

KEYWORD: Drugs

DIGEST: As an undergraduate student from 1984 to 1988, Applicant smoked marijuana while socializing in the dormitory and experimented with psychedelic mushrooms twice and LSD once. He used marijuana a few times during his first year of graduate school in 1989, on a couple of occasions in the 1990s, and again in December 2001, when he smoked it with a friend from childhood. He accepted the offer of his friend to smoke marijuana knowing it was illegal and inconsistent with his obligations as a cleared employee working for a defense contractor. His more recent involvement with marijuana raises serious concerns for his judgment, reliability, and trustworthiness. Clearance is denied.

CASENO: 02-29159.h1

DATE: 07/21/2004

DATE: July 21, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-29159

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Stephanie Hess, Esq., Department Counsel

FOR APPLICANT

Josiah M. Black, Esq.

SYNOPSIS

As an undergraduate student from 1984 to 1988, Applicant smoked marijuana while socializing in the dormitory and experimented with psychedelic mushrooms twice and LSD once. He used marijuana a few times during his first year of graduate school in 1989, on a couple of occasions in the 1990s, and again in December 2001, when he smoked it with a friend from childhood. He accepted the offer of his friend to smoke marijuana knowing it was illegal and inconsistent with his obligations as a cleared employee working for a defense contractor. His more recent involvement with marijuana raises serious concerns for his judgment, reliability, and trustworthiness. Clearance is denied.

STATEMENT OF CASE

On September 18, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. [\(1\)](#) DOHA recommended referral to an administrative judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked. The SOR was based on Drug Involvement (Guideline H).

On October 15, 2003, Applicant filed his *pro se* response to the SOR allegations and requested a hearing before a DOHA administrative judge. The case was assigned to me on January 8, 2004. On January 23, 2004, counsel for Applicant entered his appearance. Pursuant to notice dated January 28, 2004, a hearing was scheduled for February 25, 2004.

At the hearing, the Government submitted two exhibits, with Applicant's counsel stipulating to their admission. Applicant submitted his testimony as well as that of his spouse, of his second-level supervisor at work, and of a close friend who shared a house with him from 1992 to 1995. A transcript of the hearing was received on March 5, 2004.

FINDINGS OF FACT

The SOR allegations concern Drug Involvement (Guideline H) based on marijuana use from 1984 to 1990 and in December 2001, the latest use while he held a secret security clearance, and on uses of psychedelic mushrooms twice and LSD once. In his response to the SOR, Applicant admitted the allegations with clarifications, and notified the Government for the first time that he had recently remembered using marijuana once in 1996 while on business travel, and he could have also smoked marijuana on another occasion sometime between 1989 and 1996. Applicant expressed regret that he had used illegal drugs and indicated he had a "strong desire never to use any illegal drug again." Applicant's admissions are accepted and incorporated as findings of fact. After a complete and thorough review of the evidence, I render the following additional findings:

Applicant is a 37-year-old research staff member with a doctorate degree who has been employed by a defense contractor since October 1999. Three or four months after his hire, he was given an interim secret clearance. In October 2000, his secret clearance was granted. He seeks a clearance upgrade to top secret for his defense-related duties that include processing classified data and generating classified briefings.

As an undergraduate student from 1984 to 1988, Applicant used marijuana with other students with varying frequency. He also experimented with psychedelic mushrooms two or three times and LSD once between 1986 and 1988. He held a confidential security clearance for about three months in Fall 1987 for an undergraduate research internship, but did not use any controlled dangerous drug during that period.

In 1989, Applicant moved to his present locale to attend graduate school. During his first year of postgraduate study, Applicant used marijuana "a few times." Sometime in the early 1990s, Applicant smoked marijuana with a childhood friend during a visit to his home state. ⁽²⁾ In August 1995, Applicant married his spouse, who does not use illegal drugs. They met through their church where they have been active congregants for the past ten years.

In February 1996, Applicant was awarded his doctorate degree. After a brief postdoctoral appointment on campus from March 1996 to June 1996, Applicant went to work as a senior scientist for a small consulting firm. He did not require a security clearance for his position. While on a business trip for that employer in Summer 1996, Applicant went out to dinner with a local technician, whose friend later offered Applicant some marijuana. Applicant took one or two hits off a marijuana cigarette on that occasion.

In October 1999, Applicant commenced employment as a staff researcher for his present employer. Applicant did not disclose his 1996 drug use on his security clearance application. He was granted an interim secret clearance three or four

months later and his secret clearance in October 2000. At the request of his employer, Applicant applied for an upgrade of his clearance to top secret in January 2001. On his security clearance application (SF 86), Applicant responded negatively to question 27 regarding any illegal drug involvement in the seven years preceding the date of the application, as he had not recalled the drug use in 1996 on that business trip for his previous employer.

Sometime that spring, Applicant was granted a special access clearance for a program he was tangentially involved in. At that time, he was briefed as to his responsibilities, which was in addition to the regular annual security refresher briefing he attended in Spring 2001.

