

DATE: December 29, 2006

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-06496

DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a history of illegal involvement with drugs. From approximately June 1976 to at least April 2002, he used marijuana. In June and August of 2004, while holding an active security clearance, he possessed, transported, and distributed marijuana. Applicant deliberately failed to list his April 2002 marijuana use on a security clearance application he signed on September 25, 2002, and he deliberately failed to report his 2002 marijuana use in a signed, sworn statement he provided to an authorized investigator of the Defense Security Service on January 16, 2003. Applicant again deliberately failed to report his 2002 use of marijuana and his possession, transportation, and distribution of marijuana on a security clearance he executed in August 2004. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On July 18, 2006, under the applicable Executive Order ⁽¹⁾ and Department of Defense Directive, ⁽²⁾ DOHA issued a Statement of Reasons (SOR), detailing the basis for its decision—security concerns raised under Guideline H (Drug Involvement), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of the Directive. On August 10, 2006, Applicant submitted an answer to the SOR and elected to have a hearing before an administrative judge. The case was assigned to me October 11, 2006. On November 27, 2006, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called no witnesses and introduced six exhibits (Ex.), which were identified as Ex. 1 through 6 and admitted to the record without objection. Applicant called no witnesses and offered no exhibits. On December 8, 2006, DOHA received the transcript (Tr.) of the proceeding.

RULING ON PROCEDURE

On October 6, 2006, Department Counsel moved to amend the SOR, and he sent a copy of the motion and the proposed amended SOR to Applicant. The proposed amended SOR added a new allegation, designated SOR 1.c., which read as follows: "You smoked a pipe of marijuana with a friend during a round of golf in April 2002." The proposed amended

SOR then re-designated the original allegation 1.c. as 1.d. and corrected the date alleged in 1.d. that Applicant was arrested to "July 1979." The original SOR subparagraphs 1.d. and 1.e. were re-designated as 1.e. and 1.f. respectively. Subparagraph 3.a. was subsequently amended to cross reference subparagraph 1.f. Applicant acknowledged timely receipt of the motion to amend and a copy of the proposed amended SOR. Applicant did not object to the substitution of the amended SOR for the original SOR. Accordingly, Department Counsel's motion to amend the SOR was granted. (Tr. 10-18.)

FINDINGS OF FACT

The amended SOR contains six allegations of disqualifying conduct under Guideline H, Drug Involvement, four allegations under Guideline E, Personal Conduct, and two allegations under Guideline J, Criminal Conduct. Applicant admitted three and denied three Guideline H allegations. He admitted one and denied three Guideline E allegations, and he admitted in part and denied in part the two Guideline J allegations. (Tr. 28-33.) Applicant's admissions are incorporated as findings of fact.

Applicant is 48 years old, married, and the father of an eight-year-old child. In 1995, he earned a bachelor of science degree, and he is employed by a government contractor as a Consulting Associate III. Since January 2004, he has held an active security clearance. In approximately February 2005, Applicant suffered a heart attack and subsequently had a pacemaker installed. (Ex. 1, Ex. 2, Ex. 5; Tr. 33-34, 47.)

Applicant has a history of involvement with illegal drugs. He used marijuana from approximately 1976 until Christmas Day 2001 for an estimated 15 to 20 times. (Ex. 2; Ex. 3.) He experimented with LSD in 1977 and cocaine in 1979. (Tr. 30.) In 1979, he and two friends were arrested for marijuana possession. The two friends admitted owning the marijuana that had been seized, and they were charged with a drug violation. No charges were filed against Applicant, and he was released. (Ex. 3; Tr. 30.)

In April 2002, Applicant and a friend were playing a round of golf. The friend had marijuana and a pipe on the golf course. He encouraged Applicant to join him in smoking the marijuana, which he represented as very special. Applicant gave in to his friend's persuasions and joined him in smoking the marijuana. While Applicant admitted smoking marijuana, he minimized the amount of his use, asserting he only took a puff, which he considered too small an amount of marijuana to constitute use. However, he conceded his argument might be seen as "cutting straws." (Ex. 6; Tr. 28-29, 31-32.)

In June 2004 and in August 2004, while holding a security clearance, Applicant twice obtained about \$200 worth of marijuana in State A and transported it to State B, where he distributed it to a friend who had asked Applicant to obtain the marijuana for him. Applicant denied he purchased the marijuana for the friend. He said he did not profit from the transaction, although his friend reimbursed him \$20 for the gas he used to make the trip. It was unclear whether Applicant's action facilitated a profit for either party in the transaction. (Tr. 29, 39-40; Ex. 6.)

Applicant executed security clearance applications (SF-86) on September 25, 2002 and August 13, 2004. Question 27 on the SF-86 reads:

Your Use of Illegal Drugs and Drug Activity - Illegal Use of Drugs Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants, (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?

On both SF-86 applications, Applicant responded "yes" to Question 27 and indicated he had used marijuana from 1977 to December 25, 2001. He did not report his use of marijuana in April 2002. He explained he did not list the 2002 use on his two security clearance applications or in the January 2003 interview because he considered his 2002 marijuana use to be inconsequential. (Tr. 31-32.)

On January 16, 2003, Applicant provided a signed statement to an investigator of the Defense Investigative Service. In discussing his use of marijuana, Applicant stated: "I have not used marijuana since Christmas day 2001 and never intend to use it again." Applicant certified that the statement he provided to the investigator was "true, complete and accurate to

the best of my knowledge and belief and is made in good faith. I understand that a knowing and willful false statement can be punished by fine or imprisonment or both." (3) (Ex. 4 at 1.)

In executing his SF-86 on August 13, 2004, Applicant was required to respond to Question 29, which reads as follows:

Your Use of Illegal Drugs and Drug Activity - Drug Activity

In the last 7 years, have you been involved in the illegal purchase, manufacture, trafficking, production, transfer, shipping, receiving, or sale of any narcotic, depressant, stimulant, hallucinogen, or cannabis for your own intended profit or that of another?

Applicant answered "no" to Question 29. Applicant then signed his name at the end of the following certification:

CERTIFICATION BY PERSON COMPLETING FORM

My statement on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both. (See section 1001 of title 18, United States Code.)

At his hearing, Applicant stated he should have admitted on the August 13, 2004 SF-86 that he had transported marijuana in June and August 2004. (Tr. 31.) He also conceded he committed a criminal act by not admitting he possessed, transported, and distributed marijuana. (Tr. 32.)

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 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.

CONCLUSIONS

Guideline H - Drug Involvement

In the amended SOR, DOHA alleged under Guideline H that Applicant used marijuana from approximately 1976 to at least April 2002 (¶ 1.a.); that he purchased, possessed, transported, and distributed marijuana valued at \$200 on at least two occasions, June 2004 and August 2004, a time during which he held a security clearance (¶ 1.b.); and that he smoked a pipe of marijuana with a friend during a round of golf in April 2002 (¶ 1.c.). The amended SOR also alleged that Applicant and two friends were arrested in July 1979 after police found a quarter pound of marijuana in their possession, that the friends admitted ownership of the marijuana, and Applicant was released with no charges (¶ 1.d.); and that Applicant used cocaine in 1979 (¶ 1.e.) and LSD in 1977 (¶ 1.f.).

The Government's concern with Guideline H conduct is that it raises questions regarding an individual's willingness to protect classified information. Drug abuse or dependence may impair social or occupational functioning, thereby increasing the risk of an unauthorized disclosure of classified information. ¶ E2.A8.1.1.1.

Drugs are defined under Guideline H as mood and behavior-altering substances, including drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended, (the Act) and inhalants and other similar substances. ¶¶ E2.A8.1.1.2., E2.A8.1.1.2.1., E2.A8.1.1.2.2. Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction. ¶ E2.A8.1.1.3. Marijuana, cocaine, and LSD, the drugs that DOHA alleges Applicant used illegally, are controlled substances under the Act.

Applicant admitted SOR allegations 1.d., 1.e., and 1.f. He also admitted smoking marijuana on the golf course with his friend. He argued that, in his opinion, his marijuana smoking in April 2002 was too insignificant to be considered use. He admitted acquiring marijuana, possessing it illegally, and distributing it to another, although he denied paying money for the marijuana. Through Applicant's own admissions, the Government established a *prima facie* case that Applicant's improper or illegal involvement with drugs raises serious concerns about his security worthiness. Applicant has admitted Guideline H drug involvement specified in the SOR and identified as disqualifying under Disqualifying Condition (DC) E2.A8.1.2.1. and DC E2.A8.1.2.2.

Moreover, since under the Directive any recent drug involvement, especially following the granting of a security clearance, will almost invariably result in an unfavorable determination (See DC E2.A8.1.2.5.), Applicant bears a particularly heavy burden to demonstrate reform. The record shows Applicant was granted a security clearance in January 2004. His most recent drug involvement occurred in August 2004, approximately 2½ years ago, and occurred after he had been granted a security clearance. In 2003, he asserted to an authorized investigator that he never intended to use drugs again.

An Applicant might mitigate Guideline H security concerns by showing the alleged drug involvement was not recent (Mitigating Condition (MC) E2.A8.1.3.1.); by providing evidence that the alleged drug involvement was an isolated or aberrational event (MC E2.A8.1.3.2.); by providing evidence of a demonstrated intent not to abuse any drugs in the future (MC E2.A8.1.3.3.); or by providing evidence of 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 E2.A8.1.3.4.).

Applicant presented no evidence indicating he had ever sought treatment for his drug involvement or that he had ever been diagnosed or evaluated as a drug abuser or as drug dependent. While he experimented with cocaine and LSD in the 1970s, he apparently stopped using these drugs. In 1979, when he and some friends were stopped by police, the friends admitted marijuana possession, and the charges against Applicant were dropped.. Accordingly, I conclude that mitigating condition (MC) E2.A8.1.3.1 applies to allegations 1.d., 1.e., and 1.f. of the amended SOR.

Applicant admitted marijuana use from approximately 1976 to at least April 2002. His most recent use of marijuana occurred in April 2002, and he admitted possession, transportation, and distribution of marijuana in June 2004 and August 2004, when he held a security clearance and after he had asserted his intent never to become involved with drugs

in the future. These facts demonstrate Applicant's drug involvement is recent; it is part of an life-long pattern and not an isolated or aberrational event , and he has failed to demonstrate intent not to abuse any drugs in the future. Accordingly, MC E2.A8.1.3.1., E2.A8.1.3.2., and E2.A8.1.3.3. are inapplicable. MC E2.A8.1.3.4. is also inapplicable.

Guideline E - Personal Conduct

In the amended SOR, DOHA alleged Applicant deliberately falsified his answers to Question 27 on two security clearance applications executed in September 2002 and August 2004 by failing to disclose his marijuana use in April 2002 (¶¶ 2.a. and 2.b.); that he deliberately falsified his answer to Question 29 on the SF-86 he executed in August 2004 by failing to disclose he had possessed, transported, and distributed marijuana on at least two occasions in June 2004 and August 2004, while possessing a security clearance (¶ 2.c.); and he deliberately falsified material facts in a security interview in January 2003, when he failed to disclose to an authorized investigator that he used marijuana in April 2002. (¶ 2.d.).

Guideline E conduct, which involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, could indicate that an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1. The deliberate omission, concealment, or falsification of relevant and material facts from a personal security application raises security concerns under Disqualifying Condition (DC) E2.A5.1.2.2. of Guideline E. Additionally, in a signed, sworn statement executed January 16, 2003, Applicant provided false or misleading information concerning relevant and material matters to an investigator in connection with a personnel security or trustworthiness determination, thus raising a concern under DC E2.A5.1.2.3. Applicant's concealment of his marijuana use and his possession, transportation, and distribution of marijuana increased his vulnerability to coercion, exploitation, or duress because his conduct, if known, could affect his personal, professional, or community standing or render him susceptible to blackmail. These facts raise a concern under DC E2.A5.1.2.4.

Applicant denied falsifying his answers to Question 27 on two separate security clearance applications and he denied material falsifications in his interview with an authorized security investigator. When a falsification allegation is controverted or denied, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time the omission occurred. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004.)) Applicant stated he omitted his April 2002 use of marijuana from his answer to Question 27 and did not refer to it in his interview with the investigator because he did not think he smoked enough marijuana on that date to constitute use. His assertion lacked credibility, which he himself conceded when he said his explanation might be seen as "splitting straws."

At his hearing Applicant admitted falsifying his answer to Question 29 and stated he should have changed his answer to Question 29 to acknowledge transporting the marijuana in June and August of 2004. While Applicant asserted he did not profit from the drug transactions he facilitated, I found his statement hard to believe, especially since his earlier testimony about his drug use in 2002 reflected dissembling about pertinent facts. Applicant was a middle-aged adult holding a security clearance when he twice undertook to obtain marijuana with a value of \$200 from one source and supply it to a friend. His assertion he did not profit from the transaction lacked credibility. August 13, 2004, Applicant signed his application, attested to its completeness and truthfulness, and acknowledged his understanding that a knowing and willful false statement on the security clearance application could be punished by fine or imprisonment or both.

The information Applicant concealed and failed to report on his security clearance applications and in his interview with an authorized investigator was substantiated and pertinent to a determination of his judgment, trustworthiness, and reliability. His falsifications were recent and not isolated incidents, and Applicant did not subsequently provide correct information voluntarily. He did not make prompt, good-faith efforts to correct the falsifications before being confronted with the facts, and he did not take positive steps to significantly reduce or eliminate his vulnerability to coercion, exploitation, or duress. Thus, mitigating conditions E2.A5.1.3.1., E2.A5.1.3.2., E2.A5.1.3.3., and E2.A5.1.3.5. do not apply. Applicant's deliberate misrepresentations cause serious security concerns.

Guideline J, Criminal Conduct

In the amended SOR, DOHA alleged Applicant's drug involvement, as described in allegations 1.a. through 1.f. constituted criminal offenses (§ 3.a.). DOHA also alleged the information set forth in subparagraphs 2.a. through 2.d. of the amended SOR constituted felonious criminal conduct under section 1001 of Title 18 of the United States Code. (§ 3.b.)

A history or pattern of criminal activity raises doubts about a person's judgment, reliability, and trustworthiness. Disqualifying conditions include allegations or admissions of criminal conduct, regardless of whether the person was formally charged (§ E2.A10.1.2.1.), and a single serious crime or multiple lesser offenses (§ E2.A10.1.2.2.). Applicant admitted the criminal conduct alleged by the Government in §§ 1.a. through 1.f of the amended SOR, but he dissembled. He did not deny he used marijuana in April 2002; he questioned how much marijuana constituted use. He did not deny possessing, transporting, and distributing marijuana in June and August 2004, but he did deny purchasing or selling the drug or making a profit from the transaction.

When he completed his security clearance applications in September 2002 and August 2004, Applicant signed and dated the following statement:

My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both. (See section 1001 of title 18, United States Code)

He also acknowledged his responsibility to comply with 18 U.S.C. § 1001 when he signed and certified his remarks to the authorized investigator in January 2003. Applicant's drug involvement and his deliberate falsifications raise security concerns under § E2.A10.1.2.1. and § E2.A10.1.2.2. of Guideline J.

Security concerns under Guideline J recognize that an individual's history or pattern of criminal activity raises doubts about his judgment, reliability and trustworthiness. A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. Where the facts proven by the Government or admitted by the applicant raise doubts about the applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nevertheless security worthy.

Applicant's admitted use of marijuana spanned a period of 26 years, and continued until at least April 2002. He admitted possessing and transporting marijuana, an illegal drug, from State A to State B at least twice in 2004. These criminal acts were recent, and they were not isolated events. They demonstrate a pattern of criminal conduct. Thus, the mitigating conditions at §§ E2.A10.1.3.1. and E2.A10.1.3.2 of Guideline J do not apply in this case. Mitigating conditions at §§ E2.A10.1.3.3, E2.A10.1.3.4., E2.A10.1.3.5, and E2.A10.1.3.6. also do not apply.

Whole Person Analysis

Paragraph E2.2 of the Directive requires that the adjudicative process in a security clearance case not only assess conduct under the adjudicative guidelines, but it must also reflect a careful weighing of a number of variables known as the whole person concept. The factors to be considered in a whole person analysis include the nature, extent, and seriousness of the conduct (E2.2.1.1); the circumstances surrounding the conduct, to include knowledgeable participation (E2.2.1.2); the frequency and recency of the conduct (E2.2.1.3); the individual's age and maturity at the time of the conduct (E2.2.1.4.); the voluntariness of participation (E2.2.1.5.); the presence or absence of rehabilitation and other pertinent behavioral changes (E2.2.1.6); the motivation for the conduct (E2.2.1.7); the potential for pressure, coercion, exploitation, or duress (E2.2.1.8.); and, the likelihood for continuation or recurrence (E2.2.1.9).

Applicant admitted his earlier drug involvement but misrepresented his 2002 and 2004 drug involvement. Applicant is 48 years old and a college graduate. The record reflects he has a clear knowledge of language and knew what he was certifying with his signature on the SF-86 and signed statement to an investigator. Applicant's explanations for his omissions for Questions 27 and 29 lacked credibility. He offered no credible evidence to rebut the Government's allegations about his recent drug involvement. He failed to offer credible testimony that his falsifications on his two security clearance applications and his omissions and falsifications in his interview with the authorized investigator were not knowing and willful and deliberate.

I have reviewed and considered all of the evidence, and I have assessed Applicant's credibility and demeanor. After weighing the applicable Guideline H, E, and J disqualifying and mitigating conditions, and after considering all relevant factors in the whole person analysis, I conclude Guideline H allegations 1.a., 1.b., and 1.c. against Applicant, and Guideline H allegations 1.d., 1.e., and 1.f. for the Applicant. I conclude Guideline E allegations 2.a., 2.b., 2.c., and 2.d. against Applicant. I conclude Guideline J allegations 3.a. and 3.b. against Applicant.

In all adjudications, the protection of our national security is the paramount concern. Security clearance decisions are not intended to assign guilt or to impose further punishment for past transgressions. Rather, the objective of the security clearance process is the fair-minded, common sense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of his or her acts and omissions, including all disqualifying and mitigating conduct. Having done so, I conclude Applicant should not be entrusted with a security clearance. In reaching my decision, I have considered the evidence as a whole, including the appropriate factors and guidelines in Department of Defense Directive, 5220.6., as amended

FORMAL FINDINGS

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

Paragraph 1.: Guideline H: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For Applicant

Paragraph 2.: Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: Against Applicant

Paragraph 3.: Guideline J: AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

Subparagraph 3.b.: 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.

Joan Caton Anthony

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. Allegation 2.d. recounts the falsification made by Applicant in his interview with an authorized security investigator on January 13, 2003. While the facts of the 2002 marijuana use are correctly alleged, SOR allegation 2.d. incorrectly alleges Applicant failed to disclose his possession, transportation, and distribution of marijuana in June and August 2004, disclosures which were impossible in January 2003.