

KEYWORD: Personal Conduct; Drugs; Criminal Conduct

DIGEST: Applicant used and purchased marijuana, psilocybin (mushrooms), and Ecstasy. He used cocaine and abused nitrous oxide and the prescription drugs Percocet, Valium, and Oxycontin. He lied about his drug use on security clearance applications and to Department of Defense investigators. Applicant failed to mitigate his disqualifying conduct under Guidelines E, H, and J of the Directive. Clearance is denied.

CASENO: 02-23302.h1

DATE: 01/26/2006

DATE: January 26, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-23302

DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

APPEARANCES

**FOR GOVERNMENT**

Richard Stevens, Esq., Department Counsel

## **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant used and purchased marijuana, psilocybin (mushrooms), and Ecstasy. He used cocaine and abused nitrous oxide and the prescription drugs Percocet, Valium, and Oxycontin. He lied about his drug use on security clearance applications and to Department of Defense investigators. Applicant failed to mitigate his disqualifying conduct under Guidelines E, H, and J of the Directive. 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 November 4, 2004, 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 answered the SOR in writing on November 22, 2004, and elected to have a hearing before an administrative judge. On July 8, 2005, the case was assigned to me. On October 17, 2005, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. At the hearing, the Government submitted six exhibits (Ex.), which were identified as Ex. 1 through 6 and admitted to the record without objection. Applicant submitted three exhibits, which were identified as Ex. A through C, and they were admitted to the record without objection. On October 28, 2005, DOHA received the hearing transcript (Tr.) of the proceeding.

### **FINDINGS OF FACT**

The SOR contains 22 allegations of disqualifying conduct. Twelve allegations relate to conduct alleged under Guideline H, Drug Involvement; nine allegations relate to conduct alleged under Guideline E, Personal Conduct; and one allegation relates to conduct alleged under Guideline J, Criminal Conduct. In his answer to the SOR, Applicant admitted all 22 allegations. His admissions are incorporated as findings of fact.

Applicant is a 26-year-old information systems specialist employed by a federal contractor. He holds a bachelor of science degree in business administration and is pursuing a graduate degree. He has never been married. (Exs. 1, 2; Ex. B.)

In 2001, after graduating from college, Applicant took a job with a defense contractor. He worked for the defense contractor from October 2001 until February 2003. In March 2002, Applicant completed a security clearance application (SF-86), which he signed and certified as true, complete, and correct on April 2, 2002. ( Tr. 23-24; Ex. 2.)

In March 2003, Applicant resigned from his position with the defense contractor and moved to another state, where he obtained a job and lived for approximately four months. In July 2003, Applicant returned to work for his defense contractor employer and has remained there since. (Ex. 1, 2.) On July 28, 2003, Applicant signed a statement that he had read, understood and would comply with the terms and conditions of his employer's substance abuse policy, which strictly prohibited the use of illegal drugs. (Tr. 25.) In September 2003, Applicant completed a second SF-86, which he signed and certified as true, complete, and correct on October 5, 2003. (Ex. 1.)

Applicant has a history of illegal drug use. He began using marijuana in 1996, when he was a junior in high school. He has purchased marijuana, and he has used marijuana, with varying frequency and at times daily, from approximately 1996 to at least 2003. (Ex. 3 at 1; Ex. 4 at 3.) In July 1999, he was arrested and charged with Controlled Dangerous Substance - Possession of Marijuana. (Ex. 4 at 2-3.) The case was *nolle prossed*. At his hearing, Applicant presented an Order for Expungement of Police and Court Records, dated August 8, 2005, directing that the record of this case be expunged. A certificate of compliance was issued by the relevant court on September 1, 2005. (Ex. C.)

