

KEYWORD: Drugs; Personal Conduct

DIGEST: Applicant is a 38-year-old environmental database engineer for a defense contractor. Applicant used marijuana sporadically until 2001 when he stopped. He submitted a drug test that showed negative for marijuana in November 2001 when he was hired by his employer. Applicant changed his lifestyle and matured, declaring he will not use marijuana again. Applicant mitigated the drug involvement and personal conduct security concerns. Clearance is granted.

CASENO: 02-19789.h1

DATE: 09/30/2004

DATE: September 30, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-19789

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Juan J. Rivera, Esq., Department Counsel

FOR APPLICANT

Scott Badami, Esq.

SYNOPSIS

Applicant is a 38-year-old environmental database engineer for a defense contractor. Applicant used marijuana sporadically until 2001 when he stopped. He submitted a drug test that showed negative for marijuana in November 2001 when he was hired by his employer. Applicant changed his lifestyle and matured, declaring he will not use marijuana again. Applicant mitigated the drug involvement and personal conduct security concerns. Clearance is granted.

STATEMENT OF THE CASE

On July 10, 2003, the Defense Office of Hearings and Appeals (DOHA), under 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) to Applicant. The SOR detailed reasons under Guideline H (Drug Involvement) and Guideline E (Personal Conduct) 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 Applicant, and recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked.

In a signed and sworn statement, dated August 20, 2003, Applicant responded to the SOR allegations. He admitted in part and denied in part the allegations in the SOR. His answer attached six exhibits, and he requested a hearing.

This case was assigned to me February 10, 2003. A Notice of Hearing was issued on February 19, 2004, setting the hearing for March 2, 2004. I granted a continuance and a new Notice of Hearing issued on March 23, 2004, setting the

hearing for April 15, 2004. On April 15, 2004, I convened the hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government presented three exhibits which were admitted into evidence pursuant to a stipulation. The Applicant testified and presented 13 exhibits. Both counsel submitted post-hearing research on the applicability of Guideline E to the allegations in Paragraph 2. I received the transcript of the hearing April 27, 2004.

FINDINGS OF FACT

Applicant's admissions to the allegations are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is 38 years old and is an environmental database engineer for a defense contractor. He graduated from college in 1987. While in college, at parties and other social settings, Applicant used marijuana, about once a month. He continued to use marijuana periodically (averaging once a year) until 2001 when he started working for his current employer. He has not used marijuana since 2001, and he submitted drug test results from November 8, 2001, showing negative for marijuana. Applicant expressed his commitment to not use marijuana again the future. (Answer at 2, Exhibit M and Answer Exhibit 1, Exhibits 1 at 6, 2 and 3; Tr. 66 to 69, 75, 76, 80)

Applicant disclosed his marijuana use on his security clearance application (SCA) in answer to Question 27, which asked for the past seven year's drug usage. Applicant revealed his usage back to 1984. Applicant answered question 28 about illegal drug use while in a sensitive position, so defined to include any position which an applicant has a security clearance, in the negative. Applicant had a "confidential" clearance from 1987 until 1992, during which time he did a majority of his work on commercial airliners for his employer. Applicant misunderstood the question because he forgot that the position he was in at the time with a confidential clearance was considered a sensitive position. Applicant's disclosure of his marijuana use in Question 27 included the period encompassed in Question 28. The SCA was signed November 26, 2001. (Answer at 3 and 4; Exhibits 1 and 2; Tr. 69, 72 to 74, 78)

Applicant received very good evaluations for his work performance. His supervisors and co-workers rate him highly on his work performance, integrity, honesty, and technical competence. I find Applicant's testimony credible from his demeanor and his confident directness in his answers. Applicant has matured from his college days, now has a career that he wants to keep, and is rated highly by his peers and superiors to the extent some of them came to the hearing to testify on his behalf. (Exhibits B to L, Answer Exhibits 2 to 6; Tr. 17 to 48, 52 to 64)

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* Section 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicted upon the applicant meeting the security guidelines contained in the Directive.

