

DATE: September 28, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 06-00410

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant failed to mitigate drug involvement, personal conduct, and criminal conduct security concerns that arose because of his marijuana use and his falsification of his security clearance application by failing to acknowledge that use. 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. As required by Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan. 2, 1960), as amended, DOHA issued a Statement of Reasons (SOR) on 8 February 2006 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 an undated writing and elected to have a hearing before an administrative judge. The case was assigned to two other administrative judges and reassigned to me on 23 July 2006. On 2 August 2006, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 10 August 2006.

FINDINGS OF FACT

Applicant is a 55-year-old principal scientist for a defense contractor. He was hired in 2003. He served on active duty with the U.S. Coast Guard from 1968-1972 and was granted a Secret clearance in 1970.

In June 2000, Applicant was arrested for driving while his ability was impaired by alcohol (DWAI). He pled guilty to careless driving, and was sentenced to a fine and ordered to pay costs of \$168 and to undergo an alcohol evaluation and to complete 12 hours of Level I alcohol education.

Applicant completed a security clearance application (SCA) on 29 May 2003 by certifying that his statements therein

were "true, complete, and correct" to the best of his knowledge and belief, and acknowledging that any knowing and willful false statements could be punished under 18 U.S.C. § 1001. Ex. 1 at 5. Question 24 asked if he had ever been charged with or convicted of any offenses related to alcohol or drugs. Applicant answered "yes," and reported a January 1988 driving under the influence charge. *Id.* at 4. He did not reveal the conviction resulting from his June 2000 arrest for DWAI. Question 26 asked Applicant if, in the previous seven years, he had been arrested for, charged with, or convicted of any offenses he had not listed elsewhere on his SCA. Ex. 1 at 4 (emphasis added). Applicant answered "no." Question 27 asked if, in the previous seven years, Applicant had "illegally used any controlled substance," to include marijuana. Applicant answered "yes," and reported using marijuana "several times," from January 1996 to January 2002. *Id.* Applicant was granted an interim Secret clearance in 2003.

On 12 July 2004 Applicant signed a copy of the SCA he had submitted on 29 May 2003. He did not change his answers to questions 24, 26, or 27. After obtaining an interim security clearance, but before he re-signed the SCA in July 2004, Applicant took a few puffs from a marijuana cigarette while on an annual vacation visit with friends. Tr. 31. He still associates with these friends, but they no longer use marijuana around him.

Applicant's supervisor was part of the team that hired him. She finds him to be an ethical, trustworthy, dedicated, and diligent worker. She has no reason to suspect him of any activity that would represent a risk to the Government. Tr. 13-14. Applicant's employer tests employees for drug abuse as part of the hiring process, but not thereafter. Tr. 16.

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 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). Each security clearance decision "must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy." Directive ¶ 6.3. 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.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. 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. 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.

CONCLUSIONS

Guideline H--Drug Involvement

In the SOR, DOHA alleged Applicant used marijuana at least yearly from 1996 to about 2005 (¶ 1.a) and he used marijuana after he had been granted a security clearance in November 2003 (¶ 1.b). In his Answer, Applicant denies the allegations, with explanation.

The 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. It is a potentially disqualifying condition for an applicant to engage in any drug abuse. DC E2.A8.1.2.1. Drug abuse is defined as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction." Directive ¶ E2.A8.1.1.3. Applicant admitted using marijuana "several times" between January 1996 and January 2002 and taking a few puffs from a marijuana cigarette in 2004. Ex. 1 at 4. DC E2.A8.1.2.1 applies.

An applicant may mitigate drug involvement security concerns by establishing the drug involvement was not recent (MC E2.A8.1.3.1) or was an isolated or aberrational event (MC E2.A8.1.3.2); he demonstrated an intent not to abuse drugs in the future (MC E2.A8.1.3.3); or he satisfactorily completed a prescribed drug treatment program (MC E2.A8.1.3.4). "Aberration" is defined as a "deviation from the proper or expected course." *The American Heritage Dictionary of the English Language* (4th ed. 2000) (available at <http://www.bartleby.com/61/38/A0013800.html>).

