

KEYWORD: Drugs

DIGEST: Applicant used ecstasy, a controlled substance, on two occasions in July 1999. He also used marijuana once in either April 1997 or April 1998. There is no evidence of any illegal drug usage since July 1999. Clearance is granted.

CASE NO: 02-03110.h1

DATE: 10/08/2003

DATE: October 8, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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**DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

**APPEARANCES**

**FOR GOVERNMENT**

Nygina T. Mills, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant used ecstasy, a controlled substance, on two occasions in July 1999. He also used marijuana once in either April 1997 or April 1998. There is no evidence of any illegal drug usage since July 1999. Clearance is granted.

**STATEMENT OF THE CASE**

On January 2, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.<sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline H (drug involvement). Applicant submitted a response to the SOR, dated February 19, 2003, and a request for a clearance decision based on the written record without a hearing on May 5, 2003. In his response to the SOR, Applicant admitted all allegations contained in the SOR.

Department Counsel prepared a File of Relevant Material (FORM) on May 19, 2003, that was mailed to Applicant on May 21, 2003 and informed him he had 30 days from receipt of the documents to submit his objections or information he wished to be considered. Applicant acknowledged receipt of the file on June 2, 2003 and did not file any additional information or interpose any objection to the material submitted by Department Counsel within the time allowed. The case was assigned to me September 3, 2003.

### **FINDINGS OF FACT**

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

Applicant is a 23-year-old single man employed by a defense contractor as a computer technician. He graduated from high school in June 1999, and was hired by his present employer on July 26, 1999.

Applicant submitted a security clearance application (SF 86) on August 19, 1999 in which he admitted using ecstasy on two occasions in July 1999, and marijuana once in April 1998. He submitted a signed and sworn statement on February 23, 2001 in which he stated he smoked marijuana once in April 1997, and explained that the first time he used ecstasy it was laced with heroin and on the second occasion it was laced with mescaline. Both uses of ecstasy occurred at parties he attended a week apart, within a month after his graduation from high school, and when he was 19-years-old. The sole marijuana use occurred while he was in high school and either 16 or 17 years of age.<sup>(2)</sup> He has not sought any treatment or counseling related to illegal drug use.

### **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, Guidelines H, pertaining to drug involvement, with its respective DC and MC, is 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.<sup>(3)</sup> The government has the burden of proving controverted facts.<sup>(4)</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence,<sup>(5)</sup> although the government is required to present substantial evidence to meet its burden of proof.<sup>(6)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(7)</sup> 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.<sup>(8)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(9)</sup>

No one has a right to a security clearance<sup>(10)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(11)</sup> Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.<sup>(12)</sup>

### **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.

The record does establish that Applicant used controlled substances on three occasions, the last time occurring in July 1999 and within one month after his graduation from high school. There is no indication in the record that Applicant experienced any dependency problems that would have suggested the need for him to seek counseling or treatment related to his illegal drug use. Disqualifying Condition (DC) 1: *Any drug abuse* applies in this case.

Applicant candidly disclosed his illegal use of drugs in the SF 86 he submitted in August 1999. When questioned about his illegal use of drugs in

February 2001, Applicant again candidly disclosed his use of drugs and explained the surrounding circumstances. Most notably in that statement, Applicant did not report any additional illegal drug use between the time he submitted the SF 86 and when he provided the statement. There is no evidence to suggest any additional use of illegal controlled substances by Applicant, or other misconduct of any sort by him. Further, he has been employed by the same defense contractor since graduating from high school, and his last illegal use of drugs, without any reported concerns by the employer about Applicant's conduct.

In the February 2001 statement, Applicant said he did not regret using drugs and "I doubt that I will get to a point in my life again where I will feel the need but I cannot promise that it will not happen again." I do not view this as any indication on the part of Applicant that he intends or contemplates using illegal controlled substances in the future. Reading his statement in its entirety makes clear that Applicant experimented with controlled substances on three occasions, has not since used drugs, and does not intend to use them in the future. 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.

After considering the evidence, and weighing the disqualifying condition against the mitigating conditions, I find that Applicant has mitigated the security concern caused by his drug involvement. He has overcome the case against him and satisfied his ultimate burden of persuasion. Guideline H is decided for Applicant.

### **FORMAL FINDINGS**

SOR ¶ 1-Guideline H: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph 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 Applicant.

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. The SOR alleges marijuana use in April 1997 and April 1998. Applicant lists a single marijuana use that occurred in April 1998 in the SF 86 he submitted and a single use that occurred in April 1997 in the statement he submitted. I am satisfied he is only admitting a single use and is confused as to one or the other of the years, despite his unequivocal admission to the allegation in the SOR.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
5. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
10. *Egan*, 484 U.S. at 528, 531.
11. *Id* at 531.
12. *Egan*, Executive Order 10865, and the Directive.