

KEYWORD: Drugs; Personal Conduct; Criminal Conduct

DIGEST: Since graduating college Applicant has used marijuana infrequently, however, he used after having been awarded security clearances. When he completed his security clearance questionnaires, he listed his marijuana usage but did not list his other drug usage. The record evidence is insufficient to mitigate or extenuate the negative security implications stemming from Applicant's drug usage and failure to list all of his usage on his questionnaires. Clearance is denied.

CASENO: 02-28139.h1

DATE: 03/10/2005

DATE: March 10, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-28139

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Since graduating college Applicant has used marijuana infrequently, however, he used after having been awarded security clearances. When he completed his security clearance questionnaires, he listed his marijuana usage but did not list his other drug usage. The record evidence is insufficient to mitigate or extenuate the negative security implications stemming from Applicant's drug usage and failure to list all of his usage on his questionnaires. Clearance is denied.

STATEMENT OF THE CASE

On February 25, 2004, 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 March 18, 2004, Applicant answered the SOR and requested a hearing. On September 28, 2004, I was assigned the case. On October 7, 2004, I convened a hearing in this matter. The record was kept open to allow Applicant to submit additional documents, which were received on October 21, 2004. The documents were admitted into evidence. On October 18, 2004, the transcript (tr.) of the hearing was received.

FINDINGS OF FACT

The SOR alleges security significant drug involvement, personal conduct, and criminal conduct. The Applicant admits to the following: he used marijuana from 1987 to April 2002; used LSD, hallucinogenic mushrooms, and opium three times each between 1988 and 1996; he purchased and sold marijuana; and he continued to use marijuana after having been granted secret security clearances in 1997 and 1999. Those admissions are incorporated herein as findings of fact. After thorough review of the whole record, I make the following additional findings of fact:

The Applicant is a 34-year-old electrical engineer who has worked for a defense contractor since July 2002 and is seeking to maintain a security clearance. In 2003, Applicant received two special recognition payments and one spot award for his work performance. In 2004, Applicant received a certificate of excellence.

In 1987, Applicant--then 17 years old-- first used marijuana. For the last two years of high school (1987 and 1988), Applicant used marijuana once a quarter. He continued his quarterly use as a college student until May 1996, when he graduated from college. In 1997 or 1998, Applicant smoked marijuana during a vacation trip to Amsterdam where marijuana use is either legal or decriminalized. From 1996 until April 2002, he used marijuana once every two years. His last use was April 2002 on a vacation trip in Mexico after he had been laid off from his defense contractor job. He thought marijuana was legal in Mexico. During the period 1999 to 2002, he used marijuana three or four times. (Gov Ex 4)

On two weekends, for a total of four times, Applicant used marijuana while he had a security clearance. (Tr. 34) He used in Amsterdam in 1997 or 1998 and during the Mexican vacation in 2002. One time, ⁽²⁾ Applicant and a friend purchased one ounce of marijuana for \$120 and sold it to their friends. Some time before graduating from college, Applicant used LSD three times, opium two or three times, hashish once or twice, and hallucinogenic mushrooms two or three times. His usage occurred during three Grateful Dead concerts. (Tr. 25) His memory of this usage is hazy and vague, due to the passage of time and his use of alcohol and marijuana at the concerts. (Tr.25) Applicant admits there is the possibility he used these drugs, but he does not clearly remember each event. (Tr. 31)

In July 2002, Applicant completed a security clearance application, Standard Form (SF) 86. In response to question 27, which asked him about his prior illegal drug usage, he listed using marijuana five times between 1995 and 2002, but did not list he had used LSD, hallucinogenic mushrooms, hashish, or opium. In response to the same question on a February 1997 SF 86, he listed he had used marijuana 15 times between 1989 and 1990, but did not list other drug use. Applicant states he never intended to mislead or falsify on his SF 86s. (Tr. 52) He alleges he did not list his other illegal drug usage because he was unsure he had used other drugs. His memory was hazy about the other drugs used. (Tr. 47) He does not intend to use illegal drugs in the future.

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.

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. The improper or illegal involvement with drugs raises questions regarding an applicant'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. Directive E.2.A.8.1.1. Since 1996, Applicant used marijuana three or four times after having a security clearance. Disqualifying Condition (DC) 1 (E2.A8.1.2.1. *Any drug abuse*) applies.

Applicant used marijuana less than five times since graduating college in May 1996. He used on two weekends, for a total of four times. He used in Amsterdam in 1997 or 1998, where marijuana is legal or decriminalized, and during a trip to Mexico in 2002, after he had been laid off from work. Although his use is infrequent use, his last use is recent and more importantly the usage occurred after he had been granted security clearances in April 1997 and July 2002. Recent drug involvement, especially following the granting of a security clearance will almost invariably result in an unfavorable determination. (E2.A8.1.2.5.)

None of the Mitigating Conditions (MC) apply. MC 1 (E2.A8.1.3.1. *The drug involvement was not recent*) does not apply to his marijuana use because his last use was approximately two and a half years before the hearing. MC 1 does apply to his use of LSD, opium, hashish, and hallucinogenic mushrooms, which occurred prior to May 1996 and is, therefore, not recent. I find for Applicant as to SOR 1.b, 1.c, 1.d, and 1.e. MC2 (E2.A8.1.3.2. *The drug involvement was an isolated or aberrational event*) does not apply to his marijuana use because he used marijuana on numerous occasions, although with reduced frequency as of late. However, MC 2 does apply to his single sale of marijuana. I find for Applicant as to SOR 1.g.

MC 3 (E2.A8.1.3.3. *A demonstrated intent not to abuse any drugs in the future*) does not apply. I am not compelled to accept applicant's stated intention not used marijuana in the future. Even if Applicant makes a sincere statement that he has no intention of using drugs in the future, such a statement does not preclude me from considering it in light of the record evidence as a whole in deciding whether the applicant is likely to adhere to such a commitment in the future. As a matter of common sense and human experience, people do not always successfully adhere to the promised to reform or change their conduct or lifestyle.

The sufficiency or insufficiency of an applicant's period of conduct without recurrence of past misconduct does not turn on any bright-line rules concerning the length of time needed to demonstrate reform and rehabilitation, but rather a reasoned analysis of the facts and circumstances of an applicant's case based on a careful evaluation of the totality of the evidence record within the parameters set by the Directive. Here, the two and a half years since Applicant's last use is insufficient to demonstrate reform or rehabilitation. I find against 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. The nature of Applicant's actions, in providing false information on his February 1997 and July 2002 SF 86s poses a serious potential risk to the nation's security precautions.

On both SF 86s, the Applicant listed his marijuana usage, but failed to list other drug usage, which occurred during college at Grateful Dead concerts. Prior to ay 1996, Applicant had used LSD, hashish, hallucinogenic mushrooms, and opium two or three times each. Although his memory of this usage may have been affected by the passage of time and use of alcohol and marijuana at the concerts, he should have listed it on his SF 86. The February 1997 SF 86 was completed within a year of graduation from college when his memory of his concert drug usage should have been fresher.

None of the mitigating conditions apply to his false answers. His drug involvement was pertinent to a determination of judgment, trustworthiness, or reliability. The falsifications were not an isolated incident because he gave false answers on two different SF 86s. There is no showing the Applicant make a prompt, good-faith effort to correct the falsification before being confronted with the facts. There is no indication his omissions were caused by improper or inadequate advice from authorized personnel or based on advice from legal counsel. Because of the serious nature of his falsification, I find against the Applicant as to Personal Conduct, SOR subparagraph 2.a. and 2.b.

The Government has satisfied its initial burden of proof under Criminal Conduct, Guideline J. Under Guideline J, the security eligibility of an applicant is placed into question when that applicant is shown to have a history or pattern of criminal activity creating doubt about his judgment, reliability, and trustworthiness. Falsifying his SF 86 is criminal conduct. DC 1. (E2.A10.1.2.1. *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*) applies.

It is unlikely Applicant will fail to list his other illegal drug usage when he completes forms in the future. MC 4. (E2.A10.1.3.4. *The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*) applies. I find for Applicant as to criminal conduct.

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.

The awarding of a security clearance is not a once in a life time occurrence, but is based on current disqualifying and mitigating conditions. In fairness to the Applicant, this decision should not be construed as a determination that Applicant can not or will not attain the reform and rehabilitation necessary to justify the award of a DoD security clearance. To the contrary, his mitigating evidence suggests a sound potential for positive reform and outstanding accomplishments in the defense industry. With the passage of sufficient additional time, continued rehabilitation, and no future incidents of misconduct, he may well demonstrate persuasive evidence of his security worthiness. But that time has not yet arrived. Because the Applicant meets the disqualifying conditions and none of the mitigating conditions, the drug involvement and personal conduct is resolved against him. A clearance at this time is not warranted.

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: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: For the Applicant

Subparagraph 1.e.: For the Applicant

Subparagraph 1.f.: Against the Applicant

Subparagraph 1.g.: For the Applicant

Subparagraph 1.h.: Against the Applicant

Subparagraph 1.i.: Against the Applicant

Paragraph 2 Personal Conduct: AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.b.: Against the Applicant

Paragraph 3 Criminal Conduct: FOR THE APPLICANT

Subparagraph 3.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 the Applicant. Clearance is denied.

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. Record is silent as to when this occurred.