Applicant smoked marijuana before and after he submitted the SCA which is currently being adjudicated. Therefore, his use of marijuana is recent. Applicant used marijuana several times over the years. Although not frequent and not routine, his use several times was not aberrational--he used it during vacation trips with friends. He did not seek treatment for his drug abuse. Applicant failed to establish MC E2.A8.1.3.1, MC E2.A8.1.3.2, or MC E2.A8.1.3.4.

Applicant reported he has not used marijuana since 2004 and does not intend to use it in the future. He claims "the amount of marijuana involved here is minimal. [His] involvement is a few puffs of a joint." Tr. 22. He testified that he "could have not taken it." *Id.* He used it "out of . . . camaraderie" of his friends. *Id.* He "could have easily said no." *Id.* "If I would have known at the time that any use, no matter how infrequent and how minimal in amount, make me a security risk, I would have never done it." Answer. "I am new to security clearances and did not realize that any use of marijuana is unacceptable." *Id.* He seems unconcerned that using marijuana is unlawful.

Although he still associates with the persons with whom he used marijuana, he asked them not to smoke it around him, and they haven't. Applicant established MC E2.A8.1.3.3.

Guideline E--Personal Conduct

In the SOR, DOHA alleged Applicant falsified his SCA, signed on 29 October 2003 and re-signed on 12 July 2004, by deliberately failing to disclose his conviction for careless driving (¶ 2.a) and his use of marijuana in 2004 (¶ 2.b). In his Answer, Applicant admitted these allegations, with explanation.

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1. The deliberate omission of relevant and material facts from any SCA is a security concern and may be disqualifying. DC E2.A5.1.2.2. Information is material if it would affect a final agency decision or, if incorrect, would impede a thorough and complete investigation of an applicant's background. ISCR Case No. 01-06870, 2002 DOHA LEXIS 469 at **13-14 (App. Bd. Sep. 13, 2002). An applicant's criminal history and history of drug abuse is a matter that could affect a final agency decision on whether to grant the applicant a clearance and his failure to disclose it would impede a thorough investigation of the his background.

There is no doubt Applicant was arrested for an alcohol-related offense in 2000--DWAI. But question 24 did not ask whether Applicant was arrested for an alcohol-related offense; it asked whether he was charged with or convicted of an alcohol-related offense. Thus, the issue is whether Applicant knew he had been charged with or convicted of an alcohol-related offense and deliberately failed to disclose it. I am convinced he did. Although he pled guilty to and was convicted of careless driving, an offense not necessarily related to alcohol, the court's sentence makes clear it was alcohol related. Applicant was required to undergo an alcohol evaluation and complete 12 hours of an alcohol education program.

In his Answer to the SOR, Applicant asserted that he did not intend to "hide anything" about his drug use. He explained how he had already admitted his use of marijuana on his initial SCA and that he "volunteered" the information about his post-clearance use of marijuana to the investigator who interviewed him. Answer. At his hearing, Applicant stated that he volunteered the information about his post-clearance marijuana use "when the [investigator] directly asked [him] questions." Tr. at 21. He complained that there is nothing in the regulations about the amount of marijuana one can use. Tr. 22. "[N]o one said to [him] that that amount of marijuana usage is not okay." But, "I would have thought I would have been alerted to my answer to that question in some way. . . . Just to let me know that's unacceptable." Tr. 24-25.

I conclude DC E2.A5.1.2.2 applies to the allegations in ¶¶ 2.a and 2.b.

