

KEYWORD: Drugs

DIGEST: Applicant is a twenty-six-year-old software engineer employed by a defense contractor. After submitting a security clearance application indicating marijuana usage from November 1994 through July 2000, Applicant was arrested for possession of marijuana and drug paraphernalia in 2002. Applicant commenced abstinence from drugs and completed both a counseling assessment and drug education program. Applicant's abstinence may be contingent upon his being granted a security clearance. Clearance is denied.

CASENO: 02-18780.h1

DATE: 02/22/2005

DATE: February 22, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-18780

DECISION OF ADMINISTRATIVE JUDGE

ARTHUR E. MARSHALL, JR.

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a twenty-six-year-old software engineer employed by a defense contractor. After submitting a security clearance application indicating marijuana usage from November 1994 through July 2000, Applicant was arrested for possession of marijuana and drug paraphernalia in 2002. Applicant commenced abstinence from drugs and completed both a counseling assessment and drug education program. Applicant's abstinence may be contingent upon his being granted a security clearance. Clearance is denied.

STATEMENT OF THE CASE

On December 15, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) detailing why, pursuant to Guideline H-Drug Involvement, it 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 Applicant. Consequentially, DOHA recommended that the matter be referred to an Administrative Judge to determine whether a clearance should be granted.

In a written statement dated January 23, 2004, Applicant admitted with explanation the allegations contained in the SOR. In his response, Applicant also elected to have his case decided on the written record. Department Counsel submitted the government's case on May 17, 2004. A complete copy of the file of relevant material (FORM) ⁽¹⁾ was provided to the Applicant. Applicant was afforded the opportunity to file objections and submit evidence in refutation, extenuation, or mitigation. Applicant received a copy of the FORM on June 21, 2004, but did not submit any additional material. I received this case on February 1, 2005.

FINDINGS OF FACT

I have thoroughly reviewed the entire record and make the following findings of fact:

Applicant is 26 years old and has been employed as a software engineer by a defense contractor since January 2001. On March 26, 2001, Applicant completed a security clearance application (SF-86) in which he admitted to using marijuana from November 1994 until July 2000, ⁽²⁾ when he quit in order to prepare for potential employment and drug testing. ⁽³⁾ In that same month, March 2001, Applicant resumed his use of marijuana. ⁽⁴⁾

On February 17, 2002, Applicant was arrested for possession of a controlled substance (marijuana) and of drug related paraphernalia. ⁽⁵⁾ Prior to trial, Applicant began abstinence and underwent assessment at a professional counseling service. The program director recommended six weeks of education, total abstinence, and attendance at one Alcoholics Anonymous/Narcotics Anonymous meeting per week. ⁽⁶⁾ Applicant completed the substance abuse education program.

On May 3, 2002, Applicant pled guilty to the paraphernalia charge. He received a \$95 fine (suspended) and one year of unsupervised probation before judgment. ⁽⁷⁾ The possession of marijuana charge was terminated by a *nolle prosequi*. ⁽⁸⁾

Applicant has expressed his future intentions regarding drugs and drug abuse:

In 2002: "I quit smoking pot after being arrested because of the impact it could have on my career.... I believe I had a dependency on it in the past and don't intend on using it in the future." ⁽⁹⁾

In 2003: "I have completely abstained from any illegal substance use or abuse since (the arrest). I stopped using drugs completely because of my job and also because I did not want to go through this same ordeal again. My friends no longer use marijuana or other drugs and I do not associate with any individuals involved in illegal activity." ⁽¹⁰⁾

In 2003: "The possibility exists that I may in the future use drugs but I will not use them while in a sensitive position. I do not intend to use drugs while in possession of a security clearance or a position of trust." ⁽¹¹⁾

In 2004: "I took the initiative to get rehabilitated by going to (a counseling program's substance abuse education program) which I successfully completed. It helped me realize some misconceptions I had about smoking marijuana and the true damage it can do not only to my body, but my career and personal life.... I am thoroughly dedicated not to become involved with any illegal substance in the future based upon my experience in life and the Court system." [\(12\)](#)

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, these adjudicative guidelines are subdivided into those that may be considered in deciding whether to deny or revoke one's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to determine one could still be eligible for access to classified information (Mitigating Conditions).

In application, an Administrative Judge is not strictly bound to the adjudicative guidelines. As the term implies, they are "guidelines." As such, they are but part of an amalgam of elements for the Administrative Judge to consider in assessing an applicant in light of the circumstances giving rise to the SOR, as well as in assessing the applicant as a whole. The concept of the "whole person" [\(13\)](#) means that all available, reliable information about the person - whether it is good or bad, present or past - should be considered in making a fair, impartial, and meaningful decision as to his or her suitability to hold a security clearance. To that end, Enclosure 2 also sets forth factors to be considered during this part of the adjudicative process, including: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individuals age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation of the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline most pertinent to an evaluation of the facts of this case:

Guideline H-Drug Involvement. 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. ⁽¹⁴⁾

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, pertaining to this adjudicative guideline are set forth and discussed in the Conclusions section below.

After a full and thorough examination, however, the final assessment must comport with the considerable gravity of the final decision. There is no right to a security clearance ⁽¹⁵⁾ and one seeking access to classified information must be prepared to enter into a fiduciary relationship with the United States Government that is inherently predicated on trust and confidence. Therefore, when the facts proven by the Government raise doubts about an applicant's judgment, reliability, or trustworthiness, the applicant has the heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." ⁽¹⁶⁾ In other words, any doubts will be resolved in favor of the national security, not the applicant.

Finally, Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides that industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Therefore, nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all legal precepts, factors, and conditions, including those described briefly above, I find the following with respect to the allegations set forth in the SOR:

With respect to Guideline H, the Government has established its case. Applicant's improper and illegal drug abuse, including the purchase, possession, and use of marijuana, is of concern, especially in light of his desire to have access to the nation's secrets. The Directive clearly expresses the Government's concern regarding drug involvement in provision E2.A8.1.1.1. (*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*). Drug abuse is defined in provision E2.A8.1.1.3 (*the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction*).

Drugs are identified and defined in provision E2.A8.1.1.2.1. (*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)*). Applicant's overall conduct pertaining to his illegal substance abuse clearly falls within Drug Involvement Disqualifying Condition (DI DC) E2.A8.1.2.1. (*any drug abuse*) and DI DC E2.A8.1.2.2. (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution*).

Applicant quit smoking marijuana in February 2002. He began his drug abuse in the middle of high school and continued through college, only temporarily ceasing his usage in order to "be able to get a job and be able to pass a drug test." [\(17\)](#) Shortly after securing employment and around the time he certified his SF 86 application, he resumed his use of marijuana. Facing trial over his 2002 arrest, Applicant again chose to abstain from drugs. Given the extent and duration of his overall use, the brevity and circumstances of his prior attempt at abstinence, and considering his last drug usage was barely three years ago, his involvement was recent. Therefore, I find no application of DI MC E2.A8.1.3.1. (*the drug involvement was not recent*).

Applicant's drug involvement was not isolated or aberrational. Despite seven to eight months of abstinence, his drug use from 1994 to 2002 was on-going. Applicant maintains that he smoked around 10 times in high school and "habitually while in college but the usage was recreational" [\(18\)](#); his counselor's report states that he "used marijuana at age 16 ... and smoked it daily, stating it is his drug of choice, while in high school and college." [\(19\)](#) Despite these varied portrayals, however, I need not make a determination as to which is closest to the truth; either version shows that his involvement was neither isolated nor aberrational. Therefore, I find no application of DI MC E2.A8.1.3.2. (*the drug involvement was an isolated or aberrational event*).

