

KEYWORD: Drugs; Personal Conduct; Criminal Conduct

DIGEST: Applicant is 29 years old, unmarried, and has a son whom he supports. He works for a defense contractor. He admits his 11-year marijuana use, sale, purchases, and cultivation, and that he falsified answers on his 2003 and 2004 security clearance applications. Applicant has not mitigated the drug involvement, personal conduct, and criminal conduct security concerns. Clearance is denied.

CASENO: 05-08089.h1

DATE: 05/16/2006

DATE: May 16, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-08089

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 29 years old, unmarried, and has a son whom he supports. He works for a defense contractor. He admits his 11-year marijuana use, sale, purchases, and cultivation, and that he falsified answers on his 2003 and 2004 security clearance applications. Applicant has not mitigated the drug involvement, personal conduct, and criminal conduct security concerns. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On January 17, 2006, DOHA issued a Statement of Reasons [\(1\)](#) (SOR) detailing the basis for its decision-security concerns raised under Guideline H (Drug Involvement), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on February 2, 2006. Applicant requested his case be decided on the written record in lieu of a hearing.

On March 15, 2006, Department Counsel submitted the Department's written case. A complete copy of the file of relevant material (FORM) was provided to the Applicant. He was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant filed a response to the FORM on April 12, 2006, within the 30 day time allowed. The case was assigned to me on April 20, 2006.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated here as findings of fact. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following additional findings of

fact:

Applicant is 29 years old, unmarried, and works for a defense contractor. He has a son whom he supports. (Items 4, 5)

Applicant used marijuana with varying frequency from at least 1992 until at least 1999. His usage may have been daily during certain times within this period, particularly from 1993 to 1997. From October 1997 to December 1999 he used marijuana about 300 times. Applicant also purchased marijuana from some time in 1996 until December 1999. He also sold it from December 1999 to at least June 2003. In 1993 the police department in his hometown detained him for possession of marijuana. Between 1993 and June 2003, at various times, he planted and cultivated marijuana plants at his home, in different quantities. For example, in 1993 or 1994 his local police department confiscated two marijuana plants from his home. (Items 1 and 3; FORM Response)

Sometime in 1993 Applicant received a citation from a state park ranger for having an open container of alcohol in a state park. Applicant's punishment was performance of community service. (Items 1 and 3, FORM Response) On the SCA Question 24 asked if he had ever been charged with or convicted on any alcohol or drug related offenses, he answered "no." Applicant did not disclose this citation on his security clearance application (SCA) dated September 22, 2004, but it was a mistake and not deliberate because the offense was minor, a decade earlier, and he did not go to court on the charge. (Item 3, FORM Response)

On his 2004 SCA, Applicant answered Question 27 regarding the use in the past seven years of any illegal substance with a "yes" and stated he used marijuana about 300 times from 1994 to December 31, 1999. He did not disclose any marijuana use prior to 1994. The seven year period referred to in the question was from September 1997 to September 2004. (Items 1, 3, 4; FORM Response)

Applicant disclosed on the October 2, 2003, SCA to Question 27 about his illegal drug use in the past seven years (the period October 1996 to October 2003) that he used marijuana about 20 times between September 1997 and December 31, 1999, having answered "yes". He did not disclose any use prior to September 1997. (Items 1, 3, 5, FORM Response)

Applicant did not disclose in answer to Question 29 of the October 2, 2003, SCA that he was involved in the illegal purchase, manufacture, trafficking, production, transfer, shipping, receiving, or sale of any narcotic, depressant, stimulant, hallucinogen, or cannabis for his own use. Specifically, he did not disclose his several incidents between 1993 and 2003 of cultivating marijuana plants, which activity is prohibited by state and federal laws. Nor did he disclose he sold

marijuana during 1999 to 2003, and purchased marijuana from 1996 through 1999. Deliberate falsification of information on a SCA is a felony offense under 18 U.S.C. § 1001. (Items 1, 3, 5; FORM Response)

Applicant submitted three character statements attesting to his competent work and ability to handle classified material. He complied with the rules and procedures of his workplace. He is regarded highly by his coworkers who wrote the letters. Applicant has had an interim clearance for the past 18 months. (FORM Response attachments)

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 the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information with Industry*

§ 2 (Feb. 20, 1960). 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.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline that must be carefully considered in making the overall common sense determination required.

In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. Those assessments include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 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 (See Directive, Section E2.2.1. of Enclosure 2). Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

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 that 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 that disqualify, or may disqualify, the applicant from being eligible for access to classified information. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. ay 2, 1996). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance. ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Exec. Or. 12968 § 3.1(b).

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:

Guideline H: Drug Involvement: *The Concern: 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. E2.A8.1.1*

Guideline E: Personal Conduct: *The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. E2.A5.1.1*

Guideline J: Criminal Conduct: *The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. E2.A10.1.1*

CONCLUSIONS

Applicant admitted each of the allegations in the SOR, except that in subparagraph 2.b. and subparagraph 3.c. as it referenced subparagraph 2.b. The admitted allegations create a picture of Applicant as a person using marijuana over an 11-year period who admitted he falsified his 2003 SCA in certain particular questions, and whose involvement with marijuana was in continuous violation of state and federal anti-drug laws. The specific security concerns are discussed in the succeeding paragraphs.

