



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 08-04546

Appearances

For Government: Melvin Howry, Esquire, Department Counsel
For Applicant: *Pro Se*

March 29, 2010

Decision

WESLEY, Roger C., Administrative Judge:

Statement of Case

On September 30, 2009, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on October 22, 2009, and requested a hearing. The case was assigned to me on December 16, 2009, and was scheduled for hearing on January 13, 2009. A hearing was held on the scheduled date for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, or deny Applicant's application for a security clearance. At hearing, the government's case consisted of nine exhibits and a summary of the governing federal law controlling controlled substances (21 U.S.C. §812, *et seq.* for legal guidance. Applicant, in turn, relied on two witnesses (including himself) and nine exhibits. The transcript (Tr.) was received on January 27, 2010. Based upon a review of the case file,

pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Summary of Pleadings

Under Guideline H, the government alleged that Applicant (a) used marijuana with varying frequency from 1997 to 2005; (b) purchased marijuana, (c) cultivated marijuana, (d) used cocaine in 1977, (e) used hashish between 1977 and 1981, and (f) was arrested in 1979 for DUI and possession of cannabis.

Under Guideline E, Applicant is alleged to have (a) falsified his security clearance application (DD-49) of December 1984 by omitting his drug usage; (b) misrepresented his drug usage in his August 1988 Defense Security Service (DSS) interview, (c) falsified his October 2008 affidavit submitted to DoD by denying any prior drug usage, and (d) been terminated in October 2004 for making inappropriate harassing comments and failing to treat other employees with dignity and respect.

In his response to the SOR, Applicant admitted each of the allegations. He assured he ceased his use of illegal drugs over four years previous after considering the implications on his parenting, employment, and civic responsibilities. He acknowledged his making poor decisions with regard to illegal drug use, cultivation, and dishonesty in his college years and early twenties. Applicant claimed embarrassment over his prior falsification of his drug use and cultivation in his DD-49. He claimed he denied any prior cultivation based on the advice he received from the interviewing DoD agent who conducted his October 2008 interview. Applicant claimed exceptional performance evaluations from his employers and praise from his former colleagues for his demonstrated integrity, professionalism, interpersonal skills, and adherence to company ethics.

Findings of Fact

Applicant is a 49-year-old engineering specialist for a defense contractor who seeks to retain his security clearance. The allegations covered in the SOR and admitted by Applicant are incorporated herein and adopted as relevant and material findings. Additional findings follow.

Applicant is married and has two children (see ex. 1; Tr. 101-02). He earned a bachelor of science degree in mechanical engineering from an accredited university in September 1983 (ex. 1).

Applicant was introduced to illegal drugs in high school. He experimented with marijuana, cocaine, and hashish between 1977 and 1981 (Tr. 63). He continued to use marijuana (mostly with friends in social situations) throughout his college years (Tr. 102-03). While in college, he estimates he used marijuana a couple of times a week on average (Tr. 103).

In 1979, Applicant was arrested for driving under the influence of alcohol (DUI) and possession of marijuana (see ex. 1). He pled guilty to the DUI charges, and the marijuana possession charge was dismissed (see exs. 2, 3, and 4).

After college, Applicant joined a defense contractor and was granted a security clearance (Tr. 102). Aware of DoD policy against drug use, he continued to use marijuana, albeit at a reduced frequency of once or twice a month on average (Tr. 66, 102-04). Within six months, though, he had increased his frequency of use to three to four times a month and maintained this frequency rate on average between 1985 and February 2004, (see ex. 8; Tr. 80-83, 104-06, 111-12). While he would sometimes skip several months of marijuana use, he always returned to this frequency rate before giving up drugs altogether in June 2005 (ex. 8; Tr.82-83, 106-07). He occasionally contributed \$20 to \$30 toward towards purchases for sharing among his friends (Tr. 78-79, 104, 121).

Shortly after December 1984, Applicant's clearance was deactivated. This prompted him to leave the defense industry for a number of years and resume his use of marijuana (Tr. 104-06). Applicant quit using marijuana in October 2004 for about six months while he was pursuing employment opportunities. He resumed his marijuana use for a few months in 2005, before using it for the last time in June 2005 (Tr. 80-82, 111-12). Since ceasing his use of marijuana, he rarely associates with any members of his former group who were involved in marijuana activity (Tr. 107-08, 129-33). And he assures he will never use illegal drugs in the future (see ex. 1). His assurances are not challenged by any countervailing evidence and are accepted.

In 1980, Applicant experimented with cultivating marijuana. His attempts were limited to planting a few seeds on his balcony (see ex. 4; Tr. 62). Applicant tried growing marijuana once again in his home In 1987. This time, he grew four to five marijuana plants in his closet (Tr. 62-63). His 1987 attempt is the last time he admits to cultivating or experimenting in the growth of marijuana (Tr. 63).

