

DATE: January 12, 2004

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 02-08032

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Nygina T. Mills, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 50-year-old married man employed by a major defense and aerospace company as an assembler. Regular, although occasional (once to twice annually), marijuana use starting in 1969 and continuing until his arrest for possession of marijuana in December 1997 is simply too much for Applicant to overcome and meet his ultimate burden of persuasion. This is especially true given the record's silence on what affirmative steps, if any, Applicant has taken to dispel all doubt he will remain drug free. Clearance is denied.

STATEMENT OF THE CASE

On July 21, 2003, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant.⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline H for drug involvement and Guideline E for personal conduct.

Applicant answered the SOR on August 2, 2003, and he requested a clearance decision based on the written record without a hearing. In his Answer, Applicant admitted to the factual events alleged in the SOR. Thereafter, Department Counsel prepared and submitted its written case. The File of Relevant Material (FORM) was mailed to Applicant September 25, 2003, and it was received by Applicant October 3, 2003. Applicant's written response to the FORM was due November 2, 2003, and no response was received. The case was assigned to me December 2, 2003.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the record, I make the following essential findings of fact:

In general, I find that the record evidence as a whole is sufficient to establish, by substantial evidence, the occurrence of

all the factual events alleged in SOR subparagraphs 1.a, 1.b, and 2.a.

Applicant is a 50-year-old married man. He has two children, a son born in 1984, and a daughter born in 1986.

He is employed by a major defense and aerospace company as an assembler. He has worked for this company since May 1981. The record is silent concerning Applicant's abilities and attributes as an employee. Applicant has held a company-issue confidential clearance, but it appears it he has not held a government-issued security clearance.

In conjunction with his employment, Applicant completed a security-clearance application (SF 86) in August 2000. In response to Question 24,⁽²⁾ Applicant answered "yes" disclosing a December 1997 unnamed misdemeanor offense, which had been dismissed. In response to Question 27,⁽³⁾ Applicant answered "yes" indicating using marijuana once on December 19, 1997.

Applicant was arrested for possession of marijuana by police on December 19, 1997. Applicant and a friend were arrested when a routine patrol spotted them sitting in a car outside a club with the motor running. After approaching the car, the officer smelled marijuana when the window of the car was lowered. Upon being told a search would take place, Applicant gave the officer a brown smoking pipe with a burn herbal substance inside. The officer believed the substance to be marijuana. In addition, a bag was found in Applicant's right front pocket of his pants, which also appeared to contain marijuana, in the officer's opinion.

Based on his arrest, a criminal complaint was filed in February 1998, and subsequently in April 1998, Applicant pled guilty or admitted sufficient facts to support a finding of guilty. The court continued the case without a guilty finding until October 15, 1998, when it was dismissed by the court on the probation department's recommendation.

In January 2002, Applicant was interviewed during his background investigation. That interview resulted in Applicant providing a sworn statement wherein he provided details about his past use of marijuana. He used marijuana between 1969 and 1971 during high school once to twice a month. After completing high school in 1971, Applicant used marijuana once to twice a year until his arrest in December 1997. During this time, Applicant held a company-issued confidential clearance beginning May 1981. Applicant used marijuana in social settings and smoked it in cigarette form or with a pipe. Applicant denies any financial problems related to his marijuana use, and he denies engaging in the sale, cultivation, or trafficking of marijuana or any other illegal drugs. He also denies seeking any medical assistance or counseling due to his marijuana use. After his arrest in December 1997, Applicant decided not to use marijuana or any other illegal drug in the future. Other than his statement, the record is silent concerning what affirmative steps, if any, Applicant has taken to demonstrate he will not use illegal drugs in the future.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on 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 record evidence as a whole, the following adjudicative guidelines are most pertinent here: Guideline H for drug involvement⁽⁴⁾ and Guideline E for personal conduct.⁽⁵⁾

BURDEN OF PROOF

The only 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.⁽⁶⁾ The government has the burden of proving controverted facts.⁽⁷⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.⁽⁸⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽⁹⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽¹⁰⁾

Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against them.⁽¹¹⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹²⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹³⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

Addressing the drug involvement under Guideline H, a security concern may exist based on improper or illegal involvement with drugs. Improper or illegal involvement with drugs is relevant to the security-clearance process for several reasons: (1) drug abuse indicates unwillingness or inability to abide by the law; (2) drug abuse weakens judgment; (3) some types of drug use reflect a tendency toward irresponsible or high risk behavior; (4) users of illegal drugs may be susceptible to blackmail, especially if exposure of drug use could cost them their job; (5) drug abuse or dependence often indicates the presence of broad emotional or personality problems of security concern; or (6) drug use may cause financial problems, leading to criminal activity to finance a drug habit.

