

DATE: September 19, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 04-09912

DECISION OF ADMINISTRATIVE JUDGE

ARTHUR E. MARSHALL, JR.

APPEARANCES

FOR GOVERNMENT

Ray T. Blank, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 33 years old and has worked for his current employer, a defense contractor, as both a janitor and an escort. On his 2003 security clearance application, Applicant denied recent drug use, then later made sworn statements that he had smoked marijuana through the late 1990s. He eventually conceded that he used the drug until 2003, and admitted that he had concealed this fact. Applicant failed to mitigate security concerns. Clearance is denied.

STATEMENT OF THE CASE

On November 3, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR). That SOR detailed reasons why, pursuant to Guideline H (Drug Involvement) and Guideline E (Personal Conduct), it could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant a security clearance for Applicant. In his responses, dated November 21, 2005, and November 22, 2005, ⁽¹⁾ Applicant admitted to the sub-allegations raised under the two guidelines contained in the SOR. Additionally, in a response dated December 5, 2005, he requested an administrative determination based on the written record in lieu of a hearing.

The Government's case was submitted on June 26, 2006. A complete copy of the file of relevant material (FORM) ⁽²⁾ was provided to Applicant on June 28, 2006. He was afforded the opportunity to file objections and submit evidence in refutation, extenuation, or mitigation. Applicant received the FORM on June 30, 2006, but declined to submit any responsive information within 30 days after receipt of the FORM. I was assigned the case on August 29, 2006.

FINDINGS OF FACT

Applicant's admissions to the sub-allegations set forth in the SOR are incorporated herein. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact:

Applicant is 33 years old and works for a federal defense contractor. He has been employed by his current employer since September 1999. During the course of this employment, Applicant has worked as a janitor and as an escort. He is single and has no children.

Starting around 1987, when he was approximately 15 years of age, Applicant began smoking marijuana. He purchased the drug for consumption and smoked it on at least a weekly basis. He often "smoked up to the equivalent of five joints, sometimes by [himself] and sometimes with a group."⁽³⁾ His drug usage was social and he did not use drugs at work. Additionally, for two to three months in the early 1990s, he also sold both marijuana and crack cocaine.⁽⁴⁾ In August 1997, he was diagnosed with a psychiatric condition and was treated through counseling and medication. As part of his treatment, he temporarily quit or reduced his use of marijuana.

A few months later, in October 1997, Applicant stopped taking his medication. This cessation led to a relapse eventually requiring in-patient treatment. During his relapse, he smoked marijuana on a few occasions. Following his relapse and treatment, he used marijuana occasionally through some time in 2003, when he quit using the drug.

On July 15, 2003, Applicant completed a Security Clearance Application (SF-86). In response to "**Question 27. Your Use of Illegal Drugs and Drug Activity - Illegal Use of Drugs** Since the age of 16 or in the last 7 years, which ever 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 prescriptions drugs?," he answered "no." Subsequently, in a sworn statement dated November 9, 2004, he admitted he had smoked marijuana since about the age of 15, but that he quit in October 1997. In a later sworn statement, dated May 16, 2005, Applicant stated that he had ceased smoking marijuana in early 1998. When responding to the SOR in November 2005, Applicant admitted that he had continued to smoke marijuana through 2003 and that he had concealed this fact "because [he] did not want to jeopardize [his] career since [he] felt it harmless . . . because it did not affect [his] performance or attendance at work."⁽⁵⁾

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁶⁾ The government has the burden of proving controverted facts.⁽⁷⁾ The burden of proof is something less than a preponderance of evidence.⁽⁸⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽⁹⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁰⁾

No one has a right to a security clearance⁽¹¹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹²⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽¹³⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an
⁽¹⁴⁾

applicant. 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.

Based upon consideration of the evidence, I find the following two adjudicative guidelines most pertinent to the evaluation of the facts in this case:

Guideline H - Drug Involvement. *The Concern:* 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. [\(15\)](#)

That guideline continues with the following definitions:

Drugs are defined as mood and behavior-altering substances, and include: [\(16\)](#) **Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens); and** [\(17\)](#) **[i]nhalants and other similar substances.** [\(18\)](#) **Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.** [\(19\)](#)

Moreover, consideration must be given to 10 U.S.C. 986. Under that statute, any person who is an unlawful user of, or is addicted to, a controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), is disqualified from being granted a security clearance.

Guideline E - Personal Conduct. *The Concern:* 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. [\(20\)](#)

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

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all legal precepts, factors, and conditions, I find the following with respect to the allegations set forth in the SOR:

Drug Involvement

With respect to Guideline H (Drug Involvement), the Government has established its case. Applicant admits that he has purchased marijuana, and that he illegally used marijuana from the time he was a teenager until sometime in 2003. He also concedes that he sold both marijuana and crack cocaine in the 1990s. Such facts raise security concerns with regard to Drug Involvement Disqualifying Conditions (DI DC) E2.A8.1.2.1 (*[a]ny drug abuse*) [\(21\)](#)

and DI DC E2.A8.1.2.2 (*[i]llegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution*).

When the Government's initial burden has been met and disqualifying conditions raised, the burden shifts to the Applicant to go forward with evidence in rebuttal, explanation, or mitigation which is sufficient to overcome or outweigh the Government's case. Here, the facts indicate that Applicant has not used marijuana since 2003, therefore Drug Involvement Mitigating Condition (DI MC) E2.A8.1.3.1 (*[t]he drug involvement was not recent*) may apply. Prior to that, however, Applicant was a regular abuser of marijuana for approximately 15 years. Consequently, DI MC E2.A8.1.3.2 (*[t]he drug involvement was an isolated or aberrational event*) does not apply.

Applicant did not supplement the record with many facts about himself, therefore, the record includes little information which might tend to mitigate security concerns. Specifically, he did not submit any facts or information regarding his

future intentions regarding drug usage or explain whether he received any counseling or treatment for his drug use. Therefore, neither DI MC E2.A8.1.3.3 (*[a] demonstrated intent not to abuse any drugs in the future*) nor DI MC E2.A8.1.3.4 (*[s]atisfactory 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*)⁽²²⁾ applies.

Based on Applicant's own submissions, he admits all the allegations regarding drug involvement. The only mitigating fact raised is that he has refrained from marijuana usage for approximately three years. Three years of abstinence alone, in light of all the facts presented, is not sufficient to mitigate security concerns.⁽²³⁾

Personal Conduct

The SOR alleges that Applicant deliberately falsified material facts regarding his drug use on his SF-86 and two subsequent sworn statements. Specifically, the government points to Applicant's failure to disclose prior drug use on his 2003 SF-86, and his subsequent concealment in two sworn statements that his drug use had continued into 2003. Applicant admits these allegations are true. Consequently, Personal Conduct Disqualifying Condition E2.A5.1.2.2 (*[t]he 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.

Applicant conceded that he actively concealed the fact that his marijuana usage continued beyond 1997 and 1998 until 2003 because he thought his occasional use was harmless and because he thought that an honest disclosure would jeopardize his career. The concealment of such a fact demonstrates bad judgment and a lack of candor. It also raises genuine questions regarding his trustworthiness and reliability. Under these facts, none of the Personal Conduct Disqualifying Conditions apply, and security concerns raised by Applicant's concealment remain.

I have considered both the record evidence and Applicant in light of the "whole person" concept. Applicant is a mature young man who has honestly admitted that he used marijuana in the past, and that he concealed the recency of his cessation of that drug because he feared it would jeopardize his career. Perhaps with more facts or explanation, Applicant could mitigate the security concerns raised. Based on his submissions, however, those concerns remain. In these matters, the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials. Consequently, Guideline H and Guideline E are decided against Applicant.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.2.5 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

Paragraph 2, Guideline E: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against 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 a security clearance for Applicant. Clearance is denied.

Arthur E. Marshall, Jr.

Administrative Judge

1. Applicant's admissions are expressed on a copy of the SOR by handwritten notations, dated November 22, 2005, and in a typed letter of explanation, dated November 21, 2005.
2. ⁰ The Government submitted seven items in support of its case.
3. Item 5 (Applicant's Statement, dated November 9, 2004) at 3.
4. *Id.*, see also Applicant's Response to SOR, dated November 21, 2005.
5. Applicant's Response to the FORM, *supra*, note 4.
6. ISCR Case No. 96-0277 at 2 (App Bd Jul 11, 1997).
7. ISCR Case No. 97-0016 at 3 (App Bd Dec 31, 1997), Directive, Enclosure 3, ¶ E3.1.14.
8. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
9. ISCR Case No. 94-1075 at 3-4 (App Bd Aug 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.
10. ISCR Case No. 93-1390 at 7-8 (App Bd Jan 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.
11. *Egan*, 484 U.S. at 531.
12. *Id.*
13. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
14. Executive Order 10865 § 7.
15. Directive, Enclosure 2, ¶ E2.A8.1.1.1.
16. Directive, Enclosure 2, ¶ E2.A8.1.1.2.
17. *Id.* at ¶ E2.A8.1.1.2.1.
18. *Id.* at ¶ E2.A8.1.1.2.2.
19. *Id.* at ¶ E2.A8.1.1.3.
20. Directive, Enclosure 2, ¶ E2.A5.1.1.
21. As noted *supra*, footnote 19, "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." Marijuana is a drug. See ¶ E2.A8.1.1.2.1, *supra*, footnote 17.
22. Consideration of this mitigating condition is not intended to be an indication that Applicant's past abuse of

marijuana necessarily warrants or warranted a prescribed drug treatment program.

23. Regarding 10 U.S.C. 986, there is no evidence that Applicant is either currently using marijuana or addicted to that or any other illegal substance.