

KEYWORD: Drugs; Criminal Conduct; Personal Conduct

DIGEST: The Applicant has filed all of his delinquent Federal and State income tax returns. He suffers from severe dyslexia; and as such, depended on his, now, deceased spouse to file their income tax returns. She died as a result of alcohol abuse, and it was not until after her death that he discovered their returns had not been filed. The Applicant last used marijuana in April of 2002, three years ago, and intends no future usage. His occasional drug involvement is not recent. When the Applicant executed his Security Clearance Applications (SCAs) in 1999 and again in 2002, he answered the posited questions as to his past drug involvement truthfully and to the best of his ability. Mitigation is shown; and as such, his clearance is granted.

CASENO: 03-21431.h1

DATE: 04/05/2005

DATE: April 5, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-21431

DECISION OF ADMINISTRATIVE JUDGE

RICHARD A. CEFOLA

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

Robert E. Carey, Jr., Esquire

SYNOPSIS

The Applicant has filed all of his delinquent Federal and State income tax returns. He suffers from severe dyslexia; and as such, depended on his, now, deceased spouse to file their income tax returns. She died as a result of alcohol abuse, and it was not until after her death that he discovered their returns had not been filed. The Applicant last used marijuana in April of 2002, three years ago, and intends no future usage. His occasional drug involvement is not recent. When the Applicant executed his Security Clearance Applications (SCAs) in 1999 and again in 2002, he answered the posited questions as to his past drug involvement truthfully and to the best of his ability. Mitigation is shown; and as such, his clearance is granted.

STATEMENT OF THE CASE

On August 18 2004, 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 the Applicant, which detailed the 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 the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

Applicant filed an Answer to the SOR on or about October 14, 2004.

The case was received by the undersigned on January 3, 2005. A notice of hearing was originally issued on January 18, 2005, settling this case for hearing on February 17, 2005. However, due to an unexpected serious health problem with the Applicant, the case was continued and heard on March 17, 2005. The Government submitted documentary evidence. Testimony was taken from the Applicant, who also submitted documentary evidence. The transcript (TR) was received

on March 25, 2005. The issues raised here are whether the Applicant's past Drug Involvement, alleged Criminal and Personal Conduct militate against the granting of a security clearance. [The Applicant admits the underlying factual basis of the Drug Involvement, but denies the alleged Criminal and Personal Conduct.]

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony. The Applicant is 60 years of age, and is employed by a defense contractor who seeks a security clearance on behalf of the Applicant. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact.

Guideline H - Drug Involvement

1.a.~1.d. The Applicant was granted a security clearance in July of 1967 (*See* Applicant's Exhibit (AppX) A at page 3). The Applicant initially used marijuana "on three different occasions" during the period from the fall of 1968 until about June of 1974 (TR at page 50 line 15 to page 52 line 7, and AppX A at page 3). He used it at "going-away parties" for "[g]uys . . . leaving for Vietnam" (*Id.*). The Applicant disclosed some of this infrequent marijuana abuse when he executed a Request for Industrial Security Approval (RISA) in January of 1983 (AppX A at page 3). The Applicant next used marijuana on "three occasions" from December of 2001 until his last usage in April of 2002 (TR at page 43 line 15 to page 47 line 24, and at page 77 line 21 to page 78 line 13). He used it with a "care giver," who was attending to his terminally ill uncle (*Id.*). The Applicant intends no future drug abuse (TR at page 54 lines 16~18, and at page 87 line 15 to page 88 line 13).

Guideline J - Criminal Conduct

2.a.~2.n. The Applicant is "profoundly dyslexic" (TR at page 32 line 11 to page 35 line 16, and AppX D). As a result, he depended upon his, now, deceased alcoholic wife to file their income tax returns (TR at page 32 line 11 to page 35 line 16, and AppX E). The Applicant's spouse died in 1999, and it was not until after her death that he discovered their income tax returns, dating back to 1995, had not been filed (TR at page 68 line 20- to page 70 line 14, and Government Exhibit (GX) 2 at pages 1, 2 and 3). The Applicant has now filed all of his delinquent Federal and State income tax returns (TR at page 55 line 9 to page 65 line 25, and AppX G). Through these filings, he has satisfied the provisions of the Federal and State tax codes. The Applicant intends to file all of his future income tax returns in a timely fashion (TR at page 85 line 15 to page 86 line 16).

2.o. The Applicant did not violate 18 U.S.C. 1001 when he executed his September 1999 and May 2002 Security Clearance Applications (SCAs), as is discussed below.

