

DATE: November 5, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-23365

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Juan J. Rivera, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has used marijuana on a number of occasions since his senior year in high school, the last use occurring in approximately January 2001, while he was vacationing in a foreign country where the use of marijuana is legal. He possessed a security clearance during this last reported use. Applicant also failed to disclose his use of marijuana on a Questionnaire for National Security Positions (SF 86) he submitted on August 16, 2001. Clearance is denied.

STATEMENT OF THE CASE

On June 10, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline E (personal conduct) based upon Applicant's use of marijuana, use of marijuana while possessing a security clearance, and falsification of the SF 86 he submitted on August 16, 2001; and Guideline J (criminal conduct) based upon Applicant's falsification of the SF 86 he submitted on August 16, 2001. Applicant submitted an undated answer to the SOR, admitted all allegations contained in the SOR, and requested a hearing.

The case was assigned to me on August 14, 2003. A notice of hearing was issued on August 19, 2003, scheduling the hearing for September 5, 2003. The hearing was conducted as scheduled. The government submitted two documentary exhibits at the hearing that were marked as Government Exhibits (GE) 1 & 2 and admitted into the record without an objection. The Applicant testified at the hearing and submitted a binder, containing numerous documents, that was marked as Applicant Exhibit (AE) 1 and admitted into the record without an objection. Applicant also called two character witnesses to testify on his behalf. The transcript was received on September 16, 2003.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, exhibits and testimony, I make the following findings of fact:

Applicant is a 26-year-old, single man. He graduated from college on December 16, 2000, was awarded a Bachelor of Science in Business Administration degree With Honors, and is presently taking courses toward the award of a master's degree. He resides in an apartment with a friend from high school, although he also owns a house that he maintains for his mother and younger sister. He spends most weekends residing in the house with his mother.

Applicant was hired by a defense contractor as a *software engineer 1* on March 1, 2001 and recently promoted to *software engineer 2*. The performance and development summaries contained in AE 1 indicate he is a valued and trusted employee who is deemed to be enthusiastic, technically proficient, and a team player. His supervisors specifically noted that Applicant "consistently displays the highest standards of business and personal ethics."

Applicant is also a Staff Sergeant in the U.S. Army Reserve. He enlisted in the Army Reserve in September 1995 and has served continuously since that time. He was assigned as a detachment commander for a transportation detachment in October 2002, and is in charge of between five and six soldiers in that capacity. He is assigned collateral duties as the detachment retention NCO, and as the detachment representative for obtaining school quotas for unit members. His personal awards include the Army Commendation Medal, Army Achievement Medal, and many certificates and letters of appreciation. He has completed numerous Army training courses, including the *Protecting Secret and Confidential Documents* course on August 17, 2000. The NCO Evaluation Reports contained in AE 1 indicate Applicant is a successful and superior Soldier who is deemed to be an asset to his command.

Applicant has possessed a secret security clearance since shortly after he first enlisted in the Army Reserve. He presently has access to classified material on a regular basis. There have been no allegations or reports made alleging any mishandling or potential compromise of classified information on his part. There has not been any administrative action taken to revoke, suspend, or downgrade his security clearance before the SOR was issued by DOHA.

Applicant smoked marijuana on approximately five occasions between 1994 and 1995 while he was a senior year of high school. He also smoked marijuana on a couple of additional occasions while he was attending a junior college, the last of those uses occurring in approximately 1997. (2) Lastly, in January 2000, while on a European vacation in with a friend following Applicant's graduation from college, Applicant smoked marijuana in a coffee house in a country where the use of marijuana is legal. Applicant possessed a security clearance when he used the marijuana in January 2000.

Applicant submitted a SF 86 on August 16, 2001, in which he answered "No" to question 24a: *Since the age of 16 or in the last 7 years, which ever is shorter, have you illegally used any controlled substance, for example, marijuana. . . .* Applicant answered the question in this fashion because he had been advised by a recruiter to not disclose his high school marijuana use when he first joined the Army Reserve in 1995 and felt the need to continue with the deception when he submitted this SF 86. Applicant provided a statement to a special investigator (GE 2) on March 25, 2002, in which he admitted using marijuana while in high school and on the European vacation, however instead of disclosing the junior college uses that continued until 1997, he averred that "I stopped using marijuana when I left high school."

Applicant has two juvenile adjudications for offenses committed within his family. He was placed on probation and required to perform community service in December 1992 for the offense of Attempted Assault. That offense involved a physical altercation he had with his mother, brother, and sister. He was placed on probation and required to perform community service again in July 1994 for the offense of battery. That offense involved a physical altercation with his brother whom he cut on the arm with a kitchen knife when the brother was getting the better of him in the fight. Applicant's last arrest occurred in May 2003 when he blacked out in a bar, became involved in an altercation with two bouncers, and punched one of them. He was charged with misdemeanor battery, but the charges were eventually dismissed.

Applicant has not used marijuana since his European vacation in January 2000, and credibly testified that he will never use it, or any other controlled substance, in the future. Applicant has not consumed any alcoholic beverages since his May 2003 arrest, excepting two glasses of wine he has had with dinner, and indicated he will not drink to excess in the future.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chiefs among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon 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. Considering the evidence as a whole, Guideline E, pertaining to personal conduct, and Guideline J pertaining to criminal conduct, with their respective DC and MC, are most relevant in this case.

BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security

clearance for an applicant.⁽³⁾ The government has the burden of proving controverted facts.⁽⁴⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁵⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽⁶⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁷⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽⁸⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

No one has a right to a security clearance⁽¹⁰⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹¹⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹²⁾

CONCLUSIONS

Under Guideline E, personal conduct is always 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 classified information. Applicant's limited use of marijuana while he was in high school can be excused as a youthful indiscretion. His subsequent use of marijuana while in junior college and in possession of a security clearance was not alleged in the SOR. However, his use of marijuana while on a European vacation, even though it occurred in a country where such use is legal, does create a significant security concern.

When Applicant used the marijuana in Europe he was 22-years-old, a college graduate, a Sergeant in the Army Reserve, and had possessed a secret security clearance for several years. Although he was not subject to the Uniform Code of Military Justice (UCMJ) when he used the marijuana, and the use was otherwise legal, he was well aware of the Army policy that prohibits the use of controlled substances, including marijuana, by reserve personnel, even when not in a duty status. His use of marijuana in this circumstance was a breach of the trust that had been placed in him as an Army noncommissioned officer and security clearance holder.

Applicant also failed to disclose his multiple illegal uses of marijuana in the 1994-95 time period in the SF 86 he submitted on August 16, 2001. The uses occurred while he was a senior in high school and were within the 7-year-window of which question 24a made inquiry. His use of marijuana while on a European vacation in 2000 was legal, and he was not required to disclose those uses.

Once again his failure to disclose the marijuana use when he first enlisted in the Army in 1995, on the advice of a recruiter, might be excused as a youthful indiscretion. However, when he submitted the SF 86 in 2001, he was 24-years-old, a college graduate, and an employee of a defense contractor. Applicant did not finally disclose his marijuana use until he was interviewed by a special investigator on March 25, 2002, and even then he failed to disclose the full extent of his use. Applicant's failure to disclose his drug use in the SF 86, and certification that his answer was true create additional significant security concerns.

Disqualifying Conditions (DC) 2: *The deliberate omission, concealment, or falsification 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*; DC 4: *Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail*; and DC 5: *A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency* apply in this case.

I have considered all Guideline E Mitigating Conditions (MC) and find that MC 5: *The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress* applies in this case. I cannot find that MC 3: *The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts* applies due to the fact that Applicant still had not disclosed his use of marijuana while he was attending a junior college and in possession of a security clearance until he was questioned at the hearing. There is no basis for finding any other mitigating condition exists.

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

The government has established its case against Applicant under Guideline J. Applicant submitted the SF 86 on August 16, 2001, knowing the information he provided was false. His action was also willful. Although probably never actually prosecuted, it is a crime under 18 U.S.C. § 1001 to knowingly and willfully make a false statement in the submission of an SF 86 to any agency or department of the United States Government, which is exactly what Applicant did.

DC 1: *Allegations or admission of criminal conduct, regardless of whether the person was formally charged* applies in this case. Having considered

Applicant's appearance, demeanor, manner of testifying at the hearing, along with the character testimony provided and apparent the full disclosure of his prior transgressions at the hearing, I find MC 6: *There is clear evidence of successful rehabilitation* also applies.

Appellant does receive credit under the "whole person" concept for his eight years of honorable and faithful military service that is clearly reflected in the many awards, commendations, and NCO evaluations included in AE 1. Additionally, he has held a secret security clearance since approximately 1995 without any disciplinary action ever being taken or security violations or concerns being noted. Although there are several indiscretions in his background, the most recent occurring in May 2003, the character evidence he offered, his efforts in caring for his mother and younger sister, his employment record, and his public service endeavors establish that overall he is a very fine young man with a promising future.

In all adjudications the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. Once again, it must be noted that no one has a right to a security clearance⁽¹³⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁴⁾

After considering the evidence of record in this case, and weighing the disqualifying condition against the mitigating condition, I find that Applicant has mitigated the security concern caused by his criminal conduct. Guideline J is decided for Applicant.

After considering the evidence of record in this case, and weighing the disqualifying conditions against the mitigating condition, I find that Applicant has failed to mitigate the security concern caused by his personal conduct. He has failed to overcome the case against him under Guideline E or satisfy his ultimate burden of persuasion. Guideline E is decided against Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline E: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: For the Applicant

Subparagraph c: Against the Applicant

SOR ¶ 2-Guideline J: For the Applicant

Subparagraph a: 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.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Applicant testified to the previously undisclosed marijuana uses during the hearing. No motion was made to amend the SOR to allege those uses by Applicant while in possession of a security clearance. Accordingly, they will not be considered in arriving at a decision in this case.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
5. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
10. *Egan*, 484 U.S. at 528, 531.
11. *Id* at 531.
12. *Egan*, Executive Order 10865, and the Directive.
13. *Egan*, 484 U.S. at 528, 531.
14. *Id* at 531.