

DATE: November 9, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-19846

ECISION OF ADMINISTRATIVE JUDGE

MICHAEL J. BRESLIN

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 42-year-old employee of a defense contractor. He smoked marijuana once or twice a month from about 1985 until 2003. On 20 to 30 occasions, he purchased the marijuana and furnished it to his friends for their use. Also, on several occasions, Applicant wrongfully used medication prescribed for his spouse. Applicant made a statement indicating his intent to use marijuana in the future, and to associate with others who also used marijuana. At the hearing he declared his intent not to use marijuana again or to associate with marijuana users. Applicant has mitigated the security concerns arising from his abuse of prescription medicines, but not those resulting from his long-term misuse of marijuana or association with other marijuana users. Clearance is denied.

STATEMENT OF THE CASE

On August 1, 2002, Applicant submitted an application for a security clearance. Under Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (the "Directive"), the Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On June 15, 2004, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. (The SOR spelled Applicant's first and last name incorrectly; the correct spelling is shown on the caption of this opinion.) The SOR alleges security concerns raised under the Directive, specifically Guideline H, Drug Involvement, and Guideline E, Personal Conduct.

Applicant answered the SOR in writing on July 20, 2004. He elected to have a hearing before an administrative judge.

The case was originally assigned to another administrative judge, but was reassigned to me on August 25, 2004. With the concurrence of the parties, I conducted the hearing on September 14, 2004. The government introduced Exhibits 1, 2 and 3. Applicant presented Exhibits A, B, and C, and testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on September 30, 2004.

FINDINGS OF FACT

Applicant admitted the allegations in ¶¶ 1.a, 1.c, 1.d, 1.e, and 2.a of the SOR. Applicant's Answer to SOR, dated July 20, 2004. Those admissions are incorporated herein as findings of fact. He denied the allegations in ¶¶ 1.b and 1.f of the SOR. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact:

Applicant is 42 years old and married with two children. Ex. 1, at 1, 3-4. He has worked for a defense contractor for over 20 years. *Id.* at 2. His supervisors praise his job performance. Ex. A, B, and C.

Applicant smoked marijuana while in high school. Ex. 2, at 1. He claimed he first tried marijuana because of peer pressure. *Id.* Applicant entered active duty in the United States Navy in 1980. Tr. at 16-17. He was an aviation electronics technician and held a security clearance. Tr. at 16. When he joined the U.S. Navy, he took an oath not to use illegal drugs. Tr. at 19. Applicant states he never smoked marijuana while on active duty in the Navy. Tr. at 17. Applicant was honorably discharged from the Navy in 1984 (Tr. at 16), and completed his two-year inactive reserve commitment in 1986. Tr. at 25-26.

After his discharge, Applicant returned to the same area where he went to high school, met some of his old friends, and resumed smoking marijuana. Tr. at 17-18. Applicant admitted smoking marijuana during his inactive duty commitment to the U.S. Navy. Tr. at 29. Applicant used marijuana approximately once or twice a month between about 1985 and 2003. Ex. 2; Tr. at 18. Normally he obtained the drug from friends. Tr. at 23. However, on about 20 to 30 occasions, Applicant purchased the marijuana used at his social gatherings. Ex. 2. He usually spent about \$60.00 to buy about 3 grams of marijuana. Tr. at 23-24.

On several occasions, Applicant used medication prescribed to his spouse. Once Applicant took hydroxyzine, a prescription anti-itching medication, for temporary relief from a reaction to penicillin. Tr. at 21. Between 1996 and 1999, Applicant took medicine prescribed for his wife to control a rash. Tr. at 22. Applicant did not take either medication to get "high" or for a reason other than its intended medical purpose. Tr. at 21.

In August 2002, Applicant applied for a security clearance and reported his drug use. Tr. at 20. In February 2003, security clearance investigators interviewed Applicant about his drug use. Ex. 2. Applicant admitted using marijuana beginning in high school. *Id.* He admitted smoking marijuana once or twice a month from about 1985 until the present time. He wrote,

I continued to smoke marijuana because it helps me relax. I also like to smoke marijuana because I had stopped smoking cigarettes, and marijuana helped to fill that void. Each time I smoked marijuana, I was with friends at get-togethers or parties. The drug has the effect of making me feel relaxed, tired, and sometimes more motivated.

...

I probably would use marijuana again because of the way it helps me relax. If I were to obtain a security clearance though, I would consider not using marijuana any more. I do continue to socialize with people who use drugs illegally.

