

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant tested positive for marijuana in 1985 while serving in the United States Air Force and holding a clearance. He was sanctioned through Article 15 proceedings as a result of the incident. He was also convicted of alcohol-related disorderly conduct in 1987, and charged with a felony offense resulting from a domestic matter in 1992. The felony charge was later dismissed. Applicant did not disclose these matters or his past use of marijuana on his Security Clearance Application (SF 86). Applicant failed to mitigate the security concerns raised by his personal and criminal conduct. Clearance is denied.

CASENO: 04-11549.h1

DATE: 02/15/2006

DATE: February 15, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-11549

DECISION OF ADMINISTRATIVE JUDGE

DAVID S BRUCE

APPEARANCES

FOR GOVERNMENT

Richard A. Stevens, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant tested positive for marijuana in 1985 while serving in the United States Air Force and holding a clearance. He was sanctioned through Article 15 proceedings as a result of the incident. He was also convicted of alcohol-related disorderly conduct in 1987, and charged with a felony offense resulting from a domestic matter in 1992. The felony charge was later dismissed. Applicant did not disclose these matters or his past use of marijuana on his Security Clearance Application (SF 86). Applicant failed to mitigate the security concerns raised by his personal and criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

On January 14, 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 Review Program*, dated January 2, 1992, as amended and modified (Directive), issued a Statement of Reasons (SOR) to Applicant alleging facts that raise security concerns addressed in the Directive under Guideline E - Personal Conduct, and Guideline J Criminal Conduct. The SOR detailed why DOHA could not preliminarily determine under the Directive that it is clearly consistent with the national interest to grant or continue Applicant's request for a security clearance. By his answer to the SOR executed January 28, 2005, Applicant admitted with explanations the allegations of subparagraphs 1.a. - 1.e. of the SOR, and denied the allegation of subparagraphs 2.a., and requested a hearing before an administrative judge.

The case was assigned to me on October 3, 2005, and I conducted the hearing on October 27, 2005. The government submitted exhibits (GE) 1 through 4, which were admitted without objection. Applicant testified at the hearing along with one other witness, and offered exhibits (AE) A through D, also admitted without objection. DOHA received the hearing transcript (Tr.) on November 9, 2005.

FINDINGS OF FACT

Applicant's admissions to the allegations of the SOR are incorporated herein by reference. In addition, after a thorough review of the pleadings, transcript, and exhibits, I make the following findings of fact:

Applicant is 45 years old and has been married three times. He has one son, age 18, who is presently enrolled in college. It is unclear exactly when Applicant was married to his first wife. He was married to his second wife from 1988 until 1990, and married his present wife in November 1992.⁽¹⁾

He served in the United States Air Force (USAF) from October 1982 until February 1986, and was honorably discharged at paygrade E-2.⁽²⁾ In 1985, Applicant tested positive for marijuana during routine urinalysis drug testing while on active duty when he held a security clearance.⁽³⁾ He was sanctioned through Article 15 proceedings under the Uniform Code of Military Justice for the incident.⁽⁴⁾ In the opinion of Applicant, this incident ultimately led to him getting out of the Air Force, along with personal problems he was experiencing with his wife at the time.⁽⁵⁾ Applicant received counseling for depression through the USAF as a result of the incident.⁽⁶⁾

Applicant held various private jobs since he was discharged from the USAF.⁽⁷⁾ In 2000 and 2001, he participated in electronics systems training for about ten months and received a vocational certificate in January 2001.⁽⁸⁾ He endured a period of unemployment at the same time for about ten months before securing his present position,⁽⁹⁾ but received social security disability benefits during the same period.⁽¹⁰⁾

He has been employed by a federal contractor as a junior systems administrator since April 2001. He was laid off in October 2005 due to his pending security clearance application.⁽¹¹⁾ He is highly regarded by his supervisors at work and is generally considered reliable, trustworthy and dependable, and an outstanding employee.⁽¹²⁾

Applicant used marijuana intermittently while in the Air Force at least in 1985 and 1986, and again in 2000. His use of the drug has typically paralleled periods when his anxiety problems have been more compelling. He has never been involved in the sale, distribution, or cultivation of the drug.⁽¹³⁾

In 1987, Applicant was charged and convicted of being drunk and disorderly and playing loud music in public. He paid fines for these offenses. [\(14\)](#)

As a result of a domestic matter involving his present wife in May 1992, about six months before they were married, Applicant was arrested and charged with threatening to bomb, burn, or destroy their residence, a felony charge. With input and cooperation from his wife, the charges were ultimately dismissed. [\(15\)](#)

Applicant has regularly taken prescribed medication for his anxiety disorder since 1995. [\(16\)](#) He has also been seeing a counselor for therapy since July 2000 when his symptoms worsened, and he presently goes to counseling about twice per month. He has been able to work successfully with his present condition, [\(17\)](#) demonstrated by the positive performance appraisals he has received from his employer the last three years. [\(18\)](#)

Applicant completed a Personnel Security Questionnaire (DD Form 48) on October 20, 1988. As to Question 15a concerning use of any narcotic drug including marijuana, he failed to disclose he used marijuana at least in 1985 and 1986. [\(19\)](#)

Applicant's Security Clearance Application (SF 86) is dated May 29, 2001. As to Question 21 concerning his police record for felony offenses, he failed to disclose he was arrested and charged with threatening to bomb, burn, or destroy residential property in 1992. [\(20\)](#)

As to Question 24 concerning his police record for alcohol and drug offenses, Applicant failed to disclose he was sanctioned through Article 15 proceedings in 1985 for wrongful use of marijuana while on active duty with the USAF. He also did not disclose he was charged and convicted in 1987 for drunk and disorderly conduct and playing loud music in public for which he was ordered to pay a fine. [\(21\)](#)

As to Question 27 concerning his use of illegal drugs in the preceding seven years, Applicant failed to disclose he used marijuana at least twice in 2000. [\(22\)](#)

As to Question 28 concerning his use of illegal drugs at anytime while possessing a security clearance or serving in a sensitive position, Applicant did not disclose he used marijuana when serving in the Air Force in 1985 while holding a

clearance. [\(23\)](#)

POLICIES

Enclosure 2 of the Directive, *Adjudicative Guidelines For Determining Eligibility For Access To Classified Information*, sets forth the criteria which must be evaluated when determining security clearance eligibility. The adjudicative guidelines specifically distinguish between those factors that are considered in denying or revoking an employee's request for access to classified information (Disqualifying Conditions), together with those factors that are considered in granting an employee's request for access to classified information (Mitigating Conditions). By acknowledging that individual circumstances of each case are always different, the guidelines provide substantive standards to assist an administrative judge in reaching fair and impartial common sense decisions.

The adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at well-informed decisions. Section E2.2. of Enclosure 2 of the Directive describes the essence of scrutinizing all appropriate variables in a case as the "whole person concept." In evaluating the conduct of the applicant and the circumstances in any case, the factors an administrative judge should consider pursuant to the concept are: (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 the 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.

Protecting national security is the paramount concern in reaching a decision in any case, and is dependent upon the primary standard that issuance of a clearance must be clearly consistent with the interests of national security. Granting an applicant's clearance for access to classified information is predicated on a high degree of trust and confidence in the individual. Accordingly,

decisions under the Directive must include consideration of not just the *actual* risk of disclosure of such information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information in any aspect of his or her life. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information. [\(24\)](#) The decision to deny a security clearance request to an individual is not necessarily a determination of the loyalty of the applicant. [\(25\)](#) It is merely an indication the applicant has not met the strict guidelines established by the Department of Defense for issuing a clearance.

In accordance with the Directive, the government bears the burden of proof in the adjudicative process to first establish conditions by substantial evidence which indicate it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. [\(26\)](#) The legal standard for the burden of proof is something less than a preponderance of the evidence. [\(27\)](#) When the government meets this burden, the corresponding heavy burden of

rebuttal then falls on the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the position of the government, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance. [\(28\)](#)

Upon consideration of all the evidence submitted in this matter, the following adjudicative guidelines are appropriate for evaluation with regard to the facts of this case:

Guideline E - Personal conduct is a security concern because conduct involving questionable judgment, trustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Guideline J - Criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