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. Enclosure 2 to the Directive sets forth adjudicative guidelines that must be carefully considered according to the pertinent guideline in making the overall common sense determination required.

Each adjudicative decision must also include an assessment of:

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation;
- (3) how recent and frequent the behavior was;
- (4) the individual's 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 for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence (See Directive, Section E2.2.1. of Enclosure 2).

Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the guidelines.

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 that 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. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a prima facie case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. See Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "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. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. See Exec. Or. 12968 § 3.1(b).

In the decision-making process, the burden of proving evidence initially falls on the Government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the Government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the Government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

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

Guideline H - Drug Involvement

(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); 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.

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

- (1) Any drug abuse (see above definition);
- (2) Illegal drug possession, including purchase.

(E) Conditions that could mitigate security concerns include:

- (1) The drug involvement was not recent;
- (3) A demonstrated intent not to abuse any drugs in the future.

Guideline E - Personal Conduct:

(A) Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified

information

(B) Conditions that could raise a security concern and may be disqualifying also include:

(2) The deliberate omission, concealment, falsification or misrepresentation of relevant and material facts from any personnel security questionnaire, personal history statement or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(4) Personal conduct that increases an individual's vulnerability to coercion, exploitation or duress.

(5) A pattern of dishonesty or rule violations.

(C) Conditions that could mitigate security concerns include:

(5) The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions above, I conclude the following with respect to each allegation set forth in the SOR:

Guideline H - Drug Involvement. The Government established its case by its evidence and Applicant's admissions. I conclude Disqualifying Conditions (DC) 1 and DC 2 apply here. A security concern may exist if an applicant uses illegal drugs such as marijuana.

However, the record evidence is that Applicant's drug use was mainly from 1984 to 1987 when he was in college and the collegiate social scene. The last marijuana use was before November 2001. Therefore, the drug use is not recent. Mitigating Condition (MC) 1 applies. Furthermore, Applicant has demonstrated his intent not to use drugs in the future, and MC3 applies. Applicant explained his lifestyle changes, including regular exercise, proper culinary choices, and sufficient sleep, all of which would be adversely affected by the contemporaneous use of marijuana. Also, the evidence is that Applicant's past marijuana usage was sparse and sporadic, being once a year since 1987. Applicant disclosed his marijuana use back to 1984 on Question 27 on his SCA. Accordingly, the finding is for the Applicant on Guideline H.

Guideline E - Personal Conduct: I conclude the Government established by its evidence and Applicant's admissions the apparent validity of the allegation. Applicant did not answer Question 28 in the affirmative. He had used marijuana when he had confidential clearance from 1987 until 1992. The Government admits it was not charging him with falsification because the disclosure of his marijuana use back to 1984 as discussed previously obviated any question on non-disclosure. I conclude his answer to Question 28 was a mistake under the facts presented at the hearing, and the inaccurate disclosure was not deliberate, anyway. Therefore, Disqualifying Condition (DC) 2 does not apply here. However, an individual who has a security clearance should not be using illegal drugs while holding that clearance, and such conduct shows a pattern of dishonesty and a violation of rules. DC 4 and DC 5 apply here.

Regarding mitigating conditions, MC 5 is clearly applicable. Applicant stopped using marijuana three years ago, and his use during the period of 1987 to 1992 averaged only annually. Considering the adjudicative factors set forth in Paragraph 6 of the Directive, and applying them in a common sense fashion with the whole person concept, this usage was not recent. Times and Applicant have clearly changed, for example, Applicant was 22 years old then, and now is 38 years old. It is obvious from his demeanor and attitude at the hearing that he has matured in many respects. Also, it is unlikely these circumstances will occur in the future. Therefore, I conclude this guideline for Applicant.

FORMAL FINDINGS

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline H: For Applicant

Subparagraph 1.a.: For Applicant

Paragraph 2 Guideline E: For Applicant

Subparagraph 2.a.: For Applicant

DECISION

In light of all the circumstances and facts 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.

Philip S. Howe

Administrative Judge