Regarding Applicant's drug involvement under Guideline H, the Disqualifying Conditions (DC) applicable to these facts are DC 1 (any drug abuse, defined as the illegal use of a drug. E2.A8.1.2.1 and E2.A8.1.1.3) and DC 2 (Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution. E2.A8.1.2.2). Over the 11-year period of involvement with marijuana, Applicant grew and cultivated it, bought and sold it, and used it, sometimes daily, and other times weekly or monthly.

None of the Mitigating Conditions (MC) in the guideline apply to Applicant's situation. His marijuana involvement ceased only recently compared to the time he spent in that activity. While he expresses a desire not to return to that lifestyle in his Answer, he does admit further that he did it to raise money to provide for his son and to obtain an education for himself. But he submitted no other evidence that he has separated himself from those activities, and his declaration is not persuasive. The burden of proof and persuasion on the applicability of the MC are upon Applicant under each guideline. Here he has not met that burden. I conclude this security concern against Applicant.

The personal conduct is the alleged deliberate falsification of answers on his two SCAs and the illegal course of conduct he engaged in by using marijuana from 1992 to 2003. He admits some falsifications on both SCAs, but claims some were mistakes, not deliberate, and finally that some were deliberate.

He did not disclose his open alcohol container citation from 1993, claiming he forgot about it. I am not sure an open container violation is a criminal offense that would be arrested. There is no evidence he was charged, or convicted or just cited as a juvenile and told to perform some community service. He admitted the falsifications in 2.c and 2.d, so there is no reason he would deny he lied about this insignificant charge.

Next, he disclosed on his 2003 SCA, in answer to Question 27, only 20 uses of marijuana from September 1997 to December 31, 1999. On the 2003 SCA he did not disclose his sale, purchase, and cultivation of marijuana in answering Question 29.

On the 2004 SCA he disclosed more than 300 uses of marijuana between January 1994 and December 1999. But Question 27 on the 2004 SCA only asked about a seven year period from 2004 back to 1997, so he disclosed more than he was asked and more than he did on the 2003 SCA. The Government alleges he should have disclosed almost daily use from 1992 to December 1999. On the 2004 SCA he disclosed he cultivated, sold, and purchased marijuana when he answered Question 29 with a "yes".

DC 2 (The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, or similar form used to determine security clearance eligibility or trustworthiness E2.A5.1.2.2), DC 4 (Personal conduct that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail. E2.A5.1.2.4), DC 5 (A pattern of dishonesty or rule violations. E2.A5.1.2.5), and DC 6 (Association with persons involved in criminal activity. E2.A5.1.2.6) apply. Considering all of the evidence submitted to me, I conclude Applicant deliberately falsified his Answer to Question 29 on the 2003 SCA by not disclosing his cultivation, sale, and purchase of marijuana over several years. I also conclude Applicant's course of conduct over those years as alleged in SOR Paragraph 1 is personal conduct that displays questionable judgment, untrustworthiness, unreliability, lack of candor, and dishonesty.

Regarding Mitigating Conditions under the personal conduct security concern, MC 5 (The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress. E2.A5.1.3.5) and MC 7 (Association with persons involved in criminal activities has ceased. E2.A5.1.3.7) apply here on certain falsification allegations, those in subparagraphs 2.a. and 2.b. because Applicant had met his burden of proof and persuasion on those allegations. I conclude he did not deliberately falsify subparagraph 2.a. because it was not recent and so insignificant he forgot about it, so he only made a mistake. On subparagraph 2.b. he disclosed material uses of marijuana beyond the seven-year period Question 27 requested, so there was no deliberate falsification there.

In contrast to these allegations, Applicant admitted his deliberate falsification as alleged in subparagraph 2.c., so I conclude that allegation against him. He also admitted his deliberate falsification on Question 29 on the 2003 SCA regarding his sale, cultivation, and purchase of marijuana. I conclude this allegation in subparagraph 2.d. against him. His cessation of drug related activities removes him from persons involved in such criminal activities, but that MC 7 alone does not overcome the magnitude of his actions as alleged in subparagraph 2.e.

Finally, the criminal conduct security concern has DC 1 (allegations or admission of criminal conduct, regardless of whether the person was formally charged. E2.A10.1.2.1) and DC 2 (A single serious crime or multiple lesser offenses. E2.A10.1.2.2) being applicable. Applicant admits his criminal activities involving drug abuse. Isn't 3.b the same as part of 3.c? What about discussing SOR ¶ 3c concerning 18 U.S.C. § 1001?

No MC apply to Applicant's criminal activity. Therefore, I conclude this security concern against him.

FORMAL FINDINGS

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

Paragraph 1. Guideline H: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: Against Applicant

Subparagraph 2.d: Against Applicant

Subparagraph 2.e: Against Applicant

Paragraph 3. Guideline J: AGAINST APPLICANT

Subparagraph 3.a: Against Applicant

Subparagraph 3.b: Against Applicant

Subparagraph 3.c: Against 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 or continue a security clearance for Applicant. Clearance is denied.

Philip S. Howe

Administrative Judge

1. Pursuant to Exec. Or. 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).