

KEYWORD: Drugs; Personal Conduct

DIGEST: Applicant failed to successfully mitigate the security concern stemming from his history of using marijuana and cocaine, as recently as February 22, 2004. In addition, he failed to mitigate the security concern based on his falsification of his security-clearance application when he deliberately omitted or concealed his past illegal drug use as well as a drug-related arrest. Clearance is denied.

CASENO: 03-15997.h1

DATE: 04/25/2005

DATE: April 25, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-15997

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Jason R. Perry, Esq., Department Counsel
Stephanie C. Hess, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant failed to successfully mitigate the security concern stemming from his history of using marijuana and cocaine, as recently as February 22, 2004. In addition, he failed to mitigate the security concern based on his falsification of his security-clearance application when he deliberately omitted or concealed his past illegal drug use as well as a drug-related arrest. Clearance is denied.

STATEMENT OF THE CASE

On July 13, 2004, 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 and Guideline E for personal conduct.

Applicant's response to the SOR was received by DOHA on August 5, 2004, he requested a hearing, and he admitted the factual allegations in the SOR except for subparagraph 1.d. Department Counsel indicated he was ready to proceed on August 31, 2004, and the case was assigned to me September 7, 2004. A notice of hearing was issued September 16, 2004, scheduling the hearing for October 28, 2004. Applicant appeared without counsel and the hearing took place as scheduled. DOHA received the transcript until November 5, 2004. Issuing a decision in this case has been delayed due to a heavy caseload.

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 findings of fact:

Applicant is a 40-year-old man who is a native-born U.S. citizen. He is seeking a security clearance in conjunction with employment as a computer operator. Applicant married for the first time in October 2003, and he and his wife have a child who is about six-months old.

In July 1997, police arrested Applicant on the misdemeanor charge of possessing marijuana. The circumstances and details surrounding his arrest are contained in Exhibit 4. In February 1998, the charge against Applicant was nolle prossed. [\(2\)](#)

Applicant started employment as a computer operator in October 1999. According to Applicant, he initially completed a security-clearance application in late October 1999. Exhibit 1 is the security-clearance application that was submitted to the government. It is dated March 9, 2000, and was signed by Applicant on arch 13, 2000. In response to Question 24, Applicant answered no thereby denying having ever been charged with or convicted of any offense(s) related to alcohol or drugs. In response to Question 27, Applicant answered no thereby denying having illegally used any controlled substance within the last seven years.

In July 2001, Applicant was interviewed as part of the background investigation, and the interview produced a sworn statement (Exhibit 2). Various topics are covered in the statement, including the 1997 drug-related arrest, but no mention is made of any illegal drug use by Applicant.

Applicant was interviewed again in January 2002, and this interview also produced a sworn statement (Exhibit 3). In this statement, Applicant discussed his illegal use of marijuana and cocaine.

Applicant described his marijuana use as follows:

When I first started, I smoke one or twice a week perhaps more. From approximately 1979 until Oct. 1998. From Oct. 1982 until Aug. 1984 I had no drug usage while in the military. From Aug. 1984 until July 1997 I would smoke on a monthly basis, social gathering. I had not used any illegal drugs since July 1997. During my time of usage I purchase

small amounts of marijuana for personal use. I never sold, traffic, or manufacture any illegal drugs. I never use any illegal drugs while I held a security clearance. I don't hang around anyone that does illegal drugs except for in late 2001 one. I was in a social setting, someone fired up a joint I refused (Exhibit 3 at page 2).

Concerning his cocaine use, Applicant said he first tried it in 1988. He admitted to using cocaine, either by smoking or snorting it, approximately ten times from 1988 to 1991. Concerning his July 2001 interview, Applicant admitted to responding no to questions about any illegal drug usage, but he denied any intent to deceive or hid his past drug use, as he explained he had merely forgot.

In March 2004, Applicant responded to interrogatories propounded to him by DOHA (Exhibit 6). In response to Interrogatory No. 4, which asked if he had used any illegal drugs since September 1997, Applicant replied he had. He explained he had used both marijuana and cocaine, perhaps on a monthly basis, while attending a party or hanging out with co-workers.

DOHA propounded another set of interrogatories to Applicant, to which he replied in April 2004 (Exhibit 7). In response to Interrogatory No. 1, Applicant indicated he had used marijuana and cocaine, usually together, on a daily basis, at an average quantity of five to ten joints. He also indicated his last use was February 22, 2004, and he had no intention to use illegal drugs in the future. In response to Interrogatory No. 2, Applicant indicated he decided to stop using illegal drugs during his background interview in 2002, and that he had gradually reduced his usage until he no longer used any illegal drugs. In response to Interrogatory No. 3, Applicant explained he was motivated to stop using illegal drugs because he felt his family was more important than drugs, as well as concerns about his health and job. In response to Interrogatory No. 6, Applicant pointed to his marriage in October 2003, expecting a child, and changing his residence as changes in his personal life that might indicate a change in lifestyle away from his past drug use.

During his hearing testimony, Applicant reaffirmed he last used any illegal drugs on February 22, 2004. He also denied any intent to deliberately provide false information when completing his security-clearance application and during his July 2001 interview. Applicant presented Exhibit A, which is a signed and undated pen-and-ink version of Applicant's security-clearance application. Applicant maintains Exhibit A is the first application his employer gave him to complete. In it, he revealed his 1997 drug-related arrest, but he makes no mention of using any illegal drugs in response to the relevant question. Exhibit A is significant, Applicant submits, because he realized he provided incorrect information in it and asked for and received another application, which he completed and submitted to his employer. Applicant maintains when he completed the second application he inadvertently copied the same incorrect information from Exhibit A, and this process accounts for the incorrect answers in Exhibit 1, which Applicant signed and certified as true and correct in March 2000.

Applicant presented documentary evidence of his good character (Exhibits B, C, and D). He is described as dedicated, reliable, hard working, and responsible by the authors of these documents.

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.

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.⁽³⁾ There is no presumption in favor of granting or continuing access to classified information.⁽⁴⁾ The government has the burden of proving controverted facts.⁽⁵⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.⁽⁶⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽⁷⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁸⁾ 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 him.⁽⁹⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁰⁾

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."⁽¹¹⁾ 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

SOR paragraph 1 concerns Applicant's history of illegal 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 record evidence, the government established its case under Guideline H. A security concern is raised by Applicant's marijuana and cocaine use. Starting in 1979 and continuing until February 2004 (except during his military service in 1982 - 84), Applicant used marijuana. Starting in 1988 and continuing until February 2004, Applicant used cocaine. In addition, Applicant was arrested in 1997 for a drug-related offense (possession of marijuana), which the state decided to not prosecute. Given these circumstances, DC 1 [\(12\)](#) and DC 2 [\(13\)](#) apply against Applicant. Aggravating the situation, he continued using both marijuana and cocaine after he submitted a security-clearance application in March 2000 and after he was interviewed during his background investigation in 2001 and 2002. The remaining DC do not apply based on the facts and circumstances here. At bottom, the concern here is Applicant's illegal drug involvement calls into question his willingness or ability to follow the law.

I have reviewed the mitigating conditions under Guideline H and conclude none apply. First, MC 1 [\(14\)](#) does not apply because his last use of marijuana and cocaine was February 2004, which is less than one year ago (the record closed October 28, 2004). Second, MC 2 [\(15\)](#) does not apply because Applicant engaged in a pattern of illegal drug use over many years. Third, MC 3 [\(16\)](#) does not apply either. Although I accepted Applicant's testimony that his last illegal drug usage was in February 2004, too little time has passed for me to conclude that Applicant is fully committed to a drug-free lifestyle. The remaining MC does not apply based on the facts and circumstances here. Accordingly, Applicant has failed to successfully mitigate this security concern, and Guideline H is decided against him.

SOR paragraph 2 concerns Applicant's personal conduct in conjunction with disclosing truthful information about his background. Personal conduct under Guideline E is always 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 classified information. 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 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, based on the record evidence as a whole, the government established its case under Guideline E. I conclude Applicant deliberately provided false answers in response to Questions 24 and 27 when he signed and submitted his security-clearance application (Exhibit 1). I reach the same conclusion concerning his interview in July 2001. Applicant's explanations to the contrary are disjointed and not credible. For example, concerning the interview in July 2001, it is neither plausible nor convincing for Applicant to claim he forgot about his illegal drug use in light of his extensive history of marijuana and cocaine use, which continued until February 2004. Moreover, Applicant's reliance on Exhibit A, as discussed above, is misplaced. Although I admitted this exhibit, I have given it little if any weight, because it is undated and I have no independent or third-party evidence showing it was completed when Applicant said it was. Given these circumstances, both DC 2 [\(17\)](#) and DC 3 [\(18\)](#) apply against Applicant.

I have reviewed the mitigating conditions under the guideline and conclude none apply. Falsification of a security-clearance application and providing false information during a background interview are serious matters, not easily mitigated or explained away. Accordingly, Guideline E is decided against Applicant.

To conclude, Applicant has failed to meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching my decision, I have considered the record evidence as a whole, the whole-person concept, the clearly-consistent standard, and the appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

SOR ¶ 1-Guideline H: Against the Applicant

Subparagraphs a - f: Against the Applicant

SOR ¶ 2-Guideline E: Against the Applicant

Subparagraphs a - c: 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. According to a comprehensive guide to legal style and usage, "[t]he phrase *nolle prosequi* (lit., 'not to wish to prosecute') denotes either (1) the legal notice of abandonment of suit, or (2) a docket entry showing that the plaintiff or the prosecution has relinquished the action." In addition, "[n]olle prosequi is only a noun in England, but has two verb forms in the U.S., *nol-pros* and *nolle pros*. The term means 'to abandon a suit or have it dismissed by a *nolle prosequi*.' E.g., 'That plaintiff was arrested but never tried, and the charges against him were *nolle prossed*.'" Bryan A. Garner, *A Dictionary of Modern Legal Usage* 591 (2nd ed., Oxford University Press 1995).
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
6. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
7. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
8. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
9. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
10. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
11. *Egan*, 484 U.S. at 528, 531.
12. E2.A8.1.2.1. Any drug abuse.
13. E2.A8.1.2.2. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.
14. E2.A8.1.3.1. The drug involvement was not recent.
15. E2.A8.1.3.2. The drug involvement was an isolated or aberrational event.
16. E2.A8.1.3.3. A demonstrated intent not to abuse any drugs in the future.
17. E2.A5.1.2.2. The deliberate omission, concealment, of 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.

18. 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.