to a special agent of the Defense Investigative Service by denying he had used and purchased marijuana and cocaine during the seven years prior to April 29, 1999. (¶ 2.b.) Guideline E conduct, which involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, could indicate an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

With respect to the Guideline E conduct alleged in the SOR, the Government has established its case. Applicant's failure to answer Question 27 completely, truthfully, and correctly raises a security concern under ¶ E2.A5.1.2.2 of Guideline E. His deliberate false statement to an investigator in connection with a personal security or trustworthiness determination raises a concern under ¶ E2. A5.1.2.3. In a second signed sworn statement to a special agent of the Defense Investigative Service, dated June 3, 1999, Applicant admitted lying about his illegal drug use in his signed sworn statement of April 29, 1999. He said he was concerned that telling the truth about his drug use would have negative impacts on his career and livelihood. (Item 8, at 2.) His concealment of information he considered embarrassing or professionally damaging could make him vulnerable to coercion and blackmail. ¶E2.A5.1.2.4. His conduct raises additional concerns under E2.A5.1.2.5. because it suggests a pattern of dishonesty or rule violation. Applicant's reticence to reveal the truth about his conduct suggests that, under some circumstances, he may put his interests before those of the Government. It is well established that embarrassment is not a mitigating condition under the Directive. ISCR Case No. 99-0557 at 3 (App. Bd. Jul.10, 2000).

Mitigating condition E2.A5.1.3.1 does not apply to the facts of this case: The information Applicant withheld is pertinent to a determination of his judgment, trustworthiness, and reliability. Only one other mitigating condition under Guideline E might be applicable to the instant case. 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. ¶E.2.A.5.1.3.2. Applicant supplied the correct information when questioned a second time by a special agent of the Defense Investigative Service. While his falsifications were not recent, they were not isolated incidents. Accordingly, allegations in subparagraphs 2.a. and 2.b. of the SOR are concluded against the Applicant.

## **Guideline J, Criminal Conduct**

In the SOR, DOHA alleged Applicant was arrested, charged, and pleaded guilty to possession of cocaine and marijuana in August 1993, conduct which provides evidence of a history of criminal activity. (¶ 3.a.) The SOR also alleged Applicant deliberately falsified material facts on his security clearance application (SF-86) when he lied about his drug use and deliberately falsified his signed, sworn statement of April 29, 1999 when he lied about his drug use in the previous seven years. (¶ 3.b.)

When he completed his SF-86, Applicant signed his name and certified that his statement was true, complete and correct to the best of his knowledge and belief. Further, he acknowledged his understanding that a false statement on the SF-86 could be punished as a felony crime by fine or imprisonment under the provisions of section 1001 of title 18, United States Code. Applicant admitted making a knowing and willful false statement in his response to Question 27 on his SF-86.

Applicant provided a sworn written statement to a special agent of the Defense Investigative Service and signed his name below the following statement, which reads, in pertinent part, as follows:

I make this statement without any threats having been made against me or any promise extended to me. I certify that the following statement is true, complete and accurate to the best of my knowledge and belief and is made in good faith. I understand that a knowing and willful false statement can be punished by fine or imprisonment or both. (See U.S. Code, Title 18, Section 1001.)

Under section 1001 of title 18 of the United States Code, it is a felony crime to make a writing or document, knowing it contains a materially false, fictitious, or fraudulent statement. Applicant admitted preparing and signing a written statement in which he lied about his drug use.

The security concern under Guideline J is that an individual's history or pattern of criminal activity raises doubts about his judgment, reliability and trustworthiness. A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. Where the facts proven by the Government or admitted by the applicant raise doubts about the applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nevertheless security worthy.

Applicant's criminal behavior which led to his guilty plea of possession of marijuana and cocaine occurred in 1993, a dozen years ago. His falsifications of his security clearance application and signed, sworn statement occurred in 2001 and 1999, respectively. While these criminal acts were not recent, they were not isolated events but rather a pattern of criminal conduct. Thus, while ¶ E2.A10.1.3.1. of Guideline J applies in mitigation to these acts, ¶ E2.A10.1.3.2 of the Guideline does not.

Applicant admits the criminal conduct alleged by the Government in subparagraph 1.e. of the SOR., a security concern under ¶ E2.A10.1.2.1.of Guideline J. He also admits knowingly falsifying his response to Question 27 on his SF-86 and preparing and signing a deliberately false written statement denying any drug use during the seven years preceding 1999. Applicant's acts constitute disqualifying conduct under ¶ E2.A10.1.2.2. of Guideline J. None of the Guideline J mitigating factors apply. Thus, the Guideline J allegations in the SOR are 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

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant



Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Paragraph 3. Guideline J.: AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

Subparagraph 3.b.: 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 file contained many ambiguous statements regarding Applicant's wishes for the disposition of his case. By letter dated January 17, 2005, Applicant stated he did not wish to have a hearing.