

DATE: August 17, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-07758

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

J. Theodore Hammer, Esq., Department Counsel

Peregrine Russell-Hunter, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant experimented with marijuana in high school and used it regularly in college. He also used cocaine twice and hallucinogenic mushrooms once while in college. He graduated from college in 1984, and he continued using marijuana regularly until he was married in 1986, when he reduced his use of marijuana to three or four times a year. He stopped using marijuana in September 2004, after applying for a security clearance and learning his drug use could be an impediment. Security concerns based on drug involvement and personal conduct are not mitigated. Clearance is denied.

STATEMENT OF THE CASE

On November 4, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive). The SOR alleges security concerns under Guidelines H (Drug Involvement) and E (Personal Conduct). Under Guideline H, it alleges Applicant used marijuana on a recurring basis from at least 1978 until at least September 2004 (§ 1.a), he continues to associate with individuals who use marijuana (§ 1.b), he used cocaine and mushrooms on six occasions between 1978 and 1984 (§ 1.c), and he continued to use marijuana after submitted two security clearance applications (§ 1.d). The same conduct is alleged under Guideline E.

Applicant answered the SOR in writing on November 28, 2005, admitted all the allegations under Guideline H, denied the allegations under Guideline E, offered explanations, and requested a hearing. The case was assigned to me on May 8, 2006. On May 16, 2006, DOHA issued a notice of hearing setting the case for June 6, 2006. The case was heard as scheduled. DOHA received the transcript (Tr.) on June 15, 2006.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a 46-year-old senior mechanical engineer for a defense contractor. He has worked for his current employer since November 2001. He has never held a security clearance. (Tr. 6.) He submitted a security clearance application (SF 86) in April 2000, but he changed jobs before the security investigation was completed. He submitted a second SF 86 on June 9, 2004, in connection with his current employment. (Government Exhibit (GX) 1.) He disclosed his drug use on both applications. (Tr. 49; GX 1 at 7.)

Applicant is highly regarded by supervisors, colleagues, friends, and neighbors. The president and chief executive officer of his current employer commended him for his work on the Pentagon rebuilding project after the "9-11" attack. (Applicant's Exhibit (AX) F; Tr. 34-35.) His current operations manager regards him as conscientious and trustworthy. (AX B-1.) A current colleague regards him as dependable, conscientious, and "an excellent co-worker and friend." (AX B-2.) A former supervisor evaluated him as skilled, hard-working, and dependable. (AX B-3.) His friend and neighbor for the past nine years considers him a "very devoted father and husband, and an excellent neighbor," a "hard-working and reliable individual," and "very disciplined." (AX B-4.) His neighbor for the past four years describes him as "dependable, reliable, hard-working, conscientious, honest, peace loving, courteous and a person that maintains a high level of integrity for his country and family." (AX B-5.) A friend and former classmate regards him as "dependable, honest, and hard-working," and "a person of the highest integrity." (AX B-6.) A friend and associate for the past 26 years describes him as honest, reliable, and competent, "a man of great integrity." (AX B-7.) A friend and associate for 28 years considers him dependable, trustworthy, and responsible; this friend states, "In all ways, his attitudes and actions demonstrate honesty and integrity." (AX B-8.)

Applicant's performance appraisals for the two most recent rating periods, ending in October 2005 and October 2004 respectively, rated him as having met expectations. (AX C-1 and C-2.) His rating for the period ending in September 2003 was "exceeds expectations." (AX C-3.) His performance appraisal for the period ending in December 2000, from a different employer and using a different format, rated him as "Exceptional-Consistently exceeds expectations for position." (AX C-4.) His performance appraisal for the period ending in June 1999, again from a different employer and using a different format, stated he met or exceeded all the requirements of his position. (AX C-5.)

Applicant grew up in a family atmosphere where marijuana use was acceptable. (Tr. 89.) In his answer to the SOR, he pointed out that the Federal Bureau of Investigation has recently considered relaxing its guidelines regarding past drug use, and he commented, "To me, this is a clear acknowledgment that recreational marijuana has been an embedded part of our culture for a long time."

