

DATE: October 30, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 06-07298

**DECISION OF ADMINISTRATIVE JUDGE**

**SHARI DAM**

**APPEARANCES**

**FOR GOVERNMENT**

Candace L. Le'i, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant is 31 years old and works for a federal contractor. When he completed his 2004 security clearance application, he did not disclose his history of marijuana use, including the fact that he used it while holding an interim security clearance. He failed to mitigate the security concerns raised by his drug involvement and personal conduct. Clearance is denied.

**STATEMENT OF THE CASE**

On November 3, 2004, and May 18, 2006, Applicant signed and submitted security clearance applications (SCA). On June 12, 2006, the Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) to Applicant under Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended. The SOR detailed reasons under Guidelines H (Drug Involvement) and E (Personal Conduct) why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant a security clearance to the Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted.

On June 26, 2006, Applicant filed an Answer and elected to have the case decided on the written record in lieu of a hearing. On July 26, 2006, Department Counsel prepared a File of Relevant Material (FORM), containing six exhibits (GX), and mailed Applicant a complete copy on July 31, 2006, which he received on August 7, 2006. Applicant had 30 days from the receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. Applicant timely submitted an additional document to which Department Counsel had no objection. I later marked the document as Applicant Exhibit (AX) 7. This case was assigned to me on September 25, 2006.

**FINDINGS OF FACT**

Based on the entire record, including Applicant's admissions in his Answer to the SOR, I make the following additional

findings of fact:

Applicant is 31 years old and works for a federal defense contractor. From September 1994 until September 1998, he served in the United States Marine Corps, and left active services in the rank of Corporal (E4). After leaving the Marines, he worked sporadically until he began his present position in September 2004. (GX 4 at 2) His previous employer terminated him in August 2004 after testing positive for marijuana during a drug test.

Applicant admitted in his Answer that between 2001 and December 31, 2004, he used marijuana approximately three to four times a year and between January 1, 2005 and May 2005, about five times. Prior to his use in 2001, he had not used it since 1992. (GX 3) He used it at least five times while possessing an Interim Secret DoD clearance, which he obtained on November 10, 2004. (*Id.*) Although he denied that he ever purchased the substance and claimed he received it from friends, I do not find his denial credible based on the frequency and number of years he used marijuana.

When Applicant completed his SCA in November 2004, he certified that his answers were true, complete and correct to the best of his knowledge. In response to Question 27. Your Use of Illegal Drugs and Drug Activity - Illegal Use of Drugs: (*Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, et.) hallucinogenic (LSD, PCP, etc.), or prescription drugs*), he answered "No." In his Answer, he admitted that he falsified material facts on the SCA and deliberately failed to disclose his ongoing and recent marijuana use.

In an October 2005 interview with an agent for the Government, Applicant acknowledged he previously used marijuana in 1992, and resumed using it in 2001. (GX 3).

### POLICIES

Enclosure 2 of the Directive, *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, sets forth the criteria that must be evaluated when determining security clearance eligibility. Within those guidelines are factors to consider in denying or revoking an individual's request for access to classified information (Disqualifying Conditions), and factors to consider in granting an individual's request for access to classified information (Mitigating Conditions). By recognizing that individual circumstances of each case are different, the guidelines provide substantive standards to assist an administrative judge in weighing the evidence to reach a fair, impartial and common sense decision.

The adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at a balanced decision. Section E.2. of Enclosure of the Directive describes the essence of scrutinizing all appropriate variables in a case as the "whole person concept." In evaluating the disqualifying and mitigating conduct of the applicant, an administrative judge should consider: (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.

Granting an applicant's clearance for access to classified information is based on a high degree of trust and confidence in the individual. Accordingly, decisions under the Directive must include consideration of not just the *actual* risk of disclosure of classified information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information. Directive, Enclosure 2, ¶ E2.2.2. The decision to deny an individual a security clearance request to an individual is not necessarily a judgment of the applicant's loyalty. Executive Order 10865, § 7. Instead, it is a determination that the applicant has not met the strict guidelines established by the Department of Defense 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.

