

DATE: November 17, 2006

In re:

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SSN: -----

Applicant for Security Clearance

CR Case No. 06-09983

**DECISION OF ADMINISTRATIVE JUDGE**

**MARK W. HARVEY**

**APPEARANCES**

**FOR GOVERNMENT**

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

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Thirty-year-old Applicant used marijuana 13 times, from 1993 to June 2005. He falsely understated his marijuana abuse in his 2001 security clearance application. He used marijuana while holding a security clearance. He failed to mitigate security concerns pertaining to his drug involvement and personal conduct. Clearance is denied.

**STATEMENT OF THE CASE**

On August 10, 2005, Applicant applied for a security clearance and submitted a Security Clearance Application (SF 86). (1) On June 30, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, 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 Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. (2) The SOR alleges security concerns under Guideline H (Drug Involvement) and Guideline E (Personal Conduct). 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 him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In an answer notarized on July 14, 2006, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing. (3) A complete copy of the file of relevant material (FORM), dated August 21, 2006, was provided to him on September 19, 2006, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. (4) Any such submissions were due by October 19, 2006, but he did not submit any additional information. (5) The case was assigned to me on October 25, 2006.

**FINDINGS OF FACT**

As to the factual allegations, Applicant admitted the conduct alleged in the SOR, however he said with respect to SOR ¶ 2.b that his false answer on his 2005 SF 86 denying drug use while possessing a security clearance was not deliberate. (6) His admissions are incorporated herein as findings of fact. Under Guideline H, Applicant admitted multiple uses of marijuana, including while holding a security clearance. Under Guideline E, he admitted providing incorrect information on his 2001 SF 86, by not fully disclosing adverse information about his marijuana use. After a complete and thorough review of the evidence of record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 30-year-old (7) employee of a defense contractor. (8) From 1996 to 2000, he attended a university, and was awarded a degree. (9) Applicant has no prior military service. (10) Applicant is not married. (11)

### Drug Involvement

In the fall of 1999, Applicant used ecstasy. (12) He also used GHB around January 1, 2002, after applying for a security clearance, but prior to its approval on December 14, 2002.

Between about February 1, 1993 and February 1, 1996, Applicant used marijuana on approximately five to ten occasions, establishing the factual basis for SOR ¶ 1.b. Between about August 1998 and June 2005, he used marijuana approximately eight times, establishing SOR ¶ 1.a.

Some of his marijuana use occurred while on an unpaid eight-month leave of absence from his job, while he was backpacking around the globe. He did not think that he would be returning to work for a defense contractor after the completion of his vacation. However, this marijuana use occurred while his security clearance was still in effect, establishing the factual basis for SOR ¶ 1.c.

In his response to the SOR, Applicant candidly admitted his use of ecstasy and GHB even though his use of these two drugs is not alleged in the SOR. He also admitted use of marijuana until June 2005, rather than until June 2004, as alleged in SOR ¶ 1.a. He promised not to use drugs in the future "while maintaining a security clearance."

### Personal Conduct

Question 27 of Applicant's July 18, 2001, security clearance application asks, ". . . have you illegally used a controlled substance, for example, marijuana . . . ?" Applicant answered, "YES," and disclosed marijuana use from February 1, 1993, to at least February 1, 1996. He did not include the marijuana use that occurred from August 1998 until July 18, 2001, establishing the factual basis for the falsification alleged in SOR ¶ 2.a.

Question 24.b of Applicant's August 10, 2005, security clearance application asks, "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 the public safety?" Applicant incorrectly answered, "No." (13) Applicant however answered, "Yes," to question 24.a, which asks about his drug use in the last seven years. He explained that he used marijuana eight times from August 1998 to June 2004 (estimated). (14) In his response to the SOR Applicant credibly explains his incorrect answer:

The answer to this question was a pure and simple honest mistake. I didn't mean to misrepresent the truth with my answer. The fact that I said I had used a drug during the time I had a clearance should be proof that I did not mean to lie on the question. I simply didn't read the question carefully enough before answering. I thought I was answering that I had not used illegal drugs as a law enforcement officer. (15)

Because Applicant was honestly mistaken in his response to question 24.b, the factual basis for SOR ¶ 2.b is not established. His false answer was not "deliberate." As indicated previously, some of his marijuana use occurred while on a leave of absence from his job, while his security clearance was still in effect, establishing the factual basis for SOR ¶ 2.c.

In the response to the SOR Applicant promised to ensure his future SF 86 forms and national security documents were accurate. He also promised not to compromise national security.

## POLICIES

In an evaluation of an applicant's security suitability, an administrative judge must consider Enclosure 2 of the Directive, which sets forth adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into Disqualifying Conditions (DC) and Mitigating Conditions (MC), which are used to determine an applicant's eligibility for access to classified information.

These adjudicative guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, an administrative judge should apply these guidelines in conjunction with the factors listed in the adjudicative process provision in Section E2.2, Enclosure 2, of the Directive. An administrative judge's overarching adjudicative goal is a fair, impartial and common sense decision.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," an administrative judge should consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision.

