

KEYWORD: Drugs; Personal Conduct

DIGEST: Applicant used marijuana and cocaine at various times between 1980 and 1995. He also used marijuana twice in 2000 while holding a security clearance. He has mitigated the security concerns about his drug use and related personal conduct. Clearance is granted.

CASENO: 02-28612.h1

DATE: 02/08/2005

DATE: February 8, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-28612

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Juan Rivera, Esquire, Department Counsel

FOR APPLICANT

SYNOPSIS

Applicant used marijuana and cocaine at various times between 1980 and 1995. He also used marijuana twice in 2000 while holding a security clearance. He has mitigated the security concerns about his drug use and related personal conduct. Clearance is granted.

STATEMENT OF THE CASE

On January 12, 2004, the Defense Office of Hearings and Appeals (SOR) issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns under Guideline E (Personal Conduct), and Guideline H (Illegal Drugs). The SOR informed Applicant that, based on information available to the Government, DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to continue Applicant's security clearance. ⁽¹⁾

On March 1, 2004, Applicant answered the SOR (Answer), ⁽²⁾ admitting (with explanation) the allegations in SOR paragraph 1, but denying the allegation in subparagraph 2.a. He requested a hearing and the case was assigned to me on August 10, 2004. On September 15, 2004, I convened a hearing at which the government presented four exhibits (GE 1 - GE 4) to support the SOR. In response, Applicant presented a single 19-page exhibit (AE A) as well as the testimony of three witnesses, including the Applicant. DOHA received the transcript (Tr) on September 23, 2004.

FINDINGS OF FACT

Applicant's admissions through his Answer are entered herein as facts. After a thorough review of the pleadings, transcript, and exhibits, I also find the following:

Applicant is 42 years old and works as a senior engineer for a defense contractor. His job description requires he hold a security clearance, which he first obtained at the secret level in January 2000 based on his August 1999 security questionnaire (SF 86) and investigation. He was recently promoted and now requires a top secret clearance, for which he submitted a new SF 86 in February 2002.

Applicant has been married for more than nine years and has three children under age seven. He and his wife, a stay-at-home mother, are active in their church and, through church organizations such as the Knights of Columbus, volunteer in their community. Applicant earned two bachelors' degrees - one in management sciences and one in finance - when he graduated college in 1985, and he has applied his degrees through uninterrupted employment in various jobs leading to his current defense contracting position. By all accounts, Applicant is a valued, highly successful employee on whom his co-workers and superiors can rely for excellent results in the workplace.

As alleged in SOR subparagraphs 1.d and 1.e, Applicant used marijuana on a regular basis while in college between 1980 and 1985. He first used marijuana at age 16. Applicant also used cocaine an estimated seven times while in college. After graduating from college, Applicant did not use marijuana again until July 1995, a one time use while staying at a country cabin with friends from high school and college. (SOR subparagraph 1.c) In July 2000, Applicant gathered with these friends at a party and smoked marijuana when it was passed to him. A few weeks later, in August 2000, Applicant again smoked marijuana under similar circumstances. (SOR subparagraph 1.a)

Applicant was granted a secret clearance in January 2000. When he smoked marijuana again in July 2000, Applicant did not consider that his illegal conduct was inconsistent with conduct expected of one who holds a clearance. (SOR subparagraph 1.b) Further, he had been having health problems stemming from high blood pressure that hindered his ability to sleep at night and thought marijuana might help. ⁽³⁾ He offered no such reasoning for his 1995 use of marijuana because his health problems had not yet surfaced.

Applicant has not used cocaine since his college days and has not used marijuana since August 2000. In March 2004, after receiving the SOR, Applicant obtained a professional evaluation about his drug use from a local certified addictions counselor. The evaluation results were based on standard substance abuse screening tests and a urine screening test. The report (AE A) indicates no propensity for future abuse of or addiction to drugs, and shows the urine sample to be free of any illegal substances at the time.

Applicant no longer associates with the friends with whom he used marijuana. His social life centers on the neighborhood where he and his family live. There are several other families nearby and they gather periodically for cookouts and dinner parties. They also travel together each summer. No one in Applicant's neighborhood uses illegal drugs.

POLICIES AND BURDEN OF PROOF

The Directive sets forth adjudicative guidelines⁽⁴⁾ to be considered in evaluating an Applicant's suitability for access to classified information. The Administrative Judge must take into account both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are Guideline H (Illegal Drugs) and, as a result Applicant's alleged drug use while holding a clearance, Guideline E (Personal Conduct).

