

DATE: December 11, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-05359

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez Jr., Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was granted a security clearance in October 2001 when he was 26-years-old. In March 2002, less than five months later, Applicant used marijuana after drinking an excessive amount of alcohol. Applicant has failed to meet his heavy burden of persuasion under both the drug involvement guideline and the whole person concept because: (1) he used drugs while holding a security clearance; and, (2) he was involved in the same kind of unalleged behavior in May 1998 even though he had no security clearance at the time. Clearance is denied.

STATEMENT OF CASE

On April 30, 2003 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, amended April 4, 1999, issued a Statement of Reasons (SOR) to Applicant. The SOR 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's undated answer to the SOR was received on May 21, 2003. Applicant elected to have his case decided on a written record. The Government provided Applicant a copy of the File of Relevant Material (FORM) on October 16, 2003. Applicant received the FORM on October 28, 2003. His one-page response was received by me for decision on November 25, 2003.

FINDINGS OF FACT

The SOR alleges drug involvement. Applicant admitted subparagraph 1.a. of the SOR. Applicant's admission shall be incorporated in the following findings of fact:

Applicant is 28-years-old and employed as a network engineer by a defense contractor. He seeks a secret level

clearance.

Drug Involvement. While on vacation in March 2002, Applicant, who was then 26-years-old, attended a car race with a group of friends. During their lodging at nearby campgrounds, someone in the group passed around a water bong containing marijuana. After drinking about 12 beers during that day and evening, Applicant took a drag from the bong and began coughing and feeling sleepy. Applicant stated, "[I] did it because it felt like the right thing to do at the time." (Item 5) Applicant also stated he had not paid for the marijuana or purchased any. Then Applicant explained he had not used any drugs in the last seven years and did not intend to use any drugs in the future.

Applicant was involved in similar unalleged behavior in May 1998, but the drug was alcohol. According to his sworn statement dated September 30, 1999, Applicant (who was 22-years-old) got involved in a car accident after drinking at bars with friends after work. He was arrested for driving while intoxicated (DWI) after failing a field sobriety test. According to a computerized printout of court records (Item 6), Applicant was granted probation before judgment, dependent on completion of four conditions. Those conditions included: (1) 30 hours of community service; (2) submit to alcohol and drug evaluation; (3) do not drive after consuming alcohol; (4) enroll in a treatment program; and, (4) attend victim impact meetings. Applicant completed all terms of probation on June 16, 2000.

Before the May 1998 arrest for DWI, Applicant had been drinking on the weekends only, becoming intoxicated once a month after consuming approximately 9 or 10 beers. After the May 1998 arrest, Applicant curtailed his drinking to three or four beers once a month, and stated his intention not to drink and drive again.

Character Evidence. Applicant has been a network engineer since September 1999. In his response to the FORM, Applicant explained he owns a home and plans to marry in June 2004. He also has an excellent performance record with his current employer. In addition, he drinks occasionally at home but no longer frequents bars or drives while drinking. Even though Applicant attributes his May 1998 DWI to a "single-lifestyle activity," the March 2002 incident involving the marijuana smoking device also represents a "single-lifestyle activity" less than two years removed, that occurred after he received his Department of Defense security clearance in October 2001.

POLICIES

Enclosure 2 of the Directive sets forth policy disqualifying conditions (DC) and mitigating conditions (MC) that must be given binding consideration in making security clearance decisions. These conditions must be considered in every case according to the pertinent guideline; however, the conditions are in no way automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security case presents its own unique facts and circumstances, it should not be assumed that the conditions exhaust the entire realm of human experience or that the conditions apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Conditions most pertinent to evaluation of the facts in this case are:

Drug Involvement

Disqualifying Conditions (DC):

1. Any drug abuse;
2. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.
5. Recent drug involvement, especially following the granting of a security clearance, or an expressed intent not to discontinue use, will almost invariably result in an unfavorable determination.

Mitigating Conditions (MC):

1. The drug involvement was not recent;
2. The drug involvement was an isolated or aberrational incident;

3. A demonstrated intent not to abuse drugs in the future.

General Policy Factors (Whole Person Concept)

Every security clearance case must also be evaluated under additional policy factors that make up the whole person concept. Those factors (found at pages 16 and 17 of Enclosure 2 of the Directive) include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 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.

Burden of Proof

As set forth in the Directive, every personnel security determination must be a fair and impartial overall commonsense decision based upon all available information, both favorable and unfavorable, and must be arrived at by applying the standard that the granting (or continuance) of a security clearance under this Directive may only be done upon a finding that to do so is clearly consistent with the national interest. In reaching determinations under the Directive, careful consideration must be directed to the actual as well as the potential risk involved that an applicant may fail to properly safeguard classified information in the future. The Administrative Judge 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 which is speculative or conjectural in nature.

The Government must establish a *prima facie* case under drug involvement (Guideline H) that establishes doubt about a person's judgment, reliability, and trustworthiness. Then, the Applicant must remove that doubt with evidence in refutation, explanation, mitigation, or extenuation that demonstrates that the past adverse conduct is unlikely to repeat itself and Applicant presently qualifies for a security clearance.

CONCLUSIONS

The Department of Defense (DoD) prohibits drug use by security clearance holders because drug use is against the law and also impairs social and occupational functioning. If an individual chooses to break the law by using drugs while possessing a security clearance, he demonstrates poor judgment that may warrant the removal of his security clearance. When Applicant was 26-years-old in October 2001, he was granted a security clearance. In March 2002, he used marijuana after consuming about 12 beers. Even though the drug use occurred only once and occurred away from work, it is disqualifying under DC 1. The drug use is also disqualifying under DC 2 since Applicant was in possession of the marijuana he smoked in March 2002. Finally, Applicant's drug use is disqualifying under DC 5 because it constitutes recent drug involvement following the granting of a security clearance.

In response to the *prima facie* case that has been established under the drug involvement guideline, Applicant has a heavy burden of persuasion to demonstrate it is clearly consistent with the national interest to grant him access to classified information. MC 1 is available to mitigate drug involvement when the involvement was not recent. MC 1 is not applicable because the drug use was recent, having occurred in March 2002.

Although the record reflects Applicant only used the drug on one occasion in March 2002, that use must be weighed in light of the other evidence indicating excessive alcohol use during the entire day. In sum, Applicant receives only limited mitigation under MC 2.

MC 5 may mitigate past drug use when the individual has demonstrated an intent not to use drugs in the future. Satisfying the condition begins with a statement of intention not to use drugs in the future. However, the individual must demonstrate his intention with evidence that facilitates or promotes a drug-free lifestyle. Though Applicant has stated he has a settled lifestyle, he has not furnished any evidence to support that claim. While Applicant stresses excellent performance evaluations at work, he has offered no independent evidence to support his claim. In sum, I am unable to find that Applicant has satisfied MC 5 and the drug involvement guideline.

I reach the same conclusion after weighing and balancing the circumstances of this case under the whole person

concept. While the marijuana use occurred only once in March 2002, it occurred when Applicant was 26 years old and felt the drug use was appropriate after consuming 12 beers. Because this same kind of excessive alcohol use resulted in the car accident and a DWI in May 1998, Applicant's uncorroborated claim he will not use drugs in the future is insufficient for me to find for him under the whole person concept.

FORMAL FINDINGS

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

Paragraph 1 (drug involvement, Guideline H): AGAINST THE APPLICANT.

a. Against 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 Applicant a security clearance.

Paul J. Mason

Administrative Judge