

KEYWORD: Drugs

DIGEST: Applicant, a 26-year-old man, is seeking to obtain a security clearance. A security concern is raised by his marijuana use on at most five occasions while in college and his marijuana use in February 2003 and then again in August or September 2003 after he had completed a security-clearance application. Applicant has successfully mitigated the security concern because (1) his marijuana use is not recent, (2) he intends not to abuse any drugs in the future, and (3) his history of marijuana use is relatively minor and insignificant. Clearance is granted.

CASENO: 04-03577.h1

DATE: 11/23/2005

DATE: November 23, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-03577

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

Sheldon I. Cohen, Esq.

SYNOPSIS

Applicant, a 26-year-old man, is seeking to obtain a security clearance. A security concern is raised by his marijuana use on at most five occasions while in college and his marijuana use in February 2003, and then again in August or September 2003 after he had completed a security-clearance application. Applicant has successfully mitigated the security concern because (1) his marijuana use is not recent, (2) he intends not to abuse any drugs in the future, and (3) his history of marijuana use is relatively minor and insignificant. Clearance is granted.

STATEMENT OF THE CASE

On March 18, 2005, 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, alleged a security concern under Guideline H for drug involvement (marijuana use). Applicant answered the SOR in April 2005, and in July 2005, he requested a hearing.

Department Counsel indicated she was ready to proceed on July 28, 2005, and the case was assigned to me on August 1, 2005. Thereafter, on August 16, 2005, and with the agreement of counsel, a notice of hearing was issued scheduling the hearing for October 31, 2005. Applicant appeared with counsel and the hearing took place as scheduled. DOHA received the transcript November 9, 2005.

FINDINGS OF FACT

In his Answer, Applicant admitted to the allegation in SOR subparagraph 1.a, but denied the allegation in subparagraph

1.b, and his admissions are incorporated into my findings. After a thorough review of the record evidence, I make the following findings of fact:

Applicant is a 26-year-old man who is engaged to be married in November 2006. He is seeking access to classified information for his employment in a business development position with a company engaged in defense contracting. He graduated from college in May or June 2002 with a bachelor's degree in business administration with a concentration in management information systems. Hired as a test engineer in September 2002, he has since been promoted to his current position.

He completed high school in 1998. During this time he had no involvement with marijuana or any other illegal drug. He considered himself to be quite opposed to drug use, in part because he was actively involved as a volunteer with a local ambulance corps, and he was able to become certified as an emergency medical technician (EMT) when he turned 18 years old.

Applicant attended college from September 1998 to May 2002. While a college student, he decided to try marijuana to see what it was all about. He used marijuana no more than five times while a college student. He used marijuana at parties and other social settings. He denies any other involvement with marijuana other than smoking it when it was made available to him.

On February 11, 2003, about six months after starting his employment with a defense contractor, Applicant completed a security-clearance application (Exhibit 1). In response to Question 27, he disclosed he used marijuana five times from November 2000 to June 2002. Also, he noted that he had tried it a few times during college, but did not know the precise dates.

On or about February 14, 2003, Applicant was visiting a younger brother at his former college as well as to attend a wedding in the area. A party was ongoing when he arrived and during the course of the party Applicant was offered a marijuana joint, which he accepted and took a few puffs or drags.

On or about February 18, 2003, the Defense Department granted Applicant an interim security clearance at the secret level. Due to the nature of the work at the company, an interim security clearance was of no practical value since the interim status did not allow Applicant to test the particular product line. Given these circumstances, the company facility security officer (FSO) did not inform Applicant that he had been granted the interim clearance (Exhibit A and testimony of FSO). In other words, although Applicant had been granted eligibility for an interim clearance, he never had access to classified information due to the FSO's decision.

Sometime during August or September 2003, Applicant had returned to his hometown to visit his family. During this time, he attended a party and was offered a marijuana joint, which he accepted and took a single puff or drag. This was the last time he used marijuana.

In January 2004, Applicant was interviewed as part of his background investigation. He provided a sworn statement concerning his marijuana use, including his marijuana use in February 2003 and August or September 2003 (Exhibit 2). Also, he characterized his marijuana use as experimental and stated that he had no intent to use any illegal drug in the future.

Applicant learned he had been granted the interim security clearance once he received the SOR, which alleged he had used marijuana after the granting (SOR subparagraph 1.b). Applicant's testimony on this point is credible and worthy of belief. Concerning his marijuana use on two occasions in 2003 after he submitted the security-clearance application, he described his actions as stupid decisions he regrets, and he has no intention to use marijuana in the future.

