

KEYWORD: Drugs; Personal Conduct

DIGEST: Applicant has successfully mitigated the security concern raised by her history of using marijuana because (1) her marijuana use is not recent, and (2) she intends not to abuse any drugs in the future. But she has failed to successfully mitigate the security concern raised by her association with persons involved with criminal activity; namely, her husband continues to use marijuana, he keeps marijuana in their home, and he uses marijuana on the premises. Clearance is denied.

CASENO: 03-17649.h1

DATE: 03/04/2005

DATE: March 4, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-17649

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Nichole L. Noel, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has successfully mitigated the security concern raised by her history of using marijuana because (1) her marijuana use is not recent, and (2) she intends not to abuse any drugs in the future. But she has failed to successfully mitigate the security concern raised by her association with persons involved with criminal activity; namely, her husband continues to use marijuana, he keeps marijuana in their home, and he uses marijuana on the premises. Clearance is denied.

STATEMENT OF THE CASE

On June 16, 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 security concerns under Guideline H for drug involvement and Guideline E for personal conduct. Applicant answered the SOR on July 9, 2004, requested a hearing, admitted to the SOR allegations, and she provided clarifying statements.

Department Counsel indicated she was ready to proceed on August 27, 2004, and the case was assigned to me September 7, 2004. On September 16, 2004, a notice of hearing was issued scheduling the hearing for October 14, 2004. Applicant appeared without counsel and the hearing took place as scheduled. DOHA received the transcript October 22, 2004. Issuing a decision in this case was delayed due to a heavy caseload.

FINDINGS OF FACT

Applicant's admissions are incorporated into my findings. After a thorough review of the record evidence as a whole, I make the following findings of fact:

Applicant is a 28-year-old married woman and a native-born U.S. citizen. She is employed as a software engineer for a company engaged in the defense industry. She has worked for this company since October 2002. She is seeking to obtain a security clearance for the second time, as she previously held a security clearance while working for another company. She holds a bachelor's of science degree in computer science and engineering. Her current annual salary is about \$79,000.00, and she and her husband are homeowners.

The background investigation in this case revealed Applicant has a history of marijuana use. In December 2002, Applicant completed a security-clearance application (Exhibit 2). In response to the relevant question, she indicated she used marijuana (cannabis) three times during October 1995 to August 1998, and six times during August 2000 to August 2002.

Applicant was interviewed as part of her background investigation in March 2003. She provided a sworn statement (Exhibit 3) detailing her marijuana use. She said she first tried marijuana while a high-school student, which was not included in her security-clearance application. She said she used it a few more times while a college student. After graduating from college in May 1998 and before she was granted a security clearance sometime in 1999, Applicant said she used marijuana on another occasion. She denied using marijuana while holding a security clearance. After her clearance was deactivated, she said she used marijuana several more times with friends and her then fiancé. She said the last time she used marijuana was August 2002, which is a few months before starting her current employment. Concerning future marijuana use, Applicant made the following statement:

I feel marijuana does not fit with my current job and my intentions of starting a family soon. The possibility of marijuana use again is not in my near future. I do see the possibility to use it again when my life is of leisure most likely at retirement age (Exhibit 3, at p. 2).

In her Answer to the SOR and in her hearing testimony, Applicant explained that marijuana use is no longer part of her life and she is not interested in continuing its use. She also clarified that she would not use marijuana again, unless it was decriminalized. On that point, she is of the opinion that marijuana use should be legalized. In her testimony, she reaffirmed her last marijuana use took place in August 2002. She estimated she has used marijuana less than 20 times during her lifetime and that 90% of her use took place with her husband before they were married. Concerning future marijuana use, Applicant testified credibly that she does not intend to use marijuana for two main reasons: (1) doing so is illegal; and (2) doing so is inconsistent with her desire to have children and raise a family (Transcript at p. 68).

Applicant called her husband as a witness. He is a 30-year-old man employed in the computer software business. He was with Applicant when she last used marijuana in August 2002, and, as far as he knows, she has not used marijuana since. The husband described Applicant as a very honest and forthright person, and that lying about her marijuana use is not an option for her. Concerning his own marijuana use, the husband admitted to the following: (1) he has used marijuana during the last ten years; (2) he characterizes himself as a social or recreational user of marijuana; (3) he keeps or stores marijuana in their home; (4) the amount of marijuana stored at their home is normally less than a quarter ounce and certainly under a half ounce; and (5) he uses marijuana at their home when Applicant is not there.