Guideline E - Personal Conduct

3.a. When the Applicant answered question "28. Your Use of Illegal Drugs and Drug Activity - Use in Sensitive Positions," on his September 1999 SCA, he misread the question (TR at page 71 line 6 to page 72 line 16, and at page 92 lines 2~8). He read "while possessing a security clearance" in conjunction with being "a law enforcement officer, prosecutor, or courtroom official" (*Id*). As he held none of these positions, he answered "NO" to the posited question (GX 2 at page 6). Furthermore, in 1983, he did disclose that he used marijuana while holding a security clearance, when he executed his RISA (AppX A at page 3).

3.b. When the Applicant answered question "27. Your Use of Illegal Drugs and Drug Activity - Illegal Use of Drugs," on his May 2002 SCA, he answered the posited question truthfully, and to the best of his knowledge and belief (TR at page 48 line 20 to page 50 line 14, and at page 92 lines 9~13). He disclosed that he used marijuana on three occasions, "in the last 7 years," and delineated the times of usage (GX 6 at page 6).

POLICIES

Enclosure 2 and Section E.2.2. of the 1992 Directive set forth both policy factors, and conditions that could raise or mitigate a security concern. Furthermore, as set forth in the Directive, each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate:

a. Nature, extent, and seriousness of the conduct and surrounding circumstances.

b. Frequency and recency of the conduct.

c. Age and maturity of the applicant.

d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequence involved.

e. Absence or presence of rehabilitation.

f. Probability that circumstances or conduct will continue or recur in the future.

The Administrative Judge, however, can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence that is speculative or conjectural in nature.

The Government must make out its case under Guideline H (Drug Involvement), Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation, which demonstrates that the past adverse conduct is unlikely to be repeated, and that the Applicant presently qualifies for a security clearance.

The improper or illegal involvement with drugs, raises questions regarding an individual's willingness or ability to protect classified information. The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations at all times and in all places. If an applicant has demonstrated a lack of respect for the law in his private affairs, there then exists the possibility that an applicant may demonstrate the same attitude towards security rules and regulations.

CONCLUSIONS

Considering first the Applicant's Drug Involvement, the Applicant used marijuana on an occasional basis, a total of about six times, from 1968 until his last usage in April of 2002. The first Disqualifying Condition is therefore applicable, as there was "drug abuse." However, the first and third Mitigating Conditions are also applicable. Under the circumstances of this case, his past marijuana use is "not recent," having occurred three years ago. Furthermore, the Applicant has shown a "demonstrated intent," through his testimony, "not to abuse drugs in the future." The Applicant's Drug Involvement is therefore not of present security significance; and as such, Guideline H is found for the Applicant.

Considering next the alleged Criminal Conduct, arguably, the first Disqualifying Condition applies as there were "[a]llegations or admissions of criminal conduct, regardless of whether the person was formally charged." This is countered, however, by the last Mitigating Condition, as "[t]here is clear evidence of successful rehabilitation." When he filed all of his delinquent Federal and State income tax returns, the Applicant satisfied the their filing requirements, and he intends to file his returns in a timely fashion in the future. Guideline J is also found for the Applicant.

Finally, as to the Applicant's alleged Personal Conduct, I can find none. When the Applicant executed his SCAs in 1999 and again in 2002, he answered the posited questions to the best of his knowledge a belief. I find no knowing and wilful falsification here. Guideline E is found for the Applicant.

Considering all the evidence, the Applicant has rebutted the Government's case regarding his Drug Involvement, and his alleged Criminal and Personal Conduct. The Applicant has thus met the mitigating conditions of Guidelines E, H and J, and of Section E.2.2. of the Directive. Accordingly, he has met his ultimate burden of persuasion under Guidelines E, H and J.

FORMAL FINDINGS

Formal Findings required by paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: FOR THE APPLICANT

- a. For the Applicant.
- b. For the Applicant.
- c. For the Applicant.
- d. For the Applicant.

Paragraph 2: FOR THE APPLICANT

- a. For the Applicant.
- b. For the Applicant.
- c. For the Applicant.
- d. For the Applicant.
- e. For the Applicant.
- f. For the Applicant.
- g. For the Applicant.
- h. For the Applicant.
- i. For the Applicant.
- j. For the Applicant.
- k. For the Applicant.
- l. For the Applicant.
- m. For the Applicant.
- n. For the Applicant.
- o. For the Applicant.

Paragraph 3: FOR THE APPLICANT

a. For the Applicant.

b. For the Applicant.

Factual support and reasons for the foregoing are set forth in **FINDINGS OF FACT** and **CONCLUSIONS**, supra.

DECISION

In light of 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 the Applicant.

Richard A. Cefola

Administrative Judge