

DATE: May 24, 2004

---

In re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 03-17765

## **DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL H. LEONARD**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant, a 28-year-old single woman, is seeking to obtain an initial security clearance for her employment with a management consulting company. A security concern is raised by her marijuana use from August 1995 to October 1996 while a college student, her arrest for less than one ounce of marijuana in September 1996, and her marijuana use in November 2002 and February 2003 at social events. Applicant has successfully mitigated the security concern because (1) her involvement with marijuana is not recent, (2) she intends not to abuse any drugs in the future, and (3) her history of marijuana involvement is relatively minor and insignificant. 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.<sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline H for drug involvement and Guideline E for personal conduct related to her drug involvement. Applicant answered the SOR on February 27, 2004, and requested a hearing.

Department Counsel indicated she was ready to proceed on March 18, 2004, and the case was assigned to me on March 22, 2004. A notice of hearing was issued scheduling the hearing for April 20, 2004. Applicant appeared without counsel and the hearing took place as scheduled. DOHA received the transcript ay 3, 2004.

### **FINDINGS OF FACT**

In her Answer, Applicant admitted to the factual allegations in the SOR, and her admissions are incorporated into my findings. After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is a 28-year-old single woman. She is seeking access to classified information for her employment as a consultant with a large management consulting company. She graduated from college in December 1998 with a bachelor's degree in information technology. Hired as an analyst, she has since been promoted to the position of consultant.

Applicant attended college at a large state university from August 1994 to December 1998. During some of this time, she smoked marijuana. From August 1995 to October 1996, the then 20-year-old Applicant smoked marijuana approximately 20 times. She typically used marijuana at parties and other social settings. She denies using marijuana alone and denies buying marijuana or spending money on marijuana.

In September 1996, Applicant was arrested by local police. She was charged with obstructing a peace officer and possessing less than one ounce of marijuana. The basis for the drug charge was a joint found in her possession. The case went to court in December 1996, both charges were dismissed, and Applicant was required to perform community service.

In September 2001, Applicant completed a security-clearance application. In response to Question 24, Applicant disclosed her September 1996 arrest for marijuana possession. In response to Question 26, she disclosed her September 1996 arrest for obstructing a peace officer. And in response to Question 27, she disclosed her approximately 20 times of marijuana use from August 1995 to October 1996. Otherwise, her security-clearance application reveals nothing of security significance. At some unknown time thereafter, Applicant was issued an interim security clearance, although she is uncertain about the matter since she was never informed at work. Other than her admission to SOR subparagraph 2.a, the government has presented no evidence showing if and when Applicant held an interim security clearance.

In November 2002, Applicant smoked marijuana. Her use took place when she attended a concert with friends. She believes she took two or three puffs from a common joint. Applicant's last use of marijuana was in February 2003. This use also took place at a party where she took two to three puffs from a common joint. She has not used marijuana since February 2003, and she does not intend to use marijuana or other illegal drugs in the future.

Applicant was interviewed as part of her background investigation in May 2003. She provided a sworn statement revealing her past marijuana use and involvement, including her marijuana use in November 2002 and February 2003. And she swore that she planned to never use marijuana again.

Applicant presented character evidence supporting her application for a security clearance.

A supervisor at work, a former Army officer and now a managing director for the company, has seen nothing in two years to question Applicant's loyalty, work ethic, integrity, and dedication, and he has no doubt she can be trusted with access to classified information. A longtime friend of 23 years describes Applicant as a trustworthy person who can always be relied on at anytime. Another friend described Applicant as trustworthy, reliable, and the first person you would seek out in a time of need.

## **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. Considering the record evidence as a whole, the following security guidelines are most pertinent here: Guideline H for drug involvement and Guideline E for personal conduct.