Applicant presented several favorable character witnesses supporting his application for a security clearance. Of the five character witnesses, two were most impressive. The first was a company vice-president for business development, and the second was a longtime family friend who is also the president and general manager of a different company with 1,300 employees. Both are mature, serious, experienced businessmen who strongly recommend Applicant for a position of trust. The vice-president rates Applicant's work performance and work ethic as excellent. The president/general manager has known Applicant since his birth and describes Applicant as honest, direct, mature, and trustworthy. Since Applicant has entered the business world, the president/general manager has acted as an informal mentor to Applicant. If he had a suitable position for Applicant in his company, the president/general manager would not hesitate to offer Applicant employment.

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.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security

clearance is not a determination of an applicant's loyalty.⁽²⁾ Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting a clearance.

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.⁽³⁾ There is no presumption in favor of granting or continuing access to classified information.⁽⁴⁾ The government has the burden of proving controverted facts.⁽⁵⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than a preponderance of the evidence.⁽⁶⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽⁷⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁸⁾ 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.⁽⁹⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁰⁾

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."⁽¹¹⁾ 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 various reasons, including that drug abuse indicates unwillingness or inability to abide by the law. If a person is willing to violate the law by using illegal drugs, it follows that person may be willing to ignore or violate the rules and regulations concerning the proper safeguarding and handling of classified information.

Here, based on the record evidence, the government established its case under Guideline H. A security concern is raised

by Applicant's marijuana use on at most seven occasions. While a youthful college student, he smoked marijuana no more than five times while attending parties or other social settings. Since his college graduation, Applicant smoked marijuana twice, once in February 2003, and then again in August or September 2003, both times while attending parties where a joint was passed to him. He has not used marijuana since then. Given these circumstances, DC 1⁽¹²⁾ applies against Applicant. Aggravating the situation, Applicant used marijuana in 2003 after he submitted his security-clearance application, although without knowing he had been granted an interim security clearance. Although argued by Department Counsel, DC 5⁽¹³⁾ does not apply because there is no evidence showing Applicant was the subject of a prescribed drug treatment program, as required by the first sentence of DC 5.⁽¹⁴⁾ The remaining DC do not apply based on the facts and circumstances here. The concern here is Applicant's illegal drug involvement is indicative of irresponsible behavior, poor judgment, and it calls into question his willingness or ability to follow the law.

Turning to the mitigating conditions under the guideline, MC 1⁽¹⁵⁾ applies in Applicant's favor. His last use of marijuana was August or September 2003, which is about 25 months ago. Given these circumstances, his illegal drug involvement is not recent.⁽¹⁶⁾ Applicant also receives credit under MC 3⁽¹⁷⁾ based on the following: (1) he has abstained from marijuana use for about 25 months; (2) his marijuana was quite limited or infrequent, at most seven times; (3) he has affirmatively stated his intention to abstain from marijuana as it is inconsistent with his professional and personal plans, including his upcoming marriage; and (4) he was completely candid and truthful with the government concerning his marijuana use. The remaining MC do not apply based on the facts and circumstances here.

Although Applicant's marijuana use raises a security concern, it 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.⁽¹⁸⁾ 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.⁽¹⁹⁾ 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.⁽²⁰⁾ More recently in 2004, the appeal board reversed an unfavorable decision against a 50-year-old applicant with a 28-year history of regular, although occasional, marijuana use culminating in his arrest for drug-related criminal conduct.⁽²¹⁾ So compared with these cases, Applicant's marijuana use while a youthful college student, along with his two uses in 2003, pales in comparison. I conclude Applicant's marijuana use is relatively minor or insignificant when viewed in the big picture.

Applicant has not used marijuana since August or September 2003, more than two years ago. He is no longer in the college environment where the vast majority (about 70%) of his marijuana use occurred. After his last use in 2003, he decided using marijuana was inconsistent with his personal and professional plans. At the hearing, I found Applicant to be sincere, honest, and credible. He candidly acknowledged his 2003 marijuana use was due to his own stupid decisions, and indeed he was quite foolish to use marijuana after submitting a security-clearance application. But I also believe Applicant has not used marijuana since then and does not intend to use it again. 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, I conclude the favorable evidence substantially outweighs the unfavorable evidence. Applicant has met his burden of persuasion under the Directive. Accordingly, Guideline H is decided for Applicant. In reaching my decision, I have

considered the evidence as a whole, both favorable and unfavorable, 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

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. Executive Order 10865, § 7.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

6. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

7. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

8. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

9. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

10. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

11. *Egan*, 484 U.S. at 528, 531.

12. E2.A8.1.2.1 Any drug abuse.

13. E2.A8.1.2.5. Failure to successfully complete a drug treatment program prescribed by a credentialed medical professional. 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. ISCR Case No. 02-24452 (August 4, 2004) at pp. 3 - 4 (administrative judge erred by applying DC 5 when the evidence showed applicant was never the subject of any prescribed drug treatment program as described in the first sentence of DC 5).

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

16. 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).

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

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

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

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

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