

DATE: February 9, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-08100

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a 39-year-old man, is an aircraft mechanic for a defense contractor. The record evidence is insufficient to overcome the negative security implications stemming from his history of illegal drug involvement. In addition, under 10 U.S.C. § 986, the Defense Department is prohibited from granting or renewing a security clearance for Applicant based on his current drug use; a waiver is not authorized. Applicant is also unable to extenuate or mitigate his deliberate falsification of relevant and material facts about his long-term history of illegal drug involvement (1) on his security-clearance application, (2) during an interview to an investigator, and (3) in a sworn statement provided to an investigator. Clearance is denied.

STATEMENT OF THE CASE

On August 4, 2003, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant.⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline H for drug involvement, Guideline E for personal conduct, and Guideline J for criminal conduct.

Applicant answered the SOR on August 20, 2003, and he requested a clearance decision based on the written record without a hearing. In his one-page Answer, Applicant admitted the factual allegations of the SOR except the following subparagraphs: 1.a, 1.b, 1.c, and 1.h. Thereafter, Department Counsel prepared and submitted its written case. The File of Relevant Material (FORM) was mailed to Applicant on or about November 20, 2003, and it was received by Applicant December 4, 2003. Applicant's written response to the FORM was due January 3, 2004, and no response was received. The case was assigned to me January 23, 2004.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the

record, I make the following essential findings of fact:

In general, I find that the record evidence as a whole is sufficient to establish, by substantial evidence, the occurrence of all the factual events alleged in SOR subparagraphs 1.a - 1.q, 2.a - 2.c, and 3.a.

Applicant is a 39-year-old man. He works as an aircraft mechanic for a defense contractor. The record is silent concerning Applicant's abilities and attributes as an employee. Applicant was previously granted a security clearance in November 1997.

His first marriage in June 1985 ended in divorce in June 1998. He remarried in October 1998. He is the father of two children, a daughter born in August 1984 and a son born in November 1985.

Applicant has a long-term history of illegal drug use dating to 1977. His primary drug of choice is marijuana, which he has used since 1977 to at least March 4, 2003. He started using marijuana regularly in 1981. Since then, he has smoked it two to three times weekly. At times, he has smoked marijuana as frequent as daily.

In addition to using marijuana, he used cocaine during 1991 - 1992, ecstasy in 1991 - 1992, LSD in 1991, quaaludes in 1987, hashish during 1980 - 1981, amphetamines during 1979 - 1981, and prescription drugs without a prescription in 1977 and during 1979-1980. Applicant also completed a 30-day outpatient program with a drug abuse program during the summer of 1979 or 1980.

During October 2002, Applicant completed a security-clearance application, also known as a SF 86. In response to a specific question⁽²⁾ about his use of illegal drugs and drug activity within the last seven years, Applicant answered "No" denying any and all illegal drug use. In response to another drug-use question,⁽³⁾ he answered "No" denying the use of a controlled substance while possessing a security clearance. Nowhere in his security-clearance application did Applicant reveal any information about his history of illegal drug use.

On or about January 6, 2003, Applicant was interviewed by a special agent of the Defense Security Service (DSS). During that interview, Applicant denied using any illegal drugs within the past seven years.

A few days later on January 9, Applicant was interviewed again by the same DSS special agent. At the conclusion of the interview, Applicant signed a sworn statement stating he had used marijuana once in about 1978 or 1979; he denied any other illegal drug use or other involvement with illegal drugs.

On or about March 5, 2003, Applicant was interviewed by another DSS special agent. The interview produced a signed, sworn statement detailing Applicant's history of illegal drug use dating from 1977 to as recently as March 4, 2003, including the 30-day outpatient drug abuse program he attended during the summer of 1979 or 1980. Concerning his future intentions, Applicant said "I cannot state that I will never use marijuana again in the future, particularly in light of the fact that I used it last night."⁽⁴⁾ Concerning his denials of illegal drug use or drug involvement on his security-clearance application, Applicant stated:

I admit that I deliberately falsified my Security Clearance Application (SCA), dated 23 Oct 02, by failing to reveal any of my illegal drug usage or involvement. I answered "no" to all questions concerning illegal drugs because I was concerned that I'd lose my job at [the company] if I provided truthful answers to those questions. I was also slightly concerned that my truthful answers could negatively affect my security clearance.⁽⁵⁾

