

KEYWORD: Drugs

DIGEST: This 48-year-old engineer used marijuana (and some cocaine) from 1975 to 1989 and again from April 2002 to December 2002, when he failed a random drug test at his company. His last period of marijuana use occurred after he received a security clearance and access to Sensitive Compartmented Information (SCI). Over the last three years, he has received outpatient counseling, attended meetings of a 12-step program, and impressed his employer with his integrity, self control and work ethic. He has demonstrated a substantial level of rehabilitation. Mitigation has been shown. Clearance is granted.

CASE NO: 03-23483.h1

DATE: 04/20/2006

DATE: April 20, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-23483

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Candace Le'i, Esquire, Department Counsel

FOR APPLICANT

R. Scott Cornelius, Esquire

SYNOPSIS

This 48-year-old engineer used marijuana (and some cocaine) from 1975 to 1989 and again from April 2002 to December 2002, when he failed a random drug test at his company. His last period of marijuana use occurred after he received a security clearance and access to Sensitive Compartmented Information (SCI). Over the last three years, he has received outpatient counseling, attended meetings of a 12-step program, and impressed his employer with his integrity, self control and work ethic. He has demonstrated a substantial level of rehabilitation. Mitigation has been shown. Clearance is granted.

STATEMENT OF THE CASE

In September 9, 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, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding required under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether a clearance should be granted, denied or revoked.

On October 4, 2005, Applicant submitted a response to the allegations set forth in the SOR, and elected to have a decision made by a DOHA Administrative Judge after a hearing. This case was assigned to me on November 25, 2005. A Notice of Hearing was issued on January 23, 2006, setting the hearing for March 6, 2006. The transcript was received at DOHA on 2006.

FINDINGS OF FACT

Applicant is a 48-year-old engineer for a defense contractor. The SOR contains ten (10) allegations under Guideline H (Drugs). In his response, Applicant admits all SOR allegations and adds an overall explanation. The factual admissions are accepted and incorporated as Findings of Fact.

After considering the totality of the evidence of record, I make the following Findings of Fact as to each SOR allegation:

Guideline H (Drugs)

- 1.a. - Applicant used marijuana , with varying frequency, at times daily, from about 1975 to late 1989, and then again from April 2002 to at least December 2002.
- 1.b. - Applicant tested positive for marijuana during a random drug test conducted by his employer on December 20, 2002. He was suspended for one week without pay and referred to his company's Employee Assistance Program (EAP) office.
- 1.c. - Applicant was evaluated for Substance Abuse by an EAP counselor and attended four EAP sessions in January 2003. You were referred for extensive outpatient substance abuse counseling.
- 1.d. - You received treatment from February 13, 2003 to April 10, 2003 for a condition described as cannabis dependence.
- 1.e. - Applicant used marijuana after he had been granted a DoD security clearance on June 17, 2000.
- 1.f. - Applicant used marijuana after he had been granted access to Sensitive Compartmented Information (SCI) by another Government agency.
- 1.g. - Applicant's SCI access was revoked on February 19, 2003, based on his positive drug test as cited in 1.b., above.
- 1.h. - Applicant continued to use marijuana after he signed a document on August 16, 2001 in which he acknowledged that unlawful use of any narcotic substance, marijuana, or dangerous drugs may result in the removal of his SCI access.
- 1.i. - Applicant received two citations between the late 1970s and early 1980s for Possession of marijuana. He was fined on both occasions.
- 1.j. - Applicant used cocaine approximately six times while in college (September 1976 to June 1981).

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing 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 (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons.

If the Government meets its burden (either by the Applicant's admissions or by other evidence) and proves conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the Applicant to present evidence

in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the Applicant.

CONCLUSIONS

Applicant is a 48-year-old engineer (born in March 1958). He has been a licensed engineer for about 25 years (Tr at 28). He admits all ten suballegations, and adds comments in mitigation. Applicant has used marijuana (and occasionally cocaine) over 14 years from 1975 to 1989 and again from April 2002 to at least December 2002, during which latter time his admitted use of marijuana was "daily," except "for July and August" (GX at page 2). His last use of record occurred shortly before he tested positive for marijuana on a random drug screening in December 2002, which was a little more than three years prior to the arch 6, 2006 hearing.

The August 5, 2003 medical report views Applicant as "very responsive to treatment goals and sought additional knowledge through bibliotherapy" [reading a book or article and becoming involved with the characters and ideas therein] and states that his "prognosis is good" (*Id.*).

I am required to predict the risk of future misconduct based substantially on past conduct, current statements, and demonstrated rehabilitation of both thinking and conduct. This record compels the initial conclusion that Applicant's cessation of marijuana was not voluntary and would likely have continued for some unknown period, but for the December 2006 drug screening and positive for marijuana test result.

The next question is whether he has demonstrated such rehabilitation. My evaluation must first decide whether the apparent lack of drug use over the past two years reflects a basic change in both outlook and conduct or is simply a response to the pressure of the ongoing adjudicative process. Applicant points out that he "satisfactorily" completed outpatient treatment in May 2003 (GX 6). A letter from the drug counseling agency, dated October 2, 2003 (AX B), relates Applicant's 2003 marijuana use to "marital conflict." The author of the letter does "not assess [Applicant] as at risk for substance abuse. He has shown strength and willingness to grow that go far beyond that of a 'dependent' personality. In fact, I see [Applicant] as blossoming into a leader. . . . [Applicant] is a man of strength who can be trusted to remain consistently responsible" (*Id.*).

The writer of a second letter (AX C) was a counselor who met Applicant during the 2003 treatment program. The writer, who has 13 years in the field, has gone on to open two drug and alcohol treatment centers in their mutual home area. Their paths have crossed again in their private lives, and the writer has been greatly impressed by Applicant's maturity and contributions to his community (see, also AX E). A third writer, a clergyman who also holds a Master's Degree in Psychology, has known Applicant for some year and believes he has "the inner strength of character that is necessary to give a favorable prognosis for his complete recovery" (AX D) (*see, also*, Tr at 29-31).

Applicant continues to attend meetings of a "12-step group" and has learned the hard consequences of self medicating to kill the pain of his marital problems and father's terminal illness and death (Tr at 28 -30). He has taken four drug screening tests between November 2005 and February 2006, all of which produced negative results. These results are helpful, but not highly probative on the issue of Applicant's overall rehabilitation since they occurred during the current investigation and adjudication and do not necessarily reflect a voluntary change in Applicant's thought processes. He also states a willingness to undergo a lie detector test in order to verify his sincerity. However, under the DOHA adjudication process, my decision must be based on the evidence in existence at the closing of the record and, in any case, by official DoD policy, "lie detector" results are generally not admissible. Applicant stresses the "importance" of his work (Tr at 31), but that point is not relevant to the issue of whether he is eligible or not.

The facts of record relating to his marijuana use are that are of special concern include: (1) when confronted by his company about the positive drug test result, he initially denied he had used marijuana and admitted it only later (GX at page 6). Considering the extent of his marijuana use, the test result cannot have been a surprise to him. His extensive marijuana use in 2003 occurred (2) several years after he had received a DoD security clearance in June 2000; (3) after

he had received SCI access; and (4) after he signed a document on August 16, 2001 acknowledging that his unlawful use of any narcotic substance, marijuana, or controlled substance may result in the removal of his Special Security Access. His defense, in general, is that he was "not thinking clearly" at the time because of his depression (Tr at 33).

Applicant's early drug use (marijuana and cocaine) occurred from ages 17-22. He used marijuana on a social basis about once a week, by himself and with friends (Tr at 40). He used cocaine about six times during the same period (Tr at 42, 43). He began using marijuana again in April 2002, while vacationing in Hawaii (Tr at 45, 46). He used it daily between mid-April and the end of May, when he stopped because he feared the consequences (Tr at 48). He used it once again after Thanksgiving 2002 (Tr at 46). It was apparently this use that was detected during the random drug screening. His father's cancer was detected in 2001 and his final deterioration began in early 2002 (Tr at 47).

There is no real question about the extent of Applicant's drug use. However, the last use of record occurred more than three years ago, and the ultimate question is whether Applicant has demonstrated rehabilitation or is simply in an interim period before using again.

Disqualifying Conditions (DC) (1) - any drug abuse and (2) illegal drug possession are applicable. Mitigating Condition (MC) (1) is applicable as the last use /is still "recent." MC (2) is applicable, at least in part, since the drug use, although not isolated, was "infrequent." In context however, this factor, by itself, is not enough to outweigh the Government's negative evidence. Last, MC (3) is not applicable, since Applicant has not yet demonstrated "an intent not to abuse any drugs in the future."

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

Disqualifying Conditions: (1) Any drug abuse; (2) Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; (4) Evaluation of drug abuse or drug dependence by a licensed clinical social worker who is a staff member of a recognized drug treatment program, are all shown by the record.

Mitigating Conditions: (1) The drug involvement was not recent; (3) he has demonstrated his intent not to abuse any drugs in the future; and (4) he has satisfactorily completed of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and he has received a favorable prognosis by a credentialed medical professional.

As to the question of whether Applicant has adequately demonstrated rehabilitation, I conclude that he has done so. While any drug involvement is unacceptable in someone seeking a security clearance, the ultimate issue is not one of punishment but of the likelihood of unacceptable future conduct. As I evaluate the evidence, the last three years of Applicant's life have been substantially positive. In the context of eight months of marijuana use in 2002 and a prior use more 14 years earlier, his use of marijuana in 2002 is deemed to be no longer "recent."

The Government is certainly correct in its concerns about the issue of Applicant's drug on his eligibility for a security clearance. The fact of Applicant's history of drug use is made even more serious by his using marijuana after receiving a security clearance, access to SCI material, and signing a document acknowledging his understanding of DoD policy against such drug use. Without substantial mitigation, the exercise of such poor judgment and lack of self control in the past would almost certainly make him ineligible for a security clearance under Directive 5220.6. However, under the specific facts and circumstances shown by the record, Applicant has overcome the evidence supporting the SOR by recent positive conduct, the passage of time, and the opinion of mental health professionals. I conclude he has

demonstrated that he currently possesses the judgment, reliability, and trustworthiness required of anyone seeking access to the nation's secrets.

FORMAL FINDINGS

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

Guideline H (Drug Involvement) For the Applicant

Subparagraph 1.a. For the Applicant

Subparagraph 1.b. For the Applicant

Subparagraph 1.c. For the Applicant

Subparagraph 1.d. For the Applicant

Subparagraph 1.e. For the Applicant

Subparagraph 1.f. For the Applicant

Subparagraph 1.g. For the Applicant

Subparagraph 1.h. For the Applicant

Subparagraph 1.i. For the Applicant

Subparagraph 1.j. 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.

BARRY M. SAX

ADMINISTRATIVE JUDGE