Applicant presented impressive character evidence (Exhibits A, B, and C, and her brother's testimony). All four of these persons strongly support and endorse Applicant's application for a security clearance.

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.⁽²⁾ There is no presumption in favor of granting or continuing access to classified information.⁽³⁾ The government has the burden of proving controverted facts.⁽⁴⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than a preponderance of the evidence.⁽⁵⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽⁶⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁷⁾ 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.⁽⁸⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

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." ⁽¹⁰⁾ 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

SOR paragraph 1 concerns Applicant's marijuana use. Under Guideline H, ⁽¹¹⁾ 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 established its case under Guideline H. A security concern is raised by Appellant's marijuana use. Starting in high school, continuing in college and after college, and ending in August 2002, Applicant engaged in periodic marijuana use. She smoked marijuana less than 20 times in social settings (e.g., with friends or her future husband). She revealed this information in her security-clearance application and her background investigation, as discussed above. Given these circumstances, DC 1-⁽¹²⁾ applies against Applicant. Aggravating the situation somewhat, she stopped using marijuana after being granted a security clearance in 1999, but she resumed using after the clearance was deactivated. The remaining DC do not apply based on the facts and circumstances here. At bottom, the concern here is Applicant's marijuana use calls into question her willingness or ability to follow the law.

I have reviewed the mitigating conditions under Guideline H and conclude two apply in her favor. First, MC 1-⁽¹³⁾ applies because her last use of marijuana was August 2002, which is more than two years ago and not recent (the record closed October 14, 2004). Applicant also receives credit under MC 3-⁽¹⁴⁾ because (1) she has abstained from marijuana use for about more than two years, and (2) she has affirmatively and credibly stated her intention to abstain from marijuana use for two good reasons as discussed above. The remaining MC do not apply based on the facts and circumstances here. Although her past use of marijuana raises a security concern, her drug abuse needs to be put in perspective. Applicant's marijuana use on less than 20 occasions while a youthful student and a young adult is viewed as relatively minor.

To sum up, I have considered both the favorable and unfavorable evidence of Applicant's marijuana use. 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. Accordingly, Guideline H is decided for Applicant.

SOR paragraph 2 concerns Applicant's association with persons who use illegal drugs. Under Guideline E, (15) conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that a person may not properly handle and safeguard classified information.

Here, based on the record evidence, the government established its case under Guideline E.

By her marriage, Applicant is involved with a person who has used marijuana on a periodic basis for the last ten years, and he continues doing so. His marijuana use invades the couple's home as he stores and smokes marijuana there. Given these circumstances, DC 6 (16) applies with full force because Applicant's husband is engaged in criminal activity (for example, possession of a controlled substance). This ongoing situation calls into question Applicant's judgment, trustworthiness, and reliability.

I have reviewed the mitigating conditions under the guideline and conclude none apply. Although Applicant may be unaware of the specific details of her husband's marijuana involvement, she cannot reasonably claim she is totally ignorant of the basic facts that her husband is a longtime marijuana user and he uses their home to facilitate his use. If for some reason Applicant's home was searched by police, she could find herself facing a criminal charge for possession of marijuana under a legal theory of either direct or constructive possession, since she owns the home along with her husband. While I have accepted Applicant's sincere and credible statements she does not intend to use marijuana in the future, this ongoing situation is wholly inconsistent with and contrary to the standards of granting a person access to classified information. Accordingly, Guideline E is decided against Applicant.

To conclude, Applicant has not met her ultimate burden of persuasion to obtain a favorable clearance decision. In reaching my decision, I have considered the evidence as a whole, the whole-person concept, the clearly-consistent standard, and other appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

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

SOR ¶ 1-Guideline H: For the Applicant

Subparagraphs a & b: For the Applicant

SOR ¶ 2-Guideline E: Against the Applicant

Subparagraph a: Against the 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 Applicant. Clearance is denied.

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. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
5. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
10. *Egan*, 484 U.S. at 528, 531.
11. Attachment 8 to Enclosure 2 of the Directive.

12. E2.A8.1.2.1. Any drug abuse.

13. E2.A8.1.3.1. The drug involvement was not recent.

14. E2.A8.1.3.3. A demonstrated intent not to abuse any drugs in the future.

15. Attachment 5 to Enclosure 2 of the Directive.

16. E2.A5.1.2.6. Association with persons involved in criminal activity.