

DATE: June 4, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-09361

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a 35-year-old employee of a defense contractor, used marijuana between 200 and 300 times between 1992 and 1998. After obtaining an interim clearance in 2001, Applicant used marijuana on one occasion and failed to note that use on a subsequent security clearance application. Applicant failed to demonstrate it is in the national interest to grant him a clearance. Clearance is denied.

STATEMENT OF THE CASE

Applicant, an employee of a defense contractor, applied for a security clearance. The Defense Office of Hearings and Appeals (DOHA), the federal agency tasked with determining an applicant's eligibility for access to classified information, declined to grant Applicant a clearance. In accordance with the applicable Executive Order ⁽¹⁾ and Department of Defense Directive, ⁽²⁾ DOHA issued a Statement of Reasons (SOR) on 28 January 2003 detailing why a clearance was not granted and recommending Applicant's case be referred to an administrative judge to determine whether the clearance should be denied/revoked. In the SOR, DOHA alleged Applicant failed to meet the drug involvement (Guideline H) and personal conduct (Guideline E) personnel security guidelines of the Directive.

Applicant answered the SOR in writing on 7 February 2003. The case was assigned to me on 3 March 2003. On 7 April 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government's case consisted of two exhibits. Applicant testified on his own behalf, called two witnesses, and submitted two exhibits. DOHA received the transcript (Tr.) of the proceeding on 11 April 2003.

FINDINGS OF FACT

Applicant is 35-year-old federal contract manager for a defense contractor. Ex. 1 at 1-2. He is married and has three children. Ex. 1 at 4-5.

Between 1992 and 1998, Applicant used marijuana between 200 and 300 times-two to three times per week, on average, during the period. However, there were gaps of two to three months when he did not use marijuana. He only used marijuana at his home or at a friend's house. Applicant bought some of the marijuana he used, but some was given to him. Ex. 2 at 2. He stopped smoking marijuana in June 1998. Tr. 22.

Applicant was hired by the defense contractor in March 1999. Tr. 22; Ex. 1 at 2. In July 2001, Applicant was granted an interim security clearance by the Department of Defense. Tr. 19; *see* Ex. 1 at 8. On 14 September 2001, Applicant used marijuana with his brother after driving back from their grandfather's funeral. On 12 November 2001, Applicant signed a security clearance application (SCA) in which he admitted using marijuana approximately 60 times from 1992 to 1996. *Id.* Applicant did not mention the 14 September 2001 use of marijuana on his SCA.

Applicant was later interviewed during a background investigation for another government agency. After he was confronted with some inconsistencies in his answers to questions concerning his use of drugs, Applicant confessed to using drugs on 14 September 2001. Tr. 25.

Applicant has performed his duties well and is well liked by his colleagues. Tr. 39, 49.

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 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." Exec. Or. 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.

Enclosure 2 of the Directive sets forth personal 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 that the applicant has not met the strict guidelines the President and Secretary of Defense have established for issuing a clearance.

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. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. 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 security clearance." ISCR Case No. 01-20700 at 3. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Guideline H-Drug Involvement

In the SOR, DOHA alleged under Guideline H that Applicant used marijuana between 200 and 300 times (¶ 1.a.), his last use occurring while he possessed an Interim SECRET clearance (¶ 1.b.). The improper or illegal involvement with

drugs raises questions regarding an applicant's willingness or ability to protect classified information. Drug abuse may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information. Directive ¶ E2.A8.1.1.1.

Applicant has a lengthy history of abusing marijuana. DC 1. At times, he purchased marijuana. DC 2. Applicant argues that his use was not recent (MC 1), his last use being over 18 months ago. Tr. 34. He also stated that he does not intend to abuse any drugs in the future (MC 3). Tr. 38. In support of that statement, Applicant submitted the results of drug tests performed on samples of his urine and blood. Exs. A, B. Both were negative for drugs of abuse. While all but one instance of drug abuse occurred before 1998, I am unable to conclude that his drug use was not recent. His last use occurred while he possessed an interim clearance and his background was being investigated for full clearance. Although I have not discounted Applicant's statement that he will not use illegal substances in the future, I have not given it great weight in light of his use in 2001 after a three year abstinence and while already possessing an interim clearance. Finding is against Applicant.

Guideline E-Personal Conduct

In the SOR (¶ 2.a.), DOHA alleged under Guideline E that Applicant used marijuana while he possessed an Interim SECRET clearance. Under 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.

When he obtained his interim security clearance, Applicant was placed on notice of the serious concern the Government placed on drug abuse. Despite this knowledge, Applicant knowingly used marijuana while he possessed a security clearance. His conduct increased his vulnerability to coercion, exploitation, or duress. DC 4. Applicant claims that "at no time did I try to hide the fact that it had occurred." Answer at 2. Although the Government failed to allege that Applicant deliberately omitted this relevant and material information from his November 2001 SCA (DC 2), in fact he did. *See* Ex. 1 at 8. As the Government did not allege this deliberate omission in the SOR, it will not be used to disqualify Applicant. However, such misconduct directly impacts Applicant's credibility. Although he took positive steps to significantly reduce his vulnerability to coercion, exploitation, or duress by confessing to his September 2001 use of marijuana (MC 5), he did so only after being confronted by an agent investigating his drug use. Under the circumstances, I am not convinced Applicant has demonstrated that the U.S. should entrust classified information to his care. Finding is against Applicant.

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

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.

James A. Young

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.