In addition, Applicant admitted deliberately lying to the DSS special agent who conducted the January 2003 interviews as well as providing a false sworn statement on January 9, 2003. Applicant did so because he was concerned he would lose his job if he was truthful.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each

clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the record evidence as a whole, the following security guidelines are most pertinent here: Guideline H for drug involvement,⁽⁶⁾ Guideline E for personal conduct,⁽⁷⁾ and Guideline J for criminal conduct.⁽⁸⁾

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁹⁾ The government has the burden of proving controverted facts.⁽¹⁰⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.⁽¹¹⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽¹²⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽¹³⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against them.⁽¹⁴⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁵⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations

should err, if they must, on the side of denials."⁽¹⁶⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

1. Drug Involvement

Under Guideline H, a security concern may exist based on improper or illegal involvement with drugs. Improper or illegal involvement with drugs is relevant to the security-clearance process for several reasons: (1) drug abuse indicates unwillingness or inability to abide by the law; (2) drug abuse weakens judgment; (3) some types of drug use reflect a tendency toward irresponsible or high risk behavior; (4) users of illegal drugs may be susceptible to blackmail, especially if exposure of drug use could cost them their job; (5) drug abuse or dependence often indicates the presence of broad emotional or personality problems of security concern; or (6) drug use may cause financial problems, leading to criminal activity to finance a drug habit.

Here, based on the available information, a security concern is raised by Appellant's long-term history of illegal drug use. Applicant's illegal drug use dating from 1977 to as recently as March 4, 2003, is a solid basis to question Applicant's suitability to possess a security clearance. His long-term history of illegal drug use (primarily marijuana use) constitutes drug abuse and indicates unwillingness or inability to abide by the law. Aggravating the situation, his marijuana use took place after he had been granted a security clearance in 1997 and during his recent background investigation (January - March 2003). Given these circumstances, DC 1,⁽¹⁷⁾ DC 2,⁽¹⁸⁾ and DC 5⁽¹⁹⁾ apply against Applicant.

I have reviewed the mitigating circumstances under Guideline H and conclude none apply. First, Applicant's illegal drug use includes using marijuana during arch 2003, the day before his third DSS interview. And so, it cannot be viewed as mitigated by the passage of time. Second, Applicant's long-term history of illegal drug use (primarily marijuana use) dating from 1977 to March 2003 is the direct opposite of an isolated or aberrational event. Third, given his long-term history of illegal drug use, his marijuana use in March 2003, along with his statement that he may use marijuana in the future, Applicant has failed to show that he will not use illegal drugs in the future. To sum up, Applicant has failed to extenuate or mitigate the security concerns. Guideline H is decided against Applicant.

2. *Application of 10 U.S.C. § 986*

In addition to the normal security concerns of Guideline H, this case presents the issue of whether Applicant is--as a matter of law--ineligible for a security clearance based on his illegal drug use. ⁽²⁰⁾ Under 10 U.S.C. § 986 (the so-called Smith Amendment), the Defense Department may not grant or renew a security clearance for an applicant who falls under any of four statutory categories. ⁽²¹⁾ The statutory category at issue here is § 986(c)(2), which provides as follows: "The person is an unlawful user of, or is addicted to, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." The statute also provides that the Secretary of Defense and the secretary of the relevant military department may, in a meritorious case, authorize an exception to the statutory prohibition for persons in two of the four statutory categories; namely, paragraphs (1) and (4) of § 986(c). An exception is not authorized for persons falling under paragraph (2) of § 986(c), the category at issue here.

The Deputy Secretary of Defense issued a June 7, 2001, memorandum implementing the Smith Amendment. Attachment 1 to that memorandum is official policy guidance designed to assist in implementing the statutory prohibitions. Concerning users of illegal drugs, the policy guidance is that the Smith Amendment did not change the substance of the Guideline H, the adjudicative guideline for drug involvement. In particular, the official policy guidance is as follows: "Anyone who is currently an unlawful user of, or addicted to, a controlled substance is not considered eligible for a security clearance." Reading the June 7, 2001, memorandum and its attachments together indicate that it is the position of the Defense Department that 10 U.S.C. § 986(c)(2) applies if a person *is currently* an unlawful user of controlled substances. In other words, § 986(c)(2) does not create a *per se* or one-strike rule for persons who engage in one-time, isolated, or aberrational drug abuse.