An applicant may mitigate Personal Conduct security concerns by establishing the information is not pertinent to a

determination of his judgment, trustworthiness, or reliability (MC E2.A5.1.3.1); the falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily (MC E2.A5.1.3.2); the applicant made prompt, good-faith efforts to correct the falsification before being confronted with the facts (MC E2.A5.1.3.3); the omission was caused by or contributed to by improper or inadequate advice from authorized personnel, and the information was promptly and fully provided (MC E2.A5.1.3.4); and the applicant has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress (MC E2.A5.1.3.5).

Applicant failed to establish any of these conditions, except MC E2.A5.1.3.5--by admitting his conduct, he has reduced his vulnerability to exploitation. Applicant's falsification was recent as it concerned the SCA which is the subject of the current adjudication. There are two distinct falsifications on the SCA, so it was not an isolated incident. Applicant did not make any effort to correct the falsification until he was confronted by the investigator.

Guideline J--Criminal Conduct

In the SOR, DOHA alleged Applicant violated 18 U.S.C. § 1001 by omitting information about his conviction and use of drugs on his SCA. ¶ 3.a. Applicant failed to either admit or deny this allegation in his Answer.

It is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation or knowingly make or use a false writing in any matter within the jurisdiction of the executive branch of the Government of the United States. 18 U.S.C. § 1001. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. *See Egan*, 484 U.S. at 527. Information is material if it would affect a final agency decision or, if incorrect, would impede a thorough and complete investigation of an applicant's background. ISCR Case No. 01-06870, 2002 WL 32114535 (App. Bd. Sep. 13, 2002). An applicant's failure to fully advise investigators of his alcohol-related conviction and his illegal use of drugs would impede a thorough security investigation and could affect a final agency decision. A violation of 18 U.S.C. § 1001 is a serious offense--it carries a maximum sentence that includes confinement for up to five years. Based on all the evidence, I find Applicant violated 18 U.S.C. § 1001 by knowingly and willfully making materially false statements on his SCA about his drug use and his conviction for an alcohol-related offense.

A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1. It is potentially disqualifying for an applicant to engage in criminal conduct (DC E2.A10.1.2.1) that is a serious crime (DC E2.A10.1.2.2).

An applicant may mitigate such criminal conduct security concerns by establishing that the criminal behavior was not recent (MC E2.A10.1.3.1); the crime was an isolated incident (MC E2.A10.1.3.2); the applicant was pressured into committing the act and those pressures are no longer present in his life (MC E2.A10.1.3.3); the factors leading to the violation are not likely to recur (MC E2.A10.1.3.4); or there is clear evidence of successful rehabilitation (MC E2.A10.1.3.6). None of the mitigating conditions apply.

The criminal behavior was recent--it was part of the very security clearance application being adjudicated. Applicant's crime was not isolated--as evidenced by his conviction for careless driving and his illegal use of marijuana. There is no evidence Applicant was pressured into falsifying his SCA. Applicant pledged not to use marijuana in the future and claimed that had he known that was the rule, he would have complied. Thus, there would be no reason in the future to falsify his SCA. After considering his demeanor and testimony, I found him less than credible.

Whole Person Analysis

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." Directive E2.2.1. "Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination." *Id.* In evaluating Applicant's case, I have considered the adjudicative process factors listed in the Directive ¶ E2.2.1.

Applicant is an intelligent, mature scientist who has the support of his supervisor for his ethical, dedicated, and diligent work. But he voluntarily smoked marijuana both before and after obtaining a security clearance. Despite holding a

security clearance as a young man, submitting a urine specimen for drug testing in 2003 as part of the hiring process for his current job, and completing an SCA which asked him to list his "illegal use of any controlled substance," Applicant feigns shock that security regulations did not specify how much marijuana he could use before he had to report it on his SCA. After considering all the evidence, the disqualifying and mitigating conditions, and the whole person, I conclude Applicant failed to mitigate any of the allegations.

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

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Paragraph 3. Guideline J: AGAINST APPLICANT

Subparagraph 3.a: Against Applicant

Subparagraph 3.b: Against Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

James A. Young

Administrative Judge