Specifically, an administrative judge should consider the nine adjudicative process factors listed at Directive ¶ E2.2.1: (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 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.

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." Directive ¶ E2.A8.1.1.1.**

**Personal Conduct - Guideline E: "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." Directive ¶ E2.A5.1.1.**

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, pertaining to these two adjudicative guideline are set forth and discussed in the Conclusions section below.

Since the protection of the national security is the paramount consideration, the final decision in each case is arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, facts must be established by "substantial evidence." <sup>(16)</sup> The government initially has the burden of producing evidence to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence and prove a mitigating condition. Directive ¶ E3.1.15 provides, "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance

decision." The burden of disproving a mitigating condition never shifts to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).<sup>(17)</sup>

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

The scope of an administrative judge's decision is limited. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. 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." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism.

### CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

#### **Drug Involvement**

Under Guideline H, 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 drug involvement disqualifying condition (DI DC 1). Directive ¶ E2.A8.2.1. DI DC 1 applies because Applicant admitted 13 uses of marijuana, including while holding a security clearance as alleged in SOR ¶¶ 1.a to 1.c.

Security concerns based on marijuana use can be mitigated by showing that it was not recent (DI MC 1).<sup>(18)</sup> 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.* DI MC 1 does not apply because Applicant's last use of marijuana was in June 2005, less than 90 days before he filled out his security clearance application on August 10, 2005.<sup>(19)</sup>

Drug involvement security concerns may be mitigated under DI MC 2 when the "drug involvement was an isolated or aberrational event." Directive ¶ E2.A8.1.3.2, or under DI MC 3 when an applicant demonstrates an intention not to abuse any drugs in the future. Directive ¶ E2.A8.1.3.3. Neither of these mitigating condition applies because applicant used marijuana 13 times in the last 12 years as well as GHB four times in January 2002, and ecstasy on one occasion.<sup>(20)</sup>

For DI MC 3, security concerns pertaining to drug involvement may be mitigated by a "demonstrated intent not to abuse any drugs in the future." Directive ¶ E2.A8.1.3.3. Applicant has not shown a sufficient track record of no drug abuse. His promise not to abuse drugs in the future is equivocal. He promises not to use drugs while he has a security clearance. DI MC 3 does not apply.

In regard to DI MC 4, security concerns may be mitigated when an applicant has satisfactorily completed "a prescribed

drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and [after receiving] a favorable prognosis by a credentialed medical professional." Directive ¶ E2.A8.1.3.4. DI MC 4 does not apply because Applicant has not completed a prescribed drug treatment program.

### Personal Conduct

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

Three personal conduct disqualifying conditions (PC DC) could raise a security concern and may be disqualifying in this case. PC DC 2 applies where there has been "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." Directive ¶ E2.A5.1.2.2. A security concern may result under PC DC 3 when an applicant deliberately provides "false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination." Directive ¶ E2.A5.1.2.3. PC DC 5 applies when an applicant has "a pattern of dishonesty or rule violations." Directive ¶ E2.A5.1.2.5.

For SOR ¶ 2.a Applicant's response to the SOR establishes PC DCs 2 and 3 by substantial evidence. He deliberately gave a false answer to Question 27 of his security questionnaire on July 18, 2001, understating the recency of his marijuana use. Applicant's response to the SOR establishes SOR ¶ 2.c by substantial evidence because he admits that he used marijuana while holding a security clearance. PC DC 5 applies to SOR ¶¶ 2.a and 2.c because taken together they constitute a pattern of rule violations.

A security concern based on Guideline E may be mitigated by establishing by substantial evidence personal conduct mitigating conditions (PC MC). Under PC MC 1, security concerns may be mitigated when the "information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability." Directive ¶ E2.A5.1.3.1. The allegation in SOR ¶ 2.b is not established by substantial evidence because Applicant's mistaken answer to question 24.b of his 2005 security clearance application was not a deliberate falsification.

PC MC 2 applies when the "falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily." Directive ¶ E2.A5.1.3.2. PC MC 3 applies when the "individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts." Directive ¶ E2.A5.1.3.3. I find that Applicant has partially established these mitigating conditions because he made a belated, good-faith effort to correct the record. The only evidence that Applicant failed to accurately report his drug use in his 2001 security clearance application was provided by Applicant on his 2005 security clearance application. Moreover, SOR ¶¶ 2.a and 2.c are not recent, and are relatively isolated as they occurred in 2001 and 2002. Although his eventual admission that the clearance entry was false was not "prompt," he deserves some credit under the "whole person" concept for providing accurate information. *See* ISCR Case No. 04-07360 at 2, 3 (App. Bd. Sep. 26, 2006) (indicating when a mitigating condition cannot be fully applied, "some credit" is still available under that same mitigating condition).

