

KEYWORD: Drugs

DIGEST: Applicant submitted a urine sample, as required by his employer, on October 17, 2000 that tested positive for the presence of the marijuana metabolite THC. He subsequently received an employer mandated drug assessment, was determined to be a low risk for being diagnosed as chemically dependent, and successfully completed an eight-hour alcohol and drug education program. Applicant has mitigated the security concern that arose from his use of marijuana. Clearance is granted.

CASE NO: 02-25138.h1

DATE: 04/16/2004

DATE: April 16, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-25138

**DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Esquire, Department Counsel

**FOR APPLICANT**

David I. West, Esquire

**SYNOPSIS**

Applicant submitted a urine sample, as required by his employer, on October 17, 2000 that tested positive for the presence of the marijuana metabolite THC. He subsequently received an employer mandated drug assessment, was determined to be a low risk for being diagnosed as chemically dependent, and successfully completed an eight-hour alcohol and drug education program. Applicant has mitigated the security concern that arose from his use of marijuana. Clearance is granted.

**STATEMENT OF THE CASE**

On September 17, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. <sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline H, for drug involvement.

Applicant submitted an answer to the SOR that was received by DOHA on October 27, 2003, and requested a hearing. Applicant admitted the four SOR allegations. <sup>(2)</sup>

The case was assigned to me on January 6, 2004. A notice of hearing was issued on January 13, 2004, scheduling the hearing for February 5, 2004. The hearing was conducted as scheduled. The government submitted seven documentary exhibits at the hearing that were marked as Government Exhibits (GE) 1-7, and admitted into the record without an objection. Applicant testified, called two witnesses, and submitted thirteen documentary exhibits that were marked as Applicant's Exhibits (AE) 1-13, and admitted into the record without an objection. The transcript was received by

DOHA on February 18, 2004.

### **FINDINGS OF FACT**

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

Applicant is 46 years old, a high school graduate, and the father of two adult children. He married the mother of his children in December 1981, and they were divorced in January 1991. He is presently engaged to be married. He has worked as a painter for most of his life, and has been employed by his present employer, a defense contractor, since April 1988. Initially hired as a maintenance painter, Applicant was advanced to the lead painter position in the structures shop thirteen years ago, and has worked in that supervisory role ever since. He presently supervises eight painters. The testimony, certificates, and letters of recommendation and appreciation he submitted attest to his reputation as an excellent employee and co-worker, who is considered to be reliable, conscientious, trustworthy, and of great moral character.

Applicant has possessed a secret security clearance since 1991. There is no evidence that any prior action has ever been taken to revoke or downgrade his clearance or that any complaints or allegations have ever been made against him alleging mishandling of classified material.

Applicant held a party to celebrate his engagement, his birthday, his sister's birthday, and his sister-in-law's birthday in October 2000. The party was held at his fiance's house, commenced on Friday evening, and continued until sometime Sunday morning. In the early AM hours on Sunday, Applicant was intoxicated and seated in an outdoor hot tub with other partygoers. Someone passed one or more marijuana cigarettes around, from which Applicant took three to four hits. Applicant denies using controlled substances, on any occasion, either before or after this party.

Applicant was improperly directed to submit to a urinalysis by his employer on October 17, 2003 after he went to his employer's safety department to open a claim because of a probable work-related shoulder injury. He tested positive for the presence of THC, and was suspended from work for one week with pay. He was also directed to obtain a substance abuse evaluation, which he did on November 1, 2000. He was assessed to be a low risk for being diagnosed chemically dependent, but it was recommended he attend an eight-hour alcohol and drug education program. He completed the recommended program on January 13, 2001. Applicant was allowed to return to work on October 27, 2000, subject to being placed in a probationary status for two years.

### **POLICIES**

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief 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 H, pertaining to drug involvement with its respective DC and MC, is 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.<sup>(3)</sup> The government has the burden of proving controverted facts.<sup>(4)</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence<sup>(5)</sup>, although the government is required to present substantial evidence to meet its burden of proof.<sup>(6)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(7)</sup> 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.<sup>(8)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(9)</sup>

No one has a right to a security clearance,<sup>(10)</sup> and "the clearly consistent standard indicates that

security clearance determinations should err, if they must, on the side of denials."<sup>(11)</sup> Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.<sup>(12)</sup>

## **CONCLUSIONS**

Under Guideline H, illegal drug involvement raises questions about an individual's willingness or ability to protect classified information. Involvement with or use of an illegal drug indicates unwillingness or inability to abide by the law. Cleared employees must respect regulations whether they agree with them or not. If they do not respect the rules on illegal substances, they may not respect the rules designed to protect classified information.

Applicant used marijuana on one occasion in October 2000. When he used the marijuana, he worked for a defense contractor and possessed a security clearance. Disqualifying Condition (DC) 1: *Any drug abuse* applies in this case.

Considering Applicant's appearance and demeanor while testifying, the substance of his testimony, and the numerous attestations to his honesty and trustworthiness that are contained in the record, I find his claim that this was the only time he has ever abused a controlled substance to be credible. He received a favorable drug evaluation, successfully completed the recommended drug education program, has convincingly asserted he will never again abuse drugs, and has successfully completed the probationary period he was placed on by his employer. Mitigating Conditions (MC) 1: *The drug involvement was not recent*; MC 2: *The drug involvement was an isolated or aberrational event*; and MC 3: *A demonstrated intent not to abuse any drugs in the future* apply in this case.

Applicant's use of a controlled substance after being granted a security clearance is troubling. However, considering the situational and aberrational nature of the occurrence, all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find that Applicant has mitigated this security concern. Guideline H is decided for Applicant.

### **FORMAL FINDINGS**

SOR ¶ 1-Guideline H: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: For the Applicant

### **DECISION**

In light of all the circumstances 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.

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. All four allegations are based upon one positive urinalysis.
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.