Here, based on the record evidence, the government has established its case under Guideline H. A security concern is raised by Appellant's history of marijuana use dating back to 1969 and continuing on an occasional basis (once or twice annually) until December 1997, when he decided to stop after his arrest for possession of marijuana. His marijuana use constitutes drug abuse⁽¹⁴⁾ and so, DC 1⁽¹⁵⁾ applies. His marijuana use indicates, among other things, unwillingness or inability to abide by the law. In addition, DC 2⁽¹⁶⁾ applies based on Applicant's December 1997 arrest for possession of marijuana despite that the offense was eventually dismissed in 1998. Aggravating the situation, since May 1981, his drug abuse took place while he held a company-issued confidential clearance. These circumstances deserve serious consideration.⁽¹⁷⁾

Turning to the mitigating conditions under Guideline H, MC 1⁽¹⁸⁾ applies in Applicant's favor. His last documented use of marijuana was December 1997, about six years ago, and so his drug involvement can be considered not recent. But his history of regular, although occasional, marijuana use for more than 25 years cannot be characterized as aberrational and atypical behavior.⁽¹⁹⁾ Appellant receives some credit under MC 3⁽²⁰⁾ based on his representation that he has not used marijuana since his arrest in December 1997. The credit is minimal, however, because he did not disclose the full extent of his marijuana use in response to Question 27 of the SF 86. He disclosed a single use in December 1997 whereas he should have disclosed all marijuana use during the relevant seven-year period (August 1993 - August 2000). By understating his marijuana use, Applicant undermines his credibility when he says he has been drug free since December 1997 and will remain drug free in the future. MC 4⁽²¹⁾ has no application based on the facts and circumstances here.

To sum up, having considered both the favorable and unfavorable evidence, marijuana use starting in 1969 and continuing until his arrest in December 1997 is simply too much for Applicant to overcome and meet his ultimate burden of persuasion. This is especially true given the record's silence on what affirmative steps, if any, Applicant has taken to dispel all doubt he will remain drug free. Accordingly, Guideline H is decided against Applicant.

Under Guideline E, conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that a person may not properly handle and safeguard classified information.

Here, based on the record evidence, the government has not established its case. It has failed to establish, by substantial evidence, any of the disqualifying conditions under Guideline E. It should be noted that SOR ¶ 2.a is nothing more than a cross-allegation to SOR ¶ 1.a and ¶ 2.a, which are the drug involvement allegations. In other words, SOR ¶ 2.a adds nothing new. Undoubtedly, this case does raise a genuine, fact-based, security concern due to Applicant's decades long history of marijuana use and his drug-related offense. But that does not necessarily translate into a case under Guideline

E. Although it may be possible to pigeonhole Applicant's drug involvement under DC 4, [\(22\)](#) it's a stretch and, in my view, adds nothing of security significance to the case. Accordingly, Guideline E is decided for Applicant.

In reaching my decision, I have considered the evidence as a whole, both favorable and unfavorable, as well as the whole-person concept and other appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

SOR ¶ 1-Guideline H: Against the Applicant

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

SOR ¶ 2-Guideline E: For the Applicant

Subparagraph 2.a: For the Applicant

DECISION

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 a security clearance for Applicant. Clearance is denied.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Question 24, in relevant part, asks "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?"
3. Question 27, in relevant part, asks, "Since the age of 16 or in the past 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, . . ."
4. Guideline H is found at Attachment 2 to Enclosure 2 of the Directive, at pages 33-34.
5. Guideline E is found at Attachment 2 to Enclosure 2 of the Directive, at pages 27-28.
6. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
7. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
8. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
9. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
10. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
11. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
12. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
13. *Egan*, 484 U.S. at 528, 531.

14. "Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction."

15. "Any drug abuse."

16. "Illegal drug possession, . . ."

17. Appellant's marijuana use, however, does not fall within the scope of 10 U.S.C. § 986, the so-called Smith Amendment, because Appellant is not currently an unlawful user of, or addicted to, a controlled substance.

18. "The drug involvement was not recent."

19. MC 2 "The drug involvement was an isolated or aberrational event."

20. "A demonstrated intent not to abuse any drugs in the future."

21. "Satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a credentialed medical professional."

22. "Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation, or duress, such as engaging in activities which, if know, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail."