

KEYWORD: Drug Involvement, Personal Conduct, Criminal Conduct

DIGEST: Between 1994 and 2002, Applicant illegally purchased, possessed, and smoked marijuana. In 1996, the United States Marines Corps arrested, charged, and disciplined him for illegal marijuana use. He continued to smoke marijuana after being disciplined and while he held a security clearance. In 1998, he was arrested and fined for drunk and disorderly conduct. In completing his security clearance application, he responded "no" to three questions about his police record and drug use, and provided inaccurate information to one question about the extent of his drug use. He has not overcome the government's concerns regarding his drug involvement, personal conduct, and criminal conduct. Clearance is denied.

CASE NO: 05-03367.h1

DATE: 05/08/2006

DATE: May 8, 2006

In re:

SSN:

Applicant for Security Clearance

ISCR Case No. 05-03367

DECISION OF ADMINISTRATIVE JUDGE

MARY E. HENRY

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Between 1994 and 2002, Applicant illegally purchased, possessed, and smoked marijuana. In 1996, the United States Marines Corps arrested, charged, and disciplined him for illegal marijuana use. He continued to smoke marijuana after being disciplined and while he held a security clearance. In 1998, he was arrested and fined for drunk and disorderly conduct. In completing his security clearance application, he responded "no" to three questions about his police record and drug use, and provided inaccurate information to one question about the extent of his drug use. He has not overcome the government's concerns regarding his drug involvement, personal conduct, and criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

On September 30, 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 Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, 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. Specifically, the SOR set forth security concerns arising under Guideline H (Drug Involvement), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct), of the Directive. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. On October 26, 2005, Applicant submitted a notarized response to the allegations. He elected to have his case decided on the written record in lieu of a hearing. This case was assigned to me on March 17, 2006.

Department Counsel prepared a File of Relevant Material (FORM) and provided Applicant with a complete copy on January 27, 2006. Applicant had until February 27, 2006 (30 days) from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. He submitted an additional response post-marked April 5, 2006, and received by DOHA on April 10, 2006. In this response, Applicant indicated that he was "available to appear in person at a hearing."

Enclosure 3 of the Directive, ¶ E3.1.4. states that an applicant must specifically request a hearing within 20 days of receiving the SOR and in his response to the SOR. Applicant's request for a hearing was due by October 20, 2006. In his timely filed response to the SOR, Applicant did not request for a hearing. His April 5, 2006 request for a hearing request was not timely filed, and is denied.

FINDINGS OF FACT

Applicant admitted the allegations under Guideline H, subparagraphs 1.a. through 1.c., Guideline E, subparagraphs 2.a. and 2.b., and Guideline J, subparagraphs 1.a. and 1.b. of the SOR.⁽¹⁾ Those admissions are incorporated here as findings of fact. He denied the remaining allegations. After a complete review of the evidence in the record and upon due consideration, I make the following additional findings of fact:

Applicant is a 29-year-old test technician for a defense contractor.⁽²⁾ He has worked for this contractor for two and one-half years.⁽³⁾ He served five years in the United States Marine Corps and was honorably discharged.⁽⁴⁾

In his last two years of high school, he regularly purchased marijuana for his own use and smoked it.⁽⁵⁾ Upon his graduation, Applicant joined the Marines.⁽⁶⁾ Although he did not purchase marijuana as a Marine, he did smoke it at parties.⁽⁷⁾ After one party in the spring of 1996, the Marines charged him and others with using marijuana.⁽⁸⁾ As nonjudicial punishment (NJP) under the Uniform Code of Military Justice (UCMJ), he received a reduction in grade, pay forfeiture of one-half of a month's pay, restriction for 60 days, and extra duty for 60 days.⁽⁹⁾ The date of this punishment is not reflected in the record, although he estimates the spring of 1997. A year later, the local police arrested and charged him with drunk and disorderly conduct.⁽¹⁰⁾ The police detained him in jail for six hours, then released him after he paid a fine.⁽¹¹⁾