After the interview with the security investigator, Applicant continued to use marijuana for a few weeks. Tr. at 18, 28. Applicant testified that the interview was a "wake-up call," and he then realized that his job and his family were more important than the short-term effects of smoking marijuana with his friends. Tr. at 15. Applicant asserts that his priorities have changed and that, in the 18 months since the interview, he has not used illegal drugs. *Id.* He states he is not a drug-user or addicted to any controlled substance. *Id.* He also contends that he no longer associates with drug users, except for a brother-in-law at occasional family gatherings. Tr. at 26.

POLICIES

In Executive Order 12968, *Access to Classified Information*, § 3.1(b) (August 4, 1995), the President provided that eligibility for access to classified information shall be granted only 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." A person granted access to classified information enters into a special relationship with the government. 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. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. Exec. Ord. 10865, § 7. It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. The adjudicative guidelines at issue in this case are:

Guideline H, Drug Involvement. 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. Directive, ¶ E2.A8.1.1.1.

Guideline E, Personal Conduct. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the applicant may not properly safeguard classified information. Directive, ¶ E2.A5.1.1.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to these adjudicative guidelines, are set forth and discussed in the conclusions below. Additionally, Title 10, United States Code, § 986, prohibits the Department of Defense from granting or renewing a security clearance to any employee of a DoD contractor who is an unlawful user of, or is addicted to, a controlled substance as defined in Section 102 of the Controlled Substances Act, 21 U.S.C. § 802.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." Directive, ¶ E2.2.1. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. *Id.* An administrative judge should consider the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (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. *Id.*

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. Directive, ¶ E3.1.14. Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. Directive, ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 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.

CONCLUSIONS

I considered carefully all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

Guideline H, Drug Involvement.

Paragraph E2.A8.1.2.1 of the Directive provides that "*any drug abuse*" may be a disqualifying condition. Similarly, under ¶ E2.A8.1.2.2 of the Directive, "*illegal drug possession, including . . . distribution*" could raise a security concern. The SOR alleges various forms of drug involvement, which I will discuss separately.

Marijuana

The SOR, ¶¶ 1.a and 1.c, allege Applicant used and possessed marijuana. The Government's evidence and Applicant's admissions constitute substantial evidence of Applicant's use and possession of marijuana. He admitted smoking marijuana once or twice a month for nearly 20 years. He also admitted buying the drug and distributing it to his friends at social occasions. I conclude disqualifying conditions in ¶ E2.A8.1.2.1 and ¶ E2.A8.1.2.2 apply, raising security concerns.

The Directive also sets out certain conditions that could mitigate these security concerns. Under ¶ E2.A8.1.3.1 of the Directive, it may be mitigating where "*the drug involvement was not recent.*" Applicant admitted using marijuana once or twice a month for 20 years, until about March 2003. Applicant even admitted using marijuana for a few weeks after the interview with the security investigator. I conclude Applicant's drug use was recent, therefore this mitigating condition does not apply.

It may also be mitigating where the drug use was "*an isolated or aberrational event.*" Directive, ¶ E2.A8.1.3.2. Considering the length of time Applicant used marijuana, it is clear his use was not isolated or unusual, therefore this mitigating condition does not apply.

Another mitigating condition arises where the evidence reveals a "*demonstrated intent not to abuse any drugs in the future.*" Directive, ¶ E2.A8.1.3.3. Applicant asserts that, a few weeks after the interview with the security investigator, he came to the realization that his job and his family were more important than smoking marijuana with his friends. He also claims that he has not used illegal drugs since that time, a period of about 18 months.

In evaluating Applicant's declaration, I considered all the circumstances in this case. I note Applicant used marijuana in high school due to peer pressure. He did not use marijuana while in the Navy, but resumed using it when he found himself back with his high school friends. This indicates he is vulnerable to adverse influence. Moreover, Applicant has used marijuana regularly for almost 20 years, because he liked its physiological effects. Even during the interview with the security investigator, Applicant expressed his intention to continue to smoke marijuana. This shows that his marijuana use became a deeply-ingrained part of his lifestyle. Considering all the evidence, I am not persuaded Applicant's assertion is credible, or that he can sustain his commitment to refrain from using marijuana. I conclude this mitigating condition does not apply.

Finally, under ¶ E2.A8.1.3.4 of the Directive, it may be mitigating where an applicant demonstrates "*satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a credentialed medical professional.*" Applicant admitted that he did not enroll in a drug treatment program. Moreover, there is no evidence that a credentialed medical professional gave Applicant a favorable prognosis. I conclude this mitigating condition does not apply.

Prescription drugs

Under ¶ E2.A8.1.1.3 of the Directive, the term "drug abuse" includes the "*use of a legal drug in a manner that deviates from approved medical direction.*" Paragraphs 1.d and 1.e of the SOR allege Applicant illegally used prescription drugs. Applicant admits using medicines prescribed to his spouse for temporary relief of minor ailments. One instance occurred in December 1998, and the other between 1996 and 1999. Applicant's Answer to the SOR, dated July 20, 2004. Applicant's wrongful use of these drugs without a prescription constitutes drug abuse under the Directive, ¶ E2.A8.1.1.3.

I also considered the potential mitigating factors discussed above. Applicant has a long history of drug abuse, continuing until March 2003. For the reasons discussed above, I find his drug abuse was recent, it was not an isolated event, and Applicant's declaration that he will not abuse drugs in the future is not credible. Therefore, I conclude these potentially mitigating circumstances do not apply.

I also considered the "whole person" concept. Applicant was a mature adult at the time of the conduct, and his wrongful use of prescription medication was knowing and deliberate. On the other hand, he used the prescription drugs for a medical purpose, not to get "high." While it still constitutes drug abuse under the Directive, the nature of the offense is not as serious. Also, his abuse was temporary and situational. Finally, it occurred several years ago. I conclude Applicant has mitigated the security concerns arising from his abuse of prescription medicines.

Future drug use

Paragraph 1.b of the SOR alleges Applicant "expressed an intention for future marijuana use." At the time of his interview with security investigators, Applicant stated, "I probably would use marijuana again because of the way it helps me to relax." Ex. 2. Applicant admitted that, at the time, he meant that he would continue to use marijuana. Tr. at 27.

One of the disqualifying conditions set out in the Directive is ¶ E2.A8.1.2.5, which provides:

Failure to successfully complete a drug treatment program prescribed by a credentialed medical professional. 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 determination.

The phrase "*an expressed intent not to discontinue use*" would seem to state, on its face, a separate basis for potential disqualification. However, the Appeal Board concluded that the phrase must be applied within the context set out in the first sentence of the paragraph. ISCR Case No. 02-24452 at 3 (App. Bd. Aug. 4, 2004). Thus, the Appeal Board holds that an expressed intent not to discontinue drug use only constitutes a separate disqualifying condition when it follows a failure to complete a drug treatment program. *Id.* Applicant did not fail a drug treatment program, therefore his expressed intent to use marijuana in the future is not a separate disqualifying condition, according to this precedent. I conclude the evidence does not constitute a disqualifying condition.

10 U.S.C. § 986

A federal statute, 10 U.S.C. § 986, provides, in pertinent part, that the Department of Defense may not renew or grant a security clearance to a person who is "an unlawful user of, or is addicted to, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." Marijuana is a controlled substance. *See* 21 U.S.C. § 802(6); 21 U.S.C. § 812(c); 21 C.F.R. 1308.11(d)(22). The SOR alleges Applicant is disqualified from having a security clearance under 10 U.S.C. § 986, because he expressed an intent to use marijuana in the future. The available evidence reveals that Applicant used marijuana on a regular basis for 20 years, and indicated to the security investigator his intent to continue using marijuana thereafter. Applicant testified that he has changed his priorities and that he will not use marijuana again. For the reasons discussed above, I do not find this to be credible. I find Applicant is a marijuana user and was using marijuana at or near the time DOHA issued the SOR. I conclude 10 U.S.C. § 986 applies in this case and precludes the Department of Defense from granting Applicant a security clearance.

I considered all the circumstances in light of the "whole person" concept. I conclude Applicant has not mitigated the security concerns arising from his marijuana use.

Guideline E, Personal Conduct.

Under ¶ E2.A5.1.2.6 of the Directive, it may be disqualifying where an Applicant associates with persons "*involved in criminal activity.*" Applicant admitted that between about 1985 and February 2003, he associated with a group of friends who regularly engaged in the illegal use of marijuana. Applicant's admissions were substantial evidence of this potentially disqualifying condition.

Under the Directive, ¶ E2.A5.1.3.7, it may be mitigating where an applicant has stopped associating with those involved in criminal activities. At the hearing, Applicant indicated that he no longer spent time with anyone who used illegal drugs, other than a relative he necessarily encountered at occasional family gatherings. I accept this as true. However, considering Applicant's susceptibility to peer pressure, his 20-year history of using marijuana with his friends, his admitted desire for the physiological effects of marijuana, and the social nature of marijuana abuse, I am not persuaded he will not associate with persons associated with drug activity in the future. Considering all the circumstances in light of the "whole person" concept, I conclude Applicant has not mitigated the security concerns arising from his association with persons engaged in marijuana use.

FORMAL FINDINGS

My conclusions as to each allegation in the SOR are:

Paragraph 1, Guideline H: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: For Applicant

Subparagraph 1.f: Against Applicant

Paragraph 2, Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

DECISION

In light of all of 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 J. Breslin

Administrative Judge