

KEYWORD: Drug; Personal Conduct

DIGEST: From 1995 through mid summer 2002, Applicant used marijuana on a weekly to monthly basis. When he completed his November 2002 security clearance application, he failed to reveal his marijuana usage. He used marijuana after having received an interim security clearance. The record evidence is insufficient to mitigate or extenuate the negative security implications stemming from his drug involvement and falsification of his questionnaire. Clearance is denied.

CASENO: 03-20422.h1

DATE: 03/14/2005

DATE: March 14, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-20422

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

V. Rock Grundman, Esquire

SYNOPSIS

From 1995 through mid summer 2002, Applicant used marijuana on a weekly to monthly basis. When he completed his November 2002 security clearance application, he failed to reveal his marijuana usage. He used marijuana after having received an interim security clearance. The record evidence is insufficient to mitigate or extenuate the negative security implications stemming from his drug involvement and falsification of his questionnaire. Clearance is denied.

STATEMENT OF THE CASE

On March 15, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding⁽¹⁾ it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On April 13, 2004, Applicant's answer to the SOR and request for a hearing was received. On October 14, 2005, I was assigned the case. On October 15, 2004, a Notice of Hearing was issued scheduling the hearing which was held on November 9, 2004. On November 17, 2004, DOHA received a copy of the transcript (Tr.).

FINDINGS OF FACT

The SOR alleges security significant drug involvement and personal conduct. The Applicant admits to the following: he has used marijuana, he states, "I tested positive at the beginning of my employment at [defense contractor] and used marijuana once after being employed at [defense contractor]⁽²⁾," and admits being less than candid about his past drug usage when he completed his Security Clearance Application, Standard Form (SF) 86. Those admissions are incorporated herein as findings of fact. After a thorough review of the entire record, I make the following additional

findings of fact:

The Applicant is 33 years old, has worked for a defense contractor since August 2002, and is seeking to obtain a security clearance. The Applicant is regarded by those who know him as dependable, thorough, energetic, flexible, a hardworker, a quick learner with a positive attitude, and devoted to his family. At work, he is interested, involved, and demonstrates a "can do" attitude.

From 1995 until mid summer of 2002, Applicant used marijuana on a weekly to monthly basis. In November 2002, Applicant was granted an interim secret clearance. In April 2003, Applicant was celebrating the closing on his house and smoked marijuana. The following Tuesday he took a random drug test at work, which proved positive for the presence of marijuana. As a result of his positive random drug screen, he was entered into the employee assistance program. He attended six outpatient sessions and participated in substance abuse education and therapy. He completed all the requirements of the program. He has taken 10 random drugs tests since April 2003 which have all been negative. He had additional counseling following the initial outpatient sessions.

Applicant's wife had previously worked for the same company that employs him. In the fall of 2002, her employment was terminated when she tested positive for marijuana for the second time. Following her termination, she continued to occasionally use marijuana until at least August 2003.

In November 2002, he completed his SF 86 and responded "no" to question 27, which asked him if he had used any illegal drugs during the previous seven years. He knowingly gave a false answer to the question.

Applicant married in September 2000 and purchased a house in April 2003. They have a new born daughter. He does not intend to use illegal drugs in the future.

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive. The government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts must have a nexus to an Applicant's lack of security worthiness.

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. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

BURDEN OF PROOF

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." 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 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." Executive Order 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

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 which 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. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has the ultimate burden of establishing his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." *See* Executive Orders 10865 § 2 and 12968 § 3.1(b). "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 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, 484 U.S. at 531. Doubts are to be resolved against the applicant.

CONCLUSIONS

The Government has satisfied its initial burden of proof under Guideline H, Drug Involvement. Under Guideline H, the security eligibility of an applicant is placed into question when that applicant is involved with illegal drugs. The improper or illegal involvement with drugs raises questions regarding an applicant'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 E.2.A.8.1.1. From 1995 to midsummer 2002, Applicant used marijuana on a weekly to monthly basis. Disqualifying Condition (DC) 1 (E2.A8.1.2.1. *Any drug abuse*) applies. His last use is recent and more importantly the usage occurred after he had been granted an interim secret security clearance. Recent drug involvement, especially following the granting of a security clearance shows extremely poor judgment.

Applicant says he tested positive for the presence of marijuana at the beginning of his employment⁽³⁾ and used marijuana once after being employed. His April 2003 use occurred after his wife had been terminated from the same employer for using marijuana on two occasions. His wife's termination should have gotten his attention, but did not.

None of the Mitigating Conditions (MC) apply. MC 1 (E2.A8.1.3.1. *The drug involvement was not recent*) does not apply to his marijuana use because his last use was less than two years before the hearing. MC2 (E2.A8.1.3.2. *The drug involvement was an isolated or aberrational event*) does not apply to his marijuana use because he used marijuana on a weekly to monthly basis, although he greatly reduced his use after obtaining his current job.

MC 3 (E2.A8.1.3.3. *A demonstrated intent not to abuse any drugs in the future*) does not apply. I am not compelled to accept applicant's stated intention not used marijuana in the future. Even if Applicant makes a sincere statement that he has no intention of using drugs in the future, such a statement does not preclude me from considering it in light of the record evidence as a whole in deciding whether the applicant is likely to adhere to such a commitment in the future. As a matter of common sense and human experience, people do not always successfully adhere to the promised to reform or change their conduct or lifestyle.

The sufficiency or insufficiency of an applicant's period of conduct without recurrence of past misconduct does not turn on any bright-line rules concerning the length of time needed to demonstrate reform and rehabilitation, but rather a reasoned analysis of the facts and circumstances of an applicant's case based on a careful evaluation of the totality of the evidence record within the parameters set by the Directive. Here, less than two years since Applicant's last use is insufficient to demonstrate reform or rehabilitation. I find against Applicant as to Drug Involvement.

The Government has satisfied its initial burden of proof under guideline E, (Personal Conduct). Under Guideline E, the security eligibility of an applicant is placed into question when that applicant is shown to have been involved in personal conduct which creates doubt about the person's judgment, reliability, and trustworthiness. Complete honesty and candor on the part of applicants for access to classified information is essential to make an accurate and meaningful security

clearance determination. Without all the relevant and material facts, a clearance decision is susceptible to error, thus jeopardizing the nation's security. The nature of Applicant's actions, in providing false information on his SF 86s poses a serious potential risk to the nation's security precautions.

For seven years--from 1995 to mid summer 2002--Applicant used marijuana on a weekly to monthly basis. Four months after he stopped his weekly to monthly use he completed his SF 86 and said he had not used illegal drugs during the prior seven years. None of the mitigating conditions apply to his false answer. His drug involvement was pertinent to a determination of judgment, trustworthiness, or reliability. There is no showing the Applicant made a prompt, good-faith effort to correct the falsification before being confronted with the facts. There is no indication his omissions were caused by improper or inadequate advice from authorized personnel or based on advice from legal counsel. Because of the serious nature of his falsification, I find against the Applicant as to Personal Conduct, SOR subparagraph 2.a.

It was alleged in SOR 2.b that Applicant falsified material facts on the same November 2002 SF 86 in response to question 28. The question asks about drug use while possessing a security clearance. Applicant did use marijuana while holding an interim security clearance, but that usage occurred after the questionnaire was completed. Applicant's response to question 28 was not false. I find for him as to SOR 2.b.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

The awarding of a security clearance is not a once in a life time occurrence, but is based on current disqualifying and mitigating conditions. In fairness to the Applicant, this decision should not be construed as a determination that Applicant cannot or will not attain the reform and rehabilitation necessary to justify the award of a DoD security clearance. To the contrary, his mitigating evidence suggests a sound potential for positive reform and outstanding accomplishments in the defense industry. However, a clearance at this time is not warranted.

FORMAL FINDINGS

Formal Findings as required by Section 3., Paragraph 7., of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 Drug Involvement: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Subparagraph 1.d.: Against the Applicant

Paragraph 2 Personal Conduct: AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.b.: 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 the Applicant. Clearance is denied.

Claude R. Heiny

Administrative Judge

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.
2. See answer to SOR.
3. By this ambiguous statement, Applicant may be referring to his marijuana usage prior to mid summer 2002. There is no other indication he tested positive for marijuana when he was first employed.

