

DATE: July 27, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-08848

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Rebecca Barthelemy-Smith, Esq.

SYNOPSIS

Applicant is 43 years old, married, and works on computers for a defense contractor. Applicant used marijuana from 1978 until 1986 regularly, both in the Navy and afterward. He abstained from 1986 to 1998, then he used it intermittently until 2000 at parties with his brother. Applicant disclosed a 1981 marijuana civilian citation on his security clearance application, but neglected to disclose his 1998 to 2000 intermittent use in answer to Question 27. Applicant mitigated the personal conduct, drug abuse, and criminal conduct security concerns. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On May 24, 2004, DOHA issued a Statement of Reasons⁽¹⁾ (SOR) detailing the basis for its decision—security concerns raised under Guideline E (Personal Conduct), Guideline H (Drug Involvement), and Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on June 18, 2004 and elected to have a hearing before an administrative judge. The case was assigned to me on January 3, 2005. On May 17, 2005, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government and the Applicant submitted exhibits that were admitted into evidence. DOHA received the hearing transcript (Tr.) on May 27, 2005.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated here as findings of fact. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following additional findings of fact:

Applicant is 43 years old, married, and is employed as a computer network administrator by a defense contractor. Applicant has not had a security clearance previously, and needs one now to allow access to military facilities serviced by his employer. (Tr. 12-14, 56; Exhibit 1)

Applicant has a history of marijuana use, starting when he was 16 years old in high school in 1978. He served in the Navy from 1980 to 1984, during which time he received nonjudicial punishment under Article 15 of the Uniform Code of Military Justice (NJP) for the use and possession of marijuana on a ship and unauthorized absence in 1981, an NJP in 1982 for use of marijuana, and NJP in 1984 for use of marijuana and amphetamines. After the last NJP, Applicant was administratively discharged from the Navy for drug abuse with an under other than honorable discharge (UOTH). Applicant described his drug use in the Navy as heavy. In the Navy in 1982, Applicant had a drug and alcohol evaluation, and was found to have episodic marijuana use problems. Applicant was cited by the local police in his ship's home port for possessing marijuana in his off-duty time, and paid a fine in 1981. The only time Applicant purchased marijuana was in 1982, all other times he used his friends' marijuana or put money into a fund for someone else to make the actual purchase. (Tr. 17-32, 52; Exhibits 2 and 3)

Applicant stopped using marijuana in 1986 while married to his previous wife and attending college. He did not resume use until 1997 or 1998, and stopped again in 2000. Applicant used marijuana intermittently during the latter period at parties his brother took him to after work. Applicant took a couple of puffs and passed on the marijuana cigarette at those times. Applicant does not use marijuana or illegal drugs now and does not intend to do so in the future. In November 2002 he took an employer-mandated drug test and passed. On May 2005 Applicant had his hair and urine tested for drugs and the test was negative. (Tr. 17, 21, 31, 34, 35, 43, 51; Exhibits 2, 3, and A)

Applicant's supervisor saw him use marijuana about seven or eight years ago. Applicant's wife saw him use marijuana about ten years ago. (Tr. 55-69)

Applicant completed his security clearance application (SCA) in October 2002. He answered "no" to Question 27 about drug use in the past seven years. Applicant did not remember using any illegal drugs in the past seven years. In November 2002, while discussing past good times with one of his brothers, Applicant remembered that he used marijuana intermittently at parties with his brother when they attended them together. Knowing he had an investigative interview due in early 2003, he waited until that interview to disclose in response to a question from the investigator that he wanted to change his answer to Question 27, disclosing the intermittent party marijuana drug use from 1998 to 2000. He wrote a statement in March 2003 for the investigator that he "may have taken a few tokes of marijuana on about eight occasions at parties" from 1998 to November 2002. (Tr. 14-16, 34-51; Exhibits 1 and 2 at 3)

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 the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information with Industry*

§ 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline that must be carefully considered in making the overall common sense determination required.

In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. Those assessments include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 (See Directive, Section E2.2.1. of Enclosure 2). Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

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, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. ay 2, 1996). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance. ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Exec. Or. 12968 § 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

Guideline E: Personal Conduct: *The Concern: 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

Guideline H: Drug Involvement: *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.* E2.A8.1.1

Guideline J: Criminal Conduct: *The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.* E2.A10.1.1

CONCLUSIONS

Applicant denied the allegations of deliberate falsification and criminal conduct, based on the same factual allegations in the SOR. The Government established its case, so the key element in evaluating all of the evidence is the credibility of Applicant and his witnesses. Further, whether Applicant has met his burden of proof. After carefully weighing the evidence, I made an analysis and decision based on the whole person concept and all the evidence.

Because they are linked together in the SOR, I considered the allegations of Paragraph 1 (Guideline H: Drug Abuse) and Paragraph 3 (Guideline J: Criminal Conduct) as a whole. The Disqualifying Condition (DC) that might be applicable under Paragraph 1 is DC 2 (deliberate falsification of information on a SCA E2.A5.1.2.2). Applicant did not disclose his marijuana use during the seven year period before 2002 (starting in 1995). After consideration of the evidence and Applicant's credibility, I conclude Applicant did not intentionally falsify his SCA, but forgot the incidents he later voluntarily disclosed during the March 2003 interview. These incidents were so minor and infrequent that his explanation of forgetting them until a discussion with his brother refreshed his recollection is credible. Therefore, no DC apply.

Applicant also had the testimony of his wife and supervisor that they saw him use marijuana seven, eight, or ten years ago, which would make that use 1995 to 1998, compatible with Applicant's testimony and his written statement. His explanation that he guessed at the number of times as eight that he used marijuana, and that the November 2002 date he gave only meaning it was when he recalled the past use, is credible.

Finally, I find compelling his passing grade on two drug tests, one in 2002 after he completed the SCA, and the second in May 2005, that demonstrate he has not used illegal drugs in those time periods. Therefore, Applicant met his burden.

Because no DC apply, then there are no Mitigating Conditions (MC) applicable here. Therefore, I conclude this guideline for Applicant.

Regarding Guideline J, I conclude no DC apply, nor do any MC apply logically. For these reasons and those articulated under Guideline E, I conclude Applicant mitigated the security concerns of this guideline.

Regarding the Guideline H allegations, Applicant admitted all of them, though he qualified his purchase of marijuana as having occurred only once in 1982 when he directly bought marijuana. The DC applicable here are DC 1 (Any drug abuse E2.A8.1.2.1), DC 2 (Illegal drug possession E2.A8.1.2.2). Applicant used marijuana anywhere from two to four times a week from 1978 until 1986. Then he stopped using it, until the 1998 to 2000 intermittent party use.

The MC applicable are MC 1 (The drug involvement was not recent E2.A8.1.3.1) and MC 3 (A demonstrated intent not to abuse any drugs in the future E2.A8.1.3.3). Applicant took two drug tests which showed he was not using illegal drugs. He stated in his 2003 statement and at the hearing he did not intend to use drugs in the future. I find him credible, and conclude this guideline for Applicant.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline E: FOR APPLICANT

Subparagraph 1.a: For Applicant

Paragraph 2. Guideline H: FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: For Applicant

Subparagraph 2.d: For Applicant

Subparagraph 2.e: For Applicant

Subparagraph 2.f: For Applicant

Subparagraph 2.g: For Applicant

Subparagraph 2.h: For Applicant

Subparagraph 2.I: For Applicant

Paragraph 3. Guideline J: FOR APPLICANT

Subparagraph 3.a: For Applicant

DECISION

In light of all 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 Applicant. Clearance is granted.

Philip S. Howe

Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).