In December 2001, Applicant and his family (spouse, three year old daughter and infant son) went to visit his parents for the Christmas holiday. Applicant got together one night with two friends: the childhood friend with whom he had smoked marijuana in the early 1990s, and another friend from high school. While playing pool and having a few beers at his childhood friend's residence, the three also shared a small bag of marijuana. The marijuana was provided by the friend he had known since kindergarten. Aware drugs were illegal, Applicant gave no thought to the security implications of his use while he held a security clearance until after he had taken a few hits off a marijuana pipe. At that point, he realized it was something he would have to disclose when interviewed for his clearance upgrade. Cognizant of the damage done with respect to his ongoing security screening, Applicant continued to smoke marijuana with his friends over the course of a two to three hour period. That night or the next morning, Applicant told his spouse he had smoked marijuana with his friends. She was surprised as she had never seen him use marijuana since they began dating in 1991, although she was aware through Applicant of his use of marijuana on the business trip in 1996.

On January 25, 2002, Applicant was interviewed by a special agent of the Defense Security Service (DSS) about his drug involvement in part. Applicant voluntarily disclosed that he had smoked marijuana with two friends while visiting his parents for the holidays in December 2001. He revealed he had taken several hits from a marijuana pipe passed among the three of them for about a two to three hour period. Aware that his use and possession of marijuana were illegal, Applicant explained he had not fully considered the consequences of using drugs on his security clearance. After he took a few hits, he realized "the damage had been done with respect to his ongoing security clearance screening," but acknowledged he continued to smoke. He denied he had any intention of using marijuana when he went to visit his friend and that he had any intent to use any illegal drug, including marijuana, in the future. Applicant went on to describe his previous marijuana use as social with college friends between 1984 and 1989, with his last usage of marijuana before December 2001 being sometime in approximately 1990. Applicant disclosed he had also experimented before 1990 with psychedelic mushrooms on two occasions and a half dose of LSD once. He explained that he had not listed any drug activity on his security clearance application as it did not fall within the seven-year time frame. ⁽³⁾

On September 14, 2003, DOHA issued an SOR to Applicant, alleging his involvement with illegal drugs from about 1984 to 1990 and again on December 25, 2001. In his October 15, 2003, response, Applicant admitted the drug use and volunteered that he had recently recalled smoking marijuana on one, and possibly two additional occasions: on travel for work in late Spring or early Summer 1996, when he took one or two hits off a marijuana cigarette offered by a friend of a technician helping with his experiments, and possibly once with his childhood friend during a trip home sometime between 1989 and 1996. Applicant expressed regret at having used illegal drugs and a commitment to not using any illegal drug in the future.

Sometime in Fall 2003, Applicant informed his second-level supervisor that he had a problem with his clearance because of an incident of marijuana use by him in the period covered by the security investigation. This supervisor recommends Applicant be granted his top secret clearance as Applicant has demonstrated technical integrity and compliance with security practices and procedures. On at least one occasion, Applicant brought to the attention of management and the program sponsor that the data he was processing on his unclassified computer may well be classified. While it was determined that none of the material was classified, his actions helped the sponsor clarify the program guidelines.

Applicant and his spouse are active in their church. She runs the church's Sunday School program while Applicant is a teacher in the program. For the last six or seven years, Applicant has also served as chairman of an oversight committee for campus ministry to the institution where he received his postgraduate education. Applicant and his spouse's social activities revolve around their two young children. On occasion, they get together with other couples they know through church or graduate school. None of these individuals use illegal drugs to their knowledge.

Applicant has not used any illegal drugs since December 2001 and has resolved not to use any controlled dangerous substance in the future. He has told his childhood friend, who he sees once every 12 to 18 months, that he can no longer be part of any social interaction that involves illicit substances.

A close friend who shared a house with Applicant from 1992 to 1995 has found him to be completely reliable and trustworthy. He has never known Applicant to use illegal drugs since becoming acquainted with him and was very surprised to learn that Applicant had used marijuana.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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." Exec. Or. 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.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

Considering the evidence as a whole, I find the following adjudicative guidelines to be most pertinent to this case:

Drug Involvement

The Concern:

a. 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.

b. Drugs are defined as mood and behavior-altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens) (E2.A8.1.1.2.1.), and

(2) Inhalants and other similar substances.

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

Conditions that could raise a security concern and may be disqualifying include:

a. Any drug abuse (see above definition);⁽⁴⁾

b. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.

Conditions that could mitigate security concerns include:

a. The drug involvement is not recent.

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

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility of those who testified, I conclude the Government established its case with respect to Guideline H, Drug

Involvement. Applicant smoked marijuana with varying frequency and experimented with psychedelic mushrooms and LSD as an undergraduate student from 1984 to 1988. In 1989, he moved to his present geographic locale where he began graduate studies. He smoked marijuana his first semester, albeit on only a few occasions. In the early 1990s, he used the drug at least once with an old friend he has known since kindergarten. Having just started his career after earning his doctorate degree, Applicant exercised extremely poor judgment in accepting an offer of marijuana while on a business trip for his previous employer in Summer 1996. More recently, he used marijuana with a couple of old friends in December 2001.

