

KEYWORD: Criminal Conduct

DIGEST: Applicant used marijuana for one year in 1979/80 and was convicted of illegal possession of a controlled drug in August 1979. He abstained from illegal drugs thereafter, but in May 2002, was convicted of misdemeanor illegal possession after a marijuana pipe was found in his truck. The pipe had been left in the truck by a close friend, who used the drugs to alleviate the adverse effects of chemotherapy treatment before his death in September 2001. There is little likelihood of recurrence where Applicant does not use any illicit drug, and no longer knowingly associates with anyone who uses illegal drugs. Clearance is granted.

CASENO: 03-26860.h1

DATE: 01/23/2006

DATE: January 23, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-26860

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant used marijuana for one year in 1979/80 and was convicted of illegal possession of a controlled drug in August 1979. He abstained from illegal drugs thereafter, but in May 2002, was convicted of misdemeanor illegal possession after a marijuana pipe was found in his truck. The pipe had been left in the truck by a close friend, who used the drugs to alleviate the adverse effects of chemotherapy treatment before his death in September 2001. There is little likelihood of recurrence where Applicant does not use any illicit drug, and no longer knowingly associates with anyone who uses illegal drugs. Clearance is granted.

STATEMENT OF THE CASE

On February 8, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant which 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 for Applicant. [\(1\)](#) DOHA recommended referral to an administrative judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked. The SOR was based on criminal conduct (Guideline J).

On March 16, 2005, Applicant executed an Answer to the SOR, and requested a hearing before a DOHA administrative judge. The case was assigned to me on August 2, 2005. On August 3, 2005, I scheduled a hearing for August 25, 2005. At the hearing, the government submitted five exhibits. Applicant, his brother-in-law, and his father-in-law testified, as reflected in a transcript received on September 7, 2005.

FINDINGS OF FACT

The SOR alleges criminal conduct concerns due to Applicant's convictions of possession of a controlled drug in 1979 and 2002. Applicant admits the offenses, and his admissions are incorporated as findings of fact. After a thorough consideration of the evidence, I make the following additional findings:

Applicant is a 48-year-old mechanical technician who has been employed by a defense contractor since July 2001. He seeks a secret-level security clearance for his duties, which include sealing components by laser.

When he was in his early twenties, Applicant socialized with the "wrong crowd." (Tr. 37) Applicant began to use marijuana approximately once or twice a month with his friends. In late August 1979, he was arrested for illegal possession. He was found guilty, and sentenced to 30 days in the house of corrections (suspended), and fined \$150. Shortly after his arrest, Applicant stopped using illegal drugs and smoking cigarettes.

In 1983 or 1984, Applicant began socializing with Mr. X, who he met through a friend. They hiked and went snowmobiling together, and became the best of friends. In about Spring 2000, Mr. X was diagnosed with colon cancer. While undergoing chemotherapy treatment, he began to smoke marijuana so that he would have the appetite to eat. At Applicant's request, Mr. X did not smoke in Applicant's house. With Applicant's knowledge and permission, this friend smoked marijuana and cigarettes outside in Applicant's truck on occasion.

Mr. X died in September 2001. The next day, Applicant left the job where he had been employed since December 1989. (2) Applicant was unemployed for the next ten months. In mid-May 2002, Applicant was stopped by the police for having an expired inspection sticker displayed on his truck. After informing Applicant that he would be released with a verbal warning, the officer, who observed Applicant to be "very nervous," requested permission to search the truck, which had been off the road for a period of time. Applicant consented, and remained behind the vehicle with another officer during the search. A red marijuana pipe with an odor of burnt marijuana was found under the driver's side floor mat. Applicant was arrested and charged with illegal possession of a controlled/narcotic drug, a class B misdemeanor. Applicant pleaded nolo contendere, was adjudged guilty and sentenced to a \$250 fine plus \$50 penalty assessment.

In July 2001, Applicant began working for his present employer, a defense contractor, as a mechanical technician. Needing a secret-level security clearance for his duties, Applicant executed a security clearance application (SF 86) on August 8, 2002. In response to any alcohol/drug offenses (question 24) Applicant listed his August 1979 and May 2002 possession of controlled drug offenses.

On October 21, 2003, Applicant was interviewed by a Defense Security Service (DSS) special agent about his marijuana involvement and criminal arrests. Applicant admitted he had smoked marijuana for about one year from 1979 to 1980, but he denied any illegal substance use since ("I absolutly [sic] have not used any ilegal subtansas [sic] since then." Ex. 5). As for his possession of the marijuana pipe in 2002, Applicant indicated Mr. X, who had died in September 2001, had smoked marijuana to make himself hungry when he was ill. Applicant denied smoking the drug with Mr. X and claimed to have asked Mr. X to not smoke in his truck. Applicant related Mr. X had left the pipe under the floor mat of the passenger's side. Applicant denied knowing the pipe the pipe was there. Thinking he had nothing to hide, he consented to the search of his truck. He averred he told the police the pipe was not his, and that the police told him he had to be charged even if it was not his. Applicant elected to plead nolo contendere and not inform the judge of Mr. X as he wanted his friend to "rest in peace."

At his hearing, Applicant continued to deny any use of marijuana since the 1979/80 time frame. He explained he consented to the search of his truck not knowing that the marijuana pipe had been left there by Mr. X:

So when the officer asked me to stand behind my truck, and he asked me if I had anything to hide, if they could search my vehicle, I said yeah, no problem, go ahead and search it. And my vehicle had been off the road prior to that for an extended, a long period of time, and was sitting in my driveway, and it had all kinds of stuff in there.

My friend used to use that to go, because I didn't allow cigarette smoking in my house so my friend used to go in there and use it as a place to go smoke his cigarettes. He was also a cancer patient, he died of cancer by the way, and he used to also smoke marijuana in my truck . . . And I couldn't believe that he left that in my truck. I had no idea it was in there, due to the fact that I just drove my truck off with all my tools everywhere, and the stuff that was in my truck was just all over the place, under the mat there was stuff, there was just like a lot of stuff in my truck. So at the time I told the officer that I did recognize it, but it wasn't mine. (Tr. 32-33)

As to why he pleaded nolo contendere if the pipe was not his, Applicant testified he decided he couldn't bring up his friend in court since he had passed away and was unable to defend himself. (Tr. 33-34)

With Mr. X deceased and Applicant's two witnesses being family members with no personal knowledge of the incident, the decision as to whether to accept Applicant's account depends largely on his credibility, the plausibility of his account, and whether there is information of record that fairly detracts from it. Applicant's credibility is enhanced by his disclosure of the illegal drug convictions on his SF 86. Applicant also became emotional when testifying at his hearing about Mr. X's illness, necessitating two brief recesses for Applicant to recollect and compose himself. (See Tr. 34) The fact that he is still affected years later lends credence to his claim that he felt he had to protect his friend's name and reputation even in death. The police report of the May 2002 arrest confirms Applicant consented to the search of his vehicle after being told he was going to be released. It is difficult to believe Applicant would consent to a search if he knew the marijuana pipe was under the floor mat.

Yet, a refusal could have raised police suspicions, and the police reported Applicant appeared "very nervous and his pupils were pin pointed." The marijuana pipe was found under the driver's side floor mat (rather than the passenger's side as Applicant had claimed to the DSS agent). The officer "detected an odor of burnt marijuana from the pipe" (*see* Ex. 3) that could be indicative of illegal drug use.

Applicant attributed his nervousness to the fact he did not have a sticker on his vehicle (Tr. 31); his pinpoint eyes to an offset pupil and to being on over-the-counter allergy medication because of seasonal pollen allergy (Tr. 31-32); his belief that the pipe had been found on the passenger's side to an assumption on his part and not realizing the pipe had been found on the driver's side until he read the police report forwarded to him in discovery by Department Counsel (Tr. 35); and the odor of burnt marijuana in the pipe to marijuana's strong smell (Tr. 43).

Driving without a valid inspection sticker is a plausible cause for nervousness on being stopped by the police. Although neither of his two witnesses, who see him at least once a week, could confirm Applicant's pollen allergy, pinpoint eyes prove little. As for the marijuana pipe lying under the mat on the driver's side, Applicant maintains he had "stuff," including tools, all over the place in his truck and the truck had not been used for a period of time. The pipe could have gone undetected by Applicant, especially if it was a small metal pipe, and there is nothing in the record that indicates the size of the pipe found.

More difficult to explain away is the officer detecting an odor of marijuana some seven months after Mr. X died. Applicant presented no evidence to prove that the smell of marijuana would remain in a pipe for as long as seven months, but there is nothing in the police report that indicates the police smelled marijuana on the Applicant when he was arrested. Applicant testified some other friends had smoked cigarettes in his truck a few days before his arrest in 2002, although he also expressed his belief they did not use marijuana. Given the absence of proof that Applicant used marijuana after 1980, and the favorable inferences for his credibility drawn from his SF 86 disclosures, I accept Applicant's claims that the pipe was Mr. X's and left in Applicant's truck without his knowledge.

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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, Safeguarding Classified Information within Industry § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the

Directive. 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.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. 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.

Considering the evidence as a whole, the following adjudicative guideline is most pertinent to an evaluation of Applicant's security suitability:

Criminal Conduct. A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. (¶ E2.A10.1.1.)

CONCLUSIONS

Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. A history of disregard of laws, such as those proscribing illegal drug involvement, indicates an individual may fail to comply with the practices and procedures concerning the safeguarding of classified information. Applicant has two illegal drug possession convictions, in 1979 and 2002. While I have accepted Applicant's denial of any knowing possession of drug paraphernalia in 2002, he clearly condoned criminal drug involvement by his friend and the marijuana pipe was found in Applicant's truck in violation of the law. Under Guideline J, disqualifying conditions ¶ E2.A10.1.2.1. *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*, and ¶ E2.A10.1.2.2. *A single serious crime or multiple lesser offenses*, are pertinent to an evaluation of Applicant's security worthiness under Guideline J.

However, several mitigating conditions apply: ¶ E2.A10.1.3.1. *The criminal behavior was not recent*; ¶ E2.10.1.3.4. *The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*; and ¶ E2.A10.1.3.6. *There is clear evidence of successful rehabilitation*. There is no evidence Applicant has used any marijuana since 1980, so his knowing use and possession of marijuana are remote in time. With the death of Mr. X, Applicant's "best friend," the circumstances that led to the 2002 offense no longer exist. To his knowledge, Applicant does not currently associate with anyone who uses illegal drugs. He does not even allow cigarette (nicotine) smoking in his home and had even told Mr. X to go off on his own to smoke marijuana "because those days were over for [him]."

(Tr. 35) Favorable findings are returned as to SOR ¶¶ 1.a. and 1.b.

FORMAL FINDINGS

Formal findings as required by Section 3, Paragraph 7 of Enclosure 1 to the Directive are hereby rendered as follows:

Paragraph 1. Guideline J: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: 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.

Elizabeth M. Matchinski

Administrative Judge

1. The SOR was issued under the authority of Executive Order 10865 (as amended by Executive Orders 10909, 11328, and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4).
2. It is not clear from the record whether Applicant quit, was laid off, or fired from the job.