The question here is whether Applicant *is currently* an unlawful user of controlled substances. Based on the record evidence as a whole, mostly notably Applicant's March 2003 marijuana use--the day before his third DSS interview during the ongoing background investigation--coupled with his expressed intent that he may use marijuana in the future, I conclude Applicant is currently an unlawful user of controlled substances for purposes of 10 U.S.C. § 986. Accordingly, Applicant is ineligible for a security clearance; a waiver is not authorized.

3. *Personal Conduct*

Personal conduct under Guideline E is a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard and handle classified information. The deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the government when applying for a security clearance, processing for a position of responsibility, or in other official matters is a security concern. It is "deliberate" if it is done knowingly and willfully. Omission of a past arrest or past drug use, for example, is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or thought the arrest had been expunged from the record and did not need to be reported.

Here, considering the record evidence as a whole, the government has established its case under Guideline E. First, Applicant deliberately falsified his answers to Question 27 and 28 on the security-clearance application. Second, Applicant deliberately falsified relevant and material facts during his January 6th interview by denying the use of illegal drugs within the past seven years. Third, Applicant deliberately falsified relevant and material facts in his sworn statement of January 9th by grossly understating his history of illegal drug use when he stated he had used marijuana once. Given these circumstances, DC 2 ⁽²²⁾ and DC 3 ⁽²³⁾ apply against Applicant.

I have reviewed the mitigating conditions under Guideline E and conclude none apply. Applicant's falsifications are neither extenuated nor mitigated because he was concerned that telling the truth about his illegal drug history might affect his employment or security clearance. An applicant who deliberately fails to provide full, frank, and candid answers to questions about his background is not a suitable candidate for access to classified information. Making a false statement to the federal government is serious business not easily mitigated or explained away. Viewed in this light, and considering the record evidence as a whole, Applicant has not mitigated or extenuated his three falsifications. Guideline E is decided against Applicant.

4. Criminal Conduct

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

Of concern here is Applicant's deliberate falsification of relevant and material facts about his long-term history of illegal drug involvement (1) on his security-clearance application, (2) during an interview to an investigator, and (3) in a sworn statement provided to an investigator. His conduct amounts to making false statements within the jurisdiction of a federal agency in violation of 18 U.S.C. § 1001. These are federal criminal offenses at the felony level. Given these circumstances, DC 1 ⁽²⁴⁾ and DC 2 ⁽²⁵⁾ apply against Applicant. Finally, I have reviewed Guideline J's mitigating conditions and conclude none apply. Guideline J is decided against Applicant.

FORMAL FINDINGS

As required by ¶ E3.1.25 of Enclosure 3 to the Directive, below are my conclusions as to the allegations in the SOR:

SOR ¶ 1-Guideline H: Against the Applicant

Subparagraph 1.a - 1.q: Against the Applicant

SOR ¶ 2-Guideline E: Against the Applicant

Subparagraph 2.a: Against the Applicant

Subparagraph 2.b: Against the Applicant

Subparagraph 2.c: Against the Applicant

SOR ¶ 3-Guideline J: Against the Applicant

Subparagraph 3.a: 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 Applicant. Clearance is denied.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

2. Question 27 asked "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.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?"

3. Question 28 asked "Have you EVER illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official; while possessing a security clearance; or while in a position directly and immediately affecting public safety?"

4. Sworn Statement, dated March 5, 2003, at p. 5.

5. Sworn Statement, dated March 5, 2003, at p. 6.
6. Guideline H is found at Attachment 8 to Enclosure 2 of the Directive, at pages 33-34.
7. Guideline E is found at Attachment 5 to Enclosure 2 of the Directive, at pages 27-28.
8. Guideline J is found at Attachment 10 to Enclosure 2 of the Directive, at page 37.
9. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
10. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
11. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
12. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
13. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
14. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
15. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
16. *Egan*, 484 U.S. at 528, 531.
17. "Any drug abuse."
18. "Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution."
19. DC 5 reads, in part, "Recent drug involvement especially following the granting of a security clearance, or an expressed intent not to discontinue use, will almost invariably result in an unfavorable decision."
20. As alleged in SOR subparagraph 1.q.
21. 10 U.S.C. § 986(c)(1) through(c)(4).
22. "The deliberate omission, concealment, or falsification of relevant and materials 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."
23. "Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination."
24. "Allegations or admissions of criminal conduct, regardless of whether the person was formally charged."
25. "A single serious crime or multiple lesser offenses."