

KEYWORD: Drugs; Personal Conduct; Criminal Conduct

DIGEST: Applicant was discharged from the Army for illegal use of marijuana. He continued to abuse marijuana while holding a security clearance, even after completing a periodic security clearance application (SCA). He deliberately falsified his security clearance application by failing to acknowledge his illegal use of marijuana during the previous seven years. Clearance is denied.

CASE NO: 04-08762.h1

DATE: 04/27/2006

DATE: April 27, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-08762

**DECISION OF ADMINISTRATIVE JUDGE**

**JAMES A. YOUNG**

**APPEARANCES**

**FOR GOVERNMENT**

Francisco J. Mendez Jr., Esq., Department Counsel

## **FOR APPLICANT**

Pro Se

### **SYNOPSIS**

Applicant was discharged from the Army for illegal use of marijuana. He continued to abuse marijuana while holding a security clearance, even after completing a periodic security clearance application (SCA). He deliberately falsified his security clearance application by failing to acknowledge his illegal use of marijuana during the previous seven years. 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. In accordance with Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan 2, 1992), as amended, DOHA issued a Statement of Reasons (SOR) on 10 May 2005 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. Applicant answered the SOR in writing on 20 May 2005 and elected to have a hearing before an administrative judge. The case was originally assigned to another administrative judge, but was reassigned to me on 14 February 2006. On 15 March 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. DOHA received the hearing transcript (Tr.) on 24 March 2006.

### **FINDINGS OF FACT**

Applicant is a 30-year-old electronics technician for a defense contractor. He served in the U.S. Army from July 1993 until January 2002, when he was separated with a general discharge under honorable conditions because of his illegal drug use. Until then, his commander had rated him as being in the top 10 percent of more than 75 noncommissioned officers under his command. In 1996, Applicant obtained a security clearance, which he still had at the time of the hearing. In his current position, he is well respected for his job performance, and has the full trust of his supervisors. Applicant was selected by his current employer to work at a G-8 summit meeting where he performed very well in

helping protect the participants.

Applicant first used marijuana in 1991 or 1992 when he was in high school. In 1993, he joined the Army. In 1998, Applicant's urinalysis was positive for marijuana. Although disciplinary proceedings were initiated against Applicant, the case was dropped and he was allowed to transfer to Korea. In January 2001, while a noncommissioned officer (sergeant, E-5), Applicant's urinalysis was positive for marijuana. Applicant was punished for illegal drug use under Article 15, Uniform Code of Military Justice (UCMJ). 10 U.S.C. § 815. He was reduced in grade to E-4. His commander initiated discharge action against him for illegal drug abuse. On at least three additional occasions military urinalyses established Applicant continued to use marijuana between January 2001 and his discharge in January 2002.

In December 2001, before his discharge was executed, Applicant was arrested by local law enforcement for possession of marijuana, less than two ounces. The local court ordered him to attend drug classes as part of a pretrial diversion program. As part of the program, Applicant was required to submit a urine specimen for testing. When his urine specimen tested positive for marijuana, he was eliminated from the diversion program and eventually pled guilty to the wrongful possession of marijuana.

On 18 June 2002, Applicant completed a security clearance application by certifying that his statements therein were "true, complete, and correct" to the best of his knowledge and belief, and by acknowledging that a knowing and willful false statement could be punished under 18 U.S.C. § 1001 by fine and/or imprisonment. Question 27 asked if, in the previous seven years, Applicant had illegally used any controlled substance, including marijuana. Applicant answered "no." Question 25 asked if, the the previous seven years, Applicant had been subject to disciplinary proceedings under the Uniform Code of Military Justice. Applicant answered "yes," and admitted receiving an Article 15 for "misconduct" in January 2001. He continued to use marijuana after completing the SCA.

Applicant was interviewed by an agent of the Defense Security Service (DSS), and provided a signed, sworn statement dated 12 June 2004. In it, Applicant claimed the only drug-related incident he was involved in, other than his December 2001 arrest, was the January 2001 Article 15. He also admitted purchasing the marijuana he used for \$2 or \$3 per "joint." He asserted that he had not used any marijuana since December 2001.

On 4 October 2004, Applicant was re-interviewed and provided another signed, sworn statement to a DSS agent. In it, Applicant admitted he "tested positive for drugs at least four times." Ex. 3 at 1. At the hearing, Applicant admitted he lied to cover up his drug use.

Applicant's current employer does not perform drug testing.

