

DATE: July 31, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-08150

## **ECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL J. BRESLIN**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Robert E. Coacher, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant has a lengthy history of drug abuse, including the use, possession, purchase, sale, distribution and cultivation of substantial quantities of marijuana between 1987 and 1995, when he was between 16 and 24 years old. He was convicted of drug possession, sentenced to one year confinement, and actually served eight months in jail for his crime. In 2001, after being released from jail and being given a position of trust and an interim security clearance, Applicant smoked marijuana again. Also, Applicant lied on his security application by concealing his 1992 conviction for driving under the influence of alcohol. Applicant has not mitigated the security concerns arising from his history of drug abuse and the falsification of his security clearance application. Clearance is denied.

### **STATEMENT OF THE CASE**

On April 23, 2001, Applicant submitted a security clearance application. The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant under Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended (the "Directive"). On February 23, 2004, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR alleges security concerns under the Directive, Guideline H, Drug Involvement, and Guideline E, Personal Conduct.

Applicant answered the SOR in writing by letter dated March 15, 2004. He subsequently elected to have a hearing before an administrative judge.

The case was originally assigned to another administrative judge, but was re-assigned to me on May 31, 2006. With the concurrence of Applicant and Department Counsel, I convened the hearing on June 13, 2006. Department Counsel introduced Exhibits 1 through 4. Applicant provided Exhibits A through I and testified on his own behalf. DOHA received the final transcript of the hearing (Tr.) on June 28, 2006.

### **FINDINGS OF FACT**

Applicant denied the allegations in ¶¶ 2.a and 2.b, but admitted the remaining factual allegations in the SOR. (Answer to SOR, March 15, 2006.) Applicant's admissions are incorporated as findings of fact. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact.

Applicant was born in May 1971. (Ex. 1 at 1.) He began using marijuana once or twice a year while in high school. (Ex. 2 at 3.) After high school he rarely used marijuana because he was involved with a group interested in cycling. (*Id.*)

In July 1992, Applicant attended a party and consumed six beers and three glasses of wine. (Ex. 2 at 1; Ex. 4 at 2.) While driving home he misjudged a turn and struck a tree. (*Id.*) The police arrested him and charged him with driving under the influence of alcohol (DUI). He was found guilty, contrary to his plea, and sentenced to spend 30 days in jail (suspended), to serve one year of probation, and to pay a fine and court costs. (Ex. 2 at 1.)

In about 1992, Applicant began socializing with a different group of people and his marijuana usage increased to one marijuana cigarette each week. (*Id.*) Applicant would collect \$25.00 from each of three people and buy an ounce of marijuana about every other week. (*Id.*)

In about August 1995, Applicant began smoking marijuana almost every day. (Ex. 2 at 3.) He purchased larger and larger quantities, until he was buying two pounds each month. (*Id.*) He sold the marijuana to his friends. (*Id.*) Between January and October 1995, he cultivated marijuana in his home, growing up to five marijuana plants.

In October 1995, authorities arrested Applicant in possession of 2.6 pounds of marijuana. He was jailed in lieu of \$50,000.00 bond. The grand jury indicted him for the felony offense of trafficking in marijuana. (Ex. 3 at 5, 7.) Applicant retained a civilian attorney, who arranged for Applicant to consult a mental health practitioner in anticipation of sentencing. (Ex. 2 at 2; Ex. 3 at 2.) Applicant visited the mental health practitioner for about one hour once each month for four months. (Tr. at 24-25.) Ultimately, Applicant's attorney arranged for Applicant to plead guilty to possession of marijuana for personal use, a misdemeanor. (Ex. 3 at 1.) The court sentenced him to serve 12 months in the county jail, and to pay a \$500.00 fine along with fees and assessments. (*Id.*) Applicant actually served about eight months in confinement. (Tr. at 20.)

In January 1997, Applicant began attending college. (Ex. 1 at 2.) He graduated in December 2000 with a bachelor of science degree in computer science. (Ex. 1 at 2; Tr. at 21.)

In April 2001, he started working as an entry level analyst for a defense contractor, a position requiring a security clearance. (Ex. 1 at 2.) On April 23, 2004, Applicant completed an SF 86, Security Clearance Application. (Ex. 1 at 8.) Question 19 on the form inquired whether Applicant had consulted a mental health professional within the preceding seven years. (Ex. 1 at 5.) Applicant answered "No"; he did not report his visits to the mental health practitioner during the pendency of his drug charges.

Question 21 on the clearance application asked whether Applicant had been charged with or convicted of a felony. (Ex. 1 at 5.) Applicant answered "No," without reporting the felony charge of trafficking in marijuana. (*Id.*)

Question 24 on the questionnaire asked Applicant to report whether he had ever been charged or convicted of any offenses related to alcohol or drugs. (Ex. 1 at 6.) Applicant properly reported his conviction for misdemeanor possession of marijuana. However, he did not report his conviction for DUI in 1992.

Applicant received an interim clearance. (Tr. at 23.) In about May 2001, while attending a party, someone offered Applicant a marijuana cigarette. (Ex. 2 at 3.) He accepted and "took a couple puffs" from the cigarette. (*Id.*)

In December 2001, a security investigator interviewed Applicant about his security clearance application. (Ex. 2 at 4.) Applicant denied that he intentionally concealed that he consulted a mental health practitioner, claiming he simply forgot. (Ex. 2 at 2.) With regard to the drug offense, he asserted he was unaware that he had been charged with a felony. (*Id.*) Finally, he indicated he did not intentionally fail to report the alcohol-related offense; rather, he claimed he misread the question. (Ex. 2 at 1.)

DOHA initiated this action on February 23, 2004. In his response to the SOR, Applicant continued to assert that he did

not intentionally provide misleading information about his mental health consultations or his felony charges. However, he admitted that he falsified his response to the application when he omitted mention of his DUI conviction.

Shortly before the hearing, Applicant began working for a new defense contractor. (Tr. at 20.) The new employer asked that Applicant be considered for a security clearance. (Tr. at 22.)

At the hearing in June 2006, Applicant admitted the allegations concerning his history of drug abuse. He also admitted that he intentionally did not list his DUI conviction because he was embarrassed and did not want his employer to know about it. (Tr. at 26.) He indicated that he changed substantially over the previous five or ten years. (Tr. at 18.) He compiled a good record of duty performance. (Ex. C; Ex. G; Ex. I.) He bought a house and is a valued neighbor. (Ex. B; Ex. D.) He coaches soccer for an under-6 league, and is acting as a parent for his niece and nephew. (Tr. at 27; Ex. H.) He is deeply involved in cycling for recreational purposes (Ex. F), and teaches a cycling-spinning class in the morning at the local gym. (Tr. at 19; Ex. D.) Applicant indicated he now drinks alcohol responsibly. He consumes alcohol on the weekend, but does not drink and drive. (Ex. 2 at 1-2.)

## POLICIES

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." (*Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).) In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch. The President 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. Ord. 10865, § 2.)

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." (Directive, ¶ E2.2.1.) An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. (*Id.*) An administrative judge should consider the following factors: (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 individual'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. (*Id.*)

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. (Directive, ¶ E3.1.14.) Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. (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).) "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." (Directive, ¶ E2.2.2.)

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. (Exec. Ord. 10865, § 7.) It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

## CONCLUSIONS

The adjudicative guidelines at issue in this case are Guideline H, Drug Involvement, and Guideline E, Personal Conduct.

I considered carefully all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

## **Guideline H, Drug Involvement**

The security concern under Guideline H, Drug Involvement, is that "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." (Directive, ¶ E2.A8.1.1.1.)

Under the Directive, ¶ E2.A8.1.2.1, any drug abuse could raise a security concern. The Directive defines "drug abuse" as "the illegal use of a drug or the use of a legal drug in a manner that deviates from approved medical direction." (Directive, ¶ E2.A8.1.1.3.) The evidence shows Applicant wrongfully consumed marijuana on multiple occasions between about 1987 and 2001. The available evidence raises this potentially disqualifying condition.

Paragraph E2.A8.1.2.2 of the Directive provides that "illegal drug possession, including cultivation, purchase, sale, or distribution" may be disqualifying. Applicant purchased large quantities of marijuana, and sold or distributed the drug on many occasions, between about 1987 and 1995. The evidence raises this potentially disqualifying condition.

It is possible to mitigate the security concerns that arise from drug involvement. Under the Directive, ¶ E2.A8.1.3.1, it may be mitigating where, "[t]he drug involvement was not recent." The Directive does not define the term "recent." As discussed above, the determination of recency depends upon all the relevant circumstances of each case. In this case, Applicant used and possessed marijuana from about 1987 until his arrest and incarceration in 1995. Applicant smoked marijuana again in 2001, even after his arrest, prosecution, and confinement, after he received an interim clearance. He asserts he has not used marijuana since 2001. Five years of abstinence is relatively short compared to a history of many years of serious drug abuse, including use after obtaining a security clearance, which clearly placed him on notice of the government's concerns about illegal drug use. I conclude Applicant's drug involvement was recent, therefore this mitigating condition does not apply.

Paragraph E2.A8.1.3.2 indicates that it may be mitigating where the drug involvement "was an isolated or aberrational event." The available evidence shows Applicant abused drugs on numerous occasions spanning many years, therefore I find this potentially mitigating condition does not apply.

"A demonstrated intent not to abuse drugs in the future" may also be mitigating. (Directive, ¶ E2.A8.1.3.3.) The evidence indicates Applicant used marijuana for many years, but has not used it in the last five years. At the hearing, he testified credibly that he has changed his lifestyle and does not intend to use illegal drugs in the future. Although Applicant seems sincere in his desire to refrain from illegal drug abuse, his history of marijuana offenses and his wrongful use of marijuana in 2001 after receiving an interim clearance leaves me unconvinced of his ability to meet that goal. Weighing all the evidence, I find this potentially mitigating condition does not apply.

Finally, the Directive, ¶ E2.A8.1.3.4, provides that it may be mitigating where the evidence demonstrated "[s]atisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a credentialed medical professional." Applicant furnished no information indicating he ever completed a drug treatment program. I conclude this mitigating condition does not apply.

## **Guideline E, Personal Conduct**

The security concern under Guideline E, Personal Conduct, is that "[c]onduct 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.)

The Directive sets out various factors relevant to an applicant's personal conduct that may be potentially disqualifying. Under ¶ E2.A5.1.2.2 of the Directive, "[t]he deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire" may be disqualifying.

Applicant denies that he intentionally falsified material facts in response to Question 19, regarding his consultation with a mental health care provider. It appears he consulted the mental health practitioner only briefly, at the urging of his attorney, and only to ready a potential witness in sentencing in his pending criminal trial. Under the circumstances, it is not unreasonable that Applicant would not recall those four visits as "consultations with a health care provider about a mental health related condition" as specified in Question 19.

Applicant also denied the he deliberately intended to mislead the government when he answered "No" to Question 21 regarding any felony charges. In 1995, as a young person unschooled in the law, Applicant may not have been sensitive to the distinctions between felony and misdemeanor offenses, so that he did not recall the nature of the original charge when completing the security clearance application in 2001. I note Applicant properly reported the conviction flowing from the original charge, which is inconsistent with an intent to conceal the incident. I find persuasive Applicant's indication that he provided the inaccurate information accidentally, without intent to deceive the government.

Applicant admitted that, in response to Question 24 on the Security Clearance Application, he deliberately concealed his 1992 conviction for DUI. The requested information related to his history of alcohol-related offenses; thus, it was material and relevant to his security worthiness. This evidence raises this potentially disqualifying condition.

Under the Directive, it is possible to mitigate the security concerns arising from personal conduct. Under ¶ E2.A5.1.3.1 of the Directive, it may be mitigating where "The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability." The information at issue was substantiated by court records (Ex. 4) and Applicant's subsequent admissions. It concerned Applicant's history of alcohol-related offenses, which is relevant to his judgment, trustworthiness, and reliability. This potentially mitigating condition is not raised.

Under ¶ E2.A5.1.3.2 of the Directive, it may be mitigating where "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily." As discussed above, I conclude Applicant intentionally falsified one question on his security clearance. However, when questioned about it by a security investigator in December 2001, he was again untruthful, claiming that he "misread the question." (Ex. 2 at 1.) Under the circumstances, Applicant has not demonstrated that his falsification of the response to Question 24 was an isolated incident. I find this potentially mitigating condition is not raised.

### **The "Whole Person" Concept**

I carefully considered all the facts and circumstances, including the potentially disqualifying and mitigating conditions, in light of the "whole person" concept. Applicant is a mature individual who has shown promise as an employee of a defense contractor. He has a lengthy history of drug abuse, including the use, purchase, sale, and cultivation of substantial quantities of marijuana between 1987 and 1995, when he was between 16 and 24 years old. (Directive, ¶ E2.2.1.4.) The seriousness of his misconduct is demonstrated by the fact that he was arrested, charged with a felony offense, convicted of a misdemeanor, sentenced to one year confinement, and actually served eight months in jail for his crime. (Directive, ¶ E2.2.1.1.) Applicant lied on his security application by concealing his DUI conviction, greatly undermining confidence in his trustworthiness. In 2001, after being released from jail and being given a position of trust and an interim security clearance, Applicant smoked marijuana again. This tends to show an extremely low potential for rehabilitation. (Directive, ¶ E2.2.1.6.) Since then, Applicant has demonstrated behavioral changes suggesting greater maturity and increased acceptance of responsibility. While he appears to be headed in the right direction, I am not persuaded that Applicant has mitigated the security concerns arising from his history of drug abuse and the falsification of his security clearance application. Clearance is denied.

### **FORMAL FINDINGS**

My conclusions as to each allegation in the SOR are:

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

Paragraph 2, Guideline E: AGAINST APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For 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.

Michael J. Breslin

Administrative Judge