

KEYWORD: Drugs; Personal Conduct; Criminal Conduct

DIGEST: Applicant's sporadic marijuana use from 1986 to 2002 has not been mitigated because he believes marijuana should be legal and he has provided mixed signals about his future intentions of using marijuana. Applicant's attempts to conceal the full picture of his marijuana use over an eleven year period from 1992 until 2003, support an adverse finding under both the personal conduct and criminal conduct guidelines. Clearance is denied.

CASENO: 03-14352.h1

DATE: 07/14/2005

DATE: July 14, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-14352

**DECISION OF ADMINISTRATIVE JUDGE**

**PAUL J. MASON**

**APPEARANCES**

**FOR GOVERNMENT**

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant's sporadic marijuana use from 1986 to 2002 has not been mitigated because he believes marijuana should be legal and he has provided mixed signals about his future intentions of using marijuana. Applicant's attempts to conceal the full picture of his marijuana use over an eleven year period from 1992 until 2003, support an adverse finding under both the personal conduct and criminal conduct guidelines. Clearance is denied.

**STATEMENT OF CASE**

On August 30, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6, dated January 2, 1992, as reissued through Change 4 thereto, dated April 20, 1999, issued a Statement of Reasons (SOR) to the Applicant. The SOR provided 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. On September 20, 2004, Applicant responded to the SOR and requested a hearing before an Administrative Judge.

The case was assigned to me on January 3, 2005, and I convened a hearing on January 25, 2005. The government submitted six exhibits (GE) and Applicant submitted one exhibit (AE) containing character references. Testimony was taken from Applicant. The transcript (Tr.) was received on February 2, 2005.

## **RULINGS ON PROCEDURE**

During the hearing, the Government moved to amend the SOR by changing the date in subparagraphs 2.b. and 2.c. from March 3, 2004 to March 13, 2003 to conform the SOR with the evidence presented. The motion was granted.

## **FINDINGS OF FACT**

The SOR alleges drug involvement, personal conduct, and criminal conduct. Applicant denied all factual allegations except for subparagraph 2.c. Applicant opined his incorrect "no" answer to question 28 of his March 2003 security clearance application (SCA), generated all the confusion about his past drug use, and led to the allegations under paragraphs 1 and 2, except for subparagraph 2.c. Applicant is 47 years old and has been employed as a computer scientist for a defense contractor since January 2001. He seeks a top secret clearance. He has held a security clearance since 1988.

Applicant has provided conflicting information regarding his marijuana use over the years. While he claims he started using the drug in his freshman year in college in 1976 (Tr. 21; 60), three security clearance applications (SCAs) identified as GE 1, GE 2, and GE 3, reflect his first year of college was six years later in 1982. Though Applicant testified his next use of marijuana after 1976 was between 1993 and 1996 (Tr. 21), with his last use occurring in 1996, the certified results of interview (CRI) <sup>(1)</sup> appearing in GE 5 (May 2, 2003), reflects Applicant's sporadic use began in 1986 and did not end until 2002.

The record evidence supports a finding Applicant used marijuana while possessing a security clearance (subparagraph 1.b. of the SOR), notwithstanding the statements in his answer to the contrary. Even without the presence of GE 5 (CRI), Applicant has acknowledged use of marijuana between 1993 and 1996. (Tr. 21.) GE 2 and GE 3 show Applicant has possessed a security clearance since 1988. Considering GE 1, GE 2, GE 3, and GE 5, I find Applicant sporadically used marijuana from 1988 to 2002 while possessing a security clearance.

My factual finding Applicant used marijuana longer than he is willing to admit is also based on his opinion of marijuana use. Applicant testified that marijuana is naturally created and there is enough scientific evidence demonstrating seriously ill people need the drug. (Tr. 39) He does not feel marijuana use is morally wrong. As for the ethical considerations, in Applicant's view it depends on what a person does for a living. (Tr. 37.) Though he will not use marijuana until it becomes legal or he gets cancer, he believes marijuana should be legal. (Tr. 37.) Regarding his future intentions of using marijuana (subparagraph 1.c.), Applicant stated he would use it in the proper circumstances. (GE 5) However, he testified he did not plan to use the drug in the future because his conscience would bother him. He did not

explain. (Tr. 61-62.)

The incorrect information Applicant furnished in at least three SCAs solidifies my finding regarding Applicant's marijuana use until 2002. Applicant completed an SCA in July 1992. In response to question 20a. (subparagraph 2.a.), which asked "have you ever tried or used or possessed any narcotic (to include heroin or cocaine), depressant (to include quaaludes), stimulant, hallucinogen (to include LSD or PCP), or cannabis (to include marijuana or hashish), or any mind altering substance (to include glue or paint), even one time or on an experimental basis, except as prescribed by a licensed physician?," Applicant answered "no." Applicant claimed he was led to believe his "no" answer to the question was excusable because (1) he was not using the drug at the time (he filled out the application) and had not used the drug for over 10 years, (2) he had never been arrested for marijuana use, and (3) he had only used the drug once or twice in college (Tr. 23). At the hearing, Applicant realized his "no" answer to question 20a. was a falsehood.

Applicant was presented with the same question (numbered 27 on this SCA) in his March 13, 2003 SCA (subparagraph 2.b.), and again he provided a "no" response. At the hearing, Applicant first denied his drug use occurred within the prior 7 years of March 13, 2003, the date he signed the SCA. Next, he contended he really did not know when he had last used marijuana before signing the form in March 2003. (Tr. 27) In response to question 28 (subparagraph 2.c.) which 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 or immediately affecting public safety?," Applicant answered "no."

In January 1998, Applicant was asked the same two questions in an SCA and he furnished the same "no" responses. In justification of his "no" answers to both questions, Applicant stated:

I answered those questions no when the answer was yes because I had had a clearance for a long time. I had only recently - - or I had indulged in it for a few periods. I had put it down again, and I just felt, rightly or wrongly, I felt that stirring up a pot would not be in the best interests of me at the time. (Tr. 25.)

Applicant provided the same "no" answers in an SCA he furnished the Government in March 2002. While Applicant's false answers to questions 27 and 28 of his 1998 and 2002 SCAs are not alleged in the SOR, I view these additional falsifications as having an adverse impact on Applicant's overall veracity.

Applicant claims he answered "no" to SCA question 28 in March 2003 because he wanted a chance to discuss his marijuana use with an investigator. Even though Applicant thought the investigator was very nice, polite (Tr. 51), and non-adversarial (Tr. 52) during the interview, when the interview was over and the investigator asked him to write a sworn statement, he became agitated. He did not want to write down any information that would be submitted to law enforcement agencies (Tr. 51) or could be considered incriminating. (Tr. 52.)<sup>(2)</sup>

Applicant furnished five character statements from coworkers. Three of the coworkers with up to six years of professional contact with Applicant, consider him trustworthy and a real professional. Two other character references believe Applicant is a good husband and father.

## **POLICIES**

Enclosure 2 of the Directive sets forth disqualifying conditions (DC) and mitigating conditions (MC) that should be given consideration in every case according to the pertinent guideline; however, the conditions are not automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense.

## **Burden of Proof**

The government must prove controverted facts by substantial evidence. After the government meets its burden, the applicant has the ultimate burden of presenting evidence in refutation, extenuation, or mitigation that demonstrates it is clearly consistent with the national interest to grant or continue a her security clearance. Any doubt concerning an applicant's security clearance access should be resolved in favor of national security. *Department of the Navy v. Egan*, 484U.S. 518, at 531.

## **Drug Involvement**

Illegal involvement with drugs raises security concerns regarding an individual's willingness to protect classified information.

## **Personal Conduct**

Conduct involving questionable judgment or dishonesty may indicate the person may not properly safeguard classified

information.

## **Criminal Conduct**

A history or pattern of criminal conduct raises security concerns about a person's judgment and trustworthiness.

## **CONCLUSIONS**

**Drug Involvement.** Drug abuse or dependence can impair social or occupational functioning and may lead to the risk of unauthorized disclosure of classified information. The government has established a case under the drug involvement (DI) guideline. DI disqualifying condition (DC) E2.A8.1.2.1. (*any drug use*) applies. Applicant has used drugs sporadically since 1986 to 2002. In addition, from 1988 to 2002, Applicant used marijuana while holding a security clearance. DI DC E2.A8.1.2.5. (*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 determination*) also applies.

Even though Applicant's last documented marijuana use occurred in 2002, DI mitigating condition (MC) E8.1.3.1. (*the drug involvement was not recent*) fails to overcome Applicant's history of marijuana use between 1986 and 2002. The duration of Applicant's drug use militates against the application of DI MC E2.A8.1.3.2. (*the drug involvement was an isolated or aberrational event*). Given the circumstances of this case, Applicant's stated intention to forego marijuana use in the future does not constitute enough evidence under DI MC E2.A8.1.3.3. (*a demonstrated intent not to abuse any drugs in the future*). In view of Applicant's opinion that marijuana should be legal, and Applicant's poor credibility coupled with his representations he would use the drug in the proper circumstances, more evidence is needed to convince me Applicant has not used marijuana since 2002 and will not resort to drug use in the future.

Applicant's deliberate omissions of his marijuana use from his SCA in 1992 and 2003 establishes personal conduct (PC) DC E2.A5.1.2.2. (*the deliberate omission of relevant material facts from a personnel security questionnaire used to determine security clearance eligibility*). The deliberate but unalleged falsifications of his 1998 and 2002 SCAs demonstrate the magnitude of Applicant's resolve to keep his post-1996 marijuana use a secret. All mitigating conditions under PC have been considered, but none are applicable because of Applicant's continuing refusal to admit the full nature and scope of his drug use. PC MC E2.A5.1.3.2. (*the falsification was an isolated incident, was not recent, and the individual has provided correct information voluntarily*) does not apply to mitigate because Applicant's deliberate omissions were not isolated, and Applicant continues to deny he omitted any information about his history of drug use.

PC MC E2.A5.1.3.3. (*the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*) is not applicable on these facts as Applicant continues to deny he used marijuana as set forth in GE 5. Rather, his consistently dishonest answers reflect how committed he is to not revealing any information that could pose adverse consequences to his interests, presumably in keeping his security clearance.

Applicant claims he relied on the representations made by his security officer which resulted in the deliberate omissions from his SCA in 1992. E2.A5.1.3.4. (*omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided*). The foregoing condition must be ruled out for mitigation because Applicant was 32 years old when he filled out the form in 1992. He had already had a security clearance for four years. Even though Applicant may have relied on the security officer, commonsense should have guided him to provide truthful information on the security form. Finally, Applicant continues to deny the full history of his drug use. The pattern of falsifications from 1992 to the present requires a formal finding against Applicant under the PC guideline.

His pattern of deliberate omissions also constitutes violations of Federal law, 18 United States Code (U.S.C.) 1001, under the criminal conduct (CC) guideline. E2.A10.1.2.1. (*allegations or admission of criminal conduct, regardless of whether the person was ever charged*). Applicant's past deliberate omissions of drug use is material information the Government has a legitimate right to know about in order to make an informed decision about Applicant's security qualifications.

Because Applicant's last deliberate omission occurred in March 2003, less than two years ago, coupled with Applicant's continuing denial of the full scope of his drug use, E2.A10.1.3.1. (*the criminal behavior was not recent*) is not applicable to mitigate. E2.A10.1.3.2. (*the crime was an isolated incident*) is also not available to mitigate the record's pattern of deliberate misconduct. Applicant's decision not to admit his drug use means that he remains outside the mitigating reach of CC MC E2.A10.1.3.6 (*there is clear evidence of successful rehabilitation*). In sum, Applicant's positive job performance evidence does not overcome his drug involvement, personal conduct and criminal conduct. In finding against Applicant under the specific guidelines, I have also considered this case under the whole person factors of the whole person concept. E2.2.1. Given Applicant's drug use and repeated efforts to conceal the extent of his drug use, Applicant has provided insufficient evidence under factor 6 (*the presence or absence of rehabilitation and other pertinent behavioral changes*) and factor 9 (*the likelihood of continuation or recurrence*) to conclude his drug use and willingness to deceive the government will not recur in the future.

### **FORMAL FINDINGS**

Paragraph 1 (drug involvement, Guideline H): AGAINST THE APPLICANT.

Subparagraph 1.a. Against the Applicant.

Subparagraph 1.b. Against the Applicant.

Subparagraph 1.c. Against the Applicant.

Paragraph 2 (personal conduct, Guideline E): AGAINST THE APPLICANT.

Subparagraph 2.a. Against the Applicant.

Subparagraph 2.b. Against the Applicant.

Subparagraph 2.c For the Applicant.

Paragraph 3 (criminal conduct, 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.

Paul J. Mason

Administrative Judge

1. Though GE 5 (CRI) cannot be given the same weight since it is the investigator's synopsis of information Applicant provided to her rather than Applicant's sworn statement, the exhibit contains probative information that has not been discredited by the minor mistakes the investigator made in typing the wrong dates for the alcohol-related incident and when she prepared the CRI.
2. In the first paragraph of GE 5 (CRI), the investigator noted that Applicant did not want to put the information in a sworn statement because he did not want to put any incriminating information in writing and he was uncomfortable that information he disclosed could be furnished to other federal agencies.