Applicant's intent not to abuse drugs in the future is also a concern. His first attempt at abstinence served only as a means to an end: to get a job and pass a drug test. Once the hurdles were passed, he resumed his usage. Indeed, he began smoking marijuana again in the very month he certified on his SF 86 application that his drug use had ended. One year later, Applicant was arrested and faced trial. He again commenced abstinence, but this time he also sought counseling and completed a substance abuse education course. In contrast to his first attempt at abstinence, however, there is no evidence of a return to drugs. oreover, three of his subsequent statements articulate a mature, considered reflection on his ordeals, drugs, and abstinence, and include affirmative statements that he does not intend to use drugs in the future. [\(20\)](#)

Applicant, however, has also stated that his abstinence from drugs may be conditional. [\(21\)](#) Such equivocation brings into question the degree of resolve underlying his other comments, and raises the risk that he may return to improper or illegal behavior. Moreover, as this tribunal has noted in the past, a conditional vow muddies the waters as to an Applicant's true intent and teeters on the brink of DI DC E2.A8.1.2.5. [\(22\)](#) (*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 invariable result in an unfavorable determination.*). While Applicant's language does not rise to "an expressed intent not to discontinue use," it does little to mitigate the concerns that improper and illegal drug involvement raises. Although two years have passed since he articulated this conditional language, it is still too recent to gauge Applicant's true resolve, reliability, trustworthiness, and suitability for security clearance. Given this concern, I am compelled to resolve the issue in favor of [\(23\)](#)

the Government. Therefore, I find no application of DI MC E2.A8.1.3.3.(*a demonstrated intent not to abuse any drugs in the future*).

Pursuant to DI MC E2.A8.1.3.4, *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 can mitigate security concerns*. Applicant's substance abuse education program and abstinence, however, do not rise to the level of prescribed treatment program defined in the Directive. Therefore, I find no application of DI MC E2.A8.1.3.4.

The whole person, including Applicant's rehabilitative efforts, abstinence, and maturation, also has been considered. In 2001, Applicant resumed his drug usage after a brief period of abstinence while, in the same month, he certified that his drug abuse was behind him. To have done so raises additional questions regarding judgement, reliability, and trust. Based on the record before me, I question whether there has been sufficient time since his arrest, his latest abstention, and his expression of conditional abstinence to build the degree of trust necessary to enter into the fiduciary relationship that is so fundamentally a part of a security clearance.

I have considered all the evidence in this case. I am not satisfied Applicant presented sufficient evidence to mitigate the case against him. Accordingly, Guideline H is decided against the Applicant.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.2.5 of Enclosure 3 of the Directive are:

Paragraph 1. Guideline H: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against 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 Appellant. Clearance is denied.

Arthur E. Marshall, Jr.

Administrative Judge

1. The government submitted 12 items in support of its case.
2. Item 5 (Security Clearance Application SF-86, dated March 26, 2001), at 6; Applicant also admitted to the purchase of marijuana in Item 12 (Statement of Subject, dated May 7, 2003), at 2.
3. *Id.*, Item 12.
4. *Id.*
5. A silver colored smoking device. Item 6 (Incident Report, dated February 17, 2002) and Item 11 (Defendant Trial Summary with Statement of Probable Cause and Charge Sheet attached, dated May 3, 2002), at 3-4.
6. Item 8 (Counseling Evaluation, dated April 10, 2002).
7. Item 11, *supra* note 5, at 1.
8. *Id.*

9. Item 9 (Statement of Subject, dated March 11, 2002), at 1.
10. Item 12, *supra* note 2, at 2.
11. *Id.*, at 3.
12. Item 4 (Applicant's Answer to SOR, dated January 24, 2004), at 2.
13. Directive, at 2-1.
14. Directive, Enclosure 2, Attachment 8, Guideline H, ¶ E2.A8.1.1.
15. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).
16. *Id.*, at 531
17. Item 12, *supra* note 2, at 2.
18. *Id.*, at 1.
19. Item 8, *supra* note 6.
20. Item 9, *supra* note 9, (Statement of March 2002, shortly following the February 2002 arrest); Item 12, *supra* note 2, at 2 (Statement of May 2003), and Item 4, *supra* note 12, at 1-2 (Statement of January 2004).
21. "The possibility exists that I may in the future use drugs but I will not use them while in a sensitive position. I do not intend to use drugs while in possession of a security clearance or a position of trust." Item 12, *supra*, at 3.
22. *See, e.g.*, ISCR Case No. 02-09930 (September 30, 2003).
23. *Egan*, at 531. ("security clearance determinations should err, if they must, on the side of denials.")