

DATE: March 2, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-05108

DECISION OF ADMINISTRATIVE JUDGE

ROGER E. WILLMETH

APPEARANCES

FOR GOVERNMENT

Kathryn Antigone Trowbridge, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant admitted his limited marijuana use on his security clearance application. Although he suggested to a DSS investigator that he might use marijuana again if he no longer worked for his employer, there is no evidence that Applicant has used marijuana for more than two years. Aside from two instances of using marijuana with persons with whom he no longer associates, Applicant has otherwise been shown to be reliable and a man of good character. Both drug involvement concerns and personal conduct concerns are mitigated. Clearance is granted.

STATEMENT OF THE CASE

On October 6, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to the applicable Executive Order [\(1\)](#) and Department of Defense Directive, [\(2\)](#) issued a Statement Reasons (SOR) to Applicant. The SOR details security concerns under Guideline H (Drug Involvement) and Guideline E (Personal Conduct). The SOR states that DOHA was unable to find that it is clearly consistent with the national interest to grant him access to classified information and recommends that his case be submitted to an Administrative Judge.

On October 22, 2003, Applicant answered the SOR and requested a hearing. The case was assigned to me on April 7, 2004. A notice of hearing was issued on April 7, 2004, and the hearing was held on April 29, 2004. During the hearing, two Government exhibits (Govt Ex), three Applicant exhibits (Ap Ex), and the testimony of five Applicant witnesses, including Applicant, were received. The transcript (Tr) was received on June 28, 2004.

FINDINGS OF FACT

Having thoroughly considered the evidence in the record, I make the following findings of fact:

Applicant is a 36-year-old senior systems engineer employed by a defense contractor. He began working for his current employer in October 1994. Applicant is a valued employee and is respected by both supervisors and co-workers.

Applicant was granted a security clearance on December 13, 1994. As an employee of a federal contractor, he was aware of his employer's drug free workplace policy prohibiting the use of illegal drugs.

While attending a party in January 1999, Applicant smoked marijuana. He did so again at another party in April 2002. Applicant no longer associates with any of the people who made the marijuana available to him at the parties. His only other use of marijuana was on two or three occasions while he attended college.

On August 28, 2002, Applicant executed a security clearance application (SF 86). In response to question 27, ⁽³⁾ he answered, "yes," and reported his use of marijuana in January 1999 and in 2002. ⁽⁴⁾ (SOR ¶ 1.a).

In response to questions 28, ⁽⁵⁾ on the same SF 86, Applicant answered, "yes." He further reported that he had held a security clearance since December 12, 1994. (SOR ¶ 1.c).

On November 7, 2002, Applicant was interviewed by a special agent of the Defense Security Service (DSS) and provided a sworn statement. He elaborated on his use of marijuana in January 1999 and in April 2002. With regard to his use of marijuana, Applicant stated, "if I am not employed with [his employer] I may use cannabis again." He later stated, "as long as I am employed with [his employer], it is my intention not to abuse any illegal drugs." (SOR ¶ 1.b).

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information Within Industry* § 2 (February 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions and mitigating conditions for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

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. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the conditions listed in the Directive's guidelines and the applicant's security worthiness. *See* ISCR Case No. 95-0611 at 2 (May 2, 1996). (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (December 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3. Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of national security. Directive ¶ E2.2.2.

CONCLUSIONS

Guideline H: Drug Involvement

The concern under Guideline H is that improper or illegal involvement with drugs raises questions regarding an

individual's willingness or ability to protect classified information. The Directive ¶ E2.A8.1.1. Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction. ¶ E2.A8.1.1.3. Conditions that could raise a security concern and may be disqualifying include *any drug abuse*, ¶ E2.A8.1.2.1 (Disqualifying Condition 1). Applicant's admitted use of marijuana in 1999 and 2002 evidences Disqualifying Condition 1.

To his credit, Applicant has admitted his use of marijuana on his SF 86. Although this does not excuse his admitted behavior, it does reflect favorably on his credibility. Applicant refers to his admitted abuse as "two isolated aberrations." Conditions that could mitigate security concerns under Guideline H do include ¶ E2.A8.1.3.2 (Mitigating Condition 2), *the drug involvement was an isolated or aberrational event*. Although this mitigating condition might apply to Applicant marijuana use if it was limited to the incident in January 1999, his repeated use three years later removes it from the category of an isolated or aberration *event*.

Another condition that could mitigate security concerns under Guideline H is ¶ E2.A8.1.3.3 (Mitigating Condition 3), *a demonstrated intent not to abuse any drugs in the future*. Applicant testified that he does not intend to "repeat the mistake." ⁽⁶⁾ However, Applicant's statement to the DSS investigator suggests that he might use marijuana again if he no longer worked for his employer. Although Applicant contends the statement does not reflect what he actually said or intended to say, he both signed under oath and initialed a change to the paragraph containing his statements in question. This record of Applicant's inconsistent statements regarding further marijuana use does not sufficiently support a demonstrated intent not to abuse any drugs in the future.

Despite the inapplicability of those mitigating conditions, conditions that could mitigate security concerns under Guideline H also include ¶ E2.A8.1.3.1 (Mitigating Condition 1), *the drug involvement was not recent*. Mitigating Condition 1 applies to Applicant's drug abuse because there is no evidence of any further drug use since April 2002. This mitigation is further buttressed by other factors in this case: the fact Applicant disclosed his use of marijuana; the limited nature of his marijuana use; and the fact he now expresses an unequivocal intent not to use marijuana in the future. On this basis, I find in favor of Applicant with regard to SOR ¶ 1.

Guideline E: Personal Conduct

The concern under Guideline E is 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. ¶ E2.A5.1.1. Conditions that could raise a security concern and may be disqualifying under Guideline E include ¶ E2.A5.1.2.5 (Disqualifying Condition 5), *a pattern of dishonesty or rule violations*. Applicant engaged in legally prohibited conduct on the two separate occasions he admits he used marijuana. In each case, his conduct also violated his employer's drug free workplace policy of which he was aware. This record raises Disqualifying Condition 5.

It is not clear that Applicant's two violations over a 10 year period of employment actually establish a pattern under Disqualifying Condition 5. To the extent that his conduct might raise concern under Guideline E, conditions that could mitigate security concerns include ¶ E2.A5.1.3.7 (Mitigating Condition 7), *association with persons involved in criminal activities has ceased*. Mitigating Condition 7 applies to Applicant because he has ended any association with the persons at the parties who made the marijuana available to him. Moreover, Applicant has voluntarily admitted his misconduct and vowed he will not repeat it. He has otherwise demonstrated himself to be reliable and a man of good character. Based on the record, Applicant has not engaged in the prohibited conduct for more than two years and it does not appear likely it will reoccur. Therefore, I find in favor of Applicant with regard to SOR ¶ 2.

FORMAL FINDINGS

Formal findings, as required by section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1. Guideline H: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.a: For Applicant

DECISION

In light of the evidence of record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Signed

Roger E. Willmeth

Administrative Judge

1. Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified.
3. "Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.) or prescription drugs?"
4. On his SF 86, Applicant reported his use of marijuana in June 2002. In his later statement to a DSS investigator, he clarified that the use actually occurred in April of that year.
5. "Have you ever illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official; while possessing a security clearance; or while in a position directly and immediately affecting public safety?"
6. Tr 16.