

KEYWORD: Personal Conduct; Drugs; Criminal Conduct

DIGEST: Applicant was convicted of possessing marijuana on two occasions in 1997, and one additional time while he was still a juvenile. He was found to be in contempt of court in 1998 for failing to successfully complete a court-ordered drug treatment program. He has not abused any controlled substance since 1999, has credibly explained the incorrect information he provided in a security clearance application he submitted and during the course of an interview, and has demonstrated he has totally rehabilitated himself. Applicant has mitigated the security concerns raised by his past use of marijuana. Clearance is granted.

CASENO: 02-28368.h1

DATE: 01/03/2005

DATE: January 3, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-28368

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was convicted of possessing marijuana on two occasions in 1997, and one additional time while he was still a juvenile. He was found to be in contempt of court in 1998 for failing to successfully complete a court-ordered drug treatment program. He has not abused any controlled substance since 1999, has credibly explained the incorrect information he provided in a security clearance application he submitted and during the course of an interview, and has demonstrated he has totally rehabilitated himself. Applicant has mitigated the security concerns raised by his past use of marijuana. Clearance is granted.

STATEMENT OF THE CASE

On May 20, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was 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 J for criminal conduct, Guideline H for drug involvement, and Guideline E for personal conduct.

Applicant submitted a sworn answer to the SOR that was received by DOHA on June 24, 2004, and requested a hearing. Applicant admitted all SOR allegations except subparagraphs 1.b. and 2.a..

This case was assigned to me on September 10, 2004. A notice of hearing was issued on October 18, 2004, scheduling the hearing for November 9, 2004. The hearing was conducted as scheduled. The government submitted five documentary exhibits that were marked as Government Exhibits (GE) 1-5, and admitted into the record without an objection. Applicant testified at the hearing and submitted three documentary exhibits that were marked AE 1-3, and admitted into the record without an objection. The record was held open to provide Applicant the opportunity to submit additional documentation in support of his case. Three additional documents were timely received, marked as AE 4-6, and admitted into the record without an objection. The transcript was received on November 17, 2004.

FINDINGS OF FACT

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

Applicant is 25 years old, has never been married, and has no dependents. He graduated from high school in June 1997. He began working at a fast food restaurant as part of a work-study program while in high school, and continued in that employment until he quit as a result of a disagreement with management in March 2002 because he believed he was being forced out of his position as a shift manager. He was hired by his present employer, a defense contractor, in April 2002 as a laborer (technician apprentice). He was granted an interim clearance in April 2002, and no allegations of mishandling classified information have ever been made against him.

Applicant's letters of reference indicate he has proven himself to be a valued employee within the defense industry. He was promoted to technician level I in June 2003, having displayed ship surface preparation and painting skills superior to significantly more experienced personnel. He graduated from a 15-month long voluntary apprentice training program in January 2003 that he attended twice a week averaging between three to five hours a week. Following his graduation from the program he was promoted early to corrosion control technician level II effective January 24, 2004. He completed a blaster certification course in October 2004, continuing to display his willingness to go above and beyond what is normally required for his position. Applicant disclosed his criminal record to his project manager who thereafter wrote a letter on Applicant's behalf asking that his clean work record, personal growth, and valued employee status be factored into the security clearance decision making process.

Applicant was charged in August 1997 with possession of about two grams of marijuana he had purchased for \$10.00. He was convicted and sentenced to 30 days in jail (suspended) and ordered to pay \$460.00 in fines and court costs. His driving privileges were also suspended. He was charged again in November 1997 with possession of about two grams of marijuana, and was again convicted. For this conviction he was sentenced to 30 days in jail (suspended) and ordered to pay \$310.00 in fines and court costs. His driving privileges were again suspended, and he was ordered to attend a substance abuse program.

Applicant was admitted to the substance abuse program on December 22, 1997 when he was 18 years old. During the intake screening, Applicant admitted having used marijuana for the prior two years, consuming about two cigarettes every other day. His diagnosis upon admission was cannabis abuse. He tested positive for marijuana during an intake urine screen and in all subsequent screens. More intensive care was discussed with Applicant in March 1998. He denied needing the increase care, and shortly thereafter ceased attending the program. He was charged with and found guilty of failing to comply with the program in April 1998, and was sentenced to 30 days in jail and assessed court costs of \$210.00.

