

KEYWORD: Drugs; Personal Conduct

DIGEST: Applicant used marijuana from 1989-January 2004, a couple of days before he was interviewed by a DSS agent about his security clearance applications. Applicant deliberately failed to fully and accurately describe his illegal drug use on either of the security clearance applications he submitted. Clearance is denied.

CASENO: 04-03581.h1

DATE: 08/26/2005

DATE: August 26, 2005

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-03581

**DECISION OF ADMINISTRATIVE JUDGE**

**JAMES A. YOUNG**

**APPEARANCES**

**FOR GOVERNMENT**

Edward W. Loughran, Esq., Department Counsel

## **FOR APPLICANT**

Mark S. Cohen, Esq.

### **SYNOPSIS**

Applicant used marijuana from 1989-January 2004, a couple of days before he was interviewed by a DSS agent about his security clearance applications. Applicant deliberately failed to fully and accurately describe his illegal drug use on either of the security clearance applications he submitted. 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 15 October 2004, DOHA issued a Statement of Reasons<sup>(1)</sup> (SOR) detailing the basis for its decision-security concerns raised under Guideline H (Drug Involvement) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on 9 November 2004 and elected to have a hearing before an administrative judge. The case was assigned to me on 12 May 2005. On 28 June 2005, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 14 July 2005.

### **FINDINGS OF FACT**

Applicant is a 33-year-old information technology architect for a defense contractor for whom he has worked since 2001. He was married from January 1999 to September 2002. His supervisor reports Applicant is among the top contributors to the success of the mission and that he won high praise from his customers.

Applicant used marijuana with varying frequency from 1989 to at least January 2004. Applicant started using marijuana in 1989 while he was in high school. From 1989-1999, Applicant used marijuana infrequently. From 1999-May 2002, he used more frequently, "at times as high as 2-4 times a month." On at least two occasions, he purchased marijuana. His heaviest use of marijuana occurred from May 2002-September 2003 when he began to self-medicate because of

depression from his divorce. His frequency of use varied, but at times was as high as three times a week. He purchased \$80-\$100 worth of marijuana at a time and it would last between four and eleven months. Between September 2002 and 10 January 2004, the last time he used marijuana, he used it once or twice a month. He asserts that he does not intend to use marijuana or any illegal drug in the future. Ex. 3 at 2-3. Applicant used ecstasy once in October 2002. Ex. 3 at 2.

The company Applicant works for has a drug policy, but Applicant is not sure what it is. Nevertheless, he had an initial drug test when he was hired and he knows the contractor reserves the right to ask him to submit to additional testing. Tr. 37. He knew that his employer and the Department of Defense frowned on illegal drug use by personnel working on their contacts and holding security clearances. Tr. 38.

In June 2003, Applicant went for counseling concerning issues of depression resulting from his divorce. The counselor referred him to a psychiatrist (Tr. 28) who prescribed an anti-depressant. He did not tell the psychiatrist he was using marijuana while also taking the anti-depressants. Tr. 49. He last saw the psychiatrist in late 2004.

The three people who submitted letters of recommendation on his behalf do not know he used marijuana. Tr. 46.

Applicant completed a security clearance application (SCA) on 22 September 2003. Ex. 1. Above the words "certification by person completing form," Applicant wrote the words "electronic version," indicating he was only certifying the electronic version. He signed the document certifying his answers were "true, complete, and correct" to the best of his knowledge and belief, and acknowledged that a knowing and willful false statement could be punished by fine and/or imprisonment. Ex. 1 at 9. Question 27 asked if, in the previous seven years, he had illegally used any controlled substances. Applicant answered "no." On 25 September 2003, Applicant caused a SCA to be electronically submitted. On this SCA, Applicant answered question 27 "yes," and admitted using DMA (ecstasy) once in October 2002 and marijuana less than seven times between January 1999 and October 2002. Ex. 2 at 8-9

## 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 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 the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

## CONCLUSIONS

### **Guideline H-Drug Involvement**

In the SOR, DOHA alleged Applicant used marijuana between 1989 and at least January 2004 (¶ 1.a), purchased marijuana (¶ 1.b), and used ecstasy in October 2002 (¶ 1.c). Applicant admitted the allegations. The improper or illegal involvement with drugs raises questions regarding an applicant'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. Directive ¶ E2.A8.1.1.

The Government's evidence and Applicant's admissions establish potentially disqualifying conditions under Guideline H. Applicant abused (wrongfully used) marijuana and ecstasy ((DC E2.A8.1.2.1) and purchased marijuana (DC E2.A8.1.2.2). He did so even after he was fully aware that he was subject to drug testing by his employer and that the Department of Defense frowned on illegal drug use.

He asserts the trauma of his wife's medical condition and then his divorce "drove [him] to use marijuana to cope with the situation." Ex. 3 at 3. On 31 May 2005, in anticipation of the hearing, Applicant had a drug test that showed no evidence of any drugs of abuse in his system. The test is of minimal value since he was able to choose the date of the test.

Applicant claims the anti-depressants he was prescribed helped reduce his need for marijuana, but it seems the real impetus for him to quit was his interview with the DSS agent in January 2004.

Applicant has stated that he does not intend to use any illegal drugs in the future. MC E2.A8.1.3.3. After considering all of the circumstances, I am unable to find for Applicant. He knew his employer and the Department of Defense "frowned" on illegal drug use, but he did it anyway. Even after completing his SCA by annotating it so his drug use would not become known to his employer, he continued to use marijuana. I find against Applicant on ¶ 1.

## **Guideline E-Personal Conduct**

In the SOR, DOHA alleged Applicant deliberately falsified material facts on his 22 September 2003 SCA by denying he had used drugs in the previous seven years (¶ 2.a) and deliberately falsified an electronic SCA he caused to be submitted on 25 September 2003 by failing to admit he used marijuana more than seven times (¶ 2.b). Applicant admitted the allegations. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

The Government's evidence and Applicant's admissions establish potentially disqualifying conditions under Guideline E. Applicant deliberately omitted relevant and material information from his SCA and his electronic SCA by intentionally failing to provide full and accurate answers about his drug involvement. DC E2.A5.1.2.2. An applicant's drug involvement is relevant and material to a determination of an applicant's security worthiness.

Applicant did not want his employer to see the information about his drug use on his SCA. So he certified the electronic version that he knew the employer would not see. But he was not truthful on the electronic SCA either. He minimized both the number of times and the length of the period during which he used marijuana. Neither his employer nor the friends who submitted letters of reference know of his drug involvement.

Two of the listed mitigating conditions arguably apply to Applicant's case: (1) the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts (MC E2.A5.1.3.3); and (2) he has taken positive steps to significantly reduce his vulnerability to coercion, exploitation, or duress (MC E2.A5.1.3.5). I conclude neither applies. Applicant did not make a prompt effort to correct the falsification. He waited until he was interviewed by the DSS agent to give a more complete story of his drug involvement. And he was not sure he would be interviewed. He only thought it "likely" he would be contacted by an agent. Tr. 25. And although the Department of Defense now knows of his drug use, his employers and the rest of his colleagues do not. Under the circumstances, I find none of the mitigating conditions apply. He is still subject to possible exploitation. As Applicant deliberately falsified the electronic version of the SCA by failing to fully disclose his drug use, and his first SCA referenced the electronic version, I conclude Applicant deliberately falsified both documents. I find against Applicant on ¶ 2.

## **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

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

## **DECISION**

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

James A Young

## Administrative Judge

1. As required by Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).