

KEYWORD: Drug Involvement; Personal Conduct

DIGEST: Applicant used marijuana on various occasions from 1969 to June 2002. The government did not meet its burden in proving he deliberately falsified his security clearance application since he disclosed the information requested in prior security clearance applications. Concerns about his illegal drug use remain. Security concerns based on drug involvement is not mitigated. Clearance is denied

CASE NO: 04-09260.h1

DATE: 05/31/2006

DATE: May 31, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-09260

DECISION OF ADMINISTRATIVE JUDGE

ERIN C. HOGAN

APPEARANCES

FOR GOVERNMENT

John Bayard Glendon, Esq., Department Counsel

James Norman, Esq., Department Counsel

FOR APPLICANT

William F. Savarino, Esq.

SYNOPSIS

Applicant used marijuana on various occasions from 1969 to June 2002. The government did not meet its burden in proving he deliberately falsified his security clearance application since he disclosed the information requested in prior security clearance applications. Concerns about his illegal drug use remain. Security concerns based on drug involvement is not mitigated. Clearance is denied.

STATEMENT OF THE CASE

On June 6, 2005, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline H, Drug Involvement; and Guideline E, Personal Conduct.

In a sworn statement received by DOHA on June 28, 2005, Applicant responded to the SOR allegations and requested a hearing. The case was assigned to me on February 2, 2006. DOHA issued a notice of hearing on February 22, 2006, scheduling the hearing for April 4, 2006. The hearing was conducted as scheduled. The government submitted 14 exhibits that were marked as Government Exhibits (Gov. Ex.) 1-14 and admitted into the record without objection. Applicant submitted 12 exhibits that were marked as Applicant Exhibits (AE) A-L and admitted into the record without objection. Applicant testified on his own behalf and had one character witness. DOHA received the hearing transcript (Tr.) on April 19, 2006.

FINDINGS OF FACT

In his SOR response, Applicant admits to the allegations in subparagraphs 1.d, 1.g, 1.i and denies all other allegations. Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough and careful

review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is the President and Chief Executive Officer of an IT services firm and seeks a security clearance. His company is seeking a facility clearance. He has 125 employees.⁽²⁾ He is 51-years-old and divorced. He has three children, a son and two daughters, ages 22, 20 and 14.⁽³⁾

Applicant first tried marijuana when he was 14 years-old. He began using marijuana a couple of times a week between the ages of 17-19.⁽⁴⁾ He purchased marijuana a couple times while in high school.⁽⁵⁾ He also used hashish on one to two occasions while in high school.⁽⁶⁾

On October 7, 1972, Applicant was arrested and charged with Possession of Central Nervous Stimulant (Methylenedioxy Amphetamines) and Sale of Central Nervous System Stimulant (Methylenedioxy Amphetamines). The charges were nolle prossed.⁽⁷⁾

In October 1974, at the age of 19, Applicant enlisted in the United States Navy. While he was on active duty in the Navy, he used marijuana on average of once a month.⁽⁸⁾ In April 1975, while in training at a naval facility, he was brought to Captain's Mast for Possession of Marijuana. The charge was dismissed.⁽⁹⁾

In February 1976, Applicant was permanently disqualified from duty under the Nuclear Weapons Personnel Reliability Program (PRP) based on his June 1972 arrest for Possession and Sale of Central Nervous System Stimulant, being accused of ingesting LSD on February 26, 1975, and having marijuana in his car and within his personal effects on April 24, 1975.⁽¹⁰⁾ His TOP SECRET clearance was downgraded to SECRET and he was reassigned to another position.⁽¹¹⁾ He separated from the United States Navy in October 1978 with an Honorable discharge as a Petty Officer Second Class (E-5).⁽¹²⁾

In 1979, a subsequent security clearance background investigation was requested.⁽¹³⁾ Applicant required a security clearance for his new job with a defense contractor. On April 24, 1979, he was interviewed by a Special Agent of the Defense Investigative Service. He provided a sworn statement which disclosed his marijuana use while in high school and while in the Navy. He also indicated that he used marijuana on one occasion at a 1979 New Years party (December 31, 1978). He indicated he did not intend to use marijuana again.⁽¹⁴⁾ He was granted a security clearance.

On June 30, 1988, Applicant submitted a Personnel Security Questionnaire. On this questionnaire, he disclosed his

Captain's Mast for suspicion of marijuana use. He disclosed his past hashish and marijuana use and his purchase of marijuana a few times while he was in high school. He also disclosed that his security clearance was downgraded from TOP SECRET to SECRET while in the service for suspicion of marijuana use.⁽¹⁵⁾ He disclosed the same information on a Personnel Security Questionnaire that he submitted on December 28, 1989.⁽¹⁶⁾

From 1980 to 1998, Applicant did not use marijuana. During this period, he worked full-time, was attending school, became a parent, and started a company.⁽¹⁷⁾ The company eventually grew to 300 employees.⁽¹⁸⁾ In the late 1980s through the early 1990s, his company worked on some classified contracts and he held a security clearance during that period.⁽¹⁹⁾ He eventually sold the business in 1998.⁽²⁰⁾

In 1998, he started to use marijuana again during social occasions. Between 1998 to July 2002, he estimates he used marijuana a total of 10-15 times.⁽²¹⁾ His last use of marijuana occurred during a July 4th party at his residence.⁽²²⁾ His daughter had mentioned to his wife that he smelled funny. At that point, he decided to stop using marijuana.⁽²³⁾ He is aware that the use of marijuana is illegal.⁽²⁴⁾

On August 14, 2003, Applicant submitted a Security Clearance Application, Standard Form (SF) 86.⁽²⁵⁾ On this application, he disclosed he used marijuana from arch 1980 to June 2002. He also disclosed his 1973 drug arrest while in high school. He answered "No" in response to question 28. **"Your Use of Illegal Drugs and Drug Activity - Use in Sensitive Positions.** Have you EVER illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official; while possessing a security clearance; or while in a position directly and immediately affecting public safety?" He also answered "No" in response to question 32. **"Your Investigation Record - Clearance Actions.** To your knowledge have you ever had a clearance or access authorization denied, suspended, or revoked, or have you ever been debarred from government employment? (Note: An administrative downgrade or termination of a security clearance is not a revocation.)."⁽²⁶⁾

At hearing, Applicant testified that he never used marijuana while in the Navy after he went to Captain's Mast in 1975.⁽²⁷⁾ Aside from his use of marijuana while in the Navy, he states he never used marijuana while possessing an active security clearance.⁽²⁸⁾ He answered "No" to question 28 because he claims that he never used illegal drugs while possessing a security clearance. He answered "No" to question 32 because when he was removed from PRP status in 1975, he thought his removal from a TOP SECRET to a SECRET clearance was an administrative downgrade rather than a denial of access, suspension or revocation.⁽²⁹⁾

At hearing, the Vice President of Operations of Applicant's company testified. He has known Applicant since 1992.⁽³⁰⁾ He worked with him in his prior company. He indicated that the company now has a random drug testing policy and all employees are subject to random drug testing.⁽³¹⁾ He described Applicant as honest and dependable.⁽³²⁾ Applicant disclosed his 1998 to 2000 marijuana use to his business partners in 2000 when they were starting the new business.⁽³³⁾

The witness was surprised to learn that Applicant's last drug use occurred in 2002 but it does not alter his view of him. (34) Applicant did not disclose his 2000 to 2002 marijuana use to his business partners. He states he had only used marijuana a couple of times after starting the company. (35)

POLICIES

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." (36) In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch.

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. The adjudicative guidelines at issue in this case are:

Guideline H - 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. (37)

Guideline E - 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. (38)

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to this adjudicative guideline, are set forth and discussed in the conclusions below.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." (39) An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. (40) An administrative judge should consider the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for

pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.⁽⁴¹⁾

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information.⁽⁴²⁾ Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts.⁽⁴³⁾ An applicant has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance. Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.⁽⁴⁴⁾

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant.⁽⁴⁵⁾ It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards to include the whole person factors in the Directive.

Guideline H - Drug Involvement

While not a habitual user, Applicant used illegal drugs (marijuana) from 1969 to New Year's 1979. He applied for a security clearance a few months later in April 1979. He indicated in a signed sworn statement that he no longer intended to use marijuana. He quit using marijuana for approximately 20 years. In 1998, while in his mid-forties, he resumed using marijuana on a social basis over a period of approximately four years. When he used marijuana, he was aware that marijuana use is illegal. Under the Drug Involvement Guideline, Disqualifying Condition (DI DC) E2.A8.1.2.1: (*Any drug abuse*) applies. Drug abuse is defined as the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.⁽⁴⁶⁾

DI DC E2.A8.1.2.2: (*Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution*) applies since in order to use marijuana, Applicant would have to possess it at some point. In addition, he purchased marijuana on several occasions while in high school although this occurred in the distant past.

