

DATE: August 31, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-20262

## **ECISION OF ADMINISTRATIVE JUDGE**

**LEROY F. FOREMAN**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Stephanie C. Hess, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant admitted drug involvement on at least three occasions, two of which occurred while he held a security clearance and one of which resulted in a felony conviction. He intentionally failed to disclose his drug involvement on his security clearance application (SF 86). Security concerns based on criminal conduct, drug involvement, and personal conduct are not mitigated. Clearance is denied.

### **STATEMENT OF THE CASE**

On August 17, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. This action was taken under Executive Order 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). The SOR alleges security concerns under Guidelines J (Criminal Conduct), H (Drug Involvement), and E (Personal Conduct). Under Guideline J, it alleges two arrests for drug-related offenses (SOR ¶¶ 1.a, 1.b). Under Guideline H, it alleges use and purchase of marijuana "on divers occasions" from 1986 to December 2001 (SOR ¶¶ 2.a, 2.b), and the arrests alleged under Guideline J (SOR ¶ 2.c). Under Guideline E, it alleges four falsifications on Applicant's security clearance application (SF 86) (SOR ¶¶ 3.a, 3.b, 3.c, 3.d).

Applicant answered the SOR in writing on November 12, 2004, admitted all the allegations, and requested a hearing. Action on his request for a hearing was delayed by the moratorium on cases potentially covered by 10 U.S.C. § 986 (Tr. 18). The case was assigned to me on May 8, 2006. On June 5, 2006, DOHA issued a notice of hearing setting the case for June 20, 2006. The case was heard as scheduled. DOHA received the transcript (Tr.) on June 28, 2006.

### **PROCEDURAL RULINGS**

At the hearing, Department Counsel moved to amend the SOR by substituting the words "on various occasions" for the words "on divers occasions" in SOR ¶¶ 2.a and 2.b; adding ¶¶ 3.e and 3.f, alleging use and purchase of marijuana while

holding a security clearance; and adding ¶¶ 3.g and 3.h, alleging that the arrests in SOR ¶¶ 1.a and 1.b occurred while Applicant held a security clearance (Tr. 19-21). Without objection from Applicant, I granted the motion (Tr. 21). I also granted Department Counsel's motion to withdraw SOR ¶ 3.d (Tr. 22).

### **FINDINGS OF FACT**

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a 38-year-old employee of a federal contractor. He has worked for his current employer since April 1994, and held a security clearance since 1998 (Government Exhibit (GX) 2 at 3). His team leader has known him for 12 years and regards him as an outstanding employee who applies his ethics and principles on the job (Applicant's Exhibit (AX) A).

Applicant was arrested for possession of marijuana in February 1999 (GX 3). His case was placed on the "stet" docket in June 1999 (GX 6). His lawyer advised him that he would be on probation for a year and that prosecution would be terminated if he did not violate his probation. His lawyer also advised him the arrest would not jeopardize his employment if he successfully completed his probation (GX 3 at 5).

On May 8, 2001, Applicant executed a security clearance application (SF 86) to renew his clearance. He answered "no" to question 24, asking if he had ever been charged with or convicted of any alcohol-related or drug-related offenses; question 27, asking if he had illegally used a controlled substance in the last seven years or since the age of 16; and question 28, asking if he had ever illegally used a controlled substance while possessing a security clearance (GX 1 at 5).

Applicant was arrested in December 2001, after he submitted his SF 86, and charged with possession of marijuana with intent to distribute (a felony), possession of cocaine, and possession of drug paraphernalia (GX 3 at 5; GX 4; GX 5). In June 2002, he was convicted of possession of marijuana with intent to distribute. He was sentenced to three years in jail, with all but six months suspended. His six months of unsuspended jail time were served in home detention (GX 8, Tr. 67).

In January 2002, Applicant executed a written and sworn statement at the conclusion of an interview with a security investigator. The statement consists of five double-spaced pages in question-and-answer format, with Applicant's initials at the beginning and end of each page and his full signature and oath on the last page. In the statement, he told the security investigator he did not disclose the arrest in response to question 24 on his SF 86 because, based on what his lawyer had told him, he did not think it would appear on his criminal or arrest record. He repeated this explanation at the hearing (Tr. 57). He admitted to the security investigator that his answers to questions 27 and 28 were untrue in that he used marijuana about two times a week from 1986 until November 2000. He also told the investigator he intended to quit using marijuana because of his concern about random urinalysis examinations (GX 3 at 4).

At the hearing, Applicant partially recanted his January 2002 statement, claiming the security investigator misquoted him. He claimed he did not notice the errors in his written statement because he was nervous and "just skimmed through it and signed it." (Tr. 44.) He admitted telling the investigator he purchased and tried marijuana in 1986, while in high school; and he admitted telling the investigator he purchased and used it one time while on vacation in 1999. He also testified that in December 2001 he tried to sell some marijuana that was left over from a party at his house. He admitted he lied in his answers to questions 27 and 28 of his SF 86 (Tr. 59).

