

KEYWORD: Drugs; Personal Conduct; Criminal Conduct

DIGEST: Applicant is a 41-year-old communications worker for a defense contractor. He is married and has two children. He used marijuana in his youth, and stopped using it in April 1994, about a year after his divorce from his first wife. Applicant has not used marijuana in over seven years and has no intention to use it in the future. Applicant mitigated the drug involvement, personal conduct, and criminal conduct security concerns. Clearance is granted.

CASENO: 02-21234.h1

DATE: 07/27/2004

DATE: July 27, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-21234

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Juan J. Rivera, Esq., Department Counsel

FOR APPLICANT

David W. Queen, Esq.

SYNOPSIS

Applicant is a 41-year-old communications worker for a defense contractor. He is married and has two children. He used marijuana in his youth, and stopped using it in April 1994, about a year after his divorce from his first wife. Applicant has not used marijuana in over seven years and has no intention to use it in the future. Applicant mitigated the drug involvement, personal conduct, and criminal conduct security concerns. Clearance is granted.

STATEMENT OF THE CASE

On March 27, 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), Guideline E (Personal Conduct), and Guideline J (Criminal 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. DOHA 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 June 20, 2003, Applicant responded to the SOR allegations. He requested a hearing. This case was originally assigned to another administrative judge on September 25, 2003. Applicant requested a continuance, which was granted. The case was reassigned to a second administrative judge on December 22, 2003, when the hearing regions were rotated. On February 10, 2004, this case was reassigned to me due to a regional realignment.

A Notice of Hearing was issued on September 26, 2003 setting the hearing for October 15, 2003. That hearing date was cancelled because of the Applicant's continuance request being granted. The next Notice of Hearing was issued on February 19, 2004, setting a hearing date of March 3, 2004. On that date, I convened the hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. Applicant waived the 15 day notice period (Tr. 6).

The Government presented five exhibits which were admitted into evidence and questioned the Applicant and his four witnesses. Applicant appeared and testified, presented four witnesses, and offered 11 exhibits which were admitted into evidence. I received the transcript (Tr.) of the hearing on March 11, 2004.

FINDINGS OF FACT

Applicant admitted subparagraphs 1.c., 1.d., and 1.e. of the SOR allegations. He denied subparagraphs 1.a., 1.b., and 3.a. Those 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 41 years old, married with two children, and works in the telecommunications industry for a defense contractor. He worked there for the past 19 years. (Tr. 14, 20, 50; Exhibit 1)

Applicant was arrested in 1981 for possession of marijuana during a traffic stop. No action against Applicant was taken by the authorities, and the charges were dropped. Applicant was 18 years old at that time. Applicant was arrested a second time for marijuana possession in 1982, and paid a \$75 fine. He was arrested a third time in 1986 on a charge of selling marijuana. Applicant pled guilty and was given two years probation. Applicant attended a drug education program, paid restitution and court costs including \$36 to the Crime Victims Compensation Fund, and completed 40 hours of community service. Applicant's younger brother was the real culprit in that offense and was sentenced to five years in jail. Applicant did not handle the marijuana or money in those transactions, but merely connected his brother with Applicant's roommate, who was his brother's supplier of marijuana. (Tr. 15 to 18, 32, 33; Exhibits 3 to 5)

Applicant used marijuana one or two times per week from the age of 15 to 31. He did not use it while on probation for the selling charge from 1986 to 1992. Applicant resumed sporadic use of marijuana from 1992 to 1994. Applicant last used marijuana in April 1994. Applicant was divorced from his first wife in 1993, and that situation made him stop using marijuana about a year later, which would be on or about April 1993. Applicant does not associate any more with persons who use marijuana, and is divorced from his first wife who smoked marijuana. He has no intention of smoking marijuana again. (Tr. 18, 19, 35, 41, 44, 53)

