

KEYWORD: Drugs; Personal Conduct

DIGEST: Applicant used marijuana in high school, and after many years of avoidance was involved in a possession incident while holding a security clearance, in which he was arrested on a single occasion in October 1999 and awarded deferred prosecution. Because of beneficiary's failure to provide any documentation of his compliance with deferred prosecution conditions associated with his 1999 marijuana possession arrest, it remains unclear whether he has met the deferral conditions that will enable him to satisfactorily complete his imposed 5-year probation. Without more documentation of successful compliance, Applicant may not be credited with successful mitigation of his recurrent marijuana use. Clearance is denied.

CASENO: 03-19871.h1

DATE: 07/28/2005

DATE: July 28, 2005

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-19871

**DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

**APPEARANCES**

## **FOR GOVERNMENT**

Jennifer I. Campbell, Department Counsel

## **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant used marijuana in high school, and after many years of avoidance was involved in a possession incident while holding a security clearance, in which he was arrested on a single occasion in October 1999 and awarded deferred prosecution. Because of beneficiary's failure to provide any documentation of his compliance with deferred prosecution conditions associated with his 1999 marijuana possession arrest, it remains unclear whether he has met the deferral conditions that will enable him to satisfactorily complete his imposed 5-year probation. Without more documentation of successful compliance, Applicant may not be credited with successful mitigation of his recurrent marijuana use. Clearance is denied.

### **STATEMENT OF CASE**

On June 3, 2004, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons 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, and recommended referral to an administrative judge for determination whether clearance should be granted or continued.

Applicant responded to the SOR on June 17, 2004, and elected to have his case decided on the basis of the written record. Applicant received the File of Relevant Material (FORM) on October 7, 2004. Applicant failed to respond to the FORM within the 30 days provided him to provide supplement documentation regarding his drug use. The case was assigned to me November 16, 2004.

## **SUMMARY OF PLEADINGS**

Under Guideline H, Applicant is alleged to have (a) used marijuana on at least one occasion in October 1999 while possessing a DoD security clearance and (b) been arrested in October 1999 for driving under the influence (DuI), possession of marijuana and possession of drug paraphernalia, while registering a blood alcohol concentration of 0.19g/100mL (followed by deferred prosecution conditioned on five years probation, completion a two-year treatment program and active probation, ignition interlock for one year, fines of \$525.00, and attendance at AA following a two-year treatment program). The allegations are incorporated under Guideline E as well.

For his answer to the SOR, Applicant admitted making a mistake in using marijuana on the one occasion and claimed it will not happen again, considering his care for his job and his company.

## **FINDINGS OF FACT**

Applicant is a 47-year-old employee of a defense contractor who seeks to retain his security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

Applicant was introduced to marijuana while in high school, where he confined his use to occasional puffs of a joint he shared with friends at social functions (*see ex. 6*). While he would occasionally buy a joint for fifty cents or a dollar for his personal use, he never sold or cultivated drugs of any kind (marijuana included). He estimates he might have smoked marijuana once or twice at high school social gatherings, but never used it after high school, except for the one incident in October 1999 in which he was arrested. Applicant held a security clearance at the time of his arrest.

In October 1999, Applicant was involved in a collision while in an intoxicated state, according to police reports. After administering field sobriety tests, the officer called to the scene searched Applicant's vehicle and found a pipe with the residue of marijuana, a silver cannister with marijuana, and a lighter hidden under one of two floor mats on the driver's side floor. The officer then transported Applicant to a local hospital to have his blood drawn for testing for alcohol content. In tests administered at the hospital, Applicant's blood alcohol concentration (BAC) registered 0.19g/100mL. The officer then booked Applicant at the station on charges of DuI, possession of drug paraphernalia, and possession of marijuana.

Prior to his October 1999 arrest, some friends gave Applicant a very small amount of marijuana and a smoking pipe. He estimates he took one or two puffs from the pipe before he was pulled over by police, who found the pipe in his vehicle when they searched it (ex. 6). Applicant assures he completed a two-year treatment program following his 1999 arrest, has not used any illegal drugs since his 1999 incident and has no intentions of using ever using them again. But he did not provide any documentation of his completing the program.

Before the record closed in September 2004, Applicant was afforded an opportunity to document whether he had satisfied the court's imposed conditions and completed his five-year probation. Within the time permitted, he failed to supplement the record with any evidence of compliance with the court's deferred prosecution conditions.