A senior member of a major fraternal organization, of which Applicant is a member, regards Applicant as a truthful, dedicated, and charitable man, deeply involved in community activities (AX B). A colleague who has known Applicant for 18 years and worked with him for 10 years testified he is a dedicated, hard-working, and a respectable person. This colleague, along with Applicant and three others, formed an outreach program for underprivileged youths, offering them an opportunity for training and job opportunities in the construction trade. The outreach program is still in the planning stages. (Tr. 70-78.)

### **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), as amended and modified. 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 (App. Bd. Dec. 19, 2002).

The Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in persons with access to classified information. However, 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 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 which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

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; *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 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

## CONCLUSIONS

### **Guideline J (Criminal Conduct)**

A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1. Disqualifying conditions may be based on allegations or an applicant's admission of criminal conduct, whether or not charged (DC 1). Directive ¶ E2.A10.1.2.1. A single serious crime or multiple lesser offenses may also be disqualifying (DC 2). Directive ¶ E2.A10.1.2.2. Applicant's two arrests for drug-related offenses, one of which was a felony, and his admitted purchase, possession, and use of marijuana on at least three occasions establish DC 1 and DC 2.

Absent a waiver from the Secretary of Defense, the Department of Defense may not grant or continue a security clearance for any applicant who "has been sentenced by a U.S. court to confinement for more than one year, and was

incarcerated as a result of that sentence for not less than one year." 10 U.S.C. § 986 as amended. Applicant's sentence to three years in jail does not disqualify him from holding a security clearance under 10 U.S.C. § 986, because all jail time was suspended, except for the six months he served in home detention

The Directive mandates consideration of numerous factors, including the "nature, extent, and seriousness of the conduct." Directive ¶ E2.2.1.1. In his written statement in January 2002, Applicant admitted using marijuana about two times a week from 1986 until November 2000. He partially recanted that admission at the hearing, claiming the security investigator misquoted him, and that he did not notice the error because he was nervous and "just skimmed through it and signed it."

I find Applicant's recantation of his January 2002 statement implausible and incredible. He is intelligent and articulate. His statement consisted of five double-spaced pages in a question-and-answer format. His answers are very detailed. In addition to signing and swearing to the document, he initialed the beginning and end of each page. Accordingly, I have accepted as true Applicant's admission to the security investigator that he illegally used marijuana about twice a week from 1986 until November 2000.

Since the government produced substantial evidence to establish DC 1 and DC 2, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. Applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Criminal conduct can be mitigated by showing it was not recent (MC 1), an isolated incident (MC 2), or there is clear evidence of successful rehabilitation (MC 6). Directive ¶¶ E2.A10.1.3.1, E2.A10.1.3.2, E2.A10.1.3.6. The issues under both MC 1 and MC 6 are whether there has been a significant period of time without any evidence of misconduct, and whether the evidence shows changed circumstances or conduct. The Directive is silent on what constitutes a sufficient period of reform and rehabilitation. The sufficiency of an applicant's period of conduct without recurrence of past misconduct does not turn on any bright-line rules concerning the length of time needed to demonstrate reform and rehabilitation, but rather on a reasoned analysis of the facts and circumstances of an applicant's case. If the evidence shows that a significant period of time has passed without evidence of misconduct by an applicant, then an administrative judge must articulate a rational basis for concluding that the significant period of time does not demonstrate changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

Although Applicant has not been involved in any drug-related criminal conduct since his arrest in December 2001, he was on probation, with thrice-weekly drug testing, until June 2005. At the time of the hearing, only about a year had elapsed since he completed his probation. He has been aware that his job is in jeopardy since his interview with a security investigator in January 2002. When he was interviewed in December 2001, his stated motivation for stopping his drug involvement after 14 years of habitual use was the likelihood of being caught. There is no evidence he has changed his attitude about the security risks involved in drug involvement. "Only with the passage of time will there be a track record that shows whether a person, through actions and conduct, is willing and able to adhere to a stated intention to refrain from acting in a way that the person has acted in the past." ISCR Case No. 97-0727, 1998 DOHA LEXIS 302 at \*7 (App. Bd. Aug. 3, 1998). Applicant has not carried his burden of convincing me that his attitude about drugs has changed or that sufficient time has elapsed to warrant a finding that he is rehabilitated. Accordingly, I conclude MC 1 and MC 6 are not established. I also conclude MC 2 is not established because Applicant was involved in multiple instances of drug-related criminal conduct.

After weighing the disqualifying and mitigating conditions and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concern based on criminal conduct.