PC MC 4 applies when omission "of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided." Directive ¶ E2.A5.1.3.4. There is no evidence that such a circumstance as described in PC MC 4 occurred. Security concerns can be mitigated under PC MC 5 when an applicant "has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress." Directive ¶ E2.A5.1.3.5. Under PC MC 5, Applicant receives some credit for providing full information about his drug use in his response to the SOR on July 14, 2006, but PC MC 5 may not be fully applied because the steps made toward rehabilitation are insufficient in magnitude and too recent.

In sum, Applicant's July 18, 2001, false statement about the recency of his marijuana use, and his marijuana use while holding a security clearance reflect questionable judgment, untrustworthiness, and dishonesty. Standing individually, either might be regarded as an isolated, minor offense and somewhat remote in time. Directive ¶¶ 6.3.1 and 6.3.2. However, taken together, along with the recent drug use, his conduct is not mitigated.

## **"Whole Person" Analysis**

In addition to the enumerated disqualifying and mitigating conditions as discussed previously, I have considered the general adjudicative guidelines related to the whole person concept under Directive provision E2.2.1. As noted above, Applicant's history of drug abuse is counterbalanced by his strong desire to stop using drugs in the future. E2.2.1.1. His actions concerning drug use, the falsification of his 2001 security clearance application, and his use of marijuana while his security clearance was still effective were knowledgeable and voluntary. E2.2.1.2. He is 30 years old, sufficiently mature to be fully responsible for his conduct. E2.2.1.4. The likelihood of a future drug abuse remains substantial because such a short period of time has elapsed since his last marijuana use, and Applicant has not provided evidence of a change in his lifestyle. E2.2.1.9. Applicant's use of drugs while on vacation, away from his work environment makes his conduct less aggravated, but the possibility remains of compromise of sensitive or classified information. Applicant's credible description of his drug abuse in his response to the SOR also weighs favorably on his behalf. After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude Applicant has not mitigated the security concerns pertaining to drug involvement and personal conduct.

The evidence leaves me with grave questions and doubts as to Applicant's security eligibility and suitability. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"<sup>(21)</sup> and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under Enclosure 2 of the Directive. Applicant has failed to mitigate or overcome the government's case. I conclude Applicant is not eligible for access to classified information.

### **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: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Paragraph 2, Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: 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 or continue a security clearance for Applicant. Clearance is denied.

Mark W. Harvey

Administrative Judge

1. Item 4 (Electronic Questionnaires for Investigations Processing (e-QIP) for Security Clearance Application is dated August 10, 2005, on the signature page). For convenience, the security clearance application in this decision will be called an SF 86. There is an allegation of falsification of the 2005 SF 86.

2. Item 1 (Statement of Reasons (SOR), dated June 30, 2006) at 1-2. Item 1 is the source for the remainder of this paragraph.
3. Item 3 (Applicant's response to SOR, notarized July 14, 2006).
4. Defense Office of Hearings and Appeals (DOHA) transmittal letter, dated August 21, 2006.
5. *Id.* The DOHA transmittal letter informed Applicant that he had 30 days after receipt to submit information.
6. Item 3, *supra* note 3, is the source for all factual assertions in this paragraph.
7. Item 4, *supra* note 1, section 2, at 1.
8. From April 1999 to August 10, 2005 (the date of his SF 86), Applicant has been employed as a senior engineer for a defense contractor. Item 4, *supra* note 1, section 11, at 13. The quality of his employment performance was not characterized.
9. *Id.*, section 10, at 12. The type of degree Applicant received is not specified.
10. *Id.*, section 16, at 19.
11. *Id.*, section 13, at 16.
12. Item 3, *supra* note 3 is the source for the facts in the four paragraphs comprising "Drug Involvement." "Ecstasy" is the street name for a drug known as MDMA (3, 4-methylenedioxymethamphetamine), which is a Schedule I controlled substance. *See United States v. Gall*, 446 F.3d 884, 885 (8<sup>th</sup> Cir. 2006). "GHB" is gamma hydroxybutyric acid, a Schedule I controlled substance. *See United States v. Turcotte*, 405 F.3d 515, 519 n.1 (7<sup>th</sup> Cir. 2005).
13. Item 4, section 24.b, at 24.
14. Item 4, section 24, at 24-25.
15. Item 3, *supra* note 3, at 1 is the source for the remainder of this section.
16. "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994).
17. "The Administrative Judge [] consider[s] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).
18. "Recent drug involvement" also is addressed as a disqualifying condition (DI DC 5) in the Directive ¶ E2.A8.1.2.5. This disqualifying condition applies only in the context of failure to successfully complete a drug treatment program. ISCR Case No. 02-24452 at 3 (App. Bd. Aug. 4, 2004).
19. Item 3, *supra* note 3, at 1 (addressing SOR ¶ 1.a).
20. "Conduct not alleged in a SOR may be considered: (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is

applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3." ISCR Case No. 03-20327 at 3 (App. Bd. Oct. 26, 2006) (citing ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)).

21. *See* ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).