

DATE: April 2, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-26060

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant used marijuana on a fairly regular basis between 1968 and 1994. He also used cocaine on three occasions between 1969 and 1985, and mescaline twice in 1968/69. He has not used any controlled substance since 1994, and convincingly asserts he will never use an illegal controlled substance in the future. He also incorrectly answered a question concerning his use of controlled substances in a security clearance application he submitted in 2000 because he misunderstood the question. Applicant has mitigated the security concerns caused by his illegal use of controlled substances and the incorrect answer he provided in the application. Clearance is granted.

STATEMENT OF THE CASE

On December 20, 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. [\(1\)](#) The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline E for personal conduct and Guideline H for drug involvement.

Applicant submitted an answer to the SOR that was received by DOHA on June 26, 2003, and requested a hearing. Applicant admitted all allegations contained in the SOR.

The case was assigned to another administrative judge on September 9, 2003, and reassigned to me on November 21, 2003, due to caseload considerations. A notice of hearing was issued on December 2, 2003, scheduling the hearing for December 17, 2003. I cancelled the scheduled hearing because of personal reasons, and a new notice of hearing was issued on January 13, 2004, rescheduling the hearing for February 4, 2004. The hearing was conducted as rescheduled.

The government submitted three documentary exhibits at the hearing that were marked as Government Exhibits (GE) 1-3 and admitted into the record without an objection. Applicant testified at the hearing and did not submit any exhibits. The transcript was received on February 12, 2004.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the pleadings and exhibits, and consideration of the testimony presented, I make the following findings of fact:

Applicant is 57 years old and has been employed by the same defense contractor since 1972. His job title is supplier management, which is essentially a buyer. He worked for this same employer from October 1966 to July 1968. He has possessed a secret security clearance since May 1983. No allegations of mishandling classified material have been made against him, nor has any action been taken to revoke, suspend, or downgrade his clearance before the action herein involved.

Applicant has been married since April 1977. He has two daughters, ages 24 and 21. The older daughter lives on her own and is employed at a bank. The younger daughter is a student and resides with Applicant and his wife. Applicant was previously married in June 1968 and divorced in October 1971. He married a second woman in January 1972 and was divorced from her in July 1976. Applicant and his wife have lived in the same residence since October 1977. He has a bachelor of arts degree in political science.

Applicant used cocaine on three occasions - once in 1969, once in 1981, and once in 1985. He also used mescaline on two occasions between 1968 and 1969. He first used marijuana in approximately 1968 while attending college. He used marijuana about once a month until 1976. For about 18 months beginning in 1975, he used marijuana more frequently, about once a week, while residing with a friend who sold marijuana. He continued using marijuana approximately once a month from 1976 to 1994. He has purchased marijuana for his personal use on a number of occasions, and attempted, unsuccessfully, to grow marijuana in his backyard in 1974/75.

Applicant's marijuana use included several occasions in approximately 1974 when he used the drug during lunch breaks while working for his present employer. His use of marijuana following his graduation from college generally occurred when he attended professional baseball games with a friend. He discontinued using marijuana for a short period in 1988 after becoming more religiously involved, but resumed use after about one year. He had a severe adverse physical reaction to marijuana after smoking it at a baseball game in 1994 and has not used it since. He convincingly testified that his life has changed since then and he will not use any illegal controlled substance in the future.

Applicant submitted a security clearance application (SF 86) on February 3, 2000, that was signed by him on February 8, 2000, in which he answered "No" to question 28: *Your Use of Illegal Drugs and Drug Activity - Use in Sensitive Positions - 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 public safety?* He was issued a security clearance in 1986, continued to use marijuana until 1994, and, accordingly, that answer was incorrect. However, in that same SF 86 Applicant admitted he used marijuana on 10 occasions between January 1993 and July 1994 in response to question 27.⁽²⁾ He also disclosed he had possessed a secret security clearance since May 1983 in response to question 31.⁽³⁾

The net effect of the answers Applicant provided in response to questions 27 and 31 was to acknowledge he had used marijuana while possessing a security clearance, despite his denial in response to question 28. The only explanation Applicant could provide for the discrepant answers was that he must have misunderstood the question. Considering his appearance, demeanor, and manner while testifying, the answers he gave to questions 27 and 31, and the potentially confusing structure of question 28,⁽⁴⁾ I find his explanation that he misunderstood the question credible. I also find his admission to the allegation contained in SOR subparagraph 2.a. was improvident due to his failure to give proper consideration to the necessity that the falsification be deliberate to constitute a Guideline E disqualifying condition.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline E, pertaining to personal conduct, and H, pertaining to drug involvement, with their respective DC and MC, are most relevant in this case.

BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁵⁾ The government has the burden of proving controverted facts.⁽⁶⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁷⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽⁸⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁹⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽¹⁰⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹¹⁾

No one has a right to a security clearance⁽¹²⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹³⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹⁴⁾

CONCLUSIONS

Under Guideline H, illegal drug involvement raises questions about an individual's willingness or ability to protect classified information. Involvement with or use of an illegal drug indicates unwillingness or inability to abide by the law. Cleared employees must respect regulations whether they agree with them or not. If they do not respect the rules on illegal substances, they may not respect the rules designed to protect classified information.

Applicant used marijuana on a regular basis from the time he was in college in 1968/69 until 1994. He also used cocaine on three occasions, the last use occurring in 1985. He has purchased marijuana for his own use and attempted to grow marijuana plants in his backyard. He possessed a secret security clearance on one of the occasions when he used cocaine and on multiple occasions when he used marijuana. Disqualifying Conditions (DC) 1: *Any drug abuse*; and DC 2: *Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution* apply in this case.

Applicant has not used any illegal controlled substance since 1994. He convincingly testified he will not use illegal controlled substances in the future and bases that, at least in part, on religious changes that have occurred in his life. Mitigating Conditions (MC) 1: *The drug involvement was not recent*; and MC 3: *A demonstrated intent not to abuse any drugs in the future* apply in this case. Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant has overcome the case against him and satisfied his ultimate burden of persuasion under Guideline H. Guideline H is decided for Applicant.

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. 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. Although Applicant provided an incorrect answer to question 28 in the SF 86 he submitted, he did not deliberately falsify the application. I do not find any Guideline E disqualifying condition applies in this case. Guideline E is decided for Applicant.

FORMAL FINDINGS

SOR ¶ 2-Guideline H: For the Applicant

Subparagraph a: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

SOR ¶ 1-Guideline E: For the Applicant

Subparagraph a: 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 Applicant. Clearance is granted.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. *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*
3. *Your Investigation Record -Investigations/Clearances Granted - Has the United States Government ever investigated your background and/or*

granted you a security clearance?

4. If a person is not careful to give the proper consideration to the semi-colon following the term "courtroom official" it appears that the possession of a security clearance modifies the preceding job descriptions.
5. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
6. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
7. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
8. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
9. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
10. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
11. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
12. *Egan*, 484 U.S. at 528, 531.
13. *Id* at 531.
14. *Egan*, Executive Order 10865, and the Directive.