Applicant purchased psilocybin (mushrooms), which he used at least three or four times from 1997 to at least 2001. (Ex. 4 at 3) Applicant also purchased Ecstasy, which he used 25 to 30 times, from the summer of 1998 to at least the summer of 2001. (Ex. 4 at 3-4.) From 1998 to at least 2001, Applicant abused the prescription drug Percocet, with varying frequency, at least 12 times. From 1998 to at least 1999, he abused nitrous oxide, with varying frequency, approximately 30 times. In the spring of 2000, he abused the prescription drug Valium at least three or four times. In 2001, he abused the prescription drug Oxycontin at least once. In the summer of 2003, he used cocaine at least three or four times. (Ex. 5 at 1-2.) Applicant has not been diagnosed or evaluated as suffering from drug abuse or drug dependence.

Applicant completed a SF-86 on or about April 4, 2002 and submitted it electronically. 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 was interviewed by an authorized investigator for the Defense Security Service (DSS) on May 14, 2002. (Ex. 3 at 2.) He told the investigator he had never used drugs and that the marijuana found in his car at the time of his arrest in July 1999 was not his.

Although he had agreed in writing on July 29, 2003, to comply with his employer's substance abuse policy, Applicant used marijuana, with varying frequency, from July 2003 to at least December 2003. (Ex. 5 at 1; Ex. 6.)

On or about October 10, 2003, Applicant completed a second SF-86 and submitted it electronically. In response to Question 27 on the SF-86, Applicant again answered "no."

Applicant was interviewed by a special agent of the DSS on March 11, 2004. At the end of the interview, he executed a signed, sworn statement in which he admitted his marijuana use. (Ex. 3 at 2.) He said he had previously denied marijuana use because it caused him embarrassment, and he worried his use of illegal drugs might cause him to lose his job. He denied any other illegal drug use. He asserted he was an individual of high integrity and trustworthiness. (Ex. 3 at 2.)

Applicant was interviewed again by the special agent on April 8, 2004. At the conclusion of that interview, Applicant executed a signed, sworn statement admitting purchase of marijuana, purchase and use of psilocybin (mushrooms), purchase and use of Ecstasy, use of cocaine, and use of nitrous oxide within the time frames and in the amounts identified above. He reiterated his belief he was a person of high character and moral value. He again expressed embarrassment about his conduct and concern about its impact on his career. (Ex. 4 at 1-5.) After revealing previously undisclosed information about his former drug use, Applicant stated: "This is a complete and accurate report of the drug usage of my lifetime." (Ex. 4 at 4.) He did not disclose his abuse of the prescription drugs Percocet, Oxycontin, and Valium within the time frames and in the amounts identified above.

Applicant was interviewed on June 16, 2004 by a special agent of the DSS. At the conclusion of the interview, he executed a signed, sworn statement admitting abuse of the prescription drugs Percocet, Oxycontin, and Valium within

the time frames and in the amounts identified above. Applicant again denied any other illegal drug use and said he did not intend to use any illegal drugs in the future. He again expressed embarrassment and concern about the impact of his drug use on his career. (Ex. 5 at 1-2.)

After each of his interviews in 2004 with agents of the DSS, and after reviewing the written summaries he had provided, Applicant signed and dated the following certification:

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 on this form can be punished by fine or imprisonment or both. (See U.S. Code, Title 18, Section 1001.)

At his hearing Applicant submitted a performance evaluation of his work for the calendar year 2004. Applicant's performance was rated overall as "above average." (Ex. A.)

### **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 daily, from approximately 1996 to at least December 2003 (¶ 1.a.); that he purchased marijuana (¶ 1.b.); that he was arrested July 28, 1999, charged with Controlled Dangerous Substance - Possession of marijuana, and the case was *nolle prossed* (¶ 1.c.); that he used psilocybin (mushrooms) at least three or four times, from 1997 to at least 2001 (¶ 1.d.); that he purchased psilocybin (mushrooms) (¶ 1.e.); that he used Ecstasy, with varying frequency to include 25 to 30 times, from the summer of 1998 to at least the summer of 2001 (¶ 1.f.); that he purchased Ecstasy (¶ 1.g.); that he abused the prescription drug Percocet, with varying frequency, to include at least 12 times, from 1998 to at least 2001 (¶ 1.h.); that he abused nitrous oxide, with varying frequency, to include about 30 times, from 1998 to at least 1999 (¶ 1.i.); that he abused the prescription drug Valium at least three or four times in the spring of 2000 (¶ 1.j.); that he abused the prescription drug Oxycontin at least one time in 2001 (¶ 1.k.); and that he used cocaine, at least three or four times, in the summer of 2003 (¶1.l.).

