

DATE: December 21, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-18522

ECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant used marijuana regularly while he was employed by a defense contractor. He continued to use it while his security clearance application was pending. He stopped using marijuana in December 2001, has not used it since, and has no desire to use it in the future. Security concerns based on marijuana use are mitigated. Clearance is granted.

STATEMENT OF THE CASE

On March 2, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to revoke Applicant's security clearance. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive). The SOR alleges security concerns under Guidelines H (Drug Involvement) and E (Personal Conduct) of the Directive. Under Guideline H it alleges Applicant purchased and used marijuana with varying frequency and sometimes on a daily basis from September 1995 until December 2001. Under Guideline E it alleges Applicant used marijuana after his security clearance process had been initiated in November 1998.

Applicant answered the SOR in writing on March 15, 2004. He admitted the allegations, offered explanations, and requested a hearing. The case initially was assigned to another Administrative Judge and reassigned to me on August 20, 2004, based on workload considerations. On August 25, 2004, DOHA issued a notice of hearing setting the case for October 8, 2004. Applicant appeared as scheduled. DOHA received the transcript (Tr.) on October 26, 2004.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I also make the following findings:

Applicant is a 31-year-old senior systems engineer for a defense contractor. He has worked for his current employer

since February 1998. He applied for a security clearance in November 1998, and it was granted in February 1999. His clearance was suspended because of the current security investigation. His supervisors consider him an employee of exceptional skill and dedication.

Applicant was married in May 2004. He has a four-year-old stepson and his wife is in her third trimester of pregnancy.

Applicant began his college education in 1994. In 1995 he began using marijuana occasionally at parties. He used it infrequently until about 1997, when he began using it several times a week. He graduated from college in 1998, and he continued to live with his college roommate, who also used marijuana. During 1998 and 1999, there were periods when Applicant used marijuana daily. He was working on classified contracts and at classified sites, but he did not possess or use marijuana while working with classified materials or at his workplace. His use tapered off in 2000. In December 2001, realizing he was getting older and becoming physically and mentally addicted, he decided to make a lifestyle change and stop using marijuana. He moved away from friends and associates who used marijuana regularly, and he began living alone. He continued to feel addicted for about two months after he stopped using marijuana. He has not used it since December 2001, and he has no desire to use it again.

From 1995 until December 2001, Applicant spent between \$5,000.00 and \$10,000.00 to purchase marijuana. He paid the street price to purchase small quantities of marijuana for personal use.

Applicant's employer has an anti-drug policy. New employees are required to be tested for drugs, and drug use after employment is grounds for termination.

Applicant did not disclose his marijuana use on his 1998 security clearance application, because he was afraid he would lose his job. In August 2002, when he applied for a top secret clearance, he decided to "come clean," and he voluntarily disclosed his prior use of marijuana.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander-in-Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through ¶¶ 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Under Guideline H, improper or illegal involvement with drugs raises questions regarding an applicant'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. Directive ¶ E2.A8.1.1. Any illegal use of a controlled substance can raise a security concern and may be a disqualifying condition (DC 1). Directive ¶ E2.A8.2.1. Illegal drug possession also is a disqualifying condition (DC 2). Directive ¶ E2.A8.2.2. Applicant's admissions that he purchased, possessed, and used marijuana are sufficient to prove the allegations in the SOR ¶ 1.a. and 1.b., and they establish DC 1 and DC 2.

Security concerns based on possession and use of marijuana can be mitigated by showing that it was not recent (MC 1). [\(1\)](#) Directive ¶ E2.A8.1.3.1. There are no "bright line" rules for determining when conduct is "recent." The determination must be based "on a careful evaluation of the totality of the record within the parameters set by the directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows "a significant period of time has passed without any evidence of misconduct," then the Administrative Judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." *Id.*

Applicant began using marijuana in college. After graduating, he continued to live with his college roommate, who also used marijuana. In December 2001 Applicant decided to change his lifestyle. He moved away from his marijuana-using associates and friends, began living alone, and stopped smoking marijuana. He has since married and now has a family. At the hearing he repeated his assertion that he has not used marijuana since December 2001. I found his testimony credible. His credibility is enhanced by the fact that he chose to voluntarily "come clean" in his 2002 application instead of continuing the deception he initiated in his 1998 application. *See* Directive ¶ E2.A5.1.3.2. (voluntarily providing correct information after old falsification mitigates the old falsification under Guideline E). Because Applicant stopped using marijuana about eight months before submitting his 2002 application, it is unlikely that his marijuana use would have been discovered if he had not voluntarily disclosed it. I conclude MC 1 is established.

Security concerns based on marijuana use also can be mitigated (MC 3) by evidence of "a demonstrated intent not to abuse any drugs in the future." Directive ¶ E2.A8.1.3.3. When Applicant applied for a top secret clearance in 2002, he stated that he had "no interest" in resuming his marijuana use. He repeated that statement of intent when he was interviewed by a Defense Security Service investigator in February 2003 and at the hearing in October 2004. He has not used marijuana for three years. I conclude that MC 3 also is established. Applicant has mitigated the security concern based on his previous drug involvement.

Under Guideline E, conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1. A disqualifying condition is established by personal conduct "that increases an individual's vulnerability to coercion, exploitation, or duress" (DC 4) or by "[a] pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency." (DC 5) Directive ¶¶ E2.A5.1.2.4., E2.A5.1.2.5. Applicant admitted that he concealed his marijuana use in 1998 because he was afraid it would cost him his job. His continued marijuana use violated his employer's anti-drug policy. It could have cost him both his security clearance and his job, and it made him vulnerable to coercion, exploitation, or

duress by anyone who threatened to disclose it. His marijuana use while holding a security clearance was a breach of trust. I conclude DC 4 and DC 5 are established.

Potentially disqualifying conduct under Guideline E may be mitigated by taking "positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress." (MC 5) Directive ¶ E2.A5.1.3.5. Applicant has mitigated his conduct by discontinuing his use of marijuana and revealing his prior use, thereby removing the basis for coercion, exploitation, or duress. His previous concealment of marijuana use is mitigated by his voluntary disclosure on his 2002 application (MC 2). Directive ¶ E2.A5.1.3.2.

FORMAL FINDINGS

The following are my findings regarding each allegation in the SOR:

Paragraph 1. Guideline H (Drug Involvement): FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Paragraph 2. Guideline E (Personal Conduct): FOR APPLICANT

Subparagraph 2.a.: 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 a security clearance to Applicant. Clearance is granted.

LeRoy F. Foreman

Administrative Judge

1. "Recent drug involvement" also is addressed as a disqualifying condition (DC 5) in the Directive ¶ E2.A8.1.2.5. This disqualifying condition applies only in the context of failure to successfully complete a drug treatment program. ISCR Case No. 02-24452 (App. Bd. Aug. 4, 2004) at 3.