

KEYWORD: Drugs

DIGEST: Applicant, a 34-year-old single woman, has a history of marijuana use starting in about December 1996 and continuing until about December 2002. During this time she used marijuana a total of approximately 15 to 30 times; she also bought marijuana several times. She has successfully mitigated the security concern because (1) her marijuana use and involvement are not recent, (2) she intends not to abuse drugs in the future, and (3) her marijuana use and involvement are relatively minor. Clearance is granted.

CASENO: 03-15408.h1

DATE: 08/23/2004

DATE: August 23, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-15408

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Daniel Crowley, Esq., Department Counsel

Erin C. Hogan, Esq., Deputy Chief Department Counsel

FOR APPLICANT

August Bequai, Esq.

SYNOPSIS

Applicant, a 34-year-old single woman, has a history of marijuana use starting in about December 1996 and continuing until about December 2002. During this time she used marijuana a total of approximately 15 to 30 times; she also bought marijuana several times. She has successfully mitigated the security concern because (1) her marijuana use and involvement are not recent, (2) she intends not to abuse drugs in the future, and (3) her marijuana use and involvement are relatively minor. Clearance is granted.

STATEMENT OF THE CASE

On February 2, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant.⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline H for drug involvement based on Applicant's marijuana use from about December 31, 1996, to on or about December 2002. Applicant answered the SOR on March 8, 2004, and requested a hearing.

Department Counsel indicated they were ready to proceed on April 6, 2004, and the case was assigned to another administrative judge the following day. On ay 21, 2004, a notice of hearing was issued scheduling the hearing for June 22, 2004, which was subsequently amended to July 8, 2004. On July 6, 2004, the case was reassigned to me due to the previous administrative judge's unexpected unavailability. Applicant appeared with counsel and the hearing took place as scheduled on July 8th. DOHA received the hearing transcript July 21, 2004.

RULINGS ON PROCEDURE

At the close of the hearing, I raised the issue whether to attach any security significance to Applicant's marijuana use while in Amsterdam since (1) Applicant testified she believed her marijuana use was legal since she was able to buy and use the drug in a coffeehouse; and (2) the Directive defines "drug abuse" as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction." ⁽²⁾ Counsel were invited to submit written briefs on the matter and both did so. Attached to Department Counsel's brief is a memorandum prepared by the Library of Congress addressing the legality of marijuana and mushrooms in The Netherlands. Counsel for each party make arguments based on this memorandum.

I note the agency appeal board has held that it is improper to take administrative notice of foreign law, ⁽³⁾ and so, I will not consider the Library of Congress memorandum. Given these circumstances, I will presume that Applicant's marijuana use at all times relevant to this case was illegal.

FINDINGS OF FACT

After a thorough review of the record evidence, I make the following essential findings of fact:

Applicant is a 34-year-old never married woman. She is seeking a security clearance for her employment as a quality assurance person/technical writer earning \$63,0000 annually. Her job duties consist of conducting testing on web sites, editing content, and technical writing. Applicant is a college graduate. From August 1995 to May 2000, she was enrolled in graduate school where she earned a master's degree.

Applicant relocated from the West Coast to the East Coast during June - July 2002. She started her current employment in August 2002, and she completed a security-clearance application the following month (Exhibit 1, dated September 12, 2002). In response to the relevant question on the application, Applicant revealed using marijuana 25 to 30 times between December 31, 1996 and June 14, 2002.

In April 2003, Applicant was interviewed as part of her background investigation. The result of the interview was a sworn statement (Exhibit 2) wherein she provided the following details about her marijuana use:

- She first used marijuana during a New Year's Eve party on December 31, 1996, when she decided to try marijuana when it was offered to her.
- She did not use marijuana again until about March 1997 when she attended a friend's wedding party.
- Since then, she estimated using marijuana five to six times per year for a total of 25 to 30 times.
- Her marijuana use was limited to her West Coast location, on a trip to Thailand in January 1998, and on trips to Amsterdam, the most recent during December 2002 - January 2003.
- While in Amsterdam, Applicant visited coffeehouses where she bought and smoked marijuana. Sometimes her then-boyfriend would buy the marijuana while they were in Amsterdam. She estimated buying marijuana at least ten times.
- Her last use of marijuana in the U.S. was before she departed the West Coast in June 2002.
- Her last use of marijuana was in Amsterdam in December 2002.
- Since relocating to the East Coast, marijuana was offered to her one time by a stranger in a bar and she turned it down.

In addition, Applicant had this to say about marijuana:

If offered under the right circumstances I would smoke it again. I feel that it is a harmless drug, especially when you compare it to alcohol and tobacco, which can also impair judgment and effect your health. I feel that marijuana should be legalized and that it should be a taxed commodity (Exhibit 2 at pp. 6-7).

Applicant provided additional details about her marijuana use during her hearing testimony. She indicated her sworn statement (Exhibit 2) was the product of a seven-hour interview in which she felt "pressed" by the investigator. She indicated her statement about using marijuana a total of 25 to 30 times was an estimate or approximate guess. She guessed she used marijuana a total of 15 to 20 times.⁽⁴⁾ She also explained she had no intent to use marijuana in the future, and that her statement (quoted above) was about her "philosophical beliefs about legalization"⁽⁵⁾ as opposed to her future intent. Applicant is of the opinion that marijuana use should be legalized, but she has not taken any type of action to advocate legalization.

Applicant was subject to random drug testing in January 2004 by her employer. She passed the test with negative results. In anticipation of this proceeding, she took another drug test in March 2004. She passed the test with negative results. In April 2004, a medical doctor engaged in family practice evaluated Applicant, along with the March 2004 negative drug test, and concluded "there is no indication that [she] has abused drugs (Exhibit A)."

Applicant presented character evidence supporting her application for a security clearance (Exhibit A). Several persons have vouched for Applicant's general good character and security suitability. These several persons describe Applicant as honest, trustworthy, hard working, and possessing integrity.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁶⁾ There is no presumption in favor of granting or continuing access to classified information.⁽⁷⁾ The government has the burden of proving controverted facts.⁽⁸⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than a preponderance of the evidence.⁽⁹⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽¹⁰⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽¹¹⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him.⁽¹²⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹³⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁴⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

Addressing the drug involvement under Guideline H,⁽¹⁵⁾ a security concern may exist based on improper or illegal involvement with drugs. Improper or illegal involvement with drugs is relevant to the security-clearance process for

several reasons: (1) drug abuse indicates unwillingness or inability to abide by the law; (2) drug abuse weakens judgment; (3) some types of drug use reflect a tendency toward irresponsible or high risk behavior; (4) users of illegal drugs may be susceptible to blackmail, especially if exposure of drug use could cost them their job; (5) drug abuse or dependence often indicates the presence of broad emotional or personality problems of security concern; or (6) drug use may cause financial problems, leading to criminal activity to finance a drug habit.

Here, based on the record evidence, the government has established its case under Guideline H. A security concern is raised by Applicant's marijuana use starting in December 1996 and concluding in December 2002. During this time she used marijuana approximately 15 to 30 times; she also bought marijuana several times. She has not used marijuana in the U.S. since June 2002 when she relocated from the West Coast to the East Coast for her current job. She last used marijuana while on vacation in Amsterdam in December 2002, about three months after she completed her security-clearance application. Given these circumstances, both DC 1⁽¹⁶⁾ and DC 2⁽¹⁷⁾ apply against Applicant. The remaining DC do not apply based on the facts and circumstances here. At bottom, the concern here is Applicant's marijuana involvement calls into question her willingness or ability to follow the law as well as her overall judgment, reliability, and trustworthiness.

Turning to the mitigating conditions under Guideline H, MC 1⁽¹⁸⁾ applies in Applicant's favor. She last used marijuana in approximately December 2002, which is about 18 months before the record closed in July 2004. Given these circumstances, her illegal drug involvement is not recent.⁽¹⁹⁾ Applicant also receives credit under MC 3⁽²⁰⁾ based on the following: (1) she has abstained from marijuana use for about 18 months; (2) she tested negative for drugs in January and March 2004; and (3) she has affirmatively stated her intention to abstain from marijuana. The remaining MC do not apply based on the facts and circumstances here.

Although Applicant's past use of marijuana--especially her use after she completed her security-clearance application--raises a security concern, her conduct needs to be put in perspective. The agency appeal board has affirmed the granting of security clearances in cases involving applicants with long-term or significant histories of marijuana involvement. For example, in 1998, the appeal board affirmed a favorable decision for a 41-year-old applicant with a 24-year history of marijuana use who had used marijuana during his military service and who had used marijuana for several years after being granted a security clearance.⁽²¹⁾ Then in 1999, the appeal board affirmed a favorable decision for a 37-year-old applicant who started using marijuana at a party in 1996 and used marijuana one to two times daily for three months in 1998.⁽²²⁾ Then again in 1999, the appeal board affirmed a favorable decision for a 28-year-old applicant who smoked marijuana nine months before the record closed, who smoked marijuana over a ten-year period, and who smoked marijuana while working as a security professional in violation of his employer's policy.⁽²³⁾ Recently in 2004, the appeal board reversed an unfavorable decision against a 50-year-old applicant with a 28-year history (1969 to December 1997) of regular, although occasional, marijuana use culminating in his arrest for drug-related criminal conduct.⁽²⁴⁾ So compared with these cases, Applicant's marijuana use and involvement (worse case scenario-using 30 times during six years without being arrested for or charged with any drug-related criminal conduct) pales in comparison. Indeed, her marijuana use and involvement can be characterized as relatively minor or insignificant.

To sum up, I have considered both the favorable and unfavorable evidence of Applicant's drug involvement. After weighing the record evidence as a whole, and considering the totality of facts and circumstances, I conclude the favorable evidence outweighs the unfavorable evidence. Applicant has met her burden of persuasion. Accordingly, Guideline H is decided for Applicant.

In reaching my decision, I have considered the evidence as a whole, both favorable and unfavorable, as well as the whole-person concept and other appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

SOR ¶ 1-Guideline H: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: 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. Clearance is granted.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Directive, Enclosure 2, Attachment 8, E2.A8.1.1.3, at p. 33.

3. ISCR Case No. 99-0452 (March 21, 2000) at p. 8 (citation omitted).
4. Transcript at p. 38.
5. Transcript at pp. 52-53.
6. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
7. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
8. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
9. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
10. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
11. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
12. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
13. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
14. *Egan*, 484 U.S. at 528, 531.
15. Directive, Enclosure 2, Attachment 8, at pp. 33-34.
16. "Any drug abuse."
17. "Illegal drug possession, . . ."
18. "The drug involvement was not recent."
19. ISCR Case No. 98-0611 (November 1, 1999) (administrative judge did not err by applying MC 1 where applicant used marijuana nine months before record closed).
20. "A demonstrated intent not to abuse any drugs in the future."
21. ISCR Case No. 97-0803 (June 19, 1998) (*See* administrative judge's decision for underlying facts and circumstances).
22. ISCR Case No. 98-0675 (November 16, 1999) (*See* administrative judge's decision for underlying facts and circumstances).
23. ISCR 98-0611 (November 1, 1999) (*See* administrative judge's decision and remand decision for underlying facts and circumstances).
24. ISCR Case No. 02-08032 (May 14, 2004) (*See* administrative judge's decision for underlying facts and circumstances).