

DATE: November 15, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-04549

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Richard A. Stevens, Esquire, Department Counsel

FOR APPLICANT

Dale P. Kelberman, Esquire

SYNOPSIS

Applicant failed to mitigate the Guideline E (personal conduct) and Guideline H (illegal drugs) security concerns stemming from his long history of marijuana use, at times while holding a security clearance, and his multiple deliberate false statements to the government about his drug use. Clearance is denied.

STATEMENT OF THE CASE

After reviewing the results of Applicant's background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding⁽¹⁾ it is clearly consistent with the national interest to give Applicant a security clearance. On September 21, 2004, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed in the Directive under Guideline E (personal conduct) and Guideline H (illegal drugs).

Applicant timely answered the SOR (Answer), and admitted, with explanation, the allegation he had used marijuana from 1978 until 2000 (SOR ¶ 1.a); he denied, with explanation, the allegation he had used marijuana while holding a security clearance (SOR ¶ 1.b). Applicant also admitted, with explanation, the allegations he had deliberately falsified his answers to drug-related questions in three different security questionnaires (SOR ¶¶ 2.a, 2.c, and 2.d) and that he was denied a security clearance in March 2002 (SOR ¶ 2.e). Applicant denied, with explanation, the allegation he deliberately falsified an answer to a drug-related question in an October 2001 questionnaire (SOR ¶ 2.b). Applicant also requested a hearing.

The case was assigned to me on June 27, 2005, and I convened a hearing September 7, 2005. The parties appeared as scheduled⁽²⁾ and the government presented seven exhibits (GE 1 through 7), which were admitted without objection. Applicant testified in his own behalf and presented five exhibits (AE A through E), which were admitted without objection. DOHA received the transcript (Tr) on September 21, 2005.

FINDINGS OF FACT

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is 50 years old and employed by a defense contractor as a senior communications and signals processing engineer. He holds a bachelor's degree and a master's degree in electrical engineering. He has received several academic and professional awards, is a member of academic and professional fraternities, and holds patents relating to voice communications technology in a variety of applications. He is well-regarded by his employer, several neighbors and friends, and is generally known as highly accomplished in his technical field of endeavor. Applicant and his wife have been married for 27 years.

Applicant illegally used marijuana with varying frequency between 1973, when he was in high school, and September 2001, when he was in his mid-40s. Between 1973 and 1978, he used the drug weekly, sometimes buying as much as 1/4 pound of marijuana for use with friends. For the next 12 years, Applicant's use was more recreational and sporadic, and sometimes with his wife. Applicant did not use marijuana from 1990 through 1994. In 1995, Applicant used marijuana about three times, then did not use marijuana again until he used marijuana about three times during the period June 1999 through September 2001. He decided to stop using marijuana at that time because he was concerned about drug testing as he tried to look for a new job. (GE 3)

In March 1985, Applicant applied for a security clearance. He submitted a DoD Personnel Security Questionnaire (PSQ), question 15.a of which asked if Applicant had ever used drugs, including marijuana. Applicant answered "no" to that question because he was concerned if he answered truthfully, he would not get the job for which he needed that security clearance. (GE 6; Answer)

In April 1994, Applicant submitted a DoD National Agency Questionnaire (NAQ), again for the purpose of getting or keeping a security clearance. He answered "no" to NAQ question 20.a, which asked if Applicant had used drugs, including marijuana. Applicant falsified his answer because he wanted to be consistent with his previous answer in 1985 and feared he would lose his job if he revealed he had used marijuana. (GE 5; Answer)

Applicant was granted a security clearance in July 1995. (GE 1; GE 3) The record is unclear about whether this was a new clearance or a continuance of any clearance he may have held as a result of his 1985 PSQ. Through much of the 1990s, Applicant performed engineering consulting for a variety of companies. This work was arranged through a contracting agency that matched Applicant's skills with those companies' needs. Some of the work required access to classified information, some did not.