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁽⁵⁾ for an Applicant to either receive or continue to have access to classified information. The Government bears the initial burden of proving, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If the government meets its burden it establishes a *prima facie* case that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the Applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, the Applicant bears a heavy burden of persuasion.⁽⁶⁾ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. The Government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the Government.⁽⁷⁾

CONCLUSIONS

Guideline H (Illegal Drug Use). Improper or illegal involvement with drugs raises questions regarding an individual'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. Such conduct may also be criminal and indicative of a disregard for rules and regulations used to protect national interests.⁽⁸⁾

The government established its case under Guideline H by showing that Applicant has used marijuana and cocaine at various times between 1980 and 2000. His most recent use occurred while Applicant held a security clearance. Guideline H disqualifying condition (DC) 1⁽⁹⁾ applies; marijuana and cocaine are illegal drugs or controlled substances as defined under this guideline. DC 5⁽¹⁰⁾ must also be considered; however, the pertinent language in DC 5 addresses

recent drug use following the granting of a clearance. Certainly, Applicant used marijuana after he received a clearance; however, Applicant's last involvement with drugs cannot be considered recent as it was over four years ago. Therefore, I decline to apply DC 5 here. In addition to the dated nature of Applicant's last use of marijuana, Applicant has shown he is not likely to use illegal drugs again. Based on his lack of involvement with illegal drugs in over four years and on the uncontradicted assessment of a drug and alcohol counselor that Applicant is not at risk of future drug use, I conclude Guideline H mitigating condition (MC) 1⁽¹¹⁾ and MC 3⁽¹²⁾ apply here. In light of all of the evidence available, I find for Applicant as to Guideline H. **Guideline E (Personal Conduct)**. An applicant's conduct is a security concern if it involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such behavior could indicate that the person may not properly safeguard classified information.⁽¹³⁾ Here, the government has established a case for disqualification under Guideline E and is rightly concerned about Applicant's judgment because he smoked marijuana on two occasions seven or eight months after he received a clearance for the first time. (SOR subparagraph 2.a) His actions were a clear violation of state law, which probably imposes misdemeanor penalties for personal possession and/or use of marijuana. However, application of DC 6⁽¹⁴⁾ or the corresponding MC 7⁽¹⁵⁾ is not appropriate. What is germane here is Applicant's decision making while holding a clearance. Apart from the general concern referenced above,⁽¹⁶⁾ these facts do not lend themselves to application of the listed disqualifiers and mitigators under Guideline E. In addition, having considered the adjudicative factors set forth in the Directive at section E2.2.1,⁽¹⁷⁾ I conclude that Applicant's use of marijuana while holding a clearance was serious, that he used it willingly, and that he could reasonably have been expected (at age 37) to have made a more mature decision. On the other hand, his conduct was not recent and can be considered infrequent in that it consisted of two puffs of marijuana smoke taken a month apart. For the same reasons discussed under Guideline H (above) that he is not likely to use drugs again, I conclude he is not likely to act again in a manner inconsistent with his status as a clearance holder. Having also observed his demeanor at hearing, I am convinced the Applicant has learned his lesson from this proceeding and is now fully attuned to what the government expects of persons it trusts with access to sensitive information. On balance, I conclude Guideline E for the Applicant. I have carefully weighed all of the evidence, and I have applied the disqualifying and mitigating conditions as listed under each applicable adjudicative guideline. A fair and commonsense assessment⁽¹⁸⁾ of the record before me mitigates the government's concerns about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. I conclude Applicant has met his burden sufficiently to overcome the government's case. **FORMAL FINDINGS** Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows: Paragraph 1, Illegal Drugs (Guideline H): FOR THE APPLICANT Subparagraph 1.a: For 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 Paragraph 2, Personal Conduct (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 clearly consistent with the national interest to grant or continue a security clearance for the Applicant. atthew E. Malone Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. With his Answer, Applicant submitted six letters of support or recommendation. Department Counsel objected to their admission on grounds they are hearsay. However, because the rules of evidence are relaxed in these proceedings, I overruled his objection and have included the letters in the record as submitted with the Answer. (Tr., p. 6 - 8)
3. Tr., p. 31 - 34.
4. Directive, Enclosure 2.
5. See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).
6. See *Egan*, 484 U.S. at 528, 531.
7. See *Egan*; Directive E2.2.2.
8. Directive, E2.A8.1.1.1.

9. Directive, E2.A8.1.2.1. Any drug abuse...;

10. Directive, E2.A8.1.2.5. Failure to successfully complete a drug treatment program prescribed by a credentialed medical professional. *Recent* drug involvement, especially following the granting of a security clearance, or an expressed intent not to discontinue use, will almost invariably result in an unfavorable determination. (emphasis in the original)

11. Directive, E2.A8.1.3.1. The drug involvement was not recent;

12. Directive, E2.A8.1.3.3. A demonstrated intent not to abuse any drugs in the future;

13. Directive, E2.A5.1.1.

14. Directive, E2.A5.1.2.6. Association with persons involved in criminal activity.

15. Directive, E2.A5.1.3.7. Association with persons involved in criminal activities has ceased.

16. *See*, fn 13, above.

17. E2.2.1. The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for

a security clearance. Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The

adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past

and present, favorable and unfavorable, should be considered in reaching a determination. In evaluating the relevance of an individual's conduct, the adjudicator

should consider the following factors:

E2.2.1.1. The nature, extent, and seriousness of the conduct;

E2.2.1.2. The circumstances surrounding the conduct, to include knowledgeable participation;

E2.2.1.3. The frequency and recency of the conduct;

E2.2.1.4. The individual's age and maturity at the time of the conduct;

E2.2.1.5. The voluntariness of participation;

E2.2.1.6. The presence or absence of rehabilitation and other pertinent behavioral changes;

E2.2.1.7. The motivation for the conduct;

E2.2.1.8. The potential for pressure, coercion, exploitation, or duress; and

E2.2.1.9. The likelihood of continuation or recurrence;

18. Directive, E2.2.3.