

KEYWORD: Drugs; Personal Conduct

DIGEST: From the late 1970s to at least 2002, Applicant used marijuana on an occasional basis. From 1988 until about the middle 1990s, Applicant used the drug while holding a security clearance. At age 42, in April 2002, Applicant deliberately omitted his drug use and criminal record from his security clearance application (SCA). The long period of marijuana use and the deliberate omission of his drug use and criminal record from the SCA have not been mitigated. Clearance is denied.

CASENO: 04-12954.h1

DATE: 03/31/2006

DATE: March 31, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-12954

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

From the late 1970s to at least 2002, Applicant used marijuana on an occasional basis. From 1988 until about the middle 1990s, Applicant used the drug while holding a security clearance. At age 42, in April 2002, Applicant deliberately omitted his drug use and criminal record from his security clearance application (SCA). The long period of marijuana use and the deliberate omission of his drug use and criminal record from the SCA have not been mitigated. Clearance is denied.

STATEMENT OF CASE

On July 21, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, amended April 4, 1999, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

Applicant furnished his answer to the SOR on September 1, 2005. Applicant elected to have his case decided on a written record. The government provided Applicant a copy of the File of Relevant Material (FORM) on November 2, 2005. Applicant received the FORM on November 18, 2005. His response to the FORM was due by December 18, 2005. No response was received. The case was assigned to me on January 23, 2006.

FINDINGS OF FACT

The SOR alleges drug involvement (Guideline H) and personal conduct (Guideline E). Applicant admitted all factual allegations except for subparagraph 2.c., where he explained he did not have enough room on the form to furnish a full explanation. Applicant is 45 years and has been employed as a repair technician by a defense contractor since April 1981. He seeks a secret security clearance. He has held a confidential security clearance since 1988.

Drug Involvement. On April 14, 2004, Applicant provided a sworn statement (Item 5) about his drug use. Applicant's primary drug of choice has been marijuana. He began using the drug in the late 1970s on an occasional basis. He did not go into any detail about his current use of marijuana because of allegations his former wife had lodged against him (time undisclosed) for allegedly using marijuana with his son. Applicant did recount an incident in 1996 when he was using marijuana in the garage of his house when his son appeared and asked him if he was using marijuana. Applicant cautioned his son that if the latter was going to use the drug, he should use it at home and not in public. Applicant then left the garage without taking the paraphernalia and marijuana. When he returned to the garage, the marijuana had been used, persuading Applicant to believe his son had used the marijuana.

When asked again by the investigator about his marijuana use since 1996, Applicant stated, "I have continued to smoke marijuana occasionally on the weekends since 1996. I have not used marijuana during the work week since the mid-1990s." Applicant declined to identify his last use of marijuana, and would not answer the question about his future intentions regarding drug use.

In April 2005, Applicant provided answers to interrogatories (Item 4) asking him to describe the nature and scope of his drug use. While he declined to reveal his last date of drug use in his earlier sworn statement, in his answers to the interrogatories he said his last use was in 2002. In his sworn statement he declined to discuss his future drug use, but in his interrogatory answers, he stated

he decided to quit about five years earlier as apart of his maturation process after turning 40 years old.

Applicant cited "decent evaluations" as evidence of his good job performance since 1981. He furnished no additional character evidence or information about his drug use.

Personal conduct. On April 15, 2002, Applicant provided information in a security clearance application (SCA). In response to question 27 (drug use since 16 or in the last 7 years), Applicant answered "no." In response to question 28 (drug use while possessing a security clearance), Applicant answered "no." In response to question 26 (arrested, charged or convicted of any offense not listed in modules 21, 22, 23, 24, or 25), Applicant answered "no." Applicant acknowledged the answers to questions 27 and 28 were false. The lack of room to provide a complete explanation was the explanation for his "no" answer to question 26 of the SCA.

POLICIES

Enclosure 2 of the Directive sets forth guidelines containing disqualifying conditions (DC) and mitigating conditions (MC) that should be given binding consideration in making security clearance determinations. These conditions must be considered in every case along with the general factors of the whole person concept. However, the conditions are not automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense.

Burden of Proof

Initially, the government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualifies, or may disqualify, the applicant from being eligible for access to classified information. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988) "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *See Egan*, 481 U.S. at 531; *see* Directive E2.2.2.

Drug Involvement

Illegal drug use may impair an individual's occupational functioning, thereby increasing the risk the individual may commit a security violation.

Personal Conduct (PC)

Conduct involving poor judgment or dishonesty indicates the person may not have the qualifications to safeguard classified information .

CONCLUSIONS

Drug involvement (DI). Since compliance with security regulations is an around-the-clock duty, an individual's activities away from work are also potentially relevant in determining his security suitability. If an individual chooses to violate the law to satisfy his own interests, then he is not a suitable candidate to hold a security clearance. Applicant's occasional marijuana use from the late 1970s to at least 2002 requires the invocation of DI disqualifying condition (DC) E2.A8.1.2.1. (*any drug use*) and DI DC E2.A8.1.2.2. (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, and distribution*). Applicant has purchased and used marijuana for about 23 years on an occasional basis. For approximately seven years of the 23-year-period, Applicant used marijuana while possessing a security clearance.

Conditions that could mitigate the security concerns of Applicant's long history of drug use under the DI guideline are: DC mitigating condition (MC) E2.A8.1.3.1. (*the drug involvement was not recent*); DI MC E2.A8.1.3.2. (*the drug involvement was an isolated or aberrational event*); and, DI MC E2.A8.1.3.3. (*a demonstrated intent not to abuse any drugs in the future*). E2.A8.1.3.1. may have applied to these circumstances had Applicant not been ambiguous in describing his use since 1996. Applicant's unequivocal statements in April 2004 that (1) he had continued to use marijuana occasionally since 1996, (2) he declined to identify his last use, and (3) he would not disclose whether he would use drugs in the future, provides a credible inference Applicant used marijuana more recently than 2002. DI MC E2.A8.1.3.1. is not applicable. The frequency of use and 23-year-history of marijuana use renders DI MC E2.A8.1.3.2 inapplicable to the circumstances. Though Applicant stated in April 2005 he did not intend to use drugs in the future because he had matured, I do not find his claim believable. It seems reasonable to conclude that if he had decided to quit using drugs around 2000 for maturity reasons, then this information would have been logically included in his sworn statement furnished a year earlier. Yet, in the 2004 statement he indicated he had continued to use marijuana after 1996, and would not reveal his future intentions for the drug. Having weighed the April 2005 answers to interrogatories against the April 2004 statement, and Applicant's drug use for approximately 7 years while holding a security clearance, Applicant has not presented credible evidence to support his intention to abstain as required under DI MC E2.A8.1.3.3. I find against Applicant under the DI guideline.

Personal conduct (PC). The security investigation is conducted to determine whether the aspirant has the qualifications to possess a security clearance. One of those qualifications is honesty. If the applicant has not been honest and forthright during the investigation, he probably is not a suitable candidate for access to classified information. Applicant's deliberate omission from his SCA in April 2002 falls within the scope of PC DC E2.A5.1.2.2. *(the deliberate omission of relevant and material facts from any personnel security questionnaire to determine security eligibility)* as Applicant admittedly concealed information about his drug use before, during and after he held a clearance (2.a.) and his drug use while holding a clearance (2.b.). While Applicant contends he did not supply information in response to question 26 (2.c.), his explanation does not pass the commonsense standard referred to in E2.2.3. of the Directive. He clearly had enough room to supply a "yes" or "no" answer, as he had entered these answers to all the other modules using the "yes" or "no" response format. Alternatively, he could have provided the information in question 43 which allows the applicant to provide additional information where necessary. I conclude Appellant did not reveal the criminal infractions for the same reasons he did not divulge his drug use. He feared he would lose his clearance and/or his job.

The first three mitigating conditions shall be discussed to determine whether there is sufficient evidence under one or more of them to outweigh the adverse evidence under PC guideline. PC MC E2.A5.1.3.1. *(the information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability)* does not apply because the Applicant admitted he deliberately concealed information from the SCA. Furthermore, an applicant's history of drug use is always relevant to his security suitability, particularly if he uses drugs while holding a security clearance. Though his omissions are considered isolated, they occurred less than three years ago, so PC MC E2.A5.1.3.2. *(the falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily)* does not apply. PC MC E2.A5.1.3.3. *(the individual made prompt, good-faith effort to correct the falsification before being confronted with the facts)* does not apply either. The investigator confronted Applicant with the missing information. There is no indication Applicant volunteered the missing information before he was confronted with the false entries in his SCA. The PC allegations are found against Applicant.

Having found against Applicant under the DI and PC guidelines, the evidence must still be evaluated under the whole person concept defined in E2.2 of the Directive. Given (1) Applicant's 23-year-history of marijuana use, (2) his use of the drug for about seven years while holding a security clearance, (3) his refusal to talk about the nature and scope of his use in April 2004, and (4) his decision not to disclose whether he would use marijuana in the future, Applicant has not met his burden of persuasion under the general factors of the whole person model found in E2.2.1. of the Directive.

FORMAL FINDINGS

Formal Findings required by Paragraph 25 of Enclosure 3 are:

Paragraph 1 (Drug Involvement, Guideline H): AGAINST THE APPLICANT.

Subparagraph 1.a. Against the Applicant.

Subparagraph 1.b. Against the Applicant.

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Paragraph 2 (Personal Conduct, Guideline E): AGAINST THE APPLICANT.

Subparagraph 2.a. Against the Applicant.

Subparagraph 2.b. Against the Applicant.

Subparagraph 2.c. 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.

Paul J. Mason

Administrative Judge