In October 2001, Applicant submitted a Security Clearance Application (SCA), this time to obtain a Top Secret/SCI clearance with the National Security Agency (NSA). In response to question 27, which asked if Applicant had used drugs, including marijuana, in the preceding seven years, Applicant answered "no." Applicant claimed he was concerned about his privacy when filling out the SCA in that he had to complete the form in a room through which other people were coming and going. Subsequently, Applicant disclosed his use of marijuana as well as other drugs in an interview with an NSA investigator in January 2002. (GE 4; Answer) The interview was conducted in the pre-test phase of a polygraph examination of Applicant. (3)

Applicant received a Top Secret / SCI clearance after he submitted his October 2001 SCA. However, after his interview in January 2002, Applicant's NSA access was revoked in March 2002 due to his drug use and his falsification of his SCA. Applicant was eligible to re-apply for his NSA clearance in December 2003, and he submitted another SCA that month. (GE 1; GE 3) His request for access through NSA was still pending as of this hearing.

POLICIES

The Directive sets forth adjudicative guidelines (4) to be considered in evaluating an Applicant's suitability for access to classified information. Security clearance decisions must reflect consideration of both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant.

However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are Guideline H (illegal drugs) and Guideline E (personal conduct).

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁽⁵⁾ for an Applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for the Applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it establishes that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the Applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, the Applicant bears a heavy burden of persuasion.⁽⁶⁾ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.⁽⁷⁾

CONCLUSIONS

The government questions Applicant's trustworthiness because it appears he deliberately omitted from three different security questionnaires facts about his use of marijuana. The government also alleged Applicant used marijuana while holding a security clearance, and that he ultimately lost a security clearance with another agency because of his drug use and false statements about his drug use. Under Guideline E, a security concern arises where it is shown an applicant has exhibited questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such conduct may indicate the person may not properly safeguard classified information.⁽⁸⁾

The government has presented sufficient information, in the form of Applicant's admissions, his testimony, and information obtained during his background investigation to support the allegations in the SOR and the preliminary decision to deny his request for clearance. I conclude from the available information that Applicant deliberately and repeatedly tried to hide the fact of he had used illegal drugs with varying frequency for most of his adult life. The facts established support application of Guideline E disqualifying condition (DC) 2⁽⁹⁾ and DC 5.⁽¹⁰⁾

Further, after reviewing the Guideline E mitigating conditions (MC), I conclude none apply. As to Applicant's false answers about his drug use in the 1985 and 1994 questionnaires, Applicant deliberately lied to protect his own interests. Such conduct is in direct conflict with the fiduciary nature of one's responsibilities in protecting classified information. While he claims in his defense these falsifications are not recent, the record is not to be analyzed in such a piecemeal fashion and I have weighed his earlier falsifications together with his 2001 SCA, the pleadings in this case, and all of the available information. The facts presented here, when considered together, show an ongoing history of concealing from the government information he knows to be adverse to his own interests.

Regarding his October 2001 SCA, Applicant claims he was concerned about his privacy when he completed the questionnaire. Here, again, Applicant placed his own interests ahead of the government's need to make a fully-informed decision about Applicant's suitability for access. Applicant further asserts he made "a prompt, good-faith effort to correct the error before being confronted with the facts." (Answer) However, the record shows Applicant did not disclose his marijuana use for nearly four months, disclosing this adverse information only when faced with a polygraph examination. This conduct does not meet the standard of prompt, good-faith disclosure before confrontation.

Applicant further denies he used marijuana while holding a security clearance, which would render his answer to question 28 in the October 2001 SCA truthful. Specifically, Applicant contends he did not "knowingly" use drugs while holding a clearance because he thought his clearance had to be cancelled because he was not working in a job that required a clearance. However, it is uncontroverted Applicant was granted a clearance in 1995 and he smoked marijuana

at least three times that same year. He had applied for a clearance so his services could be contracted out. The contracting agency might at any time find Applicant work in a classified environment, and the fact he was not so assigned through the late 1990's did not appear to alter his cleared status.