## **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.<sup>(2)</sup> There is no presumption in favor of granting or continuing access to

classified information.<sup>(3)</sup> The government has the burden of proving controverted facts.<sup>(4)</sup> The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than a preponderance of the evidence.<sup>(5)</sup> The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.<sup>(6)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(7)</sup> 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.<sup>(8)</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(9)</sup>

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."<sup>(10)</sup> 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, 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 Appellant's drug involvement. While a youthful college student, Applicant smoked marijuana from August 1995 to October 1996. This period of Applicant's marijuana use culminated when she was arrested for possession of a marijuana joint in September 1996, although the charges were dismissed later that year in December. After several years of no marijuana use, Applicant used marijuana (a few puffs) in November 2002 and February 2003 in social settings. She has not used marijuana since February 2003. Given these circumstances, both DC 1<sup>(11)</sup> and DC 2<sup>(12)</sup> apply against Applicant. Aggravating the situation, she used marijuana while she apparently held an interim security clearance. But DC 5<sup>(13)</sup> does not apply because there is no evidence of recent use, because February 2003, 14 months ago, is too far in the past to be considered recent. The remaining DC do not apply based on the facts and circumstances here. At bottom, the concern here is Applicant's illegal drug involvement is indicative of irresponsible behavior, and it calls into question her willingness or ability to follow the law.

Turning to the mitigating conditions under Guideline H, MC 1<sup>(14)</sup> applies in Applicant's favor. Her last use of marijuana was February 2003, which is about 14 months ago. Given these circumstances, her illegal drug involvement is not recent.<sup>(15)</sup> Applicant also receives credit under MC 3<sup>(16)</sup> based on the following: (1) she has abstained from marijuana use for about 14 months; (2) her limited marijuana use (a few puffs) in February 2003 was her only drug involvement in 2003; (3) her limited marijuana use (a few puffs) in November 2002 was her only drug involvement in 2002; (4) other than her limited marijuana use in November 2002 and February 2003, Applicant's last drug involvement was in 1996, about six years earlier, as a youthful college student; (5) she has affirmatively stated her intention to abstain from marijuana; (6) she is committed to her work and employment with the company and does not want to jeopardize it by using marijuana; and (7) she was completely candid and truthful with the government concerning her marijuana use and involvement. The remaining MC do not apply based on the facts and circumstances here.

Although Applicant's past use of marijuana and her arrest for possessing a marijuana joint raise a security concern, her behavior 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.<sup>(17)</sup> 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.<sup>(18)</sup> 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.<sup>(19)</sup> Most 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.<sup>(20)</sup> So compared with these cases, Applicant's marijuana involvement while a youthful college student, coupled with her limited use of marijuana in 2002 and 2003, pales in comparison. Indeed, it's fair to characterize her marijuana use and involvement 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 under the Directive. Accordingly, Guideline H is decided for Applicant.

Under Guideline E, 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 has not established its case. It has failed to establish, by substantial evidence, any of the disqualifying conditions under Guideline E. The SOR allegation under Guideline E is that Applicant used marijuana while holding an interim security clearance. This is a matter more properly considered under Guideline H, and I have done so. This case does raise a genuine, fact-based, security concern due to Applicant's drug involvement. But that does not necessarily translate into a case under Guideline E. Although it may be possible to pigeonhole Applicant's drug involvement under DC 5,<sup>(21)</sup> it's a stretch and adds nothing of security significance to the case. And the government has presented no evidence showing Applicant engaged in rule violations. Accordingly, Guideline E 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

SOR ¶ 2-Guideline E: For the Applicant

Subparagraph a: 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. 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. "Any drug abuse."

12. "Illegal drug possession, . . ."

13. ". . . Recent drug involvement, especially following the granting of a security clearance, or an expressed intent not to discontinue use, will almost invariably result in an unfavorable determination."

14. "The drug involvement was not recent."

15. 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).

16. "A demonstrated intent not to abuse any drugs in the future."

17. ISCR Case No. 97-0803 (June 19, 1998) (*See* administrative judge's decision for underlying facts and circumstances).

18. ISCR Case No. 98-0675 (November 16, 1999) (*See* administrative judge's decision for underlying facts and circumstances).

19. ISCR 98-0611 (November 1, 1999) (*See* administrative judge's decision and remand decision for underlying facts and circumstances).

20. ISCR Case No. 02-08032 (May 14, 2004) (*See* administrative judge's decision for underlying facts and circumstances).

21. "A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency."