

KEYWORD: Drugs; Criminal Conduct

DIGEST: Applicant is 25 years old with a history of occasional cocaine and marijuana abuse, spanning 1995 through 2003, in addition to a 2001 DUI misdemeanor conviction. Applicant failed to mitigate security concerns arising from drug involvement but did for criminal conduct. Clearance is denied.

CASENO: 04-04425.h1

DATE: 10/26/2005

DATE: October 26, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-04425

DECISION OF ADMINISTRATIVE JUDGE

SHARI DAM

APPEARANCES

FOR GOVERNMENT

Jeff A. Nagel, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 25 years old with a history of occasional cocaine and marijuana abuse, spanning 1995 through 2003, in addition to a 2001 DUI misdemeanor conviction. Applicant failed to mitigate security concerns arising from drug involvement but did for criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

On March 18, 2005, the Defense Office of Hearings and Appeals (DOHA) under Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR, which is essentially an administrative complaint, detailed reasons under Guideline H (Drug Involvement) and Guideline E (Personal Conduct) why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant a security clearance to the Applicant. On April 6, 2005, DOHA filed an Amended SOR, withdrawing the allegations filed under Guideline E. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted.

On April 13, 2005, Applicant answered the SOR in writing and elected to have the case decided on the written record. (1) On June 30, 2005, Department Counsel prepared a File of Relevant Material (FORM) and provided Applicant with a complete copy. (2) Applicant had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. Applicant received the file on July 14, 2005, and submitted additional information on July 25, 2005. The Department Counsel did not object to those additional documents. This case was assigned to me on August 25, 2005.

PROCEDURAL MATTERS

Contained within the FORM filed by the Department is a second Motion to Amend the SOR which added the following allegation:

Guideline J (Criminal Conduct): A history or pattern of criminal activity creates doubt about a persons judgement, reliability and trustworthiness.

A. You were arrested in November of 2001, by the [Sheriff] for Driving Under the Influence and were convicted pursuant to your plea agreement in January of 2002 of a wet reckless.

In his Response to the FORM Applicant answered and admitted the allegation. ⁽³⁾ Said Motion is granted.

FINDINGS OF FACT

In his answer Applicant admitted the allegations in the SOR contained in subparagraphs 1.a., 1.b., 1.d., and 1.e. under Guideline H. He denied the allegations in subparagraphs 1.c. and 1.f. He admitted subparagraph 1.a. under Guideline J of the Second Amended SOR. These admissions are incorporated into my findings of fact. After a complete review of the evidence in the record, I make the following additional findings of fact:

Applicant is a 25-year-old electrical engineer presently working for a federal contractor. He graduated college in June 2002, and applied for a security clearance in December 2002. ⁽⁴⁾ From January 1995 to July 2002, he used marijuana twenty to thirty times. ⁽⁵⁾ In 2000, he used psilocybin mushrooms which have a psychedelic effect. ⁽⁶⁾ Applicant used ⁽⁷⁾

cocaine twice in 2001. After signing the Security Clearance Application (SCA) in December 2002, he subsequently used marijuana twice and cocaine in July or August 2003. [\(8\)](#)

On November 1, 2001, Applicant was arrested for driving under the influence of alcohol. Pursuant to a plea agreement, Applicant was convicted of a misdemeanor on January 8, 2002. He was placed on probation for three years, fined \$775.00, and ordered to complete a 12-hour alcohol program. Applicant did not submit any evidence to document that he successfully completed the terms of the court imposed probation.

Applicant provided the results of a personally secured non-random urine screen, taken on July 20, 2005. The results were negative. [\(9\)](#)

Applicant's supervisor and colleague support of his request for a security clearance. [\(10\)](#)

In January 2004, Applicant said "It is possible I could use marijuana in the future, but if I did it would be an extremely rare occurrence [sic], I think I've grown out of it. I would never pay for it and I haven't in years." [\(11\)](#) In April, 2005, he retracted the previous statement about possible future use and said he would not use marijuana in the future. [\(12\)](#) Applicant claims he is remorseful about his previous drug use. [\(13\)](#)

POLICIES

Enclosure 2 of the Directive sets forth adjudication guidelines which must be considered in the evaluation of security suitability. An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the adjudicative process provision in Paragraph E2.2., Enclosure 2 of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. In addition, each security clearance decision must be based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically, these are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of

participation; (6) the presence or absence of rehabilitation and other 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. 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.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽¹⁴⁾ The government has the burden of proving controverted facts.⁽¹⁵⁾ The burden of proof is something less than a preponderance of the evidence.⁽¹⁶⁾ Once the government has met its burden, the burden shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against her.⁽¹⁷⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁸⁾

As noted by the Court in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), "it should be obvious that no one has a right to a security clearance"⁽¹⁹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽²⁰⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽²¹⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽²²⁾ 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.

In all adjudications, the protection of our national security is the paramount concern. The objective of the security clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration relevant circumstances, and applying sound judgment, mature thinking and careful analysis.

Based upon the allegations contained in the SOR and Amended SOR and a consideration of the evidence as a whole, the following adjudicative guidelines are pertinent to an evaluation of the facts of this case:

Guideline H - Drug Involvement: The security concern is improper or illegal involvement with drugs, raise 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.

Guideline J - Criminal Conduct: The security concern is a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of the appropriate adjudicative factors, I conclude the following with respect to the allegations set forth in the SOR and Amended SOR:

Guideline H: Drug Involvement

The government established its case under Guideline H. Based on Applicant's admissions in his responses to the allegations, Drug Involvement Disqualifying Condition (DI DC) E2.A8.1.2.1. (*Any drug abuse*), [\(23\)](#) applies to this case. Applicant used illegal drugs for a period of time spanning 1995 to July 2003.

In reaching a decision in this case, I considered the four mitigating conditions under Guideline H, and concluded that none apply. (1) Although Applicant claims that the last time he used cocaