

KEYWORD: Drugs; Personal Conduct; Criminal Conduct

DIGEST: As a teenager, Applicant abused marijuana with varying frequency from approximately 1998 to November 2000, and tried LSD in 1999. His illegal drug involvement led to criminal arrests for drug abuse in May 1999, July 2000 and November 2000. Despite an intent to refrain from illegal drugs in the future, he smoked marijuana twice in 2003. His illegal drug involvement is mitigated by his change to a drug-free lifestyle, but criminal conduct and personal conduct concerns persist where he falsely denied on his security clearance application that he had used any illegal drugs since age 16. Clearance is denied.

CASENO: 04-03281.h1

DATE: 04/18/2006

DATE: April 18, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-03281

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Department Counsel

FOR APPLICANT

Wayne G. Beebe, Personal Representative

SYNOPSIS

As a teenager, Applicant abused marijuana with varying frequency from approximately 1998 to November 2000, and tried LSD in 1999. His illegal drug involvement led to criminal arrests for drug abuse in May 1999, July 2000 and November 2000. Despite an intent to refrain from illegal drugs in the future, he smoked marijuana twice in 2003. His illegal drug involvement is mitigated by his change to a drug-free lifestyle, but criminal conduct and personal conduct concerns persist where he falsely denied on his security clearance application that he had used any illegal drugs since age 16. Clearance is denied.

STATEMENT OF THE CASE

On March 31, 2005, 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), personal conduct (Guideline E) and criminal conduct (Guideline J).

Applicant responded to the SOR on April 25, 2005, and requested a hearing before a DOHA administrative judge. On September 7, 2005, I scheduled a hearing for September 28, 2005. At the hearing, four government exhibits were admitted and testimony was taken from the Applicant and his father, as reflected in a transcript received on October 18, 2005. SOR ¶ 1.c. was also amended on the government's motion to reflect the correct date of Applicant's arrest for drug abuse in May 1999.

FINDINGS OF FACT

DOHA alleged drug involvement concerns related to marijuana use from approximately 1998 to at least January 2004, while he held an interim secret clearance granted in July 2003; marijuana purchases from about 1999 to at least 2000; drug abuse offenses in May 1999, July 2000, and November 2000; and one time LSD use in 1999. Applicant's drug-related offenses were also cross-alleged under the criminal conduct guideline. Applicant was alleged under the personal conduct and criminal conduct guidelines to have deliberately falsified his June 2003 security clearance application (SF 86) by denying any record of alcohol/drug offenses and any illegal drug use since age 16 or within the preceding seven years.

In his pro se response, Applicant admitted his drug-related arrest record, the purchase of marijuana as alleged, and the one-time use of LSD in 1999. He denied using marijuana, to include weekly, from 1998 to at least January 2004, or that he continued to use it after he had been granted an interim secret clearance. He also denied intentional falsification of his security clearance application, proffering that he had omitted his drug offenses and drug use because he had been told by his probation officer that his record would be sealed and expunged on him reaching age 18, and he had acted on the advice of his parents whom he consulted on the issue. Applicant's admissions are incorporated as findings of fact. After thorough review of the record, I make the following additional findings:

Applicant is a 22-year-old structural draftsman in a defense contractor's rotating apprenticeship program. He started working for the company in mid-August 2003 with a "green badge," and was subsequently issued an interim secret clearance. (2) He seeks a secret clearance for his duties.

Born into a military family, Applicant moved frequently until he was 14 when the family settled down for his mother's job in June 1998. As a high school freshman that Fall, he began using marijuana with his new friends, "the outcasts and the people who didn't fit in, most of whom were heavy drug users." (Tr. 48) While he initially tried the drug out of curiosity and peer pressure, he continued to use it on about a monthly basis as it helped alleviate the symptoms of a medical condition (Tourette's Syndrome). In early May 1999, Applicant was arrested for possession of a controlled substance (marijuana), a minor misdemeanor under pertinent state law, (3) when he was caught trying to purchase some marijuana from a friend at school. Applicant was ordered to perform community service. On completion of that service, the charge was dismissed.

Applicant abstained from marijuana for about four months after his arrest, but he used LSD once in early summer 1999. Applicant did not enjoy the drug's effect on him (paranoia and altered perception). In Fall 1999, he resumed his use of marijuana, at a frequency that varied but equated to about a joint of marijuana a week. He also began purchasing marijuana at a cost of \$20 per occasion, and estimated buying the drug 25 times total over the next year (until his arrest in November 2000).

In early July 2000, Applicant was arrested for possession of marijuana, a minor misdemeanor, and possession of drug paraphernalia, a fourth degree misdemeanor. He and his friend were caught smoking marijuana in a closed park late at night, and Applicant was found with a marijuana pipe on him. Applicant appeared in juvenile court a week later, and was ordered to undergo an evaluation in a juvenile chemical abuse program, and to attend one counseling session. Under the supervision of the chemical abuse program, he submitted to eight drug tests between July 11, 2000 and September 6, 2000. The first, third, and eighth tests were positive for marijuana, although Applicant maintains he had stopped using the drug. He was considered to have successfully completed the chemical abuse program, and the charges were dismissed in September 2000.

In mid-November 2000, he was again arrested for possession of marijuana after he and a friend were caught smoking marijuana outside of a bowling alley. Adjudicated delinquent, he was sentenced in February 2001 to a juvenile detention facility (suspended), ordered to attend one counseling session, pay \$60 court costs, and he was placed on probation. Applicant was led by the magistrate to believe that if successfully completed his probation and had no further legal trouble, his records would be sealed on him turning 18, and two years after that, his crimes would be expunged (*see* Tr. 35, 54). Between February 22, 2001 and ay 15, 2001, he submitted to seven urinalyses, which were negative for all substances tested, including marijuana. In mid-June 2001, he was released from probation. ⁽⁴⁾

After graduating from high school in May 2002, Applicant attended one semester at a school of advertising art. He left school when he started to pick up on the party atmosphere there. He had several short-term employments in various fields (home maintenance, screen technician, cashier, sales representative). In June 2003, he arrived in his present location, visiting relatives after spending three months away from home helping his grandfather. He decided to stay in the area, primarily to get away from his drug-using friends, and began working as a produce clerk in a supermarket. He found himself falling back into old patterns of socializing with the "same kind of crowd" he had in the past, and on one occasion in June or July 2003, he smoked marijuana at a party. ⁽⁵⁾ Realizing then that he needed to do something with his life, he applied for work with his current employer.

Included in the hiring package was a security clearance application (SF 86) form. Under the impression that his juvenile record had been sealed, Applicant sought the opinion of his father as to whether he should report his drug offenses on his SF 86. Applicant's father holds a security clearance for his civilian duties with the U.S. military. Believing his son's records had been sealed and offenses expunged, he advised him to not include the information ("Yeah, you should put no because there is no record of it. So it's as if it never happened." Tr. 102), and to explain the circumstances should he be asked about it. Acting on that advice, Applicant responded "No" on a handwritten SF 86 to question 24 concerning whether he had ever been charged with or convicted of any offenses related to alcohol or drugs. He also responded "No" to whether he had used any illegal drugs since the age of 16 or in the preceding seven years as there would be no evidence to show he had used marijuana and he had no intent to use it in the future ("There is no evidence of me being arrested for it, there is no evidence showing that I used it and I think it was because I felt I didn't have the intent to use it anymore." Tr. 95). Applicant turned this SF 86 over to company security, and his responses were entered onto a typewritten version of the SF 86 that he signed a few days later. ⁽⁶⁾ He did not inquire of anyone in security whether he should have listed his drug use or drug offenses.

Applicant began working for the defense contractor about one month later, in mid-August 2003. While drinking at a party on December 31, 2003, Applicant smoked marijuana that was passed to him. He realized almost immediately that he had made a wrong decision and left the party. He has not used any marijuana or other illegal drug since and has no intent to use any illicit drug in the future.

On January 29, 2004, Applicant was interviewed by a special agent of the Defense Security Service (DSS) about his illegal drug involvement, related offenses, and failure to report his arrests or drug use on his SF 86. Applicant was informed upfront that there was an issue of fraudulent information on his SF86, and given to understand that the DSS had his arrest record. In response to direct inquiries from the agent, Applicant discussed his juvenile arrest record, and his use of marijuana, disclosing a recent use of marijuana in celebration of New Year's 2004. He denied any intent to use any illegal drug in the future. Concerning his omissions from his SF 86, Applicant stated:

The reason I did not list my arrests or drug use on my SF 86 was because I was not sure if I should have listed this because I was a juvenile and asked my parents if I should have listed it. They advised me not to list this because I was and [sic] a juvenile and believe that the records were sealed. Because I have never completed a form like this before I wasn't sure what to do. I realized now I probably should have just asked the security assistance at [employer name omitted]. I did not intentionally omit this for the purposes of concealing my use, but as I stated was unsure what to do as far as listing it because it was a juvenile offense. (Ex. 2)

Applicant has been living on his own since Fall 2003. He has not used any illegal drug since that New Year's party, and intends to not use any illicit drug in the future. He has a girlfriend, who is a divorcee with a four-year-old daughter, and she does not use illegal drugs. As of September 2005, a very close female friend of Applicant's was dating someone who uses marijuana. Applicant informed this person that he did not want to be around him when he was smoking the drug and that he should not bring it to his home. He has respected Applicant's wishes and not used marijuana around him.

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.

The following adjudicative guidelines are most pertinent to an evaluation of Applicant's security suitability:

Drug Involvement. Improper or illegal involvement with drugs raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information. (¶ E2.A8.1.1.)

Personal Conduct. 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.A5.1.1.)

Criminal Conduct. A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. (¶ E2.A10.1.1.)

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:

As a high school student, Applicant abused marijuana with varying frequency from 1998 to November 2000. He purchased marijuana over the 1999/2000 time frame, and also tried LSD once in 1999. His abuse of marijuana resulted in adverse legal consequences in May 1999, July 2000, and November 2000. Following his third illegal drug possession charge, he was adjudicated delinquent and placed on probation. To his credit, he realized that he needed to dissociate himself from his old drug-using friends, and he relocated in June 2003 to his current locale. Yet, he fell in with the same

type of crowd and used marijuana at a party shortly thereafter. Four months after he started working for a defense contractor, he smoked marijuana at a party in celebration of the New Year 2004. Disqualifying conditions E2.A8.1.2.1. *Any drug abuse*, and E2.A8.1.2.2. *Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution*, of Guideline H apply.

Applicant submits in mitigation his abstinence from any illicit drug since December 31, 2003/January 1, 2004, with no intent to use any illegal substance in the future. Illegal drug involvement may be mitigated under the Directive if one or more of the following conditions apply: *The drug involvement was not recent* (MC E2.A8.1.3.1.); *The drug involvement was an isolated or aberrational event* (MC E2.A8.1.3.2.); *A demonstrated intent not to abuse any drugs in the future* (MC E2.A8.1.3.3.); 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 E2.A8.1.3.4.). Applicant has not used LSD since 1999 and he is not likely to use it again where he disliked its paranoia-inducing effect on him. There is no evidence Applicant used marijuana in the 21 months preceding his hearing, (7) and his immature age was certainly a factor in his drug use (*see* E2.2.1.4.). However, Applicant has a heavy burden to prove his marijuana use is not likely to recur, given he used marijuana while working for the defense contractor with at least a "green badge" and after he had applied for a secret-level security clearance.

Applicant's two years in the defense contractor's rotating apprenticeship program suggest a level of maturation and dedication to his job. He is also involved in a relationship with a young divorcee who does not use drugs. While he has a close female friend whose boyfriend uses marijuana, Applicant has informed this individual that he is not to use marijuana around him and there is no evidence that he has disregarded Applicant's wishes in that regard. Applicant has not sought out friendships with known drug users or intentionally placed himself in situations at risk to his abstinence since that New Year's party. Under the circumstances, MC E2.A8.1.3.3. applies, and favorable findings are returned as to ¶¶ 1.a., 1.b., 1.c., 1.d., 1.e., 1.f., and 1.g. of the SOR.

Yet, significant personal conduct and criminal conduct concerns exist because Applicant did not disclose his illegal drug abuse when he completed his security clearance application. Under the personal conduct guideline, 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*, applies if the omission was intentional. Applicant's claim to good faith mistake as to whether the information was required is accepted only with respect to his failure to disclose his juvenile drug offenses. Applicant understood from the magistrate who sentenced him for the November 2000 drug possession offense that his record would be sealed on him reaching age 18 and expunged two years later, provided he stayed out of legal trouble. Applicant turned 20 two weeks before the second anniversary of his last arrest for drug possession. Uncertain whether all of his offenses had been expunged, Applicant asked his father, a civilian employee for the U.S. military who holds a clearance, whether he was required to list his offenses. His father, who believed the offenses had been expunged, *i.e.*, it was as if they never happened, advised him to not disclose them.

Applicant's father does not have actual or implied authority to give advice or guidance about answering questions pertaining to a security clearance investigation or adjudication, so MC 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, does not apply. Furthermore, question 24 is unambiguous in requiring the report of information regardless of whether the cases have been sealed or otherwise stricken from the criminal record. The limited exception is for expungement of a first-time conviction for simple possession in violation of federal law 21 U.S.C. § 844, which is inapplicable here. Applicant was convicted of a state drug crime and there is no evidence that an expungement order was ever entered. This post-conviction remedy cannot be relied on to relieve him of his reporting obligation. However, given he was only 19 and it was his first SF 86, it was reasonable of him to ask his father for advice, especially since his father holds a security clearance, and neither he nor his father clearly understood that he had the obligation to report juvenile offenses that they assumed were no longer of record. SOR ¶ 2.a. is resolved in his favor.

Applicant initially attributed his negative response to question 27 (any drug abuse since age 16) to the expungement as well ("I thought because there is no need to offer up information based on the arrests, because I thought they've been expunged. They kind of-I kind of considered them like hand . . ." Tr. 69-70) Yet, after being confronted with the illogical nature of his position, given he had used marijuana shortly before he completed his SF 86, Applicant admitted he had not disclosed his marijuana use because there would be no record of it ("I thought, well, what would be the point of answering yes on this one. There would be no evidence of me being arrested for it, there is no evidence showing that I used it and I think it was because I felt I didn't have the intent to use it anymore. I figured what was the point." Tr. 95).

