

KEYWORD: Drugs

DIGEST: Applicant used marijuana on a single occasion in 2002 and hedged on whether he might use it in the future were it offered in a social situation. Absent documentation in the record of Applicant's using illegal drugs of any kind before or after his only identified use of illegal drugs (*viz.*, marijuana in 2002), Applicant is credited with successful mitigation of his isolated marijuana use. Clearance is granted.

CASENO: 03-16797.h1

DATE: 04/29/2005

DATE: April 29, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-16797

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant used marijuana on a single occasion in 2002 and hedged on whether he might use it in the future were it offered in a social situation. Absent documentation in the record of Applicant's using illegal drugs of any kind before or after his only identified use of illegal drugs (*viz.*, marijuana in 2002), Applicant is credited with successful mitigation of his isolated marijuana use. Clearance is granted.

STATEMENT OF CASE

On May 27, 2004, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, 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, and recommended referral to an administrative judge for determination whether clearance should be granted or continued.

Applicant responded to the SOR on June 14, 2004, and elected to have his case decided on the basis of the written record. Applicant received the File of Relevant Material (FORM) on October 7, 2004. Applicant failed to respond to the FORM within the 30 days provided him to provide supplement documentation regarding his drug use. The case was assigned to me November 16, 2004.

SUMMARY OF PLEADINGS

Under Guideline H, Applicant is alleged to have used marijuana in July 2002 and hedged on using it again in the future. For his answer to the SOR, Applicant denied using marijuana more than once and hedging on using the substance in the future (claiming pure speculation as to whether he will ever use it again).

FINDINGS OF FACT

Applicant is a 44-year-old employee of a defense contractors who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference adopted as relevant and material findings. Additional findings follow.

While in the company of family and friends in May 2002 (a correction from earlier recollection), Applicant shared a marijuana joint with his nephew. His nephew produced the joint and passed it around. Applicant took a couple of puffs of the joint, which made him hungry and relaxed. Except for this one experience with marijuana, Applicant has not used illegal drugs of any kind within the past seven years that can be documented.. While he does not plan on using marijuana in the future, he doesn't rule it out either in his DSS statement. In his statement, he says "I might in the future, possibly on a camping trip if the opportunity were to arise" (*see ex. 6*). Evidence is lacking, though, that Applicant has ever used illegal drugs since 2002. Inferences warrant, accordingly, that he hasn't used illegal drugs of any kind since his last use in July 2002.

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These revised Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

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.

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's application for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a

security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his

or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSIONS

Applicant brings a very brief history of marijuana use to these proceedings. His isolated incident of experimentation with marijuana in May 2002, when coupled with some hedging on his forbearing from taking up marijuana use in the future raises some security significant issues about his judgment, reliability and trustworthiness required for eligibility to access classified information.

Applicant's single noted marijuana use in 2002 and qualified forbearance on future avoidance are sufficient to invoke two of the disqualifying conditions of the Adjudicative Guidelines for drugs, *i.e.*, E2.A8.1.2.1 (*Any drug abuse*) and E2.A8.1.2.2 (*Illegal drug possession, including cultivation, processing, manufacture, purchase, sale or distribution*). His isolated use within the previous seven years, when coupled with a less than unqualified commitment to future avoidance, creates some uncertainty over the durability of Applicant's intentions about resorting to illegal substances.

But misconduct predictions, generally, may not be based on supposition or suspicion. *See* ISCR Case No. 01-26893 (October 2002); ISCR Case No. 97-0356 (April 1998). The Appeal Board has consistently held that an unfavorable credibility determination concerning an applicant is not a substitute for record evidence that the applicant used marijuana since his last recorded use, or based on his past use is likely to resume usage in the future. *See* ISCR Case No. 02-08032 (May 2004). Based on his own volunteered statements, which are not in any way contradicted in the record, Applicant may invoke two of the mitigating conditions in the Guidelines: E2.A8.1.3.1 (*The drug involvement was not recent*) and E2.A8.1.3.2 (*The drug involvement was an isolated or aberrational event*).

Because Applicant's demonstrated intent not to use marijuana in the future is less than unqualified, he may not avail himself of E2.A8.1.3.3 (*A demonstrated intent not to abuse any drugs in the future*). Still, while Applicant's isolated marijuana use as a forty-year old with less than an unqualified commitment to abstinence in the future raises some questions over the strength of his avoidance assurances, it is not enough to prevent Applicant's successful mitigation of the issue.

Considering the all of the developed evidence of record, Applicant mitigates security concerns associated with his isolated use and possession of marijuana. Favorable conclusions warrant with respect to subparagraphs 1.a and 1.b of Guideline H.

In reaching my decision, I have considered the evidence as a whole, including each of the E 2.2.1 factors enumerated in the Adjudicative Guidelines of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the FINDINGS OF FACT, CONCLUSIONS, CONDITIONS, and the factors listed above, this Administrative Judge makes the following FORMAL FINDINGS:

GUIDELINE H (DRUGS): FOR APPLICANT

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR 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 Applicant's security clearance. Clearance is granted.

Roger C. Wesley

Administrative Judge