

DATE: March 29, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-20143

ISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a 47-year-old married woman, is a graphic designer/illustrator and display artist for a defense contractor. The record evidence is insufficient to overcome the negative security implications of her regular marijuana use for many years while possessing a security clearance. Clearance is denied.

STATEMENT OF THE CASE

On August 18, 2003, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant.⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline H for drug involvement (a history of marijuana use) and Guideline E for personal conduct (falsification of a security-clearance application in 1987 and 2001). Applicant answered the SOR on September 8, 2003, and she requested a clearance decision based on a hearing record. In her answer, Applicant admitted to all the factual allegations in SOR.

On October 29, 2003, the case was initially assigned to another administrative judge, but the case was reassigned to me on November 13, 2003, due to case load considerations. Thereafter, a notice of hearing was issued to the parties scheduling the hearing for Wednesday, December 17, 2003. Applicant appeared without counsel and the hearing took place as scheduled. DOHA received the hearing transcript January 9, 2004.

FINDINGS OF FACT

Applicant's admissions are incorporated into my findings, and after a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is a 47-year-old married woman seeking to retain a secret security clearance. She is a college graduate with a degree in liberal arts. She currently works as a graphic designer/illustrator and display artist preparing exhibits for trade

shows. She has worked as a contractor in the defense industry since 1985, and she has held a security clearance since 1986 or 1987.

Applicant's history of illegal drug use dates to 1976, and her drug of choice was marijuana, which she has used since 1976 to June 2001. She started using marijuana while a college student. Initially, she was a recreational user who smoked marijuana in social settings. Subsequently, she discovered smoking marijuana provided her relief from the pain she experienced from cramping during menstruation. She also used marijuana to help her sleep and relieve boredom. Applicant's 20-plus year history of marijuana use is summarized below:

- May 1978 to 1983, used marijuana two or three times weekly, smoking two to three joints during an evening.
- Summer 1983 to 1985, used marijuana on a weekly basis on Friday or Saturday nights, smoking two to three joints during an evening at home.
- December 1985 to January 1997, used marijuana on a regular basis at home after work as frequently as daily, or two to three times weekly, or none at all, smoking one or two joints, occasionally three, per setting.
- From 1994 until January 1997, she purchased marijuana twice monthly.
- In December 1999, after not using marijuana since January 1997, she smoked while visiting her family as her brother supplied the marijuana; she smoked three to four joints daily for five days.
- During February or March 2001, while on a trip home to visit her ill father, she smoked marijuana two or three times with her brother.
- Her last use was June 2001 when she smoked marijuana while visiting her ill father who passed away during the trip.

In August 1987, Applicant completed a security-clearance application, also known as a DD Form 49 (Exhibit 2). In response to a specific question⁽²⁾ about her use of illegal drugs, Applicant answered "No" denying any and all drug use. Indeed, nowhere in the DD Form 49 did Applicant mention her past or then current marijuana use.

In August 2001, Applicant completed a security-clearance application, also known as a SF 86 (Exhibit 1). In response to Question 27 about her use of illegal drugs and drug activity within the last seven years, Applicant answered "Yes" and revealed marijuana use during the seven-year period. In addition, in response to Question 28, she revealed she had used marijuana while possessing a security clearance. Finally, in response to Question 29, she answered "No" denying, in the last seven years, being involved in the illegal purchase, manufacture, trafficking, production, transfer, shipping, receiving, or sale of any narcotic, depressant, stimulant, hallucinogen, or cannabis for her own intended profit or that of another.

On or about April 5, 2002, Applicant was interviewed by a special agent of the Defense Security Service (DSS). The result was a signed, sworn statement wherein Applicant provided extensive detail about her history of marijuana use (Exhibit 3). Of note, Applicant stated she will not use marijuana the next time she visits her family and will not use it as long as she has a security clearance. She stated she would probably use marijuana if she did not have a clearance. She also expressed remorse due to the illegal nature of the activity.

One year later, in April 2003, Applicant provided written responses to interrogatories propounded to her by the agency (Exhibit 4). In response to Question 3, she indicated she stopped using marijuana because it was "just time," and she was no longer experiencing the severe cramps. In response to Question 6, Applicant indicated she was engaged to be married to a man who does not smoke or drink as evidence of a change in her personal life indicative of a change of lifestyle away from her past use of marijuana. Applicant has since married this man.

During her hearing testimony, Applicant admitted smoking marijuana while possessing a security clearance. She also acknowledged that doing so was illegal and inconsistent with possessing a security clearance.

Applicant's present intent is not to smoke marijuana, as she has no desire or need to smoke marijuana. She also candidly testified that she could not predict the future, but said the chances of her smoking marijuana again are very small (4% on a scale of 1 to 100). Concerning Question 29 on the SF 86, she explained, although she had purchased marijuana during the relevant period, she answered no because she did not fully understand the question.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on 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.

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue access to classified information for an applicant,⁽³⁾ and there is no presumption in favor of granting or continuing access to classified information.⁽⁴⁾ The government has the burden of proving controverted facts.⁽⁵⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.⁽⁶⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽⁷⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁸⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against them.⁽⁹⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁰⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹¹⁾ Under *Egan*, Executive Order 10865, and the Directive, any reasonable doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

1. Drug Involvement

Under Guideline H, a security concern may exist based on improper or illegal involvement with drugs. Improper or illegal involvement with drugs is relevant to the security-clearance process for several reasons: (1) drug abuse indicates unwillingness or inability to abide by the law; (2) drug abuse weakens judgment; (3) some types of drug use reflect a tendency toward irresponsible or high risk behavior; (4) users of illegal drugs may be susceptible to blackmail, especially if exposure of drug use could cost them their job; (5) drug abuse or dependence often indicates the presence of broad emotional or personality problems of security concern; or (6) drug use may cause financial problems, leading to criminal activity to finance a drug habit.