*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Directive presumes a rational connection between past proven conduct under any disqualifying condition and an applicant's present security suitability. ISCR Case No. 95-0611 at 3 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the corresponding burden of rebuttal shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the position of the government. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *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 clearance." *Id.*

Based upon a consideration of the evidence, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

**Guideline H - Drug Involvement:** A security concern arises when an individual is improperly or illegally involved with drugs, as it 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 unauthorized disclosure of classified information.

**Guideline E - Personal Conduct:** A security concern arises when 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.

The qualifying and mitigating conditions, raising either security concerns or mitigating security concerns applicable to this case, are set forth and discussed in the Conclusions section below.

## **CONCLUSIONS**

I considered all of the facts in evidence and the application of the appropriate legal standards, including the "whole person" concept, and conclude the following with respect to the allegations set forth in the SOR:

### **Guideline H: Drug Involvement**

Based on Applicant's admissions of using marijuana illegally, the Government established a potential disqualification under Drug Involvement Disqualifying Condition (DI DC) E2.A8.1.2.1 (*Any drug abuse, which includes marijuana*).

The Government having raised a trustworthiness concern, the burden shifted to Applicant to mitigate or rebut the allegations. After reviewing all four Drug Involvement Mitigating Conditions (DI C), I concluded none apply. (1) Applicant has a history of illegally using marijuana from 2001 to May 2005, such that DI MC E2.A8.1.3.1 (*The drug involvement was not recent*) does not apply. (2) Based on his Answer that he used marijuana during those four years and previously in 1992, DI MC E2.A8.1.3.2 (*The drug involvement was an isolated or aberrational event*) is not applicable. (3) He did not present any evidence regarding his intention to stop using marijuana in the future, which is necessary to mitigate the disqualification under DI MC E2.A8.1.3.3 (*A demonstrated intent not to abuse any drugs in the future*). (4) Nor did he provide any evidence that he has either been evaluated for substance abuse or completed a treatment program, as required under DI MC 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 credentialed medical professional.*)

### **Guideline E: Personal Conduct**

Based on the evidence, the Government established a potential disqualification under two disqualifying conditions: (1) Personal Conduct Disqualifying Condition (PC DC) 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.*) Applicant admitted that he falsified his application when he failed to disclose his illegal use of marijuana. (2) PC DC E2.A5.1.2.5 (*A pattern of dishonesty or*

*rule violations, including violation of any written or recorded agreement made between the individual and the agency.)* Testing positive for drugs and smoking marijuana while holding a security clearance are not only criminal offenses, but also demonstrate a pattern of rule violation contemplated within this disqualifying condition.

Applicant denied the allegation contained in SOR ¶ 2.b that he told the Government investigator he continued to use marijuana from 1992 until May 2005. He admitted he stopped using it in 1992 and resumed in 2001. Hence, the allegation is found in his favor.

I reviewed all of the mitigating conditions under this guideline, in particular two of them, and concluded neither applies. (1) The falsification was made in 2004, which is sufficiently recent, and Applicant did not volunteer the correct information, as required under Personal Conduct Disqualifying Condition (PC MC) E2.A5.1.3.2 (*The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*). (2) Applicant did not make any effort to correct the answers before he was confronted by an investigator, which is necessary to mitigate the matter under PC MC E2.A5.1.3.3 (*The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*).

### The Whole Person Analysis

In addition to the disqualifying and mitigating conditions, I also considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. I considered his age, his previous military service, the length and number of times he has used marijuana, including his use in the early 1990's. I am particularly concerned that he failed to understand his obligation to comport his behavior to the law while holding a security clearance, and instead, chose to ignore that obligation on more than one occasion, despite a potential negative effect on his employment. I am persuaded by the totality of the record that Applicant has not presented any evidence of responsible and mature behavior sufficient to warrant a security clearance. He failed to mitigate the security concerns raised by his drug involvement and personal conduct. Accordingly, Guideline H and Guideline E are decided against him.

## **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 as follows:

Paragraph 1: Guideline H (Drug Involvement) AGAINST APPLICANT

Subparagraphs 1.a - 1.d: Against Applicant

Paragraph 2: Guideline E (Personal Conduct) AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: Against Applicant

Subparagraph 2.d: 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.

Shari Dam

Administrative Judge