

KEYWORD: Drugs; Personal Conduct

DIGEST: Applicant used marijuana while holding a security clearance for a defense contractor, and was terminated from his job in December 2000 after testing positive for the drug. Applicant has not used any illegal drug since about November 2000 and intends to remain drug-free, thereby mitigating the drug involvement concerns, but he misrepresented the extent of his drug use during a 1988 interview with a government investigator and was not up-front about his drug use until his latest application for continued access. Clearance is denied.

CASENO: 03-18622.h1

DATE: 02/14/2005

DATE: February 14, 2005

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 03-18622

**DECISION OF ADMINISTRATIVE JUDGE**

**ELIZABETH M. MATCHINSKI**

**APPEARANCES**

**FOR GOVERNMENT**

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant used marijuana while holding a security clearance for a defense contractor, and was terminated from his job in December 2000 after testing positive for the drug. Applicant has not used any illegal drug since about November 2000 and intends to remain drug-free, thereby mitigating the drug involvement concerns, but he misrepresented the extent of his drug use during a 1988 interview with a government investigator and was not up-front about his drug use until his latest application for continued access. Clearance is denied.

**STATEMENT OF CASE**

On January 13, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the 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 the 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 drug involvement (guideline H) and personal conduct (guideline E).

Applicant filed an undated response to the SOR allegations, which was received by DOHA on February 9, 2004. He requested a hearing, and the case was assigned to me accordingly on June 8, 2004. Pursuant to formal notice of June 10, 2004, a hearing was scheduled for July 9, 2004. At the hearing two Government exhibits and one Applicant exhibit were admitted and testimony was taken from the Applicant, as reflected in a transcript received July 21, 2004.

## FINDINGS OF FACT

The Government alleged as security disqualifying under guideline H that Applicant used marijuana on a weekly basis in high school, a couple of times while on active duty in the Navy between March 1980 and March 1986, and thereafter to December 2000 with varying frequency, since 1980 while he held a security clearance; that he was terminated from his employment with a defense contractor in December 2000 after testing positive for marijuana; and that he used cocaine once before he enlisted in the Navy. Under guideline E Applicant was alleged to have deliberately falsified a February 1988 sworn statement provided to a government investigator wherein he indicated he used marijuana only on two occasions, when he was in high school and none since. In his Answer, Applicant admitted he used marijuana in high school but with varying frequency, and used the drug since 1980 at the frequencies alleged while he held a security clearance. He also acknowledged the one-time use of cocaine before 1980. Applicant admitted a random drug screen tested positive for marijuana, correcting the record to indicate that his employment termination on December 12, 2000, was involuntary. Applicant admitted the intentional misrepresentation of his drug involvement during his 1988 interview. His admissions are incorporated as findings of fact. After a complete and thorough review of the evidence, I make the following additional findings:

Applicant is a 45-year-old married father of two children, ages 23 and 15. He has been employed full-time as an engineering assistant by a defense contractor (defense contractor #2) since August 2001, after having been terminated from a previous job with another defense contractor (defense contractor #1) in December 2000 following a positive drug screen. Applicant seeks to retain a secret-level security clearance.

Applicant began to use marijuana in high school in 1975 or 1976. Thinking it was not a big deal since marijuana use was prevalent in his area, Applicant continued to use the drug with varying frequency. He also tried cocaine once.

In March 1980, Applicant entered on active duty in the U.S. Navy, having been granted an enlistment waiver. He reported to a DSS agent during an interview at the naval training center that he had experimented with cannabis (marijuana) on two separate occasions when he was 16 or 17 years old. During his six years on active duty, Applicant performed cryptology technical maintenance duties requiring security clearance. Aware of the Department of Defense prohibition against illegal drug use, Applicant used marijuana when it was passed to him on a couple of occasions while he was in the Navy and possessed a security clearance.

In early May 1986, Applicant began employment with defense contractor #1 as a manufacturing shift supervisor. On his initial security clearance application completed for his duties with this defense firm, he stated that he used marijuana only a couple of times and never tried it again. (2) On February 23, 1988, Applicant was interviewed by a Defense Security Service (DSS) special agent in the course of a periodic reinvestigation of his security suitability. Applicant denied any use of marijuana beyond the two times when he was in high school, claiming that he did not like it. He also denied use of any other illegal drug and any intent to use any controlled dangerous substance in the future. Applicant admitted he had not listed his use of cannabis on his Personnel Security Questionnaire, but denied any intent to falsify

the form ("I was under the impression that this was an update for my security clearance, and since I have not used any marijuana since the last time I was investigated I did not think that I had to list it again because it was already a matter of record.") Applicant was granted his security clearance.

Applicant was subjected to random urinalysis as a condition of his continued employment with defense contractor #1. Knowing that, he used marijuana with varying frequency, at least a couple of times per year, over the course of his 14 years with the company. He thought nothing of using marijuana when it was passed to him in social settings (he never sought it out) as "it just seemed to be everywhere." He took several urinalysis tests over the years that were negative for marijuana, including one in summer 2000. Applicant did not reveal this drug involvement on applications completed in update of his clearance, and his secret clearance was renewed in January 1996.

In about 1998, Applicant assumed the position of senior engineering test engineer. He continued to use marijuana with varying frequency, including at a party in late October/early November 2000. In early December 2000, Applicant took a random drug screen in connection with a new project for a federal agency. He tested positive for cannabis, and was terminated from his employment with company #1 as a result.

From spring into summer of 2001, Applicant was employed on a contract labor basis at defense contractor #2. In late April 2001, he completed a security clearance application, disclosing he had been involuntarily terminated from defense contractor #1 as a result of the positive drug screen. In August 2001, he became a direct hire of defense contractor #2 as an engineering assistant providing technical support to the electronic engineering groups.

In July 2003, Applicant was interviewed by a DSS agent. Applicant was candid about his drug history, admitting to the agent that he smoked the drug while employed by defense contractor #1 as it was "almost accepted" in that area. Applicant told the agent that he used marijuana a couple of times when he was in the Navy and with varying frequency thereafter, at least a couple of times per year.

Applicant earned an overall outstanding rating for his job performance in 2003 at defense contractor #2. The quality of his work was excellent and essentially error free. He demonstrated outstanding initiative and job knowledge such that his services were in high demand by both software and hardware engineers.

Realizing he made a mistake in using marijuana while he held a clearance, Applicant has not used marijuana since the use at the Halloween party that preceded the positive urinalysis. He has no intent to use marijuana in the future as he enjoys his job and does not want to jeopardize it. He has taken four drug tests, all with negative results, since that positive drug screen of December 2000.

## 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 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. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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.

Enclosure 2 of the Directive sets forth personnel 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.

## CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility of Applicant, I conclude the Government established its case with respect to guideline H, drug involvement, and guideline E, personal conduct, and Applicant has failed to meet his burden with respect to overcoming the guideline E concerns.

Applicant experimented with cocaine once and used marijuana with varying frequency in high school. Of greater concern, Applicant used marijuana with varying frequency while he held a secret clearance and position of trust with the Government. In the Navy, he performed duties of an especially sensitive nature requiring security clearance at such levels that Applicant felt he was not at liberty to comment at his hearing as to the specific clearances held. He used marijuana on at least a couple of occasions when it was passed to him while he was in the service. On his discharge, he

began working with a clearance for a defense contractor, aware not only of the DoD prohibition against illegal drug use, but that he was subject to random urinalysis. He continued to frequent clubs where drug use was prevalent and he smoked marijuana with varying frequency, at least a couple of times per year, until late 2000, when he stopped after testing positive for marijuana. The improper or illegal involvement with drugs raises questions regarding an individual's willingness or ability to protect classified information. Disqualifying condition a. (Any drug abuse)<sup>(3)</sup> of guideline H must be considered in determining Applicant's security suitability. Although he was not a frequent user of marijuana, Applicant bears a heavy burden of overcoming the serious concerns for his judgment caused by his repeated use of marijuana in violation of the Government's trust.

Applicant submits in mitigation his abstinence from any illegal drug since late October/early November 2000. The Directive provides for mitigation of illegal drug involvement if the drug use was not recent (MC a.), it was isolated or aberrational (MC b.), there is demonstrated intent not to abuse any drugs in the future (MC c.), or satisfactory 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 (MC d.). There is no evidence Applicant has used any illicit drug in almost four years, so MC a. applies in his favor. Applicant's falsifications raise significant concerns for his credibility (*see* guideline E, below), but a negative credibility assessment is not a substitute for record evidence.<sup>(4)</sup> However, the absence of any recent involvement is not an especially significant guarantor of reform in Applicant's case. Applicant testified unrebutted by the Government that he had not used any marijuana in 2000 until that Halloween party. As also shown by his limited use in the Navy, significant periods of abstinence served not to deter future use. Whereas Applicant used marijuana when out socializing with others, his present environment and recreational activities are more important indicators in assessing the risk of recurrence. After being terminated from his employment with defense contractor #1, Applicant relocated to a new area where drug use is at least not as obvious ["I don't walk outside and see people smoking, drugs aren't being offered up, you know, on every occasion like they seemed to be in the (defense contractor #1) area."]. (Tr. 33-34) There is no evidence Applicant has been around anyone using an illegal drug or that he has sought out individuals involved with controlled substances since he relocated. Applicant testified he has not been offered any drugs since that Halloween party in 2000, and he does not plan to use any illicit drug in the future. His personal circumstances and attitude toward any future use of marijuana have changed sufficiently to apply MC c. SOR subparagraphs 1.a., 1.b., 1.c., 1.d., 1.e., and 1.f. are resolved in his favor as there is little risk, if any, of future drug abuse.

Applicant's February 1988 falsification to the DSS agent raises security concerns independent of whether there is a risk of future drug abuse. Applicant deliberately misrepresented his illegal drug use when he denied any use of illegal drugs beyond two separate occasions when he was 16 or 17 years of age. He falsely claimed he did not like marijuana and never tried again, and that he had never used any other illegal drug. 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. Disqualifying condition 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) under guideline E, personal conduct, must be considered in evaluating his security suitability. Furthermore, although not alleged by the Government in its SOR, Applicant was not candid about his illegal drug use on various applications submitted in update of his clearances until late April 2001, when he disclosed his termination from defense contractor #1. His conduct falls within DC E2.A5.1.2.2. (The deliberate omission, concealment, or 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) and E2.A5.1.2.5. (A pattern of dishonesty) as well.

Security clearance determinations involve a careful weighing of a number of variables known as the whole person concept. (See E2.2.1.) To Applicant's credit, he was candid with the Department of Defense about his drug-related termination from his previous employment when he applied for his clearance in April 2001 and he revealed the details of his drug involvement during an interview with a DSS agent in July 2003. As the DOHA Appeal Board has repeatedly articulated, mitigating condition E2.A5.1.3.2. (The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily) is properly applied where the falsification is old and the applicant subsequently provides correct information about matters not covered by the old falsification. (5) In this situation where Applicant corrected his prior misrepresentation concerning the extent of his illegal drug involvement, mitigating condition E2.A5.1.3.3. (The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts) is potentially applicable. The only information of record as to what Applicant reported on his 2001 security clearance application is Applicant's testimony asserting he indicated on his clearance application the basis for his termination from his previous employment. When asked whether he had responded affirmatively to the inquiry of any illegal drug use in the last seven years, Applicant testified, "I don't recall that actual question on the questionnaire. I mean, I would have put yes because, you know, I mean, as I said I made a mistake and I was trying to be up front and forward about it." (Tr. 43) Assuming Applicant had accurately reported his illegal drug use on his SF 86, he admits he had not taken advantage of previous opportunities to correct the record. His rectification cannot reasonably be considered prompt where he knowingly concealed his drug use from the DoD for more than ten years.

Furthermore, doubts persist for his reform where he testified inconsistently at the hearing about his marijuana use since he entered on active duty in the Navy. As the following exchange between Department Counsel and Applicant reflects, Applicant admitted he had told the DSS agent in July 2003 that he used marijuana once or twice while in the Navy only to then deny any such involvement:

Q During your time in the Navy you didn't use any marijuana, correct?

A That's not what I told her, I said that there were times that it was passed around.

Q During the active duty period?

A After the active duty.

Q After, that's what I said. My question was during the time in the Navy you did not use marijuana? Is that correct?

A Correct. (Tr. 31)

Later in his testimony, Applicant affirmed his earlier denial of any drug use in the Navy. (Tr. 38) Then confronted with his admission to SOR 1.c. alleging use of marijuana a couple of times during his active duty service from 1980 to 1986, Applicant responded, "I thought that was one I had admitted, maybe not." (Tr. 38) Applicant then acknowledged he had used marijuana while he was in the Navy, but he claimed to have no recall of the circumstances. (Tr. 40) Applicant also testified to using marijuana once or twice after he got out of the Navy:

Q Subsequent to getting out of the Navy, between 1986 and 2000, you found yourself in situations where people were using it, it was being passed around and you participated?

A Yes, once or twice is what I told her. (Tr. 31-32)

This testimony conflicts with his admission to SOR subparagraph 1.b. ("You used marijuana with varying frequency, at least a couple of times per year, between 1986 and December 2000.") Applicant's recent performance evaluation reflects he has extensive knowledge of complex electronics and an ability to troubleshoot and repair product hardware. The hearing inquiries were sufficiently straightforward to cause little doubt as to what was being asked, and Applicant's failure to provide consistent responses undermines his claimed reform. Despite his change to a drug-free lifestyle, doubts persist as to whether he possesses the requisite good judgment that must be demanded of those with access. Subparagraph 2.a. is resolved against him.

## **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 H: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: For the Applicant

Subparagraph 1.e.: For the Applicant

Subparagraph 1.f.: For the Applicant

Paragraph 2. Guideline E: 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. The application submitted by Applicant for a clearance is not of record. He testified that the first time he responded affirmatively to the drug inquiry was "probably in the year 2001." (Tr. 47)
3. As designated following the revision of the drug involvement guideline in 2001.
4. As recently reaffirmed by the DOHA Appeal Board in ISCR 02-24452 (decided August 4, 2004), "An unfavorable credibility determination provides a Judge with a basis for deciding to disbelieve an applicant's testimony. However, mere disbelief of that testimony, standing alone, is not a sufficient basis for a Judge to conclude that the applicant did something (e.g., engaged in drug abuse after a given date) for which there is no independent evidence." *See, e.g.*, ISCR Case No. 01-26893 (October 16, 2002) at p. 7; ISCR Case No. 97-0356 (April 21, 1998) at p. 3.
5. *See e.g.*, DOHA Appeal Board decision in ISCR 02-09389 decided December 29, 2004, citing its earlier decision in ISCR 99-0557, decided July 10, 2000, at p. 4.