Without evidence he has completed any of the conditions imposed by the court in connection with his deferred prosecution of his October 1999 incident, questions persist whether he completed his prescribed treatment program and ignition interlock, paid his fine, and attend AA meetings for the two years following his two-year treatment program. Without any documentation from Applicant that he has completed his required conditions and five-year probations, there is no way of knowing whether Applicant is still subject to prosecution for the offense.

## **POLICIES**

The Adjudicative Guidelines of the Directive (Change 4) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These revised Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

### **Drug Involvement**

*The Concern:* 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.

### **Personal Conduct**

*The Concern:* 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.

### **Burden of Proof**

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's application for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

### **CONCLUSIONS**

Applicant brings both a dated history of high school marijuana use and recurrent use of the drug in 1999 (while holding a security clearance) to these proceedings. His recurrent use of marijuana, when coupled with uncertainty over his completion of his deferred prosecution conditions, raises some security significant issues about his judgment, reliability and trustworthiness required for eligibility to access classified information.

Applicant's single noted marijuana possession incident in 1999, preceded by many years of non-use, and undocumented compliance with his deferred prosecution, are sufficient to invoke two of the disqualifying conditions of the Adjudicative Guidelines for drugs, *i.e.*, E2.A8.1.2.1 (*Any drug abuse*) and E2.A8.1.2.2 (*Illegal drug possession, including cultivation, processing, manufacture, purchase, sale or distribution*).

While E2.A8.1.2.5 (*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*) has been held not to apply by the Appeal Board (*see* ISCR OSD Case No. 02-24452 (August 2004)), Applicant's possession of marijuana while holding a security clearance, nonetheless, reflects poorly on his judgment, reliability and trustworthiness. His single documented possession within the previous five years while holding a security clearance, when coupled with his lack of any demonstrated compliance with the court's conditions during his still active probation, creates some uncertainty over the durability of Applicant's intentions about resorting to illegal substances.

True, misconduct predictions, generally, may not be based on supposition or suspicion. *See* ISCR Case No. 01-26893 (October 2002); ISCR Case No. 97-0356 (April 1998). The Appeal Board has consistently held that an unfavorable credibility determination concerning an applicant is not a substitute for record evidence that the applicant used marijuana since his last recorded use, or based on his past use is likely to resume usage in the future. *See* ISCR Case No. 02-08032 (May 2004). Based on his own volunteered statements of sustained avoidance of illegal drug use since 1999 and expressed intent to stay away from illegal drugs in the future, Applicant may invoke two of the mitigating conditions in the Guidelines for drugs: E2.A8.1.3.1 (*The drug involvement was not recent*) and E2.A8.1.3.2 (*The drug involvement was an isolated or aberrational event*) are both applicable. Absent documentation of his deferred prosecution conditions, though, only limited application of the mitigating conditions may be availed of.

Because Applicant's compliance with the court's deferred prosecution conditions is not documented, and because he remains on probation, he may not avail himself of E2.A8.1.3.3 (*A demonstrated intent not to abuse any drugs in the future*) of the Guidelines for drugs. Both his recurrent use of marijuana while holding a security clearance (after years of avoidance of the substance) and his failure to document his compliance with the court's imposed conditions, as he continues his probation, preclude him from mitigating the Government's security concerns over his drug abuse at this time.

Applicant's 1999 marijuana incident is also covered by disqualifying conditions of the Adjudicative Guidelines for personal conduct: E2.A5.1.2.4 (*Personal Conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress*). For lack of any documentation of Applicant's complying with the court's deferred prosecution conditions, it is too soon to credit Applicant with clear evidence of successful drug abuse rehabilitation. As a result, Applicant can not invoke any of the mitigating conditions of the Guidelines for personal conduct to his situation.

Considering the all of the developed evidence of record, Applicant fails to mitigate security concerns associated with his recurrent possession of marijuana while holding a security clearance. Unfavorable conclusions warrant with respect to subparagraphs 1.a and 1.b of Guideline H. Unfavorable conclusions warrant as well with respect to the incorporated criminal allegations covered by Guideline E.

In reaching my decision, I have considered the evidence as a whole, including each of the E 2.2.1 factors enumerated in the Adjudicative Guidelines of the Directive.

### **FORMAL FINDINGS**

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the FINDINGS OF FACT, CONCLUSIONS, CONDITIONS, and the factors listed above, this Administrative Judge makes the following FORMAL FINDINGS:

**GUIDELINE H (DRUGS): AGAINST APPLICANT**

**Sub-para. 1.a: AGAINST APPLICANT**

**Sub-para. 1.b: AGAINST APPLICANT**

**GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT**

**Sub-para. 2.a: AGAINST 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 Applicant's security clearance. Clearance is granted.

Roger C. Wesley

Administrative Judge