Asked to complete a DD-49 in December 1984, Applicant omitted his prior purchases of illegal drugs (see exs. 3, 4, and 6). He attributed his omission to embarrassment (Tr. 68).

In an ensuing interview with an investigator from the Defense Investigator Service (DSS) in August 1988, Applicant acknowledged omitting his active drug use, purchases, and cultivation when completing a December 1984 DD-49 (see ex. 4). He attributed his omissions to concerns about what effects truthful disclosures would have on his clearance (ex. 4). When first asked about DSS reports of his prior cultivation of marijuana, he denied any involvement. Only after he was confronted with the details did he admit to growing marijuana in his closet for about three months in 1987 (ex. 4). He estimated the five plants he cultivated grew to about four feet (ex. 4). He attributed his previous misrepresentations to concerns about keeping his job (see ex. 4).

In his August 1988 DSS interview, Applicant assured he had stopped using illegal drugs because of his pending clearance investigation, his understanding of DoD policy, and his concerns for his physical fitness (see ex. 4). He committed to avoiding illegal drugs in the future (ex. 4).

Upon his return to the defense industry in 2007, Applicant completed an updated security clearance application (e-QIP). In this e-QIP, he admitted to using illegal drugs (marijuana) three to four times a month between January 2000 and October 2004, and resuming his use of the substance in May 2005: twice between May and June 2005 (see ex. 7). He denied any purchases, sales, or manufacturing of illegal drugs within the previous seven years (ex. 7).

In a follow-up interview with an agent from the Office of Personnel Management (OPM) in October 2008, Applicant assured the investigator that he never sold, supplied, manufactured, or grew drugs. He reiterated these assurances when he completed a signed, sworn affidavit for the agent (see ex. 8).

At hearing, Applicant acknowledged the statement in his affidavit, but insisted the OPM investigator who interviewed him told him it was not important (Tr. 91). The agent could not recall rendering such advice when asked by Applicant about it (Tr. 20-24). And the agent was not asked to recall whether she ever advised him it was all right to affirmatively misrepresent his avoidance of drugs in the affidavit he completed.

Without more probative evidence from Applicant, there is not enough evidentiary support to draw any factual inferences that the OPM agent characterized his expressed misstatements about his past cultivation of marijuana as immaterial. An agent's encouraging an applicant to knowingly falsify an affidavit about his past drug activity can never be inferred without corroborating evidence or exceptional circumstances. Such exceptional circumstances are not present here. Prior marijuana cultivation was still an issue of considerable concern to Applicant in 2008, just as it was for him in 1988 when he declined to acknowledge his cultivation of illegal drugs until he was confronted by the interviewing DSS agent. Considering all of the circumstances surrounding his affirmative misstatements in his 2008 affidavit, inferences warrant that they were knowingly and wilfully made to the OPM agent to avert further embarrassment, and are not excused by any statements or actions by the interviewing OPM agent.

Records report that Applicant was terminated for cause in October 2004 due to cited inappropriate sexist remarks he made in the work-place to an identified female employee (see exs. 8, 9, and B; Tr. 84-88, 123-26). Based on reported complaints, Applicant and other employees were investigated by his employer's human resources department for reported sexist remarks (see ex. 8; Tr. 76, 88-89, 124-28). He received unemployment benefits from his state following his termination (see ex. B; Tr. 76).

Applicant assures he learned from his experiences associated with his termination and consistently treats his colleagues with the utmost respect and dignity (Tr. 85-89).

Applicant's assurances are corroborated by his more recent written impressions from colleagues, his performance evaluations, and his awards, and are accepted.

Applicant is well regarded by his supervisors and former colleagues who have worked with him and documents excellent performance evaluations and awards with his defense employers between 1977 and 1984, and between 1990 and 2005 (see exs. J, K, and L and; Tr. 59-61, 70-74, and 97-101). He has an enduring marriage and has been an active provider for his family over the past 12 years.

Applicant is a demonstrated active contributor to his after-school programs with elementary students. He is a scout leader and is active in Church activities. He coaches Little League and is a recognized leader in his church's organized student activities (see ex, C; Tr. 92-95, 101).

Policies

The revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (effective September 2006) list Guidelines to be considered by judges in the decision-making process covering DOHA cases. These Guidelines require the judge to consider all of the "[c]onditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Drug Involvement

The Concern: Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. AG ¶ 24.

Personal Conduct

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful

and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. AG, ¶ 15.