## 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 from 1991-December 2001 (¶ 1.a); purchased marijuana (¶ 1.b); tested positive for marijuana in March 2001 (¶ 1.c), May 2001 (¶ 1.d), September 2001 (¶ 1.e), October 2001 (¶ 1.g); received an Article 15 on 29 September 2001 for using marijuana (¶ 1.f); and was convicted of possession of marijuana after a December 2001 arrest (¶ 1.h). In his Answer, Applicant admitted each of 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 established potentially disqualifying conditions under Guideline H. Applicant abused illegal drugs by smoking marijuana. DC E2.A8.1.2.1. He also illegally purchased marijuana. DC E2.A8.1.2.2. Applicant was

an unrepentant marijuana user. He kept using the illegal drug despite knowing the Army was testing for marijuana use, despite his being punished by the Army for such illegal use, and despite his discharge from military service because of his use of marijuana. He even smoked marijuana after he completed a security clearance application in which he deliberately lied about his drug use. Applicant claims he does not currently use marijuana and did not use in 2004, 2005, or 2006. An applicant may mitigate drug involvement security concerns by showing the drug involvement was not recent (MC E2.A8.1.3.1) and he has a demonstrated intent not to abuse any drugs in the future (MC E2.A8.1.3.3). After carefully reviewing all of the evidence, including his continued use of marijuana while he had a security clearance, after being discipline and then discharged by the Army, and even after he completed his SCA, Applicant failed to persuade me of the sincerity of his commitment to living a drug-free life. None of the mitigating conditions apply. However, as the allegation in ¶ 1.f is merely the subsequent disciplinary action for the offense alleged in ¶ 1.c, I find for Applicant on ¶ 1.f. I find against him on the other subparagraphs of ¶ 1.

## **Guideline E-Personal Conduct**

In the SOR, DOHA alleged Applicant falsified material facts on his SCA (¶ 2.a). In his Answer, Applicant admitted the allegation. 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 deliberate omission or falsification of relevant and material facts from any SCA is a security concern and may be disqualifying. DC E2.A5.1.2.2. Information is material if it would affect a final agency decision or, if incorrect, would impede a thorough and complete investigation of an applicant's background. ISCR Case No. 01-06870, 2002 WL 32114535 (App. Bd. Sep. 13, 2002). Information is material if it would affect a final agency decision or, if incorrect, would impede a thorough and complete investigation of an applicant's background. ISCR Case No. 01-06870, 2002 WL 32114535 (App. Bd. Sep. 13, 2002). An applicant's failure to accurately note his illegal drug use on his SCA would impede a thorough security investigation and affect a final agency decision. Applicant admits he deliberately falsified his SCA by claiming he had not illegally used any controlled substance, including marijuana, in the previous seven years. His falsification was not isolated. He also deliberately tried to mislead security investigators by making a false statement about his use of marijuana. After carefully reviewing all of the evidence, Applicant's testimony, the disqualifying and mitigating conditions, and the adjudicative process factors, conclude none of the mitigating conditions applies. I find against Applicant on ¶ 2.

## **Guideline J-Criminal Conduct**

In the SOR, DOHA alleged Applicant's illegal drug use amounted to criminal conduct (¶ 3.a); and he violated 18 U.S.C. § 1001 by falsifying material facts on his SCA (¶ 3.b). In his answer, Applicant admitted each of the allegations. A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

It is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the executive branch of the Government of the United States. 18 U.S.C. § 1001. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. *See Egan*, 484 U.S. at 527. Information is material if it would affect a final agency decision or, if incorrect, would impede a thorough and complete investigation of an applicant's background. ISCR Case No. 01-06870, 2002 WL 32114535 (App. Bd. Sep. 13, 2002). An applicant's failure to accurately complete his SCA concerning his illegal drug use would impede a thorough security investigation and affect a final agency decision. Applicant admitted deliberately omitting information about his use of illegal drugs from his SCA.

It is a potentially disqualifying condition for an applicant to admit to criminal conduct (DC E2.A10.1.2.1) or to engage in a single serious crime or multiple lesser offenses (DC E2.A10.1.2.2). Applicant's illegal use of marijuana on several occasions amounts to multiple lesser offenses. His deliberate omission of relevant and material information about his use of drugs from his SCA is a serious offense. Mitigating conditions pertinent to Applicant's case include the following: the criminal behavior was not recent (MC E2.A10.1.3.1) and there is clear evidence of successful rehabilitation (MC E2.A10.1.3.6). After carefully evaluating all of the evidence, considering Applicant's testimony, and reviewing the disqualifying and mitigating conditions, as well as the adjudicative process factors, I find against Applicant on ¶ 3. His criminal conduct persisted until at least January 2004, when he was still trying to mislead security investigators by failing to disclose the full extent of his illegal drug use. He failed to persuade me there is clear evidence of rehabilitation.

### **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: Against Applicant

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: For Applicant

Subparagraph 1.g: Against Applicant

Subparagraph 1.h: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a: 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 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