Applicant experimented with marijuana in high school. While in college, he used it more frequently, usually at parties. He also used cocaine twice and hallucinogenic mushrooms once. (Tr. 46, 67.) He graduated from college in 1984 and was married in 1986. Between 1986 and 2004, he used marijuana three or four times a year. He used marijuana at a family gathering in September 2003, at a party in the spring of 2004, a beach party in August 2004, and at a football game and fraternity party in September 2004.

Applicant stopped smoking marijuana in September 2004, three months after submitting his SF 86, after he heard a friend say he could no longer smoke marijuana because of his security clearance. Applicant then did some internet research and determined that marijuana use was a serious impediment to obtaining a clearance. (Tr. 84-85.) Although the primary reason for stopping his marijuana use was his security clearance application, it caused him to evaluate his marijuana use in terms of raising his children. (Tr. 88.) He stated at the hearing that his three young children are taking anti-drug classes at school, and he wants to be able to look them in the eye and tell them "dad doesn't do illegal drugs." (Tr. 25.) He has not participated in any drug rehabilitation or treatment programs. (GX 2 at 2, 5, 7.) He continues to associate with his brother, who uses marijuana regularly. (Tr. 80, 91.)

Applicant and his wife are active in community activities, including scouting and athletics. He coaches one son's soccer team and another son's baseball team. (Tr. 59.) He has not disclosed his marijuana use to any of the parents of the scouts or athletic team members with whom he interacts. (Tr. 95-96.)

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

The Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1. through 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (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 applicant's age and maturity at the time of the conduct; (5) the voluntariness of 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. Directive ¶¶ E2.2.1.1. through E2.2.1.9.

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 persons with access to classified information. However, the decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[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. ISCR Case No. 01-20700 at 3; *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Guideline H (Drug Involvement)

Under this guideline, improper or illegal involvement with drugs raises questions regarding an applicant'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. Directive ¶ E2.A8.1.1. Any illegal use of a controlled substance can raise a security concern and may be a disqualifying condition (DC 1). Directive ¶ E2.A8.2.1. Illegal drug possession also is a disqualifying condition (DC 2). Directive ¶ E2.A8.2.2. Applicant's admitted drug possession and use establish DC 1 and DC 2.

Since the government produced substantial evidence to establish DC 1 and DC 2, the burden shifted to Applicant to

produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns based on possession and use of marijuana can be mitigated by showing that it was not recent (MC 1). Directive ¶ E2.A8.1.3.1. There are no "bright line" rules for determining when conduct is "recent." The determination must be based "on a careful evaluation of the totality of the record within the parameters set by the directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." *Id.*

Applicant has refrained from using drugs for less than two years. His abstinence is largely motivated by the pressure to obtain a clearance. In the context of more than 25 years of drug use, his abstinence for less than two years, while his conduct is being closely scrutinized because of his security clearance application, is not "a significant period of time." I conclude MC 1 is not established.

Security concerns based on drug involvement can be mitigated (MC 2) by showing it "was an isolated or aberrational event." Directive ¶ E2.A8.1.3.2. Applicant's long-term recurring drug use was neither isolated nor aberrational. I conclude MC 2 is not established.

Security concerns based on marijuana possession and use also can be mitigated (MC 3) by "[a] demonstrated intent not to abuse any drugs in the future." Directive ¶ E2.A8.1.3.3. Applicant has unequivocally stated he intends to refrain from drug use in the future, but I am not satisfied that sufficient time has passed to demonstrate his willingness and ability to carry out his stated intention. "Only with the passage of time will there be a track record that shows whether a person, through actions and conduct, is willing and able to adhere to a stated intention to refrain from acting in a way that the person has acted in the past." ISCR Case No. 97-0727, 1998 DOHA LEXIS 302 at *7 (App. Bd. Aug. 3, 1998). I conclude MC 3 is not established.

Several other factors are relevant. Applicant's drug involvement extended over many years. Directive ¶ E2.2.1.1 (nature, extent, and seriousness of the conduct). His use of marijuana was frequent and continued until recently. Directive ¶ E2.2.1.3 (frequency and recency). He was a 44-year-old adult when he last used marijuana. Directive ¶ E2.2.1.4 (age and maturity). He has made some behavior changes as his family responsibilities have increased, but it is too soon to determine whether he has abandoned marijuana as part of his lifestyle. Directive ¶ E2.2.1.6 (rehabilitation and behavioral changes). His motivation to stop using marijuana is not based on a change of attitude regarding the risks to national security. Instead, he is motivated to stop primarily because it is necessary to obtain a clearance. Whether he would resume his marijuana use after obtaining a clearance cannot reliably be determined. Directive ¶ E2.2.1.7 (motivation). He is involved in youth activities, but he has not disclosed his marijuana use to the parents of the children with whom he is involved. Directive ¶ E2.2.1.8 (potential for pressure, coercion, exploitation, or duress). I cannot determine with any degree of certainty that his marijuana use will not occur. Directive ¶ E2.2.1.9.

After weighing the disqualifying and mitigating conditions and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concern based on drug involvement.

Guideline E (Personal Conduct)

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

A disqualifying condition under this guideline may arise based on "[r]eliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances." (DC 1.) Directive ¶ E2.A5.1.2.1. In this case, the unfavorable information was disclosed by Applicant himself, not a third party. I conclude DC 1 is not applicable.

A disqualifying condition also may arise from "[p]ersonal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation, or duress." (DC 4.) Directive ¶ E2.A5.1.2.4. Applicant's drug use

subjected him to criminal prosecution and jeopardized his ability to obtain a clearance. Disclosure of his drug use to parents of children with whom Applicant was involved in community activities could have adversely affected his personal and community standing. I conclude DC 4 is established.

A disqualifying condition may be based on "[a] pattern of . . . rule violations." (DC 5.) Directive ¶ E2.A5.1.2.5. Applicant has knowingly violated the law on numerous occasions by illegally using controlled substances. I conclude DC 5 is established.

Finally, a disqualifying condition (DC 6) may be based on "[a]ssociation with persons involved in criminal activity." Applicant's continued association with his marijuana-using brother establishes DC 6.

Applicant's continued use of marijuana after applying for a security clearance (SOR ¶ 1.d) was not a breach of the government's trust, because he had not yet been entrusted a clearance or access to classified information. However, it demonstrated poor judgment, because it reduced the likelihood of a clearance being granted.

Since the government produced substantial evidence to establish DC 5 and DC 6, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. Security concerns based on personal conduct may be mitigated (MC 5) by showing that Applicant "has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress." Applicant disclosed his drug use on his first SF 86 and again on his second SF 86 in connection with his current employment. His employer has supported his security clearance application notwithstanding his admitted drug use. He was candid with security investigators and at the hearing. His family is aware of his drug use. I conclude MC 5 is established.

Security concerns also may be mitigated (MC 6) by evidence that "[a]ssociation with persons involved in criminal activities has ceased." Directive ¶ E2.A5.1.3.7. Applicant's feeling of obligation and affection for his brother were obvious at the hearing. His reluctance to cut his ties to his brother is certainly understandable. On the other hand, Applicant grew up in a family where drug use was condoned, and his continuation of those family ties makes it questionable whether he will change his lifestyle from one where drug use is condoned to one where it is unacceptable. I conclude MC 6 is not established.

Applicant's history of drug use establishes questionable judgment, unreliability, and unwillingness to follow rules. After weighing the disqualifying and mitigating conditions and evaluating the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on personal conduct.

FORMAL FINDINGS

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

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

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

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

Subparagraph 2.a: 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 Applicant a security clearance. Clearance is denied.

LeRoy F. Foreman
Administrative Judge