

DATE: May 23, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-21194

ECISION OF ADMINISTRATIVE JUDGE

JOSEPH TESTAN

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Department Counsel

FOR APPLICANT

Hunter Pyle, Esq.

SYNOPSIS

Applicant's marijuana use will not recur. He did not intentionally falsify his responses to questions on a security clearance application (SCA). Clearance is granted.

STATEMENT OF THE CASE

On November 25, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to applicant which 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 for applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

Applicant responded to the SOR in writing on December 19, 2005. The case was assigned to the undersigned on February 27, 2006. A Notice of Hearing was issued on April 21, 2006, and the hearing was held on May 8, 2006. The transcript was received on May 17, 2006.

FINDINGS OF FACT

Applicant is a 56 year old employee of a defense contractor.

In 1986, applicant was issued an SOR that alleged he purchased, used and sold a wide variety of illegal drugs, and that he engaged in criminal conduct. Applicant responded to the SOR and a hearing was held. After the hearing, the Hearing Examiner issued a Decision in which he found that applicant had indeed purchased, used and/or sold various illegal drugs, and that he had engaged in criminal conduct. The Hearing Examiner concluded, however, that applicant should be granted a security clearance because his use of "hard drugs" had ended in 1975 (over ten years earlier), he had not used marijuana in approximately two and one-half years, and that his criminal conduct occurred in the distant past when applicant was young and immature.

Applicant continued to abstain from the use of illegal drugs until 1998. Between 1998 and September 2002, he used a very small amount of marijuana after work (TR at 47-48) on a daily basis to treat his glaucoma, a disease he had been diagnosed with in 1989 (TR at 33). Because he did so on the recommendation of a physician, his use was legal under California law. ⁽¹⁾

In late 2002, applicant moved to a different city and began seeing a different eye doctor. His new doctor advised him that he couldn't recommend marijuana to treat his glaucoma because, in the doctor's opinion, in order for the marijuana to be effective, applicant would have to smoke so much of it that he wouldn't be able to function. As a result of this doctor's advice, applicant stopped using marijuana. He has no intention of using it again, especially since the courts have since made it clear that regardless of State law, the possession of marijuana is illegal under Federal law.

The SOR alleges that applicant intentionally provided false, material information about his drug use to the Government in response to two questions on an SCA he executed on January 21, 2003 (Exhibit 7). Applicant responded "no" to Questions 27 and 28, each of which asked, in pertinent part, if applicant had *illegally* used a controlled substance. The Government contends applicant's responses were false because he had illegally used marijuana between 1998 and September 2002. ⁽²⁾ I find for applicant on this allegation for the following reasons: First, at the time he completed the SCA, applicant truly believed his marijuana use was legal, and therefore his "no" responses were correct. Second, on at least two SCAs he provided to the Government between 2000 and 2002 (Exhibits 4 and 5), applicant disclosed the fact he was using marijuana to treat his glaucoma. It is obvious from this fact that he did not intend to hide his marijuana use from the Government when he responded "no" to Questions 27 and 28.

Two of applicant's coworkers, both of whom have known applicant for 20 years, appeared at the hearing and testified that applicant is honest. Documentary evidence offered by applicant establishes that he performs well at his job.

CONCLUSIONS

All of the Guideline H and Guideline J allegations in the SOR, except for applicant's use of marijuana between 1998 and September 2002, were adjudicated in applicant's favor in 1988. Given the passage of time between the 1988 adjudication and applicant's subsequent, doctor recommended marijuana use (ten years), it would be fundamentally unfair to consider applicant's earlier drug involvement and criminal conduct when assessing the current security significance of his more recent marijuana use. Accordingly, only applicant's use of marijuana in the late 1990s and early 2000s will be considered in reaching a decision in this case.

Applicant was diagnosed with glaucoma in 1989. In 1998, a doctor recommended that he try marijuana to treat it. Under California law at the time, doctor recommended marijuana use to treat glaucoma was legal. Applicant used it until September 2002, when a subsequent treating physician told him that he couldn't recommend it. Under the circumstances, I cannot conclude applicant engaged in drug abuse as defined by the Directive, ⁽³⁾ or that he illegally possessed a drug. Accordingly, Disqualifying Conditions E2.A.8.1.2.1 (*any drug abuse*) and E2.A.8.1.2.2 (*illegal drug possession*) do not apply.

Applicant testified credibly that he has not used marijuana in over three and one-half years, and will not use it again. Given these facts, Mitigating Conditions E2.A.8.1.3.1 (*the drug involvement was not recent*) and E2.A.8.1.3.3. (*a demonstrated intent not to abuse any drugs in the future*) apply. Because I conclude it is highly unlikely applicant will use marijuana, or be involved in any drug-related criminal conduct in the future, Guidelines H and J are found for him.

FORMAL FINDINGS

PARAGRAPH 1: FOR THE APPLICANT

PARAGRAPH 2: FOR THE APPLICANT

PARAGRAPH 3: 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.

Joseph Testan

Administrative Judge

1. California Health and Safety Code, Section 11362.5.
2. The Government did not allege that applicant's drug use in the 1970s and 1980s required him to respond in the affirmative to either question.
3. E2.A8.1.1.3. Drug abuse is the illegal use of a drug or use of legal drug in a manner that deviates from approved medical direction.