

DATE: November 21, 2006

---

In re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 05-01676

**DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL H. LEONARD**

**APPEARANCES**

**FOR GOVERNMENT**

Emilio Jaksetic, Esq., Department Counsel

**FOR APPLICANT**

David P. Price, Esq.

**SYNOPSIS**

Applicant has a history of periodic marijuana use since 1973; he used marijuana as recently as November 2004. He lied about his drug involvement in May 2002 when he completed a security-clearance application. He lied about his marijuana use in a sworn statement in June 2004 when he denied ever using marijuana. Applicant failed to present sufficient evidence to rebut, explain, extenuate, or mitigate the security concerns stemming from his marijuana use and his false statements. Clearance is denied.

**STATEMENT OF THE CASE**

Applicant is challenging the Defense Department's preliminary decision to deny or revoke his eligibility for a security clearance. Acting under the relevant Executive Order and DoD Directive, [\(1\)](#) on June 6, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) detailing the basis for its decision. The SOR-- which is in essence the administrative complaint--alleges security concerns under Guideline H for drug involvement and Guideline E for personal conduct (falsification). On July 25, 2005, Applicant replied to the SOR and indicated he did not wish to have a hearing. Subsequently, in March 2006, Applicant requested a hearing.

The case was assigned to an administrative judge on April 24, 2006, and then it was reassigned to a second administrative judge on June 20, 2006. The case was assigned to me August 9, 2006, and a notice of hearing was issued scheduling the case for October 18, 2006. Applicant appeared with counsel and the hearing took place as scheduled. I left the record open after the hearing to allow Applicant to submit additional documentary evidence. Without objections by department counsel, the following post-hearing matters are admitted: (1) English translations of Exhibits F, G, and H, which are in German; (2) Exhibit K, the translator's resume; and (3) Exhibit L, four character statements on behalf of Applicant. DOHA received the transcript October 31, 2006.

**FINDINGS OF FACT**

In general, I find, by substantial evidence, that the record evidence is sufficient to support the factual allegations in the SOR except as otherwise noted. In addition, I make the following findings of fact.

1. Applicant is a 47-year-old man who is employed as a technician. He is seeking to retain a security clearance for his employment with a federal contractor. He has worked overseas in Germany for defense contractors since about 1996.
2. Applicant married a German citizen in 1986. He and his spouse separated in about 1999 and they divorced in 2003. Applicant has no children, although he had a stepson by marriage.
3. After graduating from high school in 1977, Applicant worked a few years until he decided to enlist in the U.S. Army. He was a soldier from about 1980 until his retirement in 1995 when he took advantage of a 15-year early retirement program. When he retired, he was stationed in Germany and elected to stay there. While in the Army, he served in the signal corps and was trained as a radio teletype operator. As a result, Applicant was required to have a security clearance. When he retired, he held the grade of sergeant (pay grade E-5).
4. In 1984 he was stationed at an Army post in the United States and rented a room in a trailer house from another soldier. Local police searched the trailer house and found marijuana. Because Applicant was an occupant of the trailer house, he was arrested and charged with possession of marijuana with intent to distribute. Applicant hired a lawyer to represent him, and the owner admitted that the marijuana was his alone and Applicant was not involved. As a result, the case was dismissed. According to Applicant, the Army was aware of this matter because his first sergeant picked him up from jail. Also according to Applicant, the Army took no adverse action against him due to this incident.
5. In March 2001, based on a tip from a drug user, German Customs Police searched Applicant's residence in Germany. As he and his wife had separated in 1999, Applicant was living alone, although his stepson would stay there from time to time. The police found and seized the following items: (1) 0.1 gram of marijuana; (2) a precision scale; and (3) note paper. Applicant denies knowingly possessing marijuana and says it belonged to his stepson who kept it at Applicant's house. According to Applicant, the case was not prosecuted or dismissed, although the documentary evidence submitted by Applicant does not reflect disposition of the case (Exhibit I).
6. Applicant completed a security-clearance application in May 2002 (Exhibit 1). In signing it, he was required to certify that his statements were true, complete, and correct to the best of his knowledge and belief and made in good faith. Also, he acknowledged that a deliberately false statement on the application could be punished by a fine or imprisonment or both. Nowhere in his security-clearance application did Applicant indicate any involvement with marijuana. In particular, in response to Question 24, he denied ever being charged with or convicted of any offenses related to alcohol or drugs. And in response to Question 27, he denied illegally using any controlled substance, including marijuana, within the last seven years (since May 1995).
7. As part of the background investigation, Applicant was interviewed in June 2004 and the interview produced a written statement (Exhibit 4). In it, Applicant addressed the search of his home by German police in 2001. In doing so, he explained that the marijuana did not belong to him, that he did not use marijuana, and that he had not "ever used marijuana." Applicant signed the statement under the penalty of perjury and certified that it was true and correct.
8. The background investigation continued in January 2005 when Applicant was again interviewed. This time, Applicant confessed that he had been untruthful in his previous statements about his marijuana use. Also, he explained that he did so because he was concerned about his job and security clearance. In his written statement (Exhibit 5), Applicant admitted using marijuana on a periodic basis since about 1973:

I tried marijuana for the first time in about 1973 when friends shared it with me free of charge. I took a few puffs from a marijuana cigarette being passed around. It made me feel euphoric. I tried it because of curiosity and peer pressure. I used marijuana about three or four times a year from about 1973 to about 1980. My marijuana use decreased after 1980 when I joined the US Army (USA). I smoked marijuana socially when I was home on leave about three or four times between 1980 and 1983. I did not use any marijuana from 1983 to 1997. In 1997 and 1998, I used marijuana socially about three or four times. I have only smoked marijuana about five times from 1998 to Nov. 04. The last time I smoked marijuana was in late Nov. 04. I have not used marijuana from Nov. 04 to the present time. I may use marijuana occasionally in the future if I happen to be in good company and I want to indulge. I purchased marijuana only three or

four times between 1974 to 1980, paying about \$5.00 to make three or four cigarettes. Most of the marijuana I have used was provided to me by friends.

He denied any other involvement with illegal drugs, including the March 2001 involving the German police.

9. During the hearing, Applicant addressed his marijuana involvement and testified consistently with his January 2005 statement (R. 28-30). But in contrast to his January 2005 statement, Applicant said that he does not intend to use marijuana or any other illegal drugs in the future (R. 46).

10. In addition to his marijuana involvement, Applicant addressed the falsification allegations in his testimony. He admitted making a false statement when he denied using marijuana in response to Question 27 of his security-clearance application. Likewise, he admitted making a false statement when he denied ever using marijuana in his June 2004 statement. Concerning his denial to Question 24 about drug-related charges or convictions, he explained that he did not disclose his 1984 arrest and charge of possession of marijuana with intent to distribute because he was under the impression the Army was aware of it and because the charge was dismissed. In other words, Applicant believed that he was not required to report the 1984 drug-related charge.

11. Applicant submitted several character statements written by various people on his behalf (Exhibits A, B, C, D, E, F, and L). All these people speak highly of Applicant as an employee and friend.

## POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.<sup>(2)</sup> A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.<sup>(3)</sup> Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

## **BURDEN OF PROOF**

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(4)</sup> There is no presumption in favor of granting or continuing access to classified information.<sup>(5)</sup> The government has the burden of presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted.<sup>(6)</sup> An applicant is responsible for presenting witnesses and other evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>(7)</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(8)</sup>

No one has a right to a security clearance.<sup>(9)</sup> And as noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(10)</sup> Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

## **CONCLUSIONS**

### **1. The Drug Involvement Security Concern**

Under Guideline H,<sup>(11)</sup> a security concern may exist based on improper or illegal involvement with drugs. Improper or illegal involvement with drugs is relevant to an applicant's security worthiness for various reasons, including that drug abuse indicates unwillingness or inability to abide by the law and calls into question an individual's willingness or

ability to protect classified information.

Here, based on the record evidence, the government established its case under Guideline H. A security concern is raised by Applicant's history of marijuana involvement, which includes using it on a periodic basis since 1973 and making several small purchases of it. Given these circumstances, both DC 1 [\(12\)](#) and DC 2 [\(13\)](#) apply against Applicant. In making this determination, I gave little, if any, weight to the 1984 or 2001 incidents. Although substantial evidence is a low standard, the reliable, available information here does not convince me that Applicant knowingly possessed marijuana in either incident. The security concern here is Applicant's marijuana involvement is indicative of irresponsible behavior and poor judgment, and it calls into question his willingness or ability to protect classified information.

I considered the MCs under the guideline and conclude none apply in Applicant's favor. First, he used marijuana as recently as November 2004, which is too soon to be considered remote in time or not recent under MC 1. [\(14\)](#) Second, he used marijuana on a periodic basis from about 1973 to November 2004, a period of more than 30 years. Given these circumstances, his marijuana involvement cannot be considered an isolated or aberrational event under MC 2. [\(15\)](#) Third, given his periodic marijuana use over 30 years, his recent marijuana use in November 2004, his January 2005 statement wherein he said he might use marijuana again, and his multiple false statements (discussed below), Applicant may be keeping open the possibility of future marijuana use. Therefore, MC 3 [\(16\)](#) does not apply in his favor. To sum up, at this time, it is too soon to tell if Applicant's marijuana involvement is a thing of the past and will not recur.

## 2. The Personal Conduct Security Concern

Personal conduct under Guideline E [\(17\)](#) is always a security concern because it asks the central question: Does a person's past conduct justify confidence the person can be trusted to properly safeguard classified information. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the government when applying for a security clearance or in other official matters is a security concern. It is deliberate if it is done knowingly and willfully.

An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

Here, based on the record evidence as a whole, a security concern is raised under Guideline E. Applicant admits making a false statement in response to Question 27 when he did not disclose his marijuana use from about May 1995 to May 2002. Likewise, he admits making a false statement in June 2004 when he said he had not ever used marijuana. He denies, however, making a false statement when he did not disclose the 1984 drug-related charge in response to Question 24 of his application. And so, the issue is whether his answer to Question 24 was deliberately false. Applicant denies any intention to provide a false answer claiming that, under the circumstances, he did not think the matter had to be reported.

In assessing Applicant's credibility, I am mindful of the wisdom of the legal doctrine known as *falsus in uno, falsus in omnibus*, which literally means false in one thing, false in everything. The doctrine is typically applied to the testimony of a witness who, if he is shown to have sworn falsely in one detail, may be considered unworthy of belief as to all the rest of his evidence. Here, it has been established that Applicant made false statements when he completed his security-clearance application (Question 27) and when he was initially interviewed (Exhibit 4). Given that Applicant twice swore falsely about his marijuana involvement, it is wholly appropriate to apply the doctrine and not believe his explanation. Accordingly, I conclude Applicant deliberately provided a false answer in response to Question 24 when he failed to disclose the 1984 drug-related charge.

The record evidence shows Applicant deliberately provided false answers to Questions 24 and 27, and he lied about his marijuana use in a sworn statement made during his background investigation. [\(18\)](#) His three false statements show questionable judgment, lack of candor, unreliability, and untrustworthiness.

I reviewed the MCs under the guideline and conclude none apply. Making false statements during the security-clearance

process is a serious matter, not easily explained away, extenuated, or mitigated.

### 3. The Whole-Person Concept

I have also considered the available information in light of the whole-person concept. In doing so, the following matters justify comment. First, since about 1980 when he joined the Army, Applicant was an adult who understood the nature of the activity (marijuana use) and the potential consequences. Also, he was certainly a mature, seasoned adult when he completed his security-clearance application in 2002.<sup>(19)</sup> In other words, his marijuana use and false statements were not the product of youth or inexperience. Second, the circumstances surrounding his marijuana use<sup>(20)</sup> are noteworthy for the following reasons: (1) he used marijuana while holding a security clearance; (2) he used marijuana while in the Army; and (3) he used marijuana in November 2004--after he completed a security-clearance application in May 2002 and after his interview in June 2004. I consider these matters aggravating circumstances, because they tend to show that he has little regard for the requirements of holding a security clearance. Third, and more troubling, are his two false answers on his security-clearance application and his false sworn statement. His three false statements are very serious matters,<sup>(21)</sup> because the evidence shows Applicant deliberately made a choice to provide false answers when he completed his security-clearance application and then complicated his situation further by lying during the background investigation. Also, his false statements go to the heart of the security-clearance process; namely, can an individual be counted on to disclose matters even when doing so is contrary to or inconsistent with one's self interest. Applicant has proven he cannot be trusted to do so.

Considering the record evidence as a whole, I conclude Applicant failed to present sufficient evidence to rebut, explain, extenuate, or mitigate the security concerns arising under Guidelines H and E. In reaching this decision, I considered all the evidence, both favorable and unfavorable, including any evidence not specifically discussed. Applicant has not met his ultimate burden of persuasion to obtain a favorable clearance decision.

### FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

SOR ¶ 1-Guideline H: Against Applicant

Subparagraphs a - b: For Applicant

Subparagraphs c - d: Against Applicant

SOR ¶ 2-Guideline E: Against Applicant

Subparagraphs a - 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 or continue a security clearance for Applicant. Clearance is denied.

Michael H. Leonard

Administrative Judge

1. Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).
2. Directive, Item E2.2.1 (setting forth nine factors to consider under the whole-person concept).
3. Executive Order 10865, § 7.

4. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

5. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.

6. Directive, Enclosure 3, Item E3.1.14.

7. Directive, Enclosure 3, Item E3.1.15.

8. Directive, Enclosure 3, Item E3.1.15.

9. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10<sup>th</sup> Cir. 2002) ("It is likewise plain that there is no 'right' to a security clearance, so that full-scale due process standards do not apply to cases such as Duane's.") (citations omitted).

10. 484 U.S. at 531.

11. Directive, Enclosure 2, Attachment 8 (setting forth disqualifying and mitigating conditions).

12. Directive, Item E2.A8.1.2.1. Any drug abuse.

13. Directive, Item E2.A8.1.2.2. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.

14. Directive, Item E2.A8.1.3.1. The drug involvement was not recent.

15. Directive, Item E2.A8.1.3.2. The drug involvement was an isolated or aberrational event.

16. Directive, Item E2.A8.1.3.3. A demonstrated intent not to abuse any drugs in the future.

17. Directive, Enclosure 2, Attachment 5 (setting forth the disqualifying and mitigating conditions).

18. Directive, Item 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.

19. Directive, Item E2.2.1.4. The individual's age and maturity at the time of the conduct.

20. Directive, Item E2.2.1.2. The circumstances surrounding the conduct, to include knowledgeable participation.

21. Directive, Item E2.2.1.1. The nature, extent, and seriousness of the conduct.