Security concerns based on possession and use of illegal drugs can be mitigated. I find that Drug Involvement Mitigating Condition (DI MC) E2.A8.1.3.1: (*The drug involvement was not recent*) applies since there is no evidence indicating marijuana use since July 2002. However, considering Applicant's history of illegal drug use and his decision to use marijuana despite his expressed intentions never to use marijuana back in 1979, a security concern remains under Guideline H. His drug involvement cannot be considered isolated since he used marijuana on more than one occasion, in fact, over a period of several years. As such DI MC E2.A8.1.1.2: (*The drug involvement was an isolated or aberrational*

event) does not apply.

Although Applicant states he stopped using marijuana in July 2002 and has no intention of using marijuana again, I give less weight to his intentions since he has failed to follow his expressed intentions never to use illegal drugs previously. Although he abstained from the illegal use of marijuana for approximately 20 years, he resumed using marijuana in 1998. This was not a one time lapse in judgment. He used marijuana at least 10 to 15 times over a four year period. When he started his new business in 2000, he disclosed his marijuana use to his business partners but continued to secretly use marijuana for another two years. DI C E2.A8.1.3.3 (*A demonstrated intent not to abuse any drugs in the future*) does not apply. There is insufficient information in the record to overcome the fact that Applicant violated his promise to abstain from marijuana use. His expressed intentions bear little weight the second time. He has not mitigated the drug involvement security concern. I find Guideline H against Applicant.

Guideline E - Personal Conduct

I conclude the government did not establish a prima facie case with respect to the Guideline E allegations. It is alleged Applicant deliberately falsified his August 14, 2003, security clearance application in response to question 28 by not listing that he used illegal drugs while possessing a security clearance. Although he did not list his illegal drug use while possessing a security clearance when he was on active duty, he had disclosed this information during past investigations in 1988 and 1989. I do not find his omission of his marijuana use while in the Navy on his August 2003 security clearance application material since the government was already on notice about this conduct. As to the marijuana use in 1979 and between 1998 to 2002, there is nothing in the record evidence indicating he held an active security clearance during these periods of marijuana use.

With respect to Applicant's failure to list in response to question 32 that his TOP SECRET access was revoked in 1976 upon being disqualified for duty under the Nuclear Weapons Personnel Reliability Program, I find credible his explanation that he thought his movement from a TOP SECRET position to a SECRET position was an administrative downgrade. The removal from PRP status is a separate action from a security clearance revocation. When removed from PRP status, he moved to a new position that required only a SECRET clearance. Question 31 specifically states that an administrative downgrade is not a revocation. I find that it is reasonable to conclude that he thought that he was administratively downgraded. Since he had provided the government with information on his removal from PRP in prior investigations in 1988 and 1989, I find such omission to be immaterial since he had already disclosed this information to the government.

I find there was no intention on Applicant's part to deceive when he filled out his security clearance application. In fact, the alleged omissions in response to questions 28 and 32 are immaterial since he had previously provided the information in prior security clearance applications. I find for Applicant under Guideline E.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

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: For Applicant

Subparagraph 1.f: For Applicant

Subparagraph 1.g: Against Applicant

Subparagraph 1.h: Against Applicant

Subparagraph 1.i: Against Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For 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.

ERIN C. HOGAN

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended.
2. Tr. at 45-47.
3. Tr. at 44-45.
4. Gov. Ex. 5 at 1.
5. Gov. Ex. 9 and 10.
6. *Id.*
7. Gov. Ex. 3, 4, 5, 6, 8, 9, 10 and 11.
8. Gov.Ex. 5 at 1.
9. Gov. Ex. 9, 10 and 12.
10. Gov.Ex. 12, 13; AE J.
11. AE G and H.
12. Gov. Ex. 1 at question 11.
13. Gov. Ex. 6.
14. Gov Ex. 5.
15. Gov. Ex. 10.
16. Gov. Ex. 9.
17. Tr. at 66.
18. Tr. at 66.
19. Tr. at 86-87.
20. Gov. Ex. 1; Tr. at 90.

21. Tr. at 67.
22. Tr. at 67-68.
23. Tr. at 68.
24. Tr. at 95.
25. Gov. Ex. 1.
26. *Id.*
27. Tr. at 59.
28. Tr. at 66.
29. Tr. at 76, 83.
30. Tr. at 25.
31. Tr. at 27-28.
32. Tr. at 29-30.
33. Tr. at 30-31; 96-97.
34. Tr. at 31.
35. Tr. at 96-97.
36. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).
37. Directive ¶ E2.A8.1.1.
38. Directive ¶ E2.A5.1.1.
39. Directive ¶ E2..2.1.
40. *Id.*
41. *Id.*
42. Directive ¶ E3.1.14.
43. Directive ¶ E3.1.15.
44. Directive ¶ E2.2.2.
45. Exec. Ord. 10865, § 7.
46. Directive ¶ E2.A8.1.1.3.