Applicant submitted a security clearance application in April 2002 and in response to a question asking for disclosure of his use of controlled substances in the previous seven years or since the age of 16 answered he had used marijuana on three occasions. He credibly testified he misunderstood the question and thought it was asking how many times he had been convicted of using a controlled substance. Applicant submitted a signed sworn statement on June 18, 2002 and stated he used marijuana about twice monthly from 1995 until about 1998/1999. He credibly explained the discrepancy between that statement and the use of marijuana he admitted during the intake interview was because during the 2002 interview he was explaining the amount of marijuana he was using when he decided to straighten out his life and quit using marijuana all together in 1999.

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 J, pertaining to criminal conduct, Guideline H, pertaining to drug involvement, and Guideline E, pertaining to personal conduct, 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.⁽²⁾ The government has the burden of proving controverted facts.⁽³⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁴⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽⁵⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁶⁾ 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.⁽⁷⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁸⁾

No one has a right to a security clearance⁽⁹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁰⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹¹⁾

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 with varying degrees of frequency between approximately 1995, when he was 16 years old, and 1999, when he was 20 years old, ranging from two marijuana cigarettes every other day during the early years and tapering off to a twice monthly use in about 1999 when he decided to stop abusing the substance all together. Disqualifying Condition (DC) 1: *Any drug abuse* applies. ⁽¹²⁾

Having viewed Applicant's demeanor, appearance, and manner of testifying, and giving due consideration to his work history, and the letters of reference he submitted, I find totally credible his assertion that he decided to change his lifestyle in 1999, and that he has not used marijuana since then. ⁽¹³⁾ Mitigating Conditions (MC) 1: *The drug involvement was not recent*; and MC 3: *A demonstrated intent not to abuse drugs in the future* apply. Applicant has mitigated the security concern caused by his use of marijuana that ended in 1999 and Guideline H is decided for Applicant. Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

The government has established its case against Applicant under Guideline J based upon Applicant's multiple convictions for possession of marijuana and his conviction for failing to successfully complete the court ordered substance abuse program. DC 2: *A single serious crime or multiple lesser offenses* applies.

Once again, having viewed Applicant's demeanor, appearance, and manner of testifying, and giving due consideration to his work history, and the letters of reference he submitted, I find totally credible his assertion that he decided to change his lifestyle in 1999, and that he has not used marijuana since that year. Further, his commendable work record, most notably his voluntary effort to complete the 15-month long apprentice training program on his own time, demonstrates Applicant has matured significantly since 1999 and is unlikely to commit criminal conduct in the future. (MC) 1: *The criminal behavior was not recent*; MC 4: . . . *the factors leading to the violation are not likely to recur* and MC 6: *There is clear evidence of successful rehabilitation* apply. Applicant has mitigated the security concern that arises from his criminal conduct. Guideline J 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. Applicant neither deliberately provided false answers in the security clearance application he submitted, nor did he intentionally provide false information in the statement he submitted. Further, I find credible his explanation for the circumstances surrounding his leaving employment with the fast food restaurant. No disqualifying condition exists under Guideline E, and it is decided for Applicant.

In all adjudications the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. Considering all relevant and material facts and circumstances present in this case, including Applicant's character references, 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.

FORMAL FINDINGS

SOR ¶ 1-Guideline E: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

SOR ¶ 2-Guideline H: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: For the Applicant

Subparagraph e: For the Applicant

Subparagraph f: For the Applicant

SOR ¶ 3-Guideline J: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: 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. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
4. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
5. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
6. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
7. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
8. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
9. *Egan*, 484 U.S. at 528, 531.
10. *Id* at 531.
11. *Egan*, Executive Order 10865, and the Directive.
12. The diagnosis of cannabis abuse was rendered by a licensed professional counselor, as opposed to a credentialed medical professional or clinical social worker, thereby making DC 3: *Diagnosis by a credentialed medical professional . . . of drug abuse . . .*; and DC 4: *Evaluation of drug abuse . . . by a licensed clinical social worker . . .* inapplicable.
13. Although Applicant submitted AE 5 and AE 6 as further proof that he has abstained from the use of marijuana it cannot be determined from those documents that the urine samples were actually tested for the presence of the marijuana metabolite.