After his NJP, in November 1997, the government granted him a security clearance.⁽¹²⁾ Between the spring 1996 and 2002, he smoked marijuana about six times, which included the time he held a security clearance.⁽¹³⁾ He last smoked marijuana in the late fall of 2002 after providing his girlfriend with money to purchase it.⁽¹⁴⁾ He has stated that he does not intend to use drugs in the future.⁽¹⁵⁾ In his signed statement, he acknowledged that when out socially, he has been offered drugs by some of his friends.⁽¹⁶⁾ He has declined their offer.⁽¹⁷⁾ Later, in his response to the SOR, he states that he knows some of his high school friends still use marijuana, but that he does not have regular contact with them.⁽¹⁸⁾

On March 1, 2004, Applicant completed his security clearance application. He answered "no" to each of the following questions in his security clearance application: [\(19\)](#)

Question 24. Your Police Record - Alcohol/Drug Offenses

Have you ever been charged with or convicted of any offense related to alcohol or drugs? For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.

He did not list his arrest for drunk and disorderly conduct, nor his arrest for marijuana use while in the Marines, although he admitted using marijuana. [\(20\)](#)

Question 25. Your Police Record - Military Court

In the last 7 years, have you been subject to court martial or other disciplinary proceedings under the Uniform Code of Military Justice? Include non-judicial, Captain's mast, etc.) For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.

He did not list his 1997 nonjudicial punishment under the UCMJ for marijuana use. [\(21\)](#)

Question 29. Your use of Illegal Drugs and Drug Activity - Drug Activity

In the last 7 years, have you been involved in the illegal purchase, manufacture, trafficking, production, transfer, shipping, receiving, or sale of any narcotic, depressant, stimulant, hallucinogen, or cannabis for you own intended profit or that of another?

He did not list his purchase of marijuana in 2002. [\(22\)](#)

In his security clearance application, he answered "yes" to the following question in his security clearance application: [\(23\)](#)

Question 28. Your use of Illegal Drugs and Drug Activity - Use in Sensitive Position

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 indicated he used marijuana twice from 1996 to 2002, not six times, as later stated. [\(24\)](#)

Applicant states that he responded "no" to Questions 24 and 25 because he was charged with use of marijuana in the spring of 1996, which is more than seven years before March 1, 2004, the date he completed his security clearance application. Thus, because he misunderstood the scope of the question, he chose the 1996 date, not the later date when he believes he received his nonjudicial punishment.

He also states that answering the questions, he did not make the distinction between "ever" and "7 years". [\(25\)](#) In its FORM, the government concedes that it has not established a *prima facie* case of falsification as to Questions 28 and 29, as contended in allegations 2.e. and 2.f. [\(26\)](#)

Since his discharge from the Marines, Applicant has received an Associates of Arts degree in electrical engineering from a community college. [\(27\)](#) He is currently enrolled in a technology college, working towards a degree in electrical engineering. [\(28\)](#) He works part-time during the school term and full-time when not in school. [\(29\)](#)

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the adjudicative process provision in Paragraph E2.2., Enclosure 2 of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Included in the guidelines are disqualifying conditions and mitigating conditions applicable to each specific guideline. 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. In addition, each security clearance decision must be based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in the Directive. Specifically, these are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 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. ⁽³⁰⁾

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. ⁽³¹⁾ The government has the burden of proving controverted facts. ⁽³²⁾ The burden of proof is something less than a preponderance of the evidence. ⁽³³⁾ Once the government has met its burden, the burden shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him. ⁽³⁴⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. ⁽³⁵⁾

No one has a right to a security clearance, ⁽³⁶⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." ⁽³⁷⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information. ⁽³⁸⁾ Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." The decision to deny an individual a security clearance is not necessarily a determination as to the allegiance, loyalty, and patriotism of an applicant. ⁽³⁹⁾ 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 a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

Drug Involvement - Guideline H: 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.

Personal Conduct - Guideline E: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulation could indicate that the person may not properly safeguard classified information.

Criminal Conduct - Guideline J: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to the allegations set forth in the SOR:

The government established its case under Guideline H. During his last two years of high school, while in the military, and until 2002, Applicant illegally used marijuana, a controlled substance. To use this drug, he had to possess it. He also purchased it in high school and in 2002. Drug Involvement Disqualifying Condition (DI DC) E2.A8.1.2.1. (*Any drug abuse...*), ⁽⁴⁰⁾ and DI DC E2.A8.1.2.2. (*Illegal drug possession, including cultivation, processing, manufacture, purchase sale, or distribution*) apply.

Applicant states that he does not intend to use drugs in the future. This statement, however, is insufficient by itself to mitigate the government's security concerns. Applicant continues to place himself in social situations that provide him with an opportunity to use marijuana. Because his last illegal use of this drug occurred three years ago, after eight years of ongoing use of marijuana, he has not met his burden of demonstrating that he is committed to abstaining from its use. Thus, Drug Involvement Mitigating Condition (DI 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*) do not apply. I conclude that DI C E2.A8.1.3.4. (*Satisfactory completion of a prescribed drug treatment program including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a credential medical professional*) does not apply because no information was provided indicating that Applicant has ever attended a drug treatment program. He has not mitigated the government's security concerns under Guideline H.

Under Guideline E, the government alleges that Applicant deliberately falsified material facts on his latest security clearance application when he answered "no" to Questions 24, 25, and 29, and should have answered "yes". The government also contends that he intentionally falsified the number of times he used marijuana between 1996 and 2000 when he answered Question 28. He denies intentionally falsifying his answers. When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred. ⁽⁴¹⁾ For Personal Conduct Disqualifying Conditions (PC DC) E2.A5.1.2.2. (*The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire...*) and PC DC E2.A5.1.2.3. (*Deliberately providing false or misleading information concerning relevant and material matters to an investigator...*) to apply, the government must establish that Applicant's omission, concealment or falsification in his answers related to a relevant and material fact and was deliberate.

Applicant stated that he was arrested for marijuana use in the spring of 1996. Because he was never charged with any offense related to his marijuana use, he did not falsify his answer to Question 24. His arrest for drunk and disorderly conduct occurred in the spring of 1998, six years prior to March 1, 2004, the date he completed his security application. His failure to list this arrest was not intentional, but rather a result of careless reading of the questions and an inattention to specific dates. When completing his answers, he did not notice a distinction between "ever" and "7-years", nor when completing his statement, did he pay attention to the fact that this arrest occurred less than seven years prior to March 1, 2004. In light of his denial that he intentionally falsified his answer, and the evidence of record, the government has not met its burden of proving intention conduct by Applicant. Allegation 2.c. is resolved in favor of Applicant.

In his response to the SOR, he admitted that sometime in April or May 1997, he received an Article 15 nonjudicial punishment under the UCMJ for his marijuana use. Given the closeness in time of this disciplinary action to the March 1, 2004 date he completed his security clearance application, I find that he did not intentionally lie when he answered Question 25. Allegation 2.d. is resolved in favor of Applicant. In light of the government's concession that it has not established a *prima facie* case, allegations 2.e. and 2.f. are found in favor of Applicant.

The government, however, has established its case under Guideline E, subparagraphs 1.a. and 1.b. Applicant received a security clearance after the Marines disciplined him for using marijuana. Even though he knew smoking marijuana was wrong, he continued to do so and after receiving his security clearance. His decision to proceed with conduct he knew to be illegal breached a special trust given to those who hold a security clearance. He continues to associate casually with individuals who chose to use illegal drugs. By his conduct, he has shown that he is not entitled to hold the trust of the government. He has not mitigated the government's security concerns under Guideline E.

The government has established its case under Guideline J. Applicant purchased and used marijuana between 1994 and 2002. When in the Marines, he received a nonjudicial punishment for using marijuana. He was arrested once in 1998 for drunk and disorderly conduct. Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1. (*Allegation or admission of criminal misconduct, regardless of whether the person was formally charged*) and CC DC E2.A10.1.2.2.

(A single serious crime or multiple lesser offenses) apply.

Criminal conduct can be mitigated by showing that it was not recent, an isolated incident, or there has been successful rehabilitation under Criminal Conduct Mitigating Conditions (CC MC) E2.A10.1.3.1., E2.A10.1.3.2., and E2.A10.1.3.6. The issues under CC MC 1 and CC MC 6 are whether there has been a significant period of time without any evidence of misconduct, and whether the evidence shows a change in circumstances or conduct. There are no "bright line" rules for determining when conduct is "recent". The determination must be made "on a careful evaluation of the totality of the record within the parameters set by the directive."⁽⁴²⁾ If the evidence shows "a significant period of time has passed without any evidence of misconduct", then the Administrative Judge must articulate a rational basis for concluding why that significant period of time does not demonstrate changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.⁽⁴³⁾

Following the punishment he received as a Marine for using marijuana, Applicant continued to occasionally smoke this drug, and on at least one occasion, he purchased it. Thus, while he only received one nonjudicial punishment, his use of marijuana, an illegal drug, is not an isolated incident. His arrest for intoxication during this same period reflects a pattern of conduct, not an isolated incident. His last illegal use of marijuana occurred more than three years ago, a significant period of time. However, his continued casual association with individuals, who smoke marijuana, his overall pattern of drug use for eight years, and his careless attitude about illegal drug use during this time are stronger evidence regarding his behavior than his statement that he does not intend to smoke marijuana in the future. The evidence of record is insufficient to demonstrate changed circumstances or conduct to warrant a finding of reform or rehabilitation.

The remaining mitigating conditions do not apply. Others did not pressure him into using marijuana; rather he voluntarily smoked it, knowing the potential criminal consequences of his conduct. Furthermore, he has not been acquitted of any crimes. CC MC E2.A10.1.3.3. (*The person was pressured or coerced into committing the act...*), CC MC E2.A10.1.3.4. (*The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to reoccur*), and CC MC E2.A10.1.3.4. (*Acquittal*) are not applicable. He has not mitigated the government's concerns under Guideline J. Accordingly, for the reasons stated, I find that it is not clearly consistent with the national interest to grant a security clearance to Applicant.

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 (Drug Involvement): AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

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

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: For Applicant

Subparagraph 2.d: For Applicant

Subparagraph 2.e: For Applicant

Subparagraph 2.f: For Applicant

Paragraph 3, Guideline J (Criminal Conduct): FOR APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: For Applicant

DECISION

In light of all of 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.

Mary E. Henry

Administrative Judge

1. Item 3 (Applicant's response to SOR, dated October 26, 2005) at 2-4.
2. Item 4 (Applicant's security clearance application, dated March 1, 2004) at 8, 14.
3. *Id.*
4. *Id.* at 10, 16; Item 3, *supra* note 1, at 2.
5. Item 5 (Applicant's signed statement, dated October 4, 2004) at 3.
6. *Id.* at 2.
7. *Id.* at 3.
8. *Id.*; Item 3, *supra* note 1, at 2.
9. *Id.*
10. Item 5, *supra* note 5, at 5.
11. *Id.*
12. Item 4, *supra* note 2, at 17.
13. Item 5, *supra* note 5, at 4.

14. *Id.*; Item 3, *supra* note 1, at 2.
15. Item 5, *supra* note 5, at 4.
16. *Id.*
17. *Id.*
18. Item 3, *supra* note 1, at 2.
19. Item 4, *supra* note 2, at 16-17.
20. Item 5, *supra* note 5, at 3, 5; Item 4, *supra* note 2, at 16.
21. Item 4, *supra* note 2, at 16.
22. *Id.* at 17; Item 5, *supra* note 5, at 4.
23. Item 4, *supra* note 2, at 17.
24. *Id.*; Item 5, *supra* note 5, at 4.
25. Item 5, *supra* note 5, at 5.
26. File of Relevant Material Submitted by Department Counsel, dated January 25, 2006, at 8.
27. Item 5, *supra* note 5, at 2.
28. *Id.*
29. Item 3, *supra* note 1, at 4.
30. Directive, Enclosure 2, ¶ E2.2.1.1. through E2.2.1.9.
31. ISCR Case No. 96-0277 (July 11, 1997) at 2.
32. ISCR Case No. 97-0016 (App. Bd., December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.
33. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).
34. ISCR Case No. 94-1075 (App. Bd., August 10, 1995) at 3-4; Directive, Enclosure 3, ¶ E3.1.15.
35. ISCR Case No. 93-1390 (App. Bd. Decision and Reversal Order, January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.
36. *Egan*, 484 U.S. at 531.
37. *Id.*
38. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
39. Executive Order No. 10865 § 7.
40. Drug abuse is defined in E2.A8.1.1.2.1 to include drugs materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970)

41. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov.17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

42. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

43. *Id.*