CONCLUSIONS

I have thoroughly considered all the facts in evidence in this case and the legal standards required by the Directive. The government has established its case for disqualification under Guideline E - Personal Conduct. Based on all the evidence, Personal Conduct Disqualifying Condition (PC 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 in this case. Applicant was aware when he completed his Personnel Security Questionnaire (DD Form 48) on October 20, 1988, he had used marijuana in the past, and particularly in 1985 while serving in the Air Force. His use at the time was not incidental. It was discovered through random drug testing performed by the Air Force for which Applicant was punished through Article 15 proceedings. He acknowledged the event was a contributing factor in his decision to voluntarily resign from the military in 1986. It is not reasonable to believe he had forgotten about it when he completed either the DD Form 48 or SF 86 questionnaires.

He was also aware in 2001 when he completed his SF 86 he had been arrested on serious charges brought about by a domestic argument he had with his current wife shortly before they were married in 1992. She called the police when the incident occurred. [\(29\)](#) He was subsequently arrested on felony charges following the incident and taken away from his job. [\(30\)](#) Even though the charges were dismissed, he was still required to appear in court before a judge to appropriately resolve the case. [\(31\)](#)

Applicant was also convicted of charges resulting from the 1987 disorderly conduct matter. He spent the night in jail when he was arrested and he recalled many details concerning the incident when he testified at the hearing.⁽³²⁾ It is inconceivable Applicant had simply forgotten about these three events. He also vividly remembered the context of his use of marijuana in 2000 when he testified at the hearing.⁽³³⁾ His personal drug use and prior contacts with the criminal justice system were readily apparent to him when he completed the application. It is reasonable to infer that he thought disclosure of such information might negatively impact his security clearance application. One objective of the security clearance process is to determine all relevant and material information concerning an applicant. Based upon truth and honesty, the process requires full and open disclosure by the applicant of all requested information. Any intentional misrepresentation or omission by an applicant raises serious concerns about the character and overall integrity of the individual. The government's evidence and Applicant's admissions constitute substantial evidence of a disqualifying condition under Guideline E.

I have considered all the Personal Conduct Mitigating Conditions (PC MC), and specifically PC MC E2.A5.1.3.3. (*The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*) and conclude it does not apply. Applicant had an affirmative obligation to determine the true status of all information requested on his DD Form 48 and SF 86 applications, and to fully provide and disclose complete and accurate answers to each item of the questionnaires. Questions 21 and 24 of the SF 86 are clear. Disclosure of the charges against him is not predicated on whether or not he was convicted of the offense. The questions concerning drug use are also clear. Applicant has used marijuana during stressful times of his life. He was quite familiar with the security clearance process having been involved with it while he was in the Air Force. After submitting his SF 86 in May 2001, Applicant did not meet with a Defense Security Service investigator until a year later. He made no attempt during that year to reconsider his responses and properly disclose the correct information. When confronted, he stated he did not know why he omitted the information about his drug use and criminal history, and presented no justification for his behavior. The omissions concerning his drug use are particularly troublesome even though he has not used drugs recently. As sometimes happens, the intentional omission of critical information by applicants can be more detrimental than the actual activity. Simply being embarrassed about his past conduct does not sufficiently mitigate the security concerns. Considering all the circumstances, Applicant's candor and credibility are questionable given his personal circumstances and the seriousness and chronology of the events. Accordingly, Applicant has failed to successfully mitigate the personal conduct security concerns raised in this case.

The government has also established its case for disqualification under Guideline J - Criminal Conduct. Based upon all the evidence, Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1. (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*) applies in this case.⁽³⁴⁾ Title 18 U.S.C. § 1001, provides that knowingly and willfully submitting materially false, fictitious, or fraudulent information in any matter within the jurisdiction of the U.S. Government is a crime punishable by a fine and up to five years imprisonment. Applicant's conduct in deliberately omitting significant material information about his involvement with drugs and other matters required to be provided as a part of his DD Form 48 and SF 86 responses qualifies as serious uncharged criminal conduct within the meaning of Guideline J.

I have considered all the Criminal Conduct Mitigating Conditions (CC MC), and specifically CC MC E2.A10.1.3.6. (*There is clear evidence of successful rehabilitation*). I conclude none apply. It is commendable Applicant has abstained

from drug use since 2000 with strong support from his wife and continuing participation in therapy for his anxiety condition. He offered no meaningful justification, however, for his very questionable judgment, and lack of candor and honesty, in completing his security clearance documentation on two occasions. Applicant has recently illustrated a genuine commitment to pursue a positive lifestyle. Nevertheless, the long-term influence of his new lifestyle and full resolution of his anxiety issues is uncertain, and not enough time has passed to be confident he has achieved a full understanding of the psychological aspects of his circumstances. In the context of this matter, Applicant has failed to mitigate the criminal conduct security concerns raised in this case.

I have further reviewed all the record evidence under the "whole person" concept required by the Directive in evaluating Applicant's vulnerability in protecting our national security. An applicant with a good or even exemplary work history may engage in conduct that has negative security implications. Although Applicant's loyalty to the United States is not in question, I am persuaded by the totality of the evidence that it is not clearly consistent with the national interest to grant Applicant a security clearance. For the reasons stated, Applicant has not met the strict guidelines established for issuance of a clearance, and he has failed to mitigate the security concerns regarding his personal and criminal conduct. Accordingly, Guidelines E and J are decided against Applicant.

FORMAL FINDINGS

In accordance with Section E3.1.25 of Enclosure 3 of the Directive, the following are the formal findings as to each allegation in the SOR:

Paragraph 1. Personal Conduct (Guideline E) AGAINST THE APPLICANT

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. Against the Applicant

Subparagraph 1.e. Against the Applicant

Paragraph 2. Criminal Conduct (Guideline J) AGAINST THE APPLICANT

Subparagraph 2.a. 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.

David S. Bruce

Administrative Judge

1. GE 1 (Applicant's Security Clearance Application (SF 86) dated May 29, 2001), at 1 and 3. Note: Applicant did not reference his first wife in his SF 86. She was mentioned by name only in the Personnel Security Questionnaire he signed on September 7, 1983, and the Personnel Security Questionnaire (DD Form 48) he executed on October 20, 1988.

2. *Id.* at 4.

3. GE 4 (Applicant's sworn statement dated May 2, 2002), at 3. See also Tr. at 33-34.

4. Tr. at 49.
5. *Id.* at 34-35.
6. GE 4, *supra* note 3, at 3.
7. GE 1, *supra* note 1, at 2-3.
8. *Id.* at 2.
9. *Id.*
10. GE 4, *supra* note 3, at 4. Note: Applicant indicated in his sworn statement to a Defense Security Service Special Agent on May 2, 2002, he received Social Security disability benefits for about eight months during the same period he was participating in vocational training. The implied contradiction of successfully completing challenging electronics training at a time he was receiving disability benefits as a result of an anxiety disorder was not addressed at the hearing.
11. Tr. at 22-23.
12. AE B-D (Annual Employee Performance Appraisals from April 2002 to April 2005).
13. GE 4, *supra* note 3, at 3. See also Tr. at 28-29.
14. *Id.* at 2.
15. *Id.* See also Tr. at 31-32 and 40-42.
16. *Id.* at 4.
17. *Id.* See also Tr. at 26-27.
18. AE B-D, *supra* note 12.
19. GE 2 (Personnel Security Questionnaire (DD Form 48) dated October 20, 1988), at 2.
20. GE 1, *supra* note 1, at 6.
21. *Id.*
22. *Id.* at 7.
23. *Id.*
24. Directive, Enclosure 2, Para. E2.2.2.
25. Executive Order 10865 § 7.
26. ISCR Case No. 96-0277 (July 11, 1007) at p. 2.
27. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
28. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Para. E3.1.15.
29. Tr. at 40-42.
30. *Id.* at 51.

31. *Id.* at 52-53.

32. *Id.* at 36-38.

33. *Id.* at 49-51.

34. It is noted that Applicant's Article 15 matter in 1985, his conviction on disorderly conduct charges in 1987, the domestic incident in 1992, and his involvement with illegal drugs are not specifically referenced as allegations under paragraph 2 of the SOR. Accordingly, I have not considered Applicant's arrests, convictions, or history of drug involvement, as potentially disqualifying conditions under Guideline J.