Lastly, Applicant claims his loss of a security clearance in 2002 was based solely on his then recent drug use, not on any concerns about his honesty, and that he has demonstrated he is and will continue to be fully candid with the government. However, GE 3 plainly states his clearance was revoked because of his drug use and his deliberate falsification of his SCA. His history of false statements to the government and his unwillingness to tell the truth until confronted with a polygraph test, and his willingness to use illegal drugs in the first place underscore the government's concerns about his personal conduct. Accordingly, I conclude Guideline E against the Applicant.

The government also questions Applicant's suitability for access to classified information based on his illegal use of marijuana between 1973 and 2001, at times while holding a security clearance. Under Guideline H, improper or illegal involvement with drugs raises questions regarding an individual'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. Such conduct may also be criminal and indicative of a disregard for rules and regulations used to protect national interests.⁽¹¹⁾ In this instance, the government has produced sufficient information through its exhibits and Applicant's admissions to support the preliminary decision as expressed in the SOR that Applicant should be denied a security clearance because of his drug use. Available information shows Applicant has used and purchased illegal drugs with varying frequency for much of his adult life. For the same reasons expressed under Guideline E, above, I conclude he also used marijuana while holding a security clearance. Guideline H disqualifying condition (DC) 1⁽¹²⁾ and DC 2⁽¹³⁾ apply.

In response to the government's information, Applicant asserts his drug use is no longer a security concern because Guideline H MC 1⁽¹⁴⁾ and MC 3⁽¹⁵⁾ apply. Indeed, it appears Applicant last used marijuana at least four years ago. However, he had used the drug off and on for nearly 30 years, abstaining only when it appeared he would be subjected to drug testing or other heightened scrutiny. As for any future intent not to use illegal drugs, his repeated falsifications about his drug use show the government cannot rely on Applicant's claim in this regard. Accordingly, any benefit Applicant might realize from his current abstinence is undermined by his poor credibility and by his extensive history of drug use. I conclude Guideline H against Applicant.

I have carefully weighed all of the available evidence, and I have applied the appropriate disqualifying and mitigating conditions. No single adjudicative factor or finding is dispositive of this decision. Rather, I have made a fair and commonsense assessment of the entire record before me as required by Directive Section E2.2.3. Reasonable doubts persist about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. Absent substantial information to mitigate these doubts, which Applicant has failed to provide, I cannot conclude he has overcome the government's case.

FORMAL FINDINGS

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Guideline H (Illegal Drugs): **AGAINST THE APPLICANT**

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Paragraph 2, Guideline E (Personal Conduct): **AGAINST THE APPLICANT**

Subparagraph 2.a: Against the Applicant

Subparagraph 2.b: Against the Applicant

Subparagraph 2.c: Against the Applicant

Subparagraph 2.d: Against the Applicant

Subparagraph 2.e: Against the 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 or continue a security clearance for the Applicant. Clearance is denied.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. On September 6, 2005, Applicant requested a continuance until March 2006. After speaking with the parties in a conference call the same day, I denied the request and directed that the hearing be held as scheduled in the Notice of Hearing dated August 25, 2005. The reasons for my ruling on this motion are included in the transcript. (Tr., 8 - 9).
3. Tr., p. 62, 68 - 69.
4. Directive, Enclosure 2.
5. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
6. *See Egan*, 484 U.S. at 528, 531.
7. *See Egan*; Directive E2.2.2.
8. Directive, E2.A5.1.1.
9. Directive, E2.A5.1.2.2. The 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;
10. Directive, E2.A5.1.2.5. A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency;
11. Directive, E2.A8.1.1.1.
12. Directive, E2.A8.1.2.1. Any drug abuse...;
13. Directive, E2.A8.1.2.2. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution;
14. Directive, E2.A8.1.3.1. The drug involvement was not recent;
15. Directive, E2.A8.1.3.3. A demonstrated intent not to abuse any drugs in the future;