

KEYWORD: Drugs; Personal Conduct

DIGEST: Despite using marijuana from 1978-80, an arrest for selling marijuana in 1980, and his resumption of using marijuana from 1981-85, Applicant was granted a security clearance in 1985, after promising not to use drugs in the future. He used marijuana from 1988-92 and 1994-96, and cocaine and LSD in 1993 or 1994. He deliberately omitted reference to his LSD and cocaine use in a 1997 security clearance application and in an interview with an agent investigating his suitability for a clearance. Clearance is denied.

CASENO: 02-21385.h1

DATE: 09/02/2004

DATE: September 2, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-21385

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Despite using marijuana from 1978-80, an arrest for selling marijuana in 1980, and his resumption of using marijuana from 1981-85, Applicant was granted a security clearance in 1985, after promising not to use drugs in the future. He used marijuana from 1988-92 and 1994-96, and cocaine and LSD in 1993 or 1994. He deliberately omitted reference to his LSD and cocaine use in a 1997 security clearance application and in an interview with an agent investigating his suitability for a clearance. 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 15 September 2003, DOHA issued a Statement of Reasons⁽¹⁾ (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 27 October 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on 2 June 2004. On 6 July 2004, 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 hearing transcript (Tr.) on 21 July 2004.

RULINGS ON PROCEDURE

The Government moved to amend the SOR by withdrawing allegations in ¶¶ 2.a-2.c, 2.f-2.h, and 2.j-2.r and re-designating allegations in ¶¶ 2.d, 2.e, and 2.i as ¶¶ 2.a, 2.b, and 2.c, respectively. Applicant had no objection and the SOR was so amended.

Applicant moved for additional time to obtain copies of agents' notes taken during interviews of people who knew him. The motion was granted. Applicant submitted documents that were admitted, without objection from Department Counsel, as Ex. I. Over Applicant's objection, Department Counsel moved to admit the final interview, in the package of

agents' notes, that Applicant had not submitted. Applicant complained the final interview contained inaccurate information, he had not been in contact with the interviewee since 1994, and the Government did not request an extension of time to enter evidence. I admitted the document as Ex. 6 as rebuttal evidence.

FINDINGS OF FACT

Applicant is a 44-year-old software programmer/engineer for a defense contractor. He is well-regarded by his employer for being innovative and a key contributor to projects, and dedicated to getting the job done right in a timely manner.

In July 1985, Applicant applied for a security clearance. In a statement he provided to an agent of the Defense Investigative Service (DIS) on 23 July 1985, Applicant admitted he used marijuana from 1978-1980 and from 1981-85. He had started using marijuana in high school in 1978. In March 1980, he was arrested by university police for selling about .5 ounces of marijuana. He was not prosecuted, but was suspended from the university for a semester. In January 1981, Applicant started using marijuana again. He used every couple of months until April 1985. He obtained most of his marijuana from others, but occasionally he bought small amounts of it. In his statement, Applicant said he never intended to use marijuana or any other drugs again. Ex. 5 at 2. He was granted a security clearance in June 1985. Ex. 2 at 2. ⁽²⁾ He failed to note that he had used LSD in 1980.

In approximately 1988, Applicant resumed using marijuana and continued to do so until about 1 January 1992. He also used marijuana from about January 1994 until January 1996. During each period, he used approximately 30 times. Tr. 16; Ex. 2 at 13. He also used marijuana once in 1997 and once in 1998. In 1993 or 1994, Applicant used LSD once and cocaine once. Ex. 2 at 18.

In 1997, Applicant submitted another security clearance application (SCA). ⁽³⁾ On his application and in a personal interview, Applicant denied any illegal drug use. He was "simply afraid of revealing the truth at the time." Answer at 2. Faced with a polygraph exam, Applicant admitted using "illicit drugs between 1978 and 1995, to include use while holding a U.S. Government Secret clearance." Ex. 4. The Government disapproved him for access to classified information on 6 October 1998. *Id.* Nevertheless, he claims he retained his clearance. He stopped using marijuana in 1996.

Applicant completed another SCA, dated 30 November 2002, that he signed on 11 December 2000, certifying that all of the information was "true, complete, and correct" to the best of his knowledge and belief. By signing the certification, Applicant also acknowledged that a "knowing and willful false statement" could be punished as a violation of 18 U.S.C. § 1001. Question 24 of the SCA asked if he had ever been charged with or convicted of any offenses related to drugs. Question 27 asked if, in the previous seven years, Applicant had illegally used drugs. Question 28 asked if Applicant had used a controlled substance while possessing a security clearance. Applicant answered "no," to each of these questions. Question 31 asked if Applicant had ever been investigated for or granted a clearance. Applicant noted the

periodic review of his secret clearance was "in process," but failed to mention the 1997-98 investigation that resulted in a denial. Ex. 2 at 10-11. In the remarks section of the form, Applicant stated: "Please see sign envelope."

Attached to Applicant's 11 December 2000 SCA is a typed statement dated 11 December 2000, that was apparently in the envelope referenced in the remarks section of the SCA. In it, Applicant provides answers to the above noted questions. He admits he was charged with possession of marijuana while in college, admits he used marijuana approximately 30 times from 1994-96, and admits he was denied a special clearance after a 1997 investigation.

Applicant re-certified his 11 December 2000 SCA on 30 March 2001. As a result of the investigation concerning the 11 December 2000 SCA, Applicant was denied access to sensitive compartmented information. Ex. 2 at 3. He claims he kept his secret clearance.

Applicant completed another SCA on 13 August 2001. Ex. 3. Applicant listed his use of marijuana, to include use while he possessed a security clearance, and the denial of a special clearance in 1997. He did not list his use of LSD and cocaine while holding a security clearance.

Applicant completed another SCA on 6 February 2003, In it, he failed to list his use of LSD and cocaine while he possessed security clearance. Ex. 1 at 6.

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 personnel 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 used marijuana sporadically between 1978 and 1998 (¶ 1.a), used marijuana after stating on his SCA and in a statement to a DSS agent that he had no plans to do so in the future (¶ 1.b), used LSD in 1980 and 1993 or 1994 (¶ 1.c), used cocaine in 1993 or 1994 (¶ 1.d), used marijuana while holding a security clearance from 1988-92 and 1994-96 (¶ 1.e), used marijuana after being granted a security clearance in 1997 and 1998 (¶ 1.f). The 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.

The Government established by substantial evidence each of the allegations in the SOR.⁽⁴⁾ Applicant abused marijuana, LSD, and cocaine. DC E2.A8.1.2.1. He also purchased marijuana for himself and others. DC E2.A8.1.2.2. Applicant asserts he did not knowingly use LSD in 1993-94--someone gave him what looked to be ordinary candy. He did not realize it contained LSD until after he ate it. Answer. But he told the investigator he had experimented with LSD once in 1980 and once in 1993-94. Ex. 2 at 18. Applicant also denies using cocaine. He claims he merely put his finger in some cocaine on the table and then ran his finger over his teeth. He does not view that as "using" cocaine. Tr. 30-31. I find his denials unpersuasive. Applicant's drug use is not recent. MC E2.A8.1.3.1. Although Applicant claims he does not intend to use drugs again, it is not the first time he has made that claim. He made a similar statement in 1985 when he was first

applying for a security clearance. Ex. 5 at 2. But that did not stop him from continuing to use drugs, even after he obtained a security clearance and must have understood the security concerns raised by drug abuse. Thus, despite Applicant's statement he will not use illegal drugs in the future, I am unable to find he has a *demonstrated* intent not to abuse drugs in the future. See MC E2.A8.1.3.3. I find against Applicant on ¶ 1.

Guideline E--Personal Conduct

In the SOR, as amended, DOHA alleged Applicant falsified his 1985 SCA by deliberately failing to admit using LSD (¶ 2.a), lied about his drug use on his 2003 SCA (¶ 2.b), and falsified material facts during an interview in 2001 by claiming he never used illegal drugs except marijuana (¶ 2.c). Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

The Government established by substantial evidence and Applicant's admissions each of the allegations in SOR except ¶ 2(c). The only evidence Applicant falsified material facts on 31 October 2001 during an interview is Applicant's equivocal answer in which he says that "[i]f such indication was made, the 1980 LSD use should have been revealed." I find for Applicant on ¶ 2.c

Applicant admitted deliberately falsifying relevant and material facts from his SCA in 1985 and 1997. DC E2.A5.1.2.2. He also admitted he deliberately provided false information concerning relevant and material matters in his 1997 interview with an investigator in connection with his security clearance. E2.A5.1.2.3. None of the mitigating conditions listed under the guideline apply. After considering all of the evidence of record, I find against Applicant on ¶¶ 2.a and 2.b. Applicant's lack of candor regarding his use of drugs on several occasions shows him to be untrustworthy.

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

Subparagraph 1.f: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: For 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.

James A. Young

Administrative Judge

1. Pursuant to Exec. Or. 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).

2. Applicant asserts he has held a security clearance continuously since 1985.

3. It is not clear if this was to get a top secret clearance or SCI status.

4. SOR ¶ 1.f alleges Applicant used drugs after he was granted a security clearance in 1997. Although Applicant admits holding a security clearance continuously since 1985, he was not granted a clearance in 1997. In fact, the clearance he applied for that year was denied. Nevertheless, Applicant continued to use marijuana in 1997 and 1998 while possessing a security clearance.