Applicant completed his security clearance application (SCA) in November 2001. He answered in the negative Question 27 concerning illegal drug use in the past seven years. That period would commence in November 1994. Applicant's statement to the government investigator varies from the information entered on the SCA and his testimony at the hearing on his use of marijuana. Observing Applicant's demeanor and evaluating his answers at the hearing, I find him credible and persuasive that the answer on the SCA and his testimony is the accurate accounting of his marijuana usage. I find the statement made in 2002 is not consistent with that evidence, and it contains several anomalies that lead me to give it less weight in these deliberations, specifically the use of military style dates by a civilian, the admission of a precise and round number (100) of times marijuana was used since 1995, and his admission he used marijuana with one of his brothers and his wife. His testimony was that his first wife used marijuana with him, but he was divorced from her in 1993 and his supposed admission refers to the 1995 to 2002 period. His brother (he has two brothers living) was not identified, and his hearing testimony was that he did not smoke marijuana with his handicapped brother and tried to avoid being near him when that brother used marijuana to relieve discomforts from his handicap. There is no record evidence that any other brother used marijuana during that period. Applicant did not use marijuana 100 times with varying frequency from 1995 to 2002, nor did he use it after he completed the SCA. (Tr. 35 to 37, 46, 55; Exhibit 2)

Applicant's work ethic and reliability was praised by his co-workers and supervisors. Applicant received many favorable comments concerning his work performance and dedication to quality work. He is a good worker and has been for the 19 years he has been with this company or its predecessors. (Tr. 62 to 88; Exhibits B to K)

Applicant is an businessman who buys houses from an on-line Department of Housing and Urban Development auction site, employs his older brother to rehabilitate them, and then leases them to family members and other people. He can double the value of these homes by the rehabilitation work done. Applicant is busy during the daytime hours working in the communications area, and then at night and weekends works on his homes. (Tr. 57 to 59)

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 judgement, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing he 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 Para 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 Para. 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 Section 3.1(b).

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. The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

Refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials or other official representatives in connection with a personal security or trustworthiness determination.

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

None

(C) Conditions that could mitigate security concerns include:

None

Guideline J - Criminal Conduct

(A) The Concern: A history or pattern of criminal activity creates doubt about a person's judgement, reliability and trustworthiness.

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

(1) Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;

(2) A single serious crime or multiple lesser offenses.

(C) Conditions which could mitigate security concerns include:

(1) The criminal behavior was not recent;

(6) There is clear evidence of successful rehabilitation.

Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, I draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record.

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. Under Guideline H, an applicant's past illegal involvement with drugs raises questions regarding his willingness to protect classified information. I conclude Disqualifying Conditions (DC) 1 and 2 apply here. A security concern may exist if an applicant uses or purchases illegal drugs such as marijuana.

The last alleged drug use was in 1994, more than seven years before the completion of Applicant's SCA. I articulated previously why I find credible his statements and testimony that he has not used marijuana since April 1994. Added to those reasons are Applicant's age and maturity, being a father of two children, and remaining busy with his daytime job and his business of buying and rehabilitating houses in his area. Therefore, the drug use is not recent. (MC 1) Applicant has demonstrated his intent not to use drugs in the future (MC 3). Accordingly, the finding is for the Applicant.

Guideline E - Personal Conduct: I conclude the Government did not prove its case. The last use of marijuana by Applicant was beyond the seven year disclosure period asked in Question 27 of the SCA. Furthermore, I have already explained why I believe Applicant on that disclosure and his hearing testimony, and place no weight on Exhibit 2 because of the discrepancies within that document when compared to the totality of the record evidence I considered. I conclude this guideline for Applicant.

Guideline J - Criminal Conduct. This allegation is related to and based on the allegation under the Personal Conduct guideline. That guideline I found for Applicant, and based on the same reasoning I conclude this guideline for Applicant. The allegation under the Personal Conduct guideline did not constitute a violation of 18 U.S. C. §1001.

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

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Paragraph 2 Guideline E: For Applicant

Subparagraph 2.a.: For Applicant

Paragraph 3 Guideline J: For Applicant

Subparagraph 3.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