

KEYWORD: Drugs; Personal Conduct; Criminal Conduct

DIGEST: Between 1982 and 1996, Applicant used marijuana five to ten times. In 1988, Applicant--then age 18--was adjudicated guilty of possession of drug paraphernalia. In 1999, he received an Article 15 following a positive urinalysis for marijuana. In 1996, he completed an SF 86 and said he had only used marijuana once. The record evidence is sufficient to mitigate or extenuate the negative security implications stemming from his drug usage and false statement. Clearance is granted.

CASENO: 02-09389.h1

DATE: 08/30/2004

DATE: August 30, 2004

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 02-09389

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Between 1982 and 1996, Applicant used marijuana five to ten times. In 1988, Applicant--then age 18--was adjudicated guilty of possession of drug paraphernalia. In 1999, he received an Article 15 following a positive urinalysis for marijuana. In 1996, he completed an SF 86 and said he had only used marijuana once. The record evidence is sufficient to mitigate or extenuate the negative security implications stemming from his drug usage and false statement. Clearance is granted.

STATEMENT OF THE CASE

On April 21, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating that DOHA could not make the preliminary affirmative finding⁽¹⁾ it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On May 19, 2003, the Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing.

On March 5, 2004, the Applicant received a complete copy of the file of relevant material (FORM) dated August 19, 2003, and was given the opportunity to file objections and submit material in extenuation, mitigation, or refutation. The Applicant's response to the FORM was due on September 22, 2003. No response has been received. In the FORM, Department Counsel (DC) presented ten exhibits (Items). The Applicant made no submissions. I was assigned the case on March 5, 2004.

In the FORM, DC moved to amend the SOR to indicate the location of an Article 15 under the Uniformed Code of Military Justice (UCMJ) from Fort Belvoir to Fort Bragg. The motion is granted.

FINDINGS OF FACT

The SOR alleges Drugs, Personal Conduct, and Criminal Conduct. The Applicant admits to the following: in June 1999, he had a positive urinalysis and received punishment under Article 15 UCMJ; he was arrested in March 1988 and found guilty of possession of drug paraphernalia; he used marijuana from 1982 through 1996; his Army recruiter told him to list only a single use of marijuana. Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact.

The Applicant is 34-years-old, has worked for a defense contractor since April 2000, and is seeking to obtain a security clearance. Applicant was in the U.S. Army from January 1997 through March 2000. Applicant was regarded by those who knew him when he was in the Army as: having an excellent work ethic, incredibly hard working, knowledgeable, a dedicated husband, devoted father, and an outstanding soldier. He was promoted ahead of his peers because of his outstanding leadership potential. Applicant asserts he is a 60% disable veteran, but has provided no supporting documentation.

From 1982 through 1996, Applicant used marijuana five to ten times. In 1988, Applicant--then age 18--and a friend were hitchhiking when the car in which they were riding was stopped for speeding. A search of the vehicle revealed cocaine and drug paraphernalia. All individuals were arrested and charged. Applicant spent a few days in jail before his release. (Gov Ex 9)

In September 1996, Applicant completed a Questionnaire for National Security Positions, Standard Form (SF) 86. In response to question 24, which asked him about his illegal drug usage, he listed a single use of marijuana. Prior to completing his SF 86, he had been advised by "many military personnel" to limit the disclosure of past illegal drug usage. (Gov Ex 5) In his February 2001 sworn statement, Applicant said his recruiter suggested he list only a single usage.

In May 1999, a random urinalysis of Applicant was positive for the presence of marijuana. Applicant has consistently asserted he did not knowingly use marijuana. He received punishment under Article 15 (UCMJ) and was reduced in grade from E-3 to E-1.

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive. The government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts must have a nexus to an Applicant's lack of security worthiness.

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. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

Drug Involvement, Guideline H, 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.

Conditions that could raise a security concern and may be disqualifying include:

a. Any drug abuse.

Conditions that could mitigate security concerns include:

a. The drug involvement was not recent.

Personal Conduct, Guideline E, 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.

Conditions that could raise a security concern and may be disqualifying include:

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.

Conditions that could mitigate security concerns include:

2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.

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

Conditions that could raise a security concern and may be disqualifying include:

a. Allegations or admission of criminal conduct, regardless of whether the person was formally charged.

b. A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

a. The criminal behavior was not recent.

BURDEN OF PROOF

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." 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 restricted eligibility for access to classified information to "United States citizens . . . whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Executive Order 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances which 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. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has the ultimate burden of establishing his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." *See* Executive Orders 10865 § 2 and 12968 § 3.1(b). "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 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, 484 U.S. at 531. Doubts are to be resolved against the applicant.

CONCLUSIONS

The Government has satisfied its initial burden of proof under Guideline H, Drug Involvement. Under Guideline H, the security eligibility of an applicant is placed into question when that applicant is involved with illegal drugs. From 1982 through 1996, Applicant used marijuana five to ten times, in 1988 he was found guilty of possession of drug paraphernalia, and in 1999, and he received punishment under Article 15 (UCMJ) following a urinalysis positive for the presence of marijuana. Disqualifying Condition (DC) a. (2) applies.

Applicant used marijuana five to ten times over a 14 year period. This is infrequent use. Applicant, at age 18, was found guilty of possession of drug paraphernalia in 1988. Applicant's most recent incident related to illegal drug use was his 1999 Article 15, which occurred five years ago. Neither this incident nor the other drug usage is recent. Mitigating Condition (MC) a. (The drug involvement was not recent.) applies. I find for Applicant as to Drug Involvement.

The Government has satisfied its initial burden of proof under Guideline E, Personal Conduct. Under Guideline E, the security eligibility of an applicant is placed into question when that applicant is shown to have been involved in personal conduct which creates doubt about the person's judgment, reliability, and trustworthiness. Complete honesty and candor on the part of applicants for access to classified information is essential to make an accurate and meaningful security clearance determination. Without all the relevant and material facts, a clearance decision is susceptible to error, thus jeopardizing the nation's security. In September 1996, Applicant completed an SF 86 and listed a single use of marijuana when he had actually used it five to ten times over a 14 year period. Because his answer was false, DC 2-(3) applies.

Applicant said he used marijuana one time when it was actually five to ten times. He followed his recruiter's advice and disclosed a single use on his SF 86. The difference in the numbers between the one use he reported and possible ten uses is a distinction without significance. In any event, Applicant's marijuana usage was minor. Applicant's false answer was to a single question on an SF 86 completed almost eight years ago. MC 2-(4) applies. I find for the Applicant as to SOR subparagraphs 2.a.

The Government has satisfied its initial burden of proof under Guideline J, Criminal Conduct. Under Guideline J, the security eligibility of an applicant is placed into question when an applicant is shown to have a history or pattern of criminal activity creating doubt about his judgment, reliability, and trustworthiness. DC a-(5) and b-(6) apply due to Applicant's 1988 conviction of possession of drug paraphernalia, his 1999 Article 15, and his false answer on his SF 86.

This conduct is not recent. The drug paraphernalia possession occurred more than 16 years ago, the false answer occurred almost eight years ago, and the Article 15 occurred five years ago. MC a. (The criminal behavior was not recent.) applies.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

FORMAL FINDINGS

Formal Findings as required by Section 3., Paragraph 7., of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1, Drug Involvement: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Paragraph 2 Personal Conduct.: FOR THE APPLICANT

Subparagraph 2.a.: For the Applicant

Paragraph 3 Criminal Conduct.: FOR THE APPLICANT

Subparagraph 3.a.: For the Applicant

Subparagraph 3.b.: For the Applicant

Subparagraph 3.c.: For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. Clearance is granted.

Claude R. Heiny

Administrative Judge

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.
2. DC a. Any drug abuse.
3. DC 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. (E2.A5.1.2.2.)
4. MC 2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily. (E2.A5.1.3.2.)
5. DC a. Allegations or admission of criminal conduct, regardless of whether the person was formally charged.
6. DC b. A single serious crime or multiple lesser offenses.