

KEYWORD: Drug Involvement; Criminal Conduct; Personal Conduct

DIGEST: This 29 year old Applicant has abused marijuana for a number of years, the last date unknown. He has failed to declare that he will not use marijuana in the future. Additionally, Applicant has committed illegal acts in 1996, 1998, 1999, and 2001. Finally, Applicant failed to provide the required information regarding a 1999 drug related arrest to the Government in a Public Trust Position Application (PTPA) , and he knew or should have known his response was materially incorrect and incomplete. Mitigation has not been shown. Clearance is denied.

CASENO: 03-14481.h1

DATE: 02/22/2005

DATE: February 22, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-14481

DECISION OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

This 29 year old Applicant has abused marijuana for a number of years, the last date unknown. He has failed to declare that he will not use marijuana in the future. Additionally, Applicant has committed illegal acts in 1996, 1998, 1999, and 2001. Finally, Applicant failed to provide the required information regarding a 1999 drug related arrest to the Government in a Public Trust Position Application (PTPA) , and he knew or should have known his response was materially incorrect and incomplete. Mitigation has not been shown. Clearance is denied.

STATEMENT OF THE CASE

On July 23, 2004, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under Guideline H (Drug Involvement), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct) 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 conduct proceedings and determine whether clearance should be granted or denied.

In a signed and sworn statement, dated August 14, 2004, Applicant responded to the SOR allegations. He requested that his case be decided on the written record in lieu of a hearing. On October 7, 2004 Department Counsel prepared the Department's written case. A complete copy of the file of relevant material (FORM) was provided to Applicant, and he was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not submit a response to the FORM. The case was assigned to this Administrative Judge on November 29, 2004.

In the FORM, Department Counsel offered eight documentary exhibits (Exhibits 1-8), which have been admitted without objection. Applicant offered no documentary evidence into the record.

FINDINGS OF FACT

The Government opposes Applicant's request for a security clearance, based upon the allegations set forth in the SOR. The SOR contains three allegations, 1.a. through 1.c., under Guideline H (Drug Involvement), four allegations, 2.a. through 2.d., under Guideline J (Criminal Conduct), and two allegations, 3.a. and 3.b., under Guideline E (Personal Conduct). Applicant admitted SOR allegations 1.a. through 1.c., and 2.a. through 2.d. He denied 3.a. and 3.b. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR and the admitted documents, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 29 years old. He is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 (Guideline H - Drug Involvement)

The Government alleges in this paragraph that Applicant is ineligible for clearance because it states that he has used marijuana with varying frequency, at times monthly, from 1993 until at least February 2003.

In a signed, sworn affidavit made by on February 26, 2003, to a Special Investigator of the Office of Personnel Management, Applicant stated that from the time he graduated high school in 1993, he used marijuana approximately two times a month until May 2001. He further stated, "Since May 2001, to the present I've only used marijuana on may

be (*sic*) three occasions and on each occasion I've never smoked more than two marijuana cigarettes (Exhibit 6).

On September 1999, Applicant was arrested and charged with Sale, Distribution of Marijuana, a felony. The charge was amended to Possession of Marijuana, which was not prosecuted (Exhibits 3 and 7).

On May 2001, Applicant was arrested and charged with Possession of Marijuana. He plead no contest and was sentenced to one year of unsupervised probation (Exhibits 1, 3,7, and 8).

In his Response to the SOR (Exhibit 3), Applicant contends that February 2003 is not accurate as to his last date of use. However, in neither Exhibits 3 or 6, or in any other submitted document, does Applicant identify if he has stopped using marijuana completely, and if he has, what was the final date of his usage. There also is nothing in the record which would indicate whether or not Applicant intends to use marijuana in the future.

Paragraph 2 (Guideline J - Criminal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he committed four criminal acts.

In May 1996, Applicant was arrested and charged with Attempted Robbery, and he was sentenced to one year probation (Exhibits 1, 3, 7, and 8).

In July 1998, Applicant was arrested and charged with Domestic Assault. He plead guilty and was sentenced to 60 days confinement, suspended. He was placed on one year probation (Exhibits 1, 3, 7, and 8).

The other related criminal acts were the two drug incidents cited above, which occurred in 1999 and 2001.

Paragraph 3 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he furnished untruthful

information to the Government. Applicant completed a signed, sworn Public Trust Position Application (PTPA) on October 22, 2002. Question 16 of the PTPA asked, "In the last seven years, have you been arrested for, charged with, or convicted of any offense(s)?" Applicant answered "Yes" and listed the arrests in 2001, 1998, and 1996. Applicant did not list his 1999 arrest in which he was initially charged with Marijuana Sale and ultimately charged with Marijuana Possession (Exhibit 1). In Exhibit 3, Applicant explained that he did not list this arrest because, "I was informed that because the case was dropped and thrown out that there would be no record of the incident." Applicant's belief that the record of the case had been expunged does not justify his failure to report his 1999 arrest to the Government. He clearly should have listed this 1999 arrest as part of the correct answer to question 16.

Question 17 of the PTPA asked, "In the last year, have you illegally used any controlled substance . . .?" Applicant answered "No" to this question. Applicant's explanation for this answer is, "On October 22, 2002, it had been 14 months since my last time I had used marijuana" (Exhibit 3). Since, as discussed above, the record is not clear what date, if any, Applicant stopped using marijuana, the Government has not proven that Applicant gave a false or incorrect statement to question 17.

Finally, while it was not alleged by the Government, I note that in a Security Clearance Application (SCA) completed on August 1, 2001, (Exhibit 5), Question 27 asks if Applicant used any illegal substances in the last 7 years, and if so what were the dates and the frequency of the usage. Applicant identified his usage from 1994 to 2001, and he indicated that he used marijuana seven times during that period. Based on the information that he furnished in Exhibit 6 in 2003, that he used marijuana approximately two times a month from 1993 until May 2001, his indication that he used marijuana only a total of seven times is completely inaccurate and untruthful.

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct

- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence.

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in acts of alcohol abuse and conduct that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue 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. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegation set forth in the SOR:

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between Applicant's conduct and the continued holding of a security clearance. If such a case has been

established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

Paragraph 1 (Guideline H - Drug Involvement) With respect to Guideline H, the Government has established its case. Applicant's improper and illegal drug abuse, including the possession, and use of marijuana, is of concern, especially in light of his desire to have access to the nation's secrets. Applicant's overall conduct pertaining to his illegal substance abuse clearly falls within Drug Involvement Disqualifying Condition (DC) (E2.A8.1.2.1.), any drug abuse, and DC (E2.A8.1.2.2.), illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.

Because Applicant has not identified when he last used marijuana or if he intends to use it again, I conclude that Applicant's conduct does not come within itigating Condition (MC) (E2.A8.1.3.1)., the drug involvement was not recent, or MC (E2.A8.1.3.3.), Applicant's stated intention not to continue using marijuana in the future.

In this case, the Government has met its initial burden of proving by substantial evidence that Applicant has used illegal drugs for many years under Guideline H. Applicant, on the other hand, has failed to introduce persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's case against him. Accordingly, Paragraph 1 Guideline H of the SOR is concluded against Applicant.

Paragraph 2 (Guideline J - Criminal Conduct) Regarding Guideline J, the Government has established Applicant's criminal conduct, which occurred in 1996, 1998, 1999, and 2001, falls within Criminal Conduct DC (E2.A10.1.2.1.), allegations or admissions of criminal conduct, regardless of whether the person was formally charged, and DC (E2.A10.1.2.2.), a single serious crime or multiple lesser offenses. I cannot conclude that any MC applies.

Paragraph 3 (Guideline E - Personal Conduct) With respect to Guideline E, the evidence establishes that Applicant provided less than complete information to the Government in response to question, #16, on the PTPA, that he executed on October 2002. I conclude that when Applicant answered the PTPA, he knowingly provide untruthful information by his failure to list his 1999 marijuana related arrest. He also failed to provide accurate information on the 2001SCA regarding the extent of his marijuana usage.

In reviewing the DCs under Guideline E, I conclude that DC (E2.A5.1.2.3.) applies because Applicant deliberately provided false and misleading information in his PTPA and SCA. No MC applies in this paragraph. Applicant's conduct, considered as a whole, including his drug history, his criminal conduct, and the misinformation that he provided to the Government, exhibits questionable judgement, unreliability, and a lack of candor. I resolve Paragraph 3 Guideline E against Applicant.

On balance, it is concluded that Applicant has failed to overcome the Government's information opposing his request for a security clearance.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Paragraph 2: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: Against Applicant

Paragraph 3: AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

Subparagraph 3.b.: For 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 or continue a security clearance for the Applicant.

Martin H. Mogul

Administrative Judge