DC E2.A5.1.2.2. under Guideline E applies. To Applicant's credit, he was candid with the Department of Defense about his drug use and arrest record in his January 2004 interview and sworn statement, even admitting to having used marijuana in celebration of the New Year only weeks before. 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*, applies where the falsification is old and the applicant subsequently provides correct information about matters not covered by the old falsification.⁽⁸⁾ MC E2.A5.1.3.3. *The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*, has potential applicability, but there was some confrontation involved in the rectification. Furthermore, Applicant's lack of candor with the agent about his reason for not disclosing his drug use on his SF 86 precludes me from applying E2.A5.1.3.3. in his favor. Applicant told the agent, "The reason I did not list my arrests or drug use on my SF 86 was because I was not sure if I should have listed this because I was a juvenile and asked my parents if I should have listed it." (Ex. 2) This was only partially true. Applicant's father testified that he could not recall whether his son asked him specifically about question 27 regarding drug abuse, and he was unaware that his son used marijuana in 2003 (Tr. 108).

By knowingly and willfully omitting his illegal drug abuse from his SF 86, Applicant violated 18 U.S.C. § 1001.⁽⁹⁾ Under Guideline J, DC E2.A10.1.2.1. *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*, and DC E2.A10.1.2.2. *A single serious crime or multiple lesser offenses*, apply because of his deliberate false statement and his criminal drug offenses. Applicant's drug offenses are mitigated by the fact that they are not recent (*see* E2.A10.2.3.1.), and are not likely to recur (*see* E2.A10.1.3.4.). While they are not to be viewed separately from his felonious false statement, his change to a drug-free lifestyle warrants finding for him as to ¶ 3.a. However, there is insufficient rehabilitation with respect to his false statement. The government must be assured that those granted access understand their responsibility to provide full and frank disclosures at all times. Applicant's eleventh-hour admission to the deliberate falsification is not enough to overcome the personal conduct and criminal conduct concerns engendered by his knowingly false response to question 27 on his SF 86. Accordingly, ¶¶ 2.b. and 3.b. are concluded 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

Subparagraph 1.g.: For the Applicant

Paragraph 2. Guideline E: AGAINST THE APPLICANT

Subparagraph 2.a.: For the Applicant

Subparagraph 2.b.: Against the Applicant

Paragraph 3. Guideline J: AGAINST THE APPLICANT

Subparagraph 3.a.: For the Applicant

Subparagraph 3.b.: 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. Applicant denies SOR ¶ f., that he continued to use marijuana to at least January 2004 after being granted an interim secret security clearance on July 31, 2003. Applicant testified at his hearing that he started with a "green badge," and there was a 90 day or six month probationary period before he was issued his interim secret clearance. (Tr. 70-71) He also testified he held "an interim clearance" as he approached New Year's Eve in 2003. The evidence is not clear as to the date of an interim secret clearance.
3. Under § 2925.11 of the state's criminal statutes, possession of less than 100 grams of marijuana is a "minor misdemeanor." If the amount of the drug equals or exceeds 100 grams but is less than 200 grams, possession is a misdemeanor of the fourth degree. Possession of marijuana is punishable as a felony if the amount involved is 200 grams or more.
4. Applicant initially testified he was placed on nine months probation, and that the second set of urinalysis results were an ongoing part of the first series of testing in 2000. (Tr. 60) The records submitted by the government (Ex. 3 and 4) indicate he was put on probation for the November 2000 offense.
5. In his sworn statement of January 29, 2004, Applicant indicated that he smoked marijuana "on one occasion in Aug 03 when [he] first moved to [state name omitted]." *See* Ex. 2. Given his hearing testimony that he was uncertain as to dates when he was interviewed by the agent, and it was this use of marijuana which led him to contemplate a different career path that eventually led him to apply for employment with the defense contractor, this use of marijuana was likely in June or July 2003 rather than August of that year.
6. The SF 86 (Ex. 1) bears a typewritten date of July 29, 2003, while the government alleges the document was executed June 29, 2003. The date on which Applicant signed the form is not clearly legible, and it could be read as either June 29, 2003 or July 29, 2003. The variance does not materially affect the government's case.

7. As 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 (App. Bd. Oct.16, 2002) at p. 7; ISCR Case No. 97-0356 (App. Bd. Apr.21, 1998) at p. 3.

8. *See e.g.*, ISCR Case No. 02-09389 (App. Bd. Dec.29, 2004), citing ISCR Case No. 99-0557 at 4 (App. Bd., July 10, 2000).

9. 18 U.S.C. § 1001 provides in part:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully: (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title or imprisoned not more than 5 years, or both.