Burden of Proof

By virtue of the precepts framed by the revised Adjudicative Guidelines, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons; and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation of the Government's case. Because Executive Order 10865 requires that all security clearances be clearly consistent with the national interest, "security-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Applicant is a well regarded engineer who has worked in the defense industry for almost 25 years with a good record of performance. Security concerns are raised over his recurrent involvement with drugs and misrepresentations over his past involvement with marijuana cultivation.

Drug concerns

Over a 27-year period (between 1977 and at least June 2005), Applicant used marijuana and other drugs intermittently in social situations (two to four times a month) with friends before permanently discontinuing his use in June 2005. Use and cultivation of illegal drugs, (inclusive of marijuana) are proscribed by both state law and federal law (see 21 U.S.C. § 802, *et seq.*

Applicant's admissions of using marijuana after applying for a security clearance raise judgment issues and initial security concerns over risks of recurrence. On the strength of the evidence presented, several disqualifying conditions of the Adjudicative Guidelines for drug abuse are applicable: DC ¶ 25(a), "any drug abuse," DC ¶ 25(c), "illegal possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia," and DC ¶ 25(h), "expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use."

Judgment concerns exist over Applicant's continued drug use after applying for and receiving security clearances between 1977 and 2007. These actions reflect both judgment lapses and disregard of the DoD's rules and policies for clearance holders. Applicant's actions are expressly covered by Guideline E, and are entitled to independent cognizance under this Guideline according to the Appeal Board. See ISCR Case No. 06-20964, at 6 (App. Bd. April 10, 2008). Where (as here) there is additional probative adverse information covered by Guideline E that is not covered by Guideline H, and *vice versa*, and which reflects a recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior, independent grounds do exist for considering questionable judgment and trustworthiness allegations under Guideline E as well as Guideline H. Authority for considering overlapping conduct under both guidelines is contained in the guidance provided in Enclosure 2, ¶ 2(d) of the Directive's August 2006 amendments.

So, under Guideline E, core judgment and trustworthiness concerns covered by D.C. ¶ 16(d), "credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information," have some applicability to this case in addressing the security significance of Applicant's using marijuana after being granted a security clearance.

Generally, though, misconduct predictions may not be based on supposition or suspicion. See ISCR Case No. 01-26893 (October 2002); ISCR Case No. 97-0356 (April 1998). The Appeal Board has consistently held that an unfavorable credibility determination concerning an applicant is not a substitute for record evidence that the applicant used marijuana since his last recorded use, or based on his past use, is likely to resume usage in the future. See ISCR Case No. 02-08032 (May 2004).

Based on his own credible testimony, the testimonials of Applicant's character references and the significant lapse of time (over five years) since his last acknowledged use of illegal drugs (marijuana), Applicant may invoke several mitigating conditions under the drug involvement guideline: specifically, MC ¶ 26(a), "the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment," is disjunctive and can be applied to Applicant's situation. Applicant's

demonstrated intent not to abuse drugs in the future has some application as well. Available considerations under ¶ 26(b) include “(3) an appropriate period of abstinence,” and “(4) a signed statement of intent with automatic revocation of clearance for any violation.”

While Applicant’s recurrent marijuana over more than 20 years raises some questions over the strength of his avoidance assurances, it is not enough to preclude his successful mitigation of the issue. Applicant’s recurrent use of marijuana between 1976 and 2002 has been interrupted by long periods of non-use, and most importantly has never been more than occasional.

Applicant has made some noticeable gains in his efforts to mitigate his past marijuana use. While Applicant’s recurrent marijuana use covered a considerable period (over 20 years), his use was never frequent, and it was generally limited to social situations after college. Applicant may invoke several mitigating conditions under the drug involvement guideline: specifically, MC ¶ 26(a), “the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment,” is disjunctive and can be applied to Applicant’s situation. Applicant’s demonstrated intent not to abuse drugs in the future has some application as well. Available considerations under ¶ 26(b) include “(3) an appropriate period of abstinence,” and “(4) a signed statement of intent with automatic revocation of clearance for any violation.”

Since quitting drugs altogether in June 2005, Applicant ceased contact with persons who use drugs. Accordingly, he may fully invoke MC ¶ 26(b)(1), “disassociation from drug-using associates and contacts,” and MC ¶ 26(b)(2), “changing or avoiding the environment where drugs were used,” to the merits of his situation. In fairness to Applicant, he has exhibited candor about his past marijuana use and his associations with persons who have used the substance.

For his ultimate acknowledgment of his using marijuana after being granted a security clearance, and his ensuing commitment to cease all involvement with illegal drugs thereafter, Applicant is entitled to take some advantage of two of the mitigating conditions of the personal conduct guideline as well: MC ¶ 17(g), “association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual’s reliability, trustworthiness, judgment, or willingness to comply with rules and regulations,” and MC ¶ 17(d), “the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.”