Here, considering the record evidence as a whole, the government has established its case under Guideline H, because a security concern is raised by Appellant's long-term history of marijuana use and purchase. Applicant's illegal drug use dating from 1976 to as recently as June 2001 is a solid basis to question her suitability to possess a security clearance. Her long-term use of marijuana is drug abuse and indicates unwillingness or inability to abide by the law. Aggravating the situation, she continued smoking marijuana after she was granted a security clearance, and she continued smoking for many years while in possession of a security clearance. Given these circumstances, DC 1,⁽¹²⁾ DC 2,⁽¹³⁾ and DC 5⁽¹⁴⁾ apply against Applicant.

I have reviewed the mitigating circumstances (MC) under Guideline H and conclude none apply. First, Applicant's marijuana use continued on a steady and regular basis until January 1997, and thereafter continued on an on-again, off-again basis to June 2001. Given the circumstances, her drug abuse cannot be mitigated, at this point, by the passage of time. Second, Applicant's long-term history of marijuana use, dating from 1976 to June

2001, is the direct opposite of an isolated or aberrational event. Third, given her 20-plus year history of marijuana use, her last marijuana use in June 2001, along with her statement that she may use marijuana again (especially if she did not possess a security clearance), Applicant has failed to persuade me she will remain drug free. To sum up, I view Applicant's regular marijuana use for many years while possessing a security clearance as a serious matter, and her evidence of changed circumstances and reform is not strong enough to overcome the security concern raised by her past misconduct. Accordingly, Guideline H is decided against Applicant.

2. Personal Conduct

Personal conduct under Guideline E is 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 and handle classified information. The deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the government when applying for a security clearance, processing for a position of responsibility, or in other official matters is a security concern. It is "deliberate" if it is done knowingly and willfully. Omission of a past arrest or past drug use, for example, is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or thought the arrest had been expunged from the record and did not need to be reported.

Here, considering the record evidence as a whole, the government has established its case under Guideline E. Applicant deliberately falsified her answer to Question 18a on the DD Form 49 (the 1987 security-clearance application). Her "No" answer was clearly false in light of her regular marijuana use since 1976; indeed, Applicant has so admitted. Given these circumstances, DC 2⁽¹⁵⁾ applies against Applicant for SOR ¶ 2.a.

Concerning Question 29 on the SF 86 (the 2001 security-clearance application), however, Applicant's "No" answer was an honest mistake, not deliberately false, because Applicant did not understand the question. Her misunderstanding is not surprising given the phrasing of the question. Moreover, given Applicant revealed her marijuana use in the two previous questions (27 and 28) on the SF 86, it is contrary to common sense that she would try to hide the fact she purchased marijuana for her own use when answering Question 29. A favorable finding is warranted for SOR ¶ 2.b.

I have reviewed the MC under Guideline E and conclude that MC 2⁽¹⁶⁾ applies in Applicant's favor. According to the DOHA Appeal Board, MC 2 may apply in the limited circumstance when the falsification is old and the applicant subsequently provides correct information to the government.⁽¹⁷⁾ Applicant's situation falls within the scope of MC 2 because: (1) she falsified her security-clearance application in 1987, more than 15 years ago; and (2) the government became aware of her past marijuana use when she provided the information in response to two questions on her 2001 security-clearance application, which led to her sworn statement detailing her history of marijuana use. But for her revealing her marijuana use on the 2001 security-clearance application, the government would likely be none the wiser. She deserves a fair amount of credit for coming forward and taking responsibility for her actions. Given these facts and circumstances, a favorable finding is warranted for SOR ¶ 2.a. Considering the record evidence as a whole, Applicant has mitigated her falsification of the 1987 security-clearance application. Accordingly, Guideline E is decided for Applicant.

FORMAL FINDINGS

As required by ¶ E3.1.25 of Enclosure 3 to the Directive, below are my conclusions as to the allegations in the SOR:

SOR ¶ 1-Guideline H: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: Against the Applicant

Subparagraph e: Against the Applicant

Subparagraph f: Against the Applicant

SOR ¶ 2-Guideline E: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant⁽¹⁸⁾

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.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Question 18a asked "Have you ever used any narcotic, depressant, stimulant, hallucinogen (to include LSD or PCP) or Cannabis (to include marijuana or hashish) except as prescribed by a licensed physician?"
 3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
 4. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
 5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
 6. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
 7. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
 8. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
 9. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
 10. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
 11. *Egan*, 484 U.S. at 528, 531.
 12. "Any drug abuse."
 13. "Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution."
 14. DC 5 reads, in part, "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 decision."
 15. "The deliberate omission, concealment, or falsification of relevant and materials 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."

16. "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily."

17. ISCR Case No. 99-0557 (July 10, 2000) at p. 4.

18. The allegation in SOR ¶ 2.c is a repetition of the drug involvement alleged in SOR ¶ 1, and is most properly addressed under Guideline H. Cross-alleging Applicant's drug involvement under Guideline E adds nothing of security significance to the case, and, on that basis, a favorable finding is warranted for SOR ¶ 2.c.