The improper or illegal involvement with drugs raises questions about an individual's willingness or ability to protect classified information. The risk of unauthorized disclosure is increased if there is impaired functioning due to the influence of a mood-altering substance. Disqualifying conditions a. (any drug abuse) and b. (illegal drug possession) are clearly pertinent in assessing whether Appellant's secret security clearance should be revoked and his eligibility to top secret denied. The Directive also provides that recent drug involvement, especially following the grant of a clearance, will almost invariably result in an unfavorable determination (*see* DC e.). The Directive does not define "recent" and the DOHA Appeal Board has declined to adopt any "bright-line" definition for what constitutes "recent" conduct. Rather, the Board has indicated the matter requires an Administrative Judge to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of an applicant's conduct. *See, e.g.*, ISCR Case No. 02-22173 (May 26, 2004).

Most of Applicant's drug use occurred when he was in college or within a year of his graduation. The evidentiary record supports a finding of at most three uses of marijuana since 1990, with his last use occurring 18 months before the SOR was issued. While his drug involvement is not particularly recent, the circumstances under which he used drugs in 1996 and in 2001 raise significant doubts for his judgment, reliability, and trustworthiness to where I cannot conclude that it is clearly consistent with the national interest to continue his clearance. Applicant's use of marijuana while representing his employer on business was a betrayal of his obligation to the company that was paying his wages and presumably also his travel expenses. Similar disregard was evident in 2001 when he failed to live up to his fiduciary duty to his current employer. Not only did he use the marijuana in knowing disregard of the law, but he continued to use it after he realized that smoking would have negative consequences for his ongoing security screening for access to the top secret level. Applicant's witnesses testified to his good character and to his reliability and trustworthiness as a friend, housemate, spouse, father, and coworker. It is especially troubling that Applicant would engage in conduct inconsistent with good character and an otherwise responsible lifestyle.

In his favor, Applicant knows he made a mistake and regrets having ever used drugs. He volunteered to the DSS agent only one month after he used the marijuana in December 2001 that he had used marijuana on that occasion. The Government argued against Applicant being credited for his voluntary self-disclosure on the basis of his failure to report any drug abuse on previous security clearance applications. Applicant testified he understood his drug use would have been outside of the scope of the drug inquiry on the application he would have filed for a clearance as an intern in 1987. The evidence is insufficient to prove Applicant falsified his initial application for a security clearance. However, it is clear Applicant's use of marijuana while on a business trip in 1996 was not reported on his applications completed for his secret clearance in October 1999 and for an upgrade to top secret in January 2001 or revealed during his DSS interview in January 2002. Applicant maintains he simply did not recall the 1996 marijuana use because "it happened in a different place and outside of [his] usual run of activities." (Tr. 47) Given he was not actively using marijuana at that point and the unusual circumstances of his use, it is more reasonable that the 1996 involvement would have stuck out in his mind. It was more recent in time to his 1999 and 2001 applications than to his October 2003 answer to the SOR where he first revealed it. Yet if Applicant intended to conceal his drug use from the Department of Defense, he would

not have disclosed his December 2001 marijuana involvement to the DSS agent during his January 2001 interview. Having told the agent that he had smoked marijuana in the previous month, when he was working for a defense contractor and held a security clearance, he would have had little to gain by concealing a 1996 instance of drug use.

Applicant has told the childhood friend with whom he used marijuana in the early 1990s and again in 2001 that he can no longer be part of any activity involving the use of illegal drugs. Applicant's continued association with this known drug user, even on a very infrequent basis, raises questions about the degree of his commitment to refrain from illegal drugs in the future. The absence of any drug use in the last 2 ½ years is viewed favorably, but it alone is not enough in light of his history of drug involvement following sustained periods of abstinence as long as five years. His recent candor about his illegal drug involvement is not enough to eradicate the concerns presented by his use of marijuana in knowing disregard of the law and his obligation as a cleared employee.

Adverse findings are returned as to subparagraphs 1.a., 1.b., and 1.c. In light of the experimental nature of, and passage of time since, his use of psychedelic mushrooms and LSD, subparagraphs 1.d. and 1.e. are resolved in his favor.

FORMAL FINDINGS

Formal Findings as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive are hereby rendered as follows:

Paragraph 1. Guideline H: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Subparagraph 1.d.: For the Applicant

Subparagraph 1.e.: 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.

Elizabeth M. Matchinski

Administrative Judge

1. The SOR was issued under the authority of Executive Order 10865 (as amended by Executive Orders 10909, 11328, and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4).
2. Applicant testified he has no specific recall of smoking marijuana in the early 1990s with this friend but he does recall telling his spouse he smoked the drug on that occasion. (Tr. 32) It is highly unlikely he would have told his spouse he used marijuana if he had not done so.
3. Applicant's use of marijuana in December 2001 occurred after he completed his security clearance application in upgrade for his clearance to top secret.
4. Under 10 U.S.C. 986, any person who is an unlawful user of, or is addicted to, a controlled substances as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), may not be granted or have renewed their access to classified information.