Applicant’s assurances that his marijuana involvement is a thing of the past are entitled to acceptance based on his exhibited limited, albeit recurrent, use of illegal substances (primarily marijuana), the absence of any drug activity attributed to him over

the past five years, and his very strong character references from former colleagues who have worked closely with him.

From a whole person perspective, Applicant has established independent probative evidence of his overall reliability and trustworthiness with his employer and community sponsors and understanding of DoD policy constraints on the use of illegal substances. His positive endorsements from his colleagues who are familiar with his past marijuana involvement reinforce his discontinuance assurances.

Considering the record on a whole, at this time there is sufficient credible seasoning of Applicant's mitigation efforts (over five years of claimed abstinence without any probative evidence of recurrence) credible to avert foreseeable risks of recurrent marijuana use. Taking into account all of the facts and circumstances surrounding Applicant's drug use and judgment lapses, Applicant mitigates security concerns related to his drug use, drug purchases, and drug cultivation under both Guideline E and Guideline H. Favorable conclusions warrant with respect to the allegations covered by Guidelines E and H, as they pertain to his drug involvement.

Personal conduct concerns

Security concerns over Applicant's judgment, reliability and trustworthiness are raised under Guideline E as the result of his determined knowing and wilful omissions of his recurrent drug use and cultivation of marijuana in the DD-49 he completed in December 1984, and ensuing misrepresentations about his drug use and cultivation in his interviews with DSS (in August 1988) and OPM (in October 2008). Applicant's acknowledgments of his recurrent use of illegal drugs and experimentations in cultivating marijuana were offered only after he was confronted by the interviewing DSS agent in 1988, and not at all in his more recent OPM interview. By omitting his recurrent drug use and past experiments in marijuana cultivation, Applicant failed to furnish materially important background information about his drug use that was needed for the government to properly process and evaluate his security clearance application.

Applicant's omissions are attributable to some embarrassment and concerns about losing his job and clearance. His omissions, as described, reflect his conscious decisions to omit material information concerning his drug use history and experiments in marijuana cultivation while holding a security clearance.

While Applicant insists he was told by the interviewing OPM agent in October 2008 that his denying any cultivation experimentation in 1987 and before was not material to a current clearance eligibility determination, his claims lack evidentiary sufficiency and plausibility. Investigating OPM agents are not known to endorse actual misrepresentations in their interviews, and cannot be accepted herein without corroborating proof from Applicant. Neither Applicant's 1988 answers nor his more recent 2008 answers were sufficiently prompt, or voluntary, to enable him to invoke MC ¶ 17(a), "the individual made prompt, good-faith efforts to correct the omission, concealment, or

falsification before being confronted with the facts.” Applicant’s subsequent hearing corrections, while manifestly forthcoming and sincere, do not meet either the prompt or good-faith prongs of MC ¶ 17(a), as these terms are generally understood. His assurances are not challenged by any countervailing evidence and are accepted.

In evaluating all of the circumstances surrounding Applicant’s DD-49 omissions, his ensuing misstatements in his 1988 DSS interview and 2008 OPM interview, and his hearing explanations, his disclosures are insufficient to enable him to convincingly refute or mitigate the deliberate falsification allegations. Questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations reflect core policy security concerns of the personal conduct guideline (AG ¶15). They are clearly evident under the facts and policy considerations developed under this Guideline. Overall, Applicant’s explanations of his omissions and misrepresentations are not persuasive enough to warrant favorable conclusions relative to the falsification allegations pertaining to his drug-related SF-86 questionnaire and ensuing DSS and OPM omissions.

By contrast, Applicant’s prior termination stemming from cited sexist remarks made to employees of his previous employer, are aged, not repeated, and are mitigated by Applicant’s behavioral changes in the way he treats his colleagues and coworkers.

Taking into account all of the evidence produced in this record, unfavorable conclusions warrant with respect to the Guideline E allegations that Applicant knowingly and wilfully omitted his (a) drug purchases and cultivation attempts in his 1984 DD-49, (b) his attempts to grow marijuana until challenged by the interviewing DSS agent, and (c) his misrepresented prior attempts to cultivate marijuana in his most recent OPM interview. Favorable conclusions are justified with respect to the allegations covered in subparagraph 2.f relative to his prior dismissal for making inappropriate and harassing comments to other employees.

In reaching my decision, I have considered the evidence as a whole, including each of the E2(a) factors enumerated in the Adjudicative Guidelines of the Directive.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE H: (DRUG INVOLVEMENT):	FOR APPLICANT
Subparas. 1.a through 1.g:	For Applicant
GUIDELINE E: (PERSONAL CONDUCT):	AGAINST APPLICANT
Subpara. 2.a through 2.e:	Against Applicant

Subpara. 2.f:

For Applicant

Conclusions

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 Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge

