

DATE: October 9, 2003

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-22279

**DECISION OF ADMINISTRATIVE JUDGE**

**JAMES A. YOUNG**

**APPEARANCES**

**FOR GOVERNMENT**

Juan J. Rivera, Esq., Department Counsel

**FOR APPLICANT**

Carl A. Barrington Jr., Esq.

**SYNOPSIS**

Applicant used marijuana from 1978-81, while he had a security clearance, and from 1993-98. He deliberately falsified his answers to questions 24, 27, and 28 on his security clearance application (SCA) by failing to acknowledge his alcohol-related arrests and his use of marijuana, some of which occurred while he possessed a security 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 18 June 2003, DOHA issued a Statement of Reasons (SOR), under the applicable Executive Order [\(1\)](#) and Department of Defense Directive, [\(2\)](#) detailing the basis for its decision-failure to meet the drug involvement (Guideline H) and personal conduct (Guideline E) personnel security guidelines of the Directive. Applicant answered the SOR in writing on 1 July 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on 6 August 2003. On 10 September 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 22 September 2003.

**FINDINGS OF FACT**

Applicant, a 48-year-old employee of a defense contractor, served 20 years in the U.S. Army from 1973-93. Ex. 1 at 1, 4. Applicant held a secret security clearance from 1979-93. Tr. 51; Ex. 1 at 6. He has a bachelor's degree in business administration (Tr. 25), performs his duties well (Tr. 55, 60, 65), and is well-liked by his superiors and co-workers (Tr. 56, 60, 61, 65). Applicant is intelligent and pays attention to detail (Tr. 58, 61), especially when completing forms. Tr. 36.

Between 1978 and 1981, Applicant smoked marijuana on a weekly basis with friends. He "usually smoked about a

\$20.00 bag of marijuana during the week and over the weekend. Ex. 3 at 2. He purchased the marijuana he used. *Id.* In 1979, while he was stationed in Korea, he shared a marijuana cigarette with another soldier. A military policeman (MP) saw them, apprehended them, and took them to the MP station. Applicant was released to his unit sergeant major, but no disciplinary was apparently taken against him. *Id.* at 1; Tr. 22.

Applicant claims, and there is no evidence to contradict him, he stopped using marijuana between 1982 and 1993. *Id.* at 2. In 1993, at a party celebrating his retirement from the Army, Applicant "smoked marijuana cigarettes that were brought to the party by friends." *Id.* He "smoked marijuana cigarettes on an occasional basis (once every two or three months) from 1993 to 1998." *Id.* He has "not smoked marijuana since 1998 when [he] was hired by the U.S. government and since holding a position of trust." *Id.* "During the period of 1993 to 1998 when [he] smoked marijuana cigarettes friends at parties always provided them." *Id.*

In 1979, Applicant was arrested for driving while intoxicated (DWI). Ex. 2 at 1. He subsequently pled guilty to DWI. In 1981, he was again arrested for DWI. In 1982, he pled guilty to this offense. *Id.* at 1-2.

On 21 March 2002, Applicant signed a security clearance application (SCA) that appears to have been submitted on 28 March 2002. Applicant answered, "no," to the following questions in the SCA:

24. Have you ever been charged with or any offenses related to alcohol or drugs?

27. Since the age of 16 or in the last 7 years, which ever is shorter, have you illegally used a controlled substance, for example marijuana?

28. Have you ever illegally used a controlled substance while possessing a security clearance?

### 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 used marijuana from 1993-98 once every two to three months (§ 1.a.), used marijuana weekly from 1978-81 (§ 1.b.), and purchased marijuana weekly from 1978-81 (§ 1.c.). 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 unauthorized disclosure of classified information. Directive § E2.A8.1.1.1.

The Government established by substantial evidence, and Applicant's admissions, that Applicant was involved in drug abuse by wrongfully using marijuana. DC 1. He also purchased marijuana. DC 2. On the other hand, as Applicant's last use of marijuana was approximately four years before he submitted his SCA, his drug abuse was not recent. MC 1. Applicant has also stated that he has no intention of using illegal drugs in the future and he does not socialize with known drug users/dealers. Ex. 3 at 3. A demonstrated intent not to abuse any drugs in the future is a mitigating condition. MC 3. Under all the circumstances, Applicant has sufficiently mitigated the security concerns raised by each of the facts alleged under Guideline H. Finding is for Applicant.

### **Guideline E-Personal Conduct**

In the SOR, DOHA alleged Applicant falsified his SCA by denying he had ever been convicted of an alcohol-related offense (§ 2.a.), by denying he had used illegal drugs in the previous seven years (§ 2.b.), and by denying he had ever used illegal drugs while possessing a security clearance (§ 2.c.). Under Guideline E, 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 that Applicant failed to correctly answer questions 24, 27, and 28 on his 2002 SCA. The question is whether Applicant's failure to correctly answer these questions was deliberate.

In § 2.a. of the SOR, DOHA alleged Applicant deliberately falsified his answer to question 24 by failing to acknowledge three DWIs. The evidence of record only supports a finding that Applicant was arrested for DWI on two occasions. Applicant contends he did not intentionally omit reference to his DWIs in question 24, but merely misunderstood the question. He claims he "was under the impression that [he] was only required to reflect alcohol-related incidents/arrests for the last 10 years" and he was "not aware of the 'have you ever' requirement. Ex. 2 at 2. At his hearing, Applicant testified he thought he only had to list his DWIs for the previous seven years. Tr. 13-14; *see* Tr. 33-35. Applicant also introduced a copy of an unsigned SCA, dated 8 March 1989, he allegedly submitted to military authorities, that lists the DWIs. Ex. B.

In answering questions 27 and 28 on his SCA, Applicant omitted any reference to his use of marijuana. Applicant asserts he did not acknowledge his use of marijuana because (1) he knew he had not been convicted of any drug offense (Tr. 18-19), (2) he "had no idea it was in [his] record" (Tr. 19), and (3) his last use was in 1993 which was outside the seven-year period for which he was required to report drug involvement (Tr. 23-24). He insists he told the Defense Security Service (DSS) agent who typed up his statement that his last use of marijuana was in 1993, not 1998. Tr. 22-23.

After listening to Applicant's testimony, observing his demeanor, and considering all other evidence in the record, I am convinced Applicant deliberately omitted relevant and material information about his DWI arrests and convictions, his use of marijuana, and his use of marijuana while holding a security clearance. DC 2. None of the mitigating conditions listed under Guideline E apply.

Applicant is intelligent, detail oriented, and familiar with Government forms. This was not the first time he ever filled out a security clearance application. Applicant's excuses are neither credible nor supported by the evidence. I am convinced he understood the requirement to report his DWIs, but purposefully failed to do so. Similarly, I am convinced Applicant deliberately falsified his answers to questions 27 and 28. The questions concern use of marijuana, not convictions for use of marijuana. The fact that his apprehension for using or possessing marijuana was not in his records

suggests he may have omitted it thinking that it would never be discovered. Applicant's assertion that he told the DSS agent his use ended in 1993 is also not persuasive. The 1998 date appears in three separate sentences in Applicant's statement. *See* Ex. 3 at 2. Applicant initialed each page and signed the statement as being true and correct to the best of his knowledge and belief. I conclude Applicant deliberately falsified his answers to questions 24, 27, and 28 on his SCA. Finding is against Applicant.

### **FORMAL FINDINGS**

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

Paragraph 1. Guideline H: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: 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.

**James A. Young**

**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.