### **Guideline H (Drug Involvement)**

Under this guideline, 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. Any illegal use of a controlled substance can raise a security concern and may be a disqualifying condition (DC 1). Directive ¶ E2.A8.2.1.

"Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution," also is a disqualifying condition (DC 2). Directive ¶ E2.A8.2.2. Applicant's admitted drug purchases, possession, and use establish DC 1 and DC 2.

A security concern based on drug involvement can be mitigated by showing that it was not recent (MC 1), or that it was "an isolated or aberrational event" (MC 2). Directive ¶¶ E2.A8.1.3.1, E2.A8.1.3.2. For the reasons set out above under Guideline J, I conclude MC 1 and MC 2 are not established.

The security concern under this guideline also can be mitigated (MC 3) by evidence of "[a] demonstrated intent not to abuse any drugs in the future." Directive ¶ E2.A8.1.3.3. Although Applicant has declared his intent not to abuse drugs again, I am not satisfied, for the reasons set out above under Guideline J, that his declared intent has been "demonstrated." Accordingly, I conclude MC 3 is not established.

After considering the disqualifying conditions and the absence of mitigating conditions, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concern based on drug involvement.

### **Guideline E (Personal Conduct)**

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1. A disqualifying condition (DC 2) under this guideline may be established by "deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities." Directive ¶ E2.A5.1.2.2. Applicant's admission that he falsified his answers to questions 27 and 28 on his SF 86 establishes DC 2.

Applicant denied intentionally falsifying his answer to question 24 on his SF 86. When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time the omission occurred. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)). After considering the plausibility of Applicant's explanation for his negative answer to question 24 and evaluating all the evidence regarding his arrest in 1999, I conclude he did not intentionally falsify his answer to question 24. Accordingly, I resolve SOR ¶ 3.a in his favor.

Two mitigating conditions (MC) are relevant to Applicant's false answers to questions 27 and 28 on his SF 86. MC 2 applies when the falsification "was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily." Directive ¶ E2.A5.1.3.2. MC 3 applies when the applicant "made prompt, good-faith efforts to correct the falsification before being confronted with the facts." Directive ¶ E2.A5.1.3.3. Neither condition is established in this case because Applicant's falsification was recent, pertaining to his current security clearance application, and he made no effort to correct the falsification until confronted with the facts by a security investigator. Even after admitting the true facts to the security investigator, he attempted at the hearing to recant that admission and minimize his drug involvement.

Under this guideline, a disqualifying condition (DC 4) may be established by "[p]ersonal conduct . . . that increases an individual's vulnerability to coercion, exploitation, or duress, such as engaging in activities, which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail." Directive ¶ E2.A5.1.2.4. Applicant's drug involvement while holding a security clearance and working as an employee of a government contractor made him vulnerable to threats to jeopardize his clearance and his job by disclosing his drug involvement. I conclude DC 4 is established.

Finally, a disqualifying condition (DC 5) may be established by evidence of "[a] pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency." Directive ¶

E2.A5.1.2.5. I conclude DC 5 is established by Applicant's multiple drug-related criminal acts.

Drug involvement while holding a security clearance is not an enumerated disqualifying condition under this guideline. However, it does constitute a breach of faith that demonstrates questionable judgment, untrustworthiness, and unreliability. Accordingly, I have considered Applicant's purchase and use of marijuana while holding a security clearance (SOR ¶¶ 3.e and 3.f) as a disqualifying condition. *See* Directive ¶¶ E2.2.1.1 (nature, extent, and seriousness of the conduct), E2.2.1.2 (circumstances surrounding the conduct).

Applicant's vulnerability to coercion, exploitation, or duress under DC 4 can be mitigated (MC 5) by evidence of "positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress." Directive ¶ E2.A5.1.3.5. He disclosed his drug abuse to a security investigator, although he partially recanted his disclosure at the hearing. He apparently had not engaged in further drug abuse as of the date of the hearing, thereby eliminating vulnerability based on continued drug abuse. I conclude MC 5 is established.

After weighing the disqualifying and mitigating conditions and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concern based on personal conduct.

### **FORMAL FINDINGS**

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

Paragraph 1. Guideline J (Criminal Conduct): AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Paragraph 2. Guideline H (Drug Involvement): AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: Against Applicant

Paragraph 3. Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraph 3.a: For Applicant

Subparagraph 3.b: Against Applicant

Subparagraph 3.c: Against Applicant

Subparagraph 3.d: Withdrawn

Subparagraph 3.e: Against Applicant

Subparagraph 3.f: Against Applicant

Subparagraph 3.g: Against Applicant

Subparagraph 3.h: Against Applicant

### **DECISION**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest

to grant Applicant a security clearance. Clearance is denied.

LeRoy F. Foreman

Administrative Judge