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. The eight substances that DOHA alleges Applicant used or abused are proscribed by Federal law.

Through Applicant's own admissions, the Government established a *prima facie* case that Applicant's improper or illegal involvement with drugs raises serious concerns about his security worthiness. 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 1996, when he was in high school and continued into his post-college years. Additionally, throughout his college years, Applicant purchased and used psilocybin and Ecstasy. He abused the prescription drugs Percocet, Valium, and Oxycontin, and he abused nitrous oxide. In the summer of 2003, he used cocaine several times.

Applicant's last admitted drug use occurred approximately two years ago, demonstrating that his drug involvement was recent. Accordingly, mitigating condition E2.A8.1.3.1. is inapplicable. Additionally, Applicant's admitted drug use spanned a period from 1996 to 2003, a period of seven years, from adolescence to young adulthood. Thus, Applicant's drug involvement was neither isolated nor aberrational, and it represented a consistent and long-term lifestyle choice that Applicant seemed unable to put aside after he left college and began his working career. Therefore, mitigating condition E2.A8.1.3.2. does not apply. In his signed, sworn statements of March 11, 2004, April 8, 2004, and June 16, 2004, Applicant stated he did not intend to use or abuse illegal drugs in the future. However, insufficient time has passed for him to demonstrate his intent, 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 material facts in his answer to Question 27 on the SF-86 he electronically submitted on or about April 4, 2002, by denying illegal drug use in the previous seven years, when he knew he had used marijuana, psilocybin, Ecstasy, and nitrous oxide, and also knew he had abused the prescription drugs Percocet, Valium, and Oxycontin in that seven-year period ¶¶ 2. a. (1), 2 a.(2); and that Applicant again falsified material facts in his answer to Question 27 on the SF-86 he electronically submitted on or about October 10, 2003, by denying illegal drug use in the previous seven years, when he knew he had used marijuana, psilocybin, Ecstasy, nitrous oxide, and cocaine, and also knew he had abused the prescription drugs Percocet, Valium, and Oxycontin in that seven year period (¶¶ 2.d.(1), 2.d.(2)).

DOHA also alleged Applicant raised Guideline E concerns when, on May 14, 2002, he falsified material facts on a signed, sworn statement he executed before a special agent of the DSS by stating he had never used drugs, and the marijuana found in his car on July 28, 1999, was not his, whereas he had, in fact used marijuana, with varying frequency, including daily, from 1996 to at least May 2002 and had used psilocybin (mushrooms), Ecstasy, and nitrous oxide and had abused the prescription drugs Percocet, Valium, and Oxycontin in the time frames and amounts alleged in ¶¶ 1.a., 1.d., 1.f., 1.h., 1.i.,1.j., and 1.k. of the SOR (¶¶ 2.b.(1) and 2.b.(2)).

DOHA alleged that Applicant continued to use marijuana with varying frequency from July 2003 to at least December 2003 after executing, on July 28, 2003, an agreement to comply with his employer's substance abuse policy (¶ 2.c.(1)). DOHA also alleged Applicant falsified material facts in the signed, sworn statement he executed before a special agent of the DSS on March 11, 2004, when he stated he had never used any other illegal drugs other than marijuana and that after his arrest in July 1999, he had never used illegal drugs, when in truth he deliberately failed to disclose he had used psilocybin (mushrooms), Ecstasy, cocaine, and abused prescription drugs and nitrous oxide and that he illegally used controlled substances from July 1999 through December 2003, as set forth in ¶¶ 1.a., 1.d., 1.f., and 1.h. through 1.l. of the SOR (¶.2.e.).

Additionally, DOHA alleged that Applicant falsified material facts in the signed, sworn statement he executed before a DSS special agent on April 8, 2004, when he stated that his use of marijuana, psilocybin (mushrooms), Ecstasy, cocaine, and abuse of nitrous oxide constituted a complete and accurate report of his drug usage, when in truth he deliberately failed to disclose he had also abused the prescription drugs Percocet, Valium, and Oxycontin, as set forth in ¶¶ 1.h., 1.j., and 1.k. of the SOR (¶2.f.).

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 on two security clearance applications raises a security concern under ¶ E2.A5.1.2.2 of Guideline E. His deliberate false statements to investigators in connection with a personal security or trustworthiness determination raise concerns under ¶ E2. A5.1.2.3. In signed sworn statements to DSS special agents, dated March 11, 2004, April 8, 2004, and June 16, 2004, Applicant admitted lying about his illegal drug use on his security clearance applications and in a previous interview in May 2002. In his three signed, sworn statements, he said he was concerned that telling the truth about his drug use would have negative impacts on his career and livelihood. 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 only when repeatedly questioned by special agents of the Defense Investigative Service. His falsifications were multiple and occurred recently. Accordingly, ¶E.2.A.6.1.3.2. does not apply to the facts of Applicant's case. The Guideline E allegations in the SOR are concluded against the Applicant.

## **Guideline J, Criminal Conduct**

In the SOR, DOHA alleged Applicant's deliberate material falsifications about his use of illegal drugs on the two security clearance applications he certified and signed on or about April 4, 2002 and October 10, 2003, and three signed statements he certified and signed pursuant to interviews with DSS special agents in May 2002, March 11, 2004, and April 8, 2004 constituted a violation of Federal law under section 1001 of Title 18, United States Code. (¶ 3.a.)



When he completed his two security clearance applications, 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 knowing and willful false statements in his responses to Question 27 on his security clearance applications.

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

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 Title 18, Section 1001, of the United States Code, it is a felony crime to knowingly make a materially false, fictitious, or fraudulent statement to a department or agency of the Federal government. Applicant admitted preparing and signing written statements to lawful investigators in which he lied about his drug use.

Applicant's admitted criminal conduct raises security concerns under ¶¶ E2. A10.1.2.1 and E2.A10.1.2.2 of Guideline J. His history or pattern of criminal activity raises doubts about his judgment, reliability and trustworthiness. ¶ E2.A10.1.1. 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 falsifications of his security clearance applications and signed, sworn statements occurred in 2002, 2003, and 2004. These criminal acts were recent. They were not isolated events but instead demonstrated a pattern of criminal conduct. Thus, neither ¶ E2.A10.1.3.1. nor ¶ E2.A10.1.3.2 of Guideline J applies in mitigation to Applicant's Guideline J conduct. Additionally, no other mitigating conditions under Guideline J are applicable to the facts of Applicant's case. Accordingly, 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

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: Against Applicant

Subparagraph 1.h.: Against Applicant

Subparagraph 1.i.: Against Applicant

Subparagraph 1.j.: Against Applicant

Subparagraph 1.k.: Against Applicant

Subparagraph 1.l.: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.(1): Against Applicant

Subparagraph 2.a.(2): Against Applicant

Subparagraph 2.b.(1): Against Applicant

Subparagraph 2.b.(2): Against Applicant

Subparagraph 2.c.(1): Against Applicant

Subparagraph 2.d.(1): Against Applicant

Subparagraph 2.d.(2): Against Applicant

Subparagraph 2.e.: Against Applicant

Subparagraph 2.f.: Against Applicant

Paragraph 3. Guideline J.: AGAINST APPLICANT

Subparagraph 3.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.