

KEYWORD: Drugs

DIGEST: Applicant has been involved with illegal drugs since 1983. He has not used drugs since August 2004, but stopped only after being notified the government had denied his request for clearance because of his drug use. It is highly probable he will resume his drug use in the future. Clearance is denied.

CASENO: 04-01469.h1

DATE: 06/15/2005

DATE: June 15, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-01469

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Candace Le'i, Esquire, Department Counsel

Erin C. Hogan, Deputy Chief Department Counsel

FOR APPLICANT

SYNOPSIS

Applicant has been involved with illegal drugs since 1983. He has not used drugs since August 2004, but stopped only after being notified the government had denied his request for clearance because of his drug use. It is highly probable he will resume his drug use in the future. Clearance is denied.

STATEMENT OF THE CASE

After reviewing the results of Applicant's background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding ⁽¹⁾ it is clearly consistent with the national interest to give Applicant a security clearance. On August 24, 2004, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed in the Directive under Guideline H (illegal drugs). Applicant timely answered the SOR (Answer), admitted with explanation all of the allegations therein, and requested a hearing.

On March 10, 2005, I convened a hearing at which the government presented six exhibits (GE 1 - GE 6) to support the SOR. In response, Applicant presented three exhibits (AE A), his own testimony and that of two other witnesses. DOHA received the transcript (Tr) on March 22, 2005.

FINDINGS OF FACT

Applicant's admissions through his Answer are entered herein as facts. After a thorough review of the pleadings, transcript, and exhibits, I also find the following:

Applicant is 37 years old and works as a software engineer for a defense contractor that hired him in 1999. Applicant

first went to work in the defense industry in 1986 while attending college to earn a degree in computer science, which he received in 1991. Applicant is well regarded by his current employer as eminently qualified for his position, easy to work with, a great team player, and very trustworthy.

Applicant began using marijuana in 1983 at about age 16. He used the drug with varying frequency until his freshman year in college in 1986, stopping because he was applying for student cooperative jobs with defense contractors that employed drug screening tests. Once clear of the drug tests, Applicant resumed his use of marijuana until about 1990, when he was nearing graduation. He again stopped using because he knew he would be subjected to drug testing as he applied for other jobs in the defense industry. Applicant resumed using marijuana on a regular basis, often weekly, in 1993.

Beginning his senior of college, Applicant also began using other illegal drugs. He used LSD once in 1990, which he has described as a bad experience. Undeterred, he resumed using LSD about once each year from 1993 to 1997. Applicant also used ecstasy two or three times in 1997, and again in 2002 despite the fact his last experience with the drug in 1997 made him ill. Applicant has purchased ecstasy for his use and for his friends to use as well. (SOR ¶¶1.a, 1.b, and 1.e)

Since he started using marijuana as a teenager, Applicant has purchased small amounts of the drug for personal use and to share with friends. He last used marijuana sometime in late 2004 and is willing to continue his abstinence from and purchase of illegal drugs while he holds a security clearance, but will continue to buy and use marijuana in the future if he does not hold a clearance. (SOR ¶¶1.c, 1.d, 1.f, 1.g, and 1.i)

Applicant was investigated for a clearance in 1992. In August 1992, he gave a written statement about his drug use to a Defense Security Service (DSS) agent, and asserted he had no intent to use illegal drugs in the future. In his most recent statement to DSS in December 2002, Applicant expressed his intent to continue using marijuana and possible ecstasy in the future. Applicant has always been aware that it is illegal to use and possess marijuana, ecstasy, and LSD. His wife uses marijuana and has also used ecstasy with Applicant, and they continue to associate with other persons who use marijuana.

POLICIES

The Directive sets forth adjudicative guidelines⁽²⁾ to be considered in evaluating an Applicant's suitability for access to classified information. Security clearance decisions must reflect consideration of both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. The presence

or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the record evidence as a whole, I conclude the relevant adjudicative guideline to be applied here is Guideline H (illegal drugs).

BURDEN OF PROOF

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁽³⁾ for an Applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for the Applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it establishes that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the Applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, the Applicant bears a heavy burden of persuasion.⁽⁴⁾ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.⁽⁵⁾

CONCLUSIONS

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. Such conduct may also be criminal and indicative of a disregard for rules and regulations used to protect national interests.⁽⁶⁾ In this instance, the government has produced sufficient information through its exhibits and Applicant's admissions to support the preliminary decision as expressed in the SOR that Applicant should be denied a security clearance. Available information shows Applicant has used illegal drugs for much of his adult life. Indeed, he has purchased and used marijuana since his mid-teens, and expanded his involvement to include LSD and ecstasy as he was finishing college. Guideline H disqualifying condition (DC) 1⁽⁷⁾ and DC 2⁽⁸⁾ apply.

By contrast, none of the listed mitigating conditions apply here. Applicant's drug use is recent in that it occurred within the past year. Also, Applicant's drug involvement is hardly an isolated or aberrational event insofar as he has used illegal

drugs for more than 20 years. As for demonstrating an intent not to use in the future, Applicant has abstained in the past, but only long enough to complete job-related drug screening. He resumed using marijuana in 1993 despite telling DSS in August 1992 he had no intent to use drugs in the future. Applicant now avers he will abstain as long as might hold a security clearance. I conclude Applicant has every intention of using marijuana and possibly other illegal drugs in the future.

The SOR also alleges that Applicant should be disqualified based on application of federal law. (SOR ¶1.i) Specifically, 10 U.S.C. 986(c)(2) prohibits granting or renewing a security clearance if Applicant "is an unlawful user of, or is addicted to, a controlled substance..." The plain language of this statute means that a person who uses illegal drugs at or very near the time of the hearing may not under any circumstances be granted a clearance. Here it is uncontroverted that, as of the hearing date, Applicant had last used an illegal drug, to wit, marijuana, about seven months earlier. While he has indicated he may use drugs in the future, he was not using them as of the hearing. The cited statute does not address past or prospective drug use and, thus, does not apply. I find for Applicant as to this allegation.

I have carefully weighed all of the evidence, and I have applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guideline. A fair and commonsense assessment⁽⁹⁾ of Applicant's drug use over the past 20 years and the distinct probability he will continue to engage in such conduct sustains the government's concerns about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. Applicant has failed to overcome the adverse information presented by the government.

FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1, Illegal Drugs (Guideline H): AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c: Against the Applicant

Subparagraph 1.d: Against the Applicant

Subparagraph 1.e: Against the Applicant

Subparagraph 1.f: Against the Applicant

Subparagraph 1.g: Against the Applicant

Subparagraph 1.h: Against the Applicant

Subparagraph 1.i: For 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 the Applicant.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. Directive, Enclosure 2.
3. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
4. *See Egan*, 484 U.S. at 528, 531.
5. *See Egan*; Directive E2.2.2.
6. Directive, E2.A8.1.1.1.
7. Directive, E2.A8.1.2.1. Any drug abuse...;
8. Directive, E2.A8.1.2.2. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution;
9. Directive, E2.2.3.