

DATE: June 25, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-11154

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Catherine Engstrom, Department Counsel

FOR APPLICANT

Thomas Albin, Esq.

SYNOPSIS

Applicant used marijuana in Vietnam from 1970 to 1971, and two or three times from 1971 to 1976. In June 1991, Applicant executed a sworn statement in which he denied any marijuana use since 1971. Following a hearing in December 1992 at which Applicant testified he had not used marijuana since 1970, his clearance was continued by the Defense Office of Hearings and Appeals (DOHA). During a reinvestigation of his background in February 2001, Applicant admitted he took puffs off marijuana cigarettes on two or three occasions from 1971 to 1976. His inconsistent statements about his marijuana use raise doubts about his judgment, reliability, and trustworthiness. Personal Conduct concerns are further compounded by his violations of security practices at his place of employment, including leaving a gate open and unattended in 1999, failing to properly secure a closed area in 2000, and allowing an unauthorized vehicle access to the facility in 2001. Clearance is denied.

STATEMENT OF THE CASE

On May 30, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.⁽¹⁾ DOHA recommended referral to an administrative judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. The SOR was based on Personal Conduct (Guideline E) and Criminal Conduct (Guideline J).⁽²⁾

On June 12, 2003, Applicant answered the SOR and requested a hearing before an administrative judge. The case was assigned to me on August 12, 2003, and pursuant to notice of August 18, 2003, a hearing was scheduled for September 18, 2003. After being notified by Applicant's employer that Applicant was unable to report for duty for medical reasons, the hearing was cancelled on September 8, 2003, to be rescheduled on confirmation of Applicant being medically cleared to appear at his hearing.

On December 3, 2003, an amended notice was issued rescheduling the hearing for January 14, 2004. At the hearing, the Government submitted nine exhibits, including the transcript of hearing and favorable prior decision in ISCR Case No. 92-0818 involving Applicant. The exhibits were admitted without any objection. Applicant's case consisted of his testimony and the testimonies of his foreman and a union official. A transcript of the hearing was received on January 26, 2004.

FINDINGS OF FACT

The SOR allegations concern Personal Conduct (Guideline E) and Criminal Conduct (Guideline J) related to Applicant deliberately misrepresenting his past marijuana involvement in a June 1991 sworn statement provided to a Defense Security Service (DSS) agent and in his testimony before an administrative judge in December 1992, and Personal Conduct because of Applicant's failure to comply with security procedures at work on three occasions between 1999 and 2001, and his termination from his employment in about December 2001 under unfavorable circumstances. Applicant denied the allegations of intentional falsification but admitted the more recent security infractions. Those admissions are accepted and incorporated as findings of fact. After a thorough review of the evidence, and on due consideration of the same, I render the following additional findings of fact:

Applicant is a 55-year-old pipefitter initially hired by his current employer, a defense contractor, in 1969. After less than a year at the company, he was activated for military duty in the infantry. He served in Vietnam for 11 months from 1970 to 1971, where he used marijuana four or five times and purchased it at least once. In April 1971, Applicant received an honorable discharge from the military. Following his return to work for the defense contractor in 1971 (initially as a pipefitter and from 1974 in security), Applicant smoked marijuana on two or three occasions when socializing with friends. He held a security clearance for his duties.

Laid off from his position as a security guard in 1977, Applicant went right back into the pipe shop where he remained until 1996. Applicant played softball on a regular basis during this time. Three times per week during softball season, Applicant was present when friends smoked marijuana. About twice each Summer, while standing in a circle of friends, Applicant transferred possession of a marijuana cigarette that had been passed to him to the next person. He did not use the marijuana on those occasions.

In September 1989, Applicant was arrested for operating under the influence (OUIL) after he made an illegal right turn. He had been drinking before his arrest but not to intoxication. In court he was fined on a lesser charge of operating while impaired.

While out of work temporarily collecting workmen's compensation benefits from his job as a pipefitter, Applicant was arrested in mid-January 1991 for OUIL after he was stopped for speeding. During a search of his vehicle, the police found four bags of suspected marijuana and drug paraphernalia (one wood and metal pipe containing burnt residue and one package of cigarette rolling papers). A small sample was field tested with the results positive for the presence of THC. U.S. paper currency totaling \$638 was found on Applicant inside his left pant pocket. Applicant told the arresting officer he had purchased the marijuana earlier that evening and was not engaged in the sale of marijuana. Charged with possession of marijuana with intent to sell and with illegal possession of drug paraphernalia, Applicant pleaded guilty to a reduced charge of possession of marijuana and was fined \$465, sentenced to six months in jail (suspended), placed on 18 months probation, and ordered to attend an alcohol education course. He successfully completed the probation.

On June 26, 1991, Applicant was interviewed by a Defense Security Service (then Defense Investigative Service) special agent about his alcohol and drug use and related arrests. Applicant admitted he had smoked marijuana in Vietnam on two or three occasions from 1970 to 1971. He claimed he stopped smoking marijuana in approximately 1971 as it gave him headaches. Applicant asserted that the marijuana found in his vehicle on the occasion of his recent arrest had been left there by his brother who had borrowed his vehicle, and while he had \$638 in his possession, it was from savings and to pay for a carpet installed in his residence. Applicant related he did not inform the police the marijuana and paraphernalia were his brother's as he did not want to cause trouble for his sibling. Concerning his alcohol involvement, Applicant described his drinking as social, on average four to six mixed drinks once per week, and he indicated he had not felt impaired on the occasions of his two arrests for OUIL.

The following day, Applicant was reinterviewed by the special agent about the statement he reportedly made to the

police on his arrest in January 1991 that he had purchased the marijuana found in his vehicle. Applicant claimed this statement was taken out of context, and he did not recall telling the police officer that the marijuana was his.

Seeking to retain a confidential security clearance, Applicant executed a National Agency Questionnaire (NAQ) on January 15, 1992. Applicant listed his arrests and court-ordered alcohol counseling. In response to any illegal drug use, Applicant responded, "I TRIED CANNABIS WHEN I WAS IN VIET NAM, 70-71, ONCE OR TWICE JUST FOR THE EXPERIMENTATION. THER [sic] WAS NO OTHER OTHER [sic] TIMES AND NO FUTURE INTENTIONS."

On July 28, 1992, DOHA issued a SOR alleging: criminal conduct because of his 1991 conviction for marijuana possession; illegal use of a controlled dangerous substance because of his use and purchase of marijuana, including his marijuana possession offense; habitual or episodic use of alcohol to excess from 1967 to at least June 1991 with alcohol-related offenses in 1989 and 1991, counseling, and continued consumption; and poor judgment, unreliability and untrustworthiness because of the aforesaid alcohol and drug involvement.

A hearing was held before an administrative judge on December 2, 1992, on the issue of Applicant's continued suitability for a confidential security clearance. Applicant testified he used and purchased marijuana when he was in Vietnam in 1969 and 1970, had neither used nor purchased the drug since, and had no intent to use or purchase marijuana in the future. He testified he stopped using marijuana because it caused him migraine headaches. When asked about the marijuana found in his vehicle on the occasion of his arrest in 1991, Applicant testified he knew it was not his:

Q And how do you know it was not yours?

A Because I don't smoke and I had let my brother use the car. He had been up to my house on vacation for like two weeks prior. And he had asked me earlier if I could get marijuana.

And I said, "Hey, buddy," I said, "I don't--you know, I don't smoke it." But eventually, I guess he must have gotten it that night or the day before or whatever and just left it in the car. (Ex. 8 p. 22).

Since he was technically in possession, he "just took the rap for it." As far as Applicant telling the police that he had purchased the marijuana, he testified on direct examination that the DSS agent had talked to him about a police report, but not in any depth. Applicant denied he had made any statements to the police. On cross examination, Applicant related he was "pretty well cocked" that night and could not recall telling the police that he had purchased the marijuana found in his vehicle. Concerning his alcohol consumption, Applicant testified on direct examination to drinking alcohol to 1991 just sociably, which he indicated was "going out and having a couple of beers with the guys" after a softball game and five or six drinks on a Friday night. Current consumption was described as wine or a couple of cocktails when on a date and beer when playing softball. In response to questions from the judge, Applicant admitted drinking to "a buzz" two or three times a month, but not to intoxication.

On January 28, 1993, the administrative judge found, in part, Applicant had not used or purchased marijuana since 1970; the marijuana found in Applicant's vehicle in 1991 belonged to Applicant's brother who had left it there without Applicant's knowledge; Applicant had consumed alcohol at times to excess from 1967 to January 1991; he was found guilty of operating a motor vehicle while impaired in September 1989; he was charged with OUI in January 1991; he completed an eight-week alcohol education course in August 1991, and while he continued to drink, it was at a reduced level of consumption. The judge concluded Applicant's ongoing consumption was responsible and he had not used marijuana in more than two decades, and he issued a determination favorable to Applicant.

In April 1997, Applicant was laid off by the defense contractor. (3) After two years in the commercial sector, Applicant returned to the defense firm in October 1999 in the position of security guard. Over the next two years, he committed three violations of company security procedures, the first shortly after his rehire when, in December 1999, he left a gate open and unattended for a short period of time. Applicant was verbally counseled for that infraction. In late November 2000, Applicant received a written report of unsatisfactory performance for failing to secure a lock on a door to a secure area. While working at an entry gate in early January 2001, Applicant allowed an unidentified, unauthorized vehicle access to the facility without checking the driver's credentials or the access list. Applicant was issued a written

reprimand and suspended for five days without pay. While employed as a security guard, Applicant continued to associate with individuals who used marijuana in his presence to as recently as January 2001.

In conjunction with an investigation into Applicant's background for a top secret security clearance, a DSS special agent interviewed Applicant in February 2001 about his illegal drug involvement.⁽⁴⁾ Applicant claimed to have no recall of any drug paraphernalia having been found in his vehicle on the occasion of his drug arrest in 1991. For the first time, Applicant admitted to the DSS that he had told the arresting officer the marijuana belonged to him, but asserted he "made that comment just to have something to say." He reiterated the marijuana belonged to his brother. As reflected in a signed, sworn statement of that date (Ex. 3), Applicant told the agent he used marijuana four or five times in 1970 and 1971 and took a puff off a marijuana joint on two or three occasions from 1971 to about 1976 when friends were smoking the drug. While he denied any drug use since 1976, he admitted ongoing association with friends who smoked marijuana in his presence to as recently as late January 2001. About twice each summer from 1971 and 1996, he "touched a marijuana cigarette only long enough to pass it to the next person" while standing in a circle with these friends. Applicant explained he had not previously reported any of his post-Vietnam service marijuana use as he "did not consider those occasional puffs of marijuana between 1971 and 1976 to be 'use' of an illegal drug since [he] felt no effect during those times." Applicant and the agent also discussed the three incidents at work for which he had been counseled or reprimanded.

In December 2001, Applicant was forced to resign from his employment as a security guard following an incident with a coworker where the latter felt threatened by Applicant. Applicant appealed the decision via a dispute resolution process and he was reinstated in April 2002 to a position in the pipefitter's shop.

Needing a top secret security clearance for his position as a pipefitter, Applicant executed a security clearance application on April 18, 2002. He disclosed his 1991 conviction for possession of marijuana but denied he ever used any illegal drug while in possession of a security clearance.

At his January 14, 2004, hearing held to determine his suitability for access, Applicant admitted initially on cross examination that he used marijuana in 1976 when he was employed as a security guard for the defense contractor and held a security clearance. He later claimed he could not even recall when his last use was. Applicant denied any intentional falsification of his June 26, 1991, sworn statement or his December 2, 1992, hearing testimony where he had said his last use of marijuana was in Vietnam, and attributed his failure to disclose his post-Vietnam marijuana use to oversight, to failure to think about it, to forgetting about it, to his belief taking a few puffs wasn't using, to being nervous at his prior security clearance hearing.⁽⁵⁾ His inconsistent explanations reflect adversely on his credibility and belie his claim that he did not intentionally misrepresent his involvement with marijuana in his June 26, 1991 statement and December 2, 1992 testimony.

Applicant has proven to be a reliable pipefitter for the defense contractor, both in the quality of his work and in his attendance.

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 restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

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.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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 (App. Bd. Dec. 19, 2002); *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.

Considering the evidence as a whole, I find the following adjudicative guidelines to be most pertinent to this case:

GUIDELINE E

Personal Conduct

E2.A5.1.1. *The Concern:* Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

E2.A5.1.2. Conditions that could raise a security concern and may be disqualifying also include:

E2.A5.1.2.3. 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

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

E2.A5.1.3. Conditions that could mitigate security concerns include:

None.

GUIDELINE J

Criminal Conduct

E2.A10.1.1. *The Concern:* A history or pattern of criminal activity creates doubt about a person's judgement, reliability and trustworthiness.

E2.A10.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.

E2.A10.1.3. Conditions that could mitigate security concerns include:

None.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility of those who testified, I conclude the following with respect to guidelines E and J:

Significant personal conduct (guideline E) concerns persist because of Applicant's failure to be completely candid about his marijuana involvement and because of his infractions of company security procedures when working as a security guard. When interviewed in June 1991 by a DSS agent, Applicant indicated he smoked marijuana on two or three occasions during 1970 to 1971 when he was stationed in Vietnam. On his January 1992 NAQ, he stated he tried cannabis when he was in Vietnam (1970-71), once or twice for experimentation. At his December 1992 security clearance hearing, he testified that the last time he used marijuana was in '69 and '70 when he was in Vietnam. This reference to 69/70 as opposed to 70/71 is a minor variance likely explained by inaccurate recollection. When questioned by a DSS agent during his recent investigation, Applicant gave 1970/71 as the years of his use in Vietnam. Yet he also told the agent in February 2001 that he smoked marijuana four or five times in Vietnam (as opposed to the two or three times admitted to previously) and he took puffs off marijuana joints on two or three occasions after he returned to the U.S.

Applicant did not tell the Government until his interview in February 2001 that he had used marijuana after his military discharge. None of his explanations persuade me that his failure to disclose his post-Vietnam drug use was unintentional. While he maintains his latest interview was different in that the agent "took it right down to a puff," he also testified that if he had been asked at his prior security clearance hearing whether he had ever had a puff of marijuana other than what he had testified to, he responded he never would have said that he smoked as "it goes back 20 years, so it's just hard to recollect that, so I would say no." (Tr. 60). He had no trouble recalling his use in Vietnam, and it simply belies common sense for him to now claim that he did not consider taking a few puffs to be the use of the marijuana. Furthermore, although not alleged as raising a security concern, assuming the marijuana found in his vehicle in 1991 was not his, then Applicant lied to the arresting officer in January 1991 when he indicated he had purchased marijuana earlier that day, conduct which further undermines his judgment, reliability and trustworthiness.

Disqualifying conditions E2.A5.1.2.3. *Deliberately providing false or misleading information concerning relevant and material matters to an investigator . . . or other official representative*, under Guideline E, Personal Conduct, and E2.A10.1.2.1. *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*, under Guideline J, Criminal Conduct are clearly pertinent to Applicant's security suitability. Applicant misrepresented his drug use in person after being advised of Title 18, Section 1001, of the United States Code, which makes punishable by a fine or imprisonment or both any knowing and willful false statement to the U.S. government. He bears a particularly heavy burden to overcome the security concerns raised by his deliberate false statements.

Applicant has failed to show his representations can be relied on. While he admitted in February 2001 that he has used marijuana after Vietnam, it came only after he apparently denied use in his social circles and after considerable prompting by the agent:

When they asked me if I smoked pot, I said no, which I don't. But later on, when this lady interviewed me for the purple, she, she was, you know, she kept on like, in the circles that you've been in, have you done this, have you done that. I says no, she says you mean to tell me that you never even took a puff of marijuana? I says, I says maybe at a party I was, you know, and that. I took a puff. (Tr. 56).

None of the mitigating conditions, including E2.A5.1.3.3. *The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*, are applicable. He was able to recall in February 2001 that he passed a marijuana joint on to the person standing next to him at least twice every Summer from 1971 to 1996, but at his hearing claimed to be unable to recall any specific occasion where he used marijuana since 1971. Reform requires taking responsibility for making the false statements, and demonstrating compliance with laws and regulations for a sufficient period of time to conclude one's representations can be relied on. Although not alleged by the Government, Applicant responded negatively to question 28 on his April 2002 SF 86 regarding any use ever of an illegal drug while in a sensitive position, including while possessing a security clearance. At his hearing, Applicant admitted using marijuana in 1976 while he held a security clearance for his duties as a security guard with the defense contractor. When asked at his hearing whether he has used marijuana since the 1970s, Applicant responded, "I'll say yes because its on the statement and I, I took the puff, the infamous puff" (Tr. 73). His involvement went beyond one puff, and his rather flippant testimony shows a disregard for his obligation of complete candor. Furthermore, his efforts to justify his

conduct on the basis he does not consider taking puffs of marijuana to constitute use of the drug cast serious doubt on his reform. Subparagraphs 1.a., 1.b. and 4.a. [sic] are resolved against him.

Applicant's violations of his employer's security procedures also raise Personal Conduct concerns (*see* 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*). While working as a security guard, Applicant in December 1999 left a gate open and unattended. In November 2000, he failed to lock a door to a secure area, and in January 2001, he allowed an unauthorized vehicle to enter the installation. In their cumulative effect, these infractions raise legitimate questions as to whether Applicant has a cavalier attitude toward security. Subparagraphs 1.c., 1.d., and 1.e. are also found against him. Although Applicant was forced to resign from his employment following an incident involving a coworker, the only evidence of the incident comes from the Applicant, who denies he threatened his coworker, and Applicant was reinstated to his employ. Thus, subparagraph 1.f. is concluded in his favor.

FORMAL FINDINGS

Formal Findings as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive are hereby rendered as follows:

Paragraph 1. Guideline E: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Subparagraph 1.d.: Against the Applicant

Subparagraph 1.e.: Against the Applicant

Subparagraph 1.f.: For the Applicant

Paragraph 4 [sic]. Guideline J: AGAINST THE APPLICANT

Subparagraph 4.a. [sic]: 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.

Elizabeth M. Matchinski

Administrative Judge

1. The SOR was issued under the authority of Executive Order 10865 (as amended by Executive Orders 10909, 11328, and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4).
2. In the SOR, Criminal Conduct is alleged under paragraph 4. Since the only other guideline at issue is Personal Conduct set forth in paragraph 1, the reference to paragraph 4 is presumed to be a typographical error.
3. Applicant testified at his January 2004 hearing that he was laid off in 1996. (Tr. 48). On his SF 86, Applicant indicated he worked until April 1997. (Ex. 1).
4. Applicant was apparently also interviewed on January 19, 2001 (*see* Ex. 3).
5. See Tr. 59-60, where on direct examination Applicant testified:

I wasn't really lying, I just didn't go back that far. It was just that it was an oversight or I just didn't think about it. I wasn't thinking about it. You know, I mean if I used marijuana, I used marijuana, but being at party or, and just taking a social hit, I didn't think it was considered using, so I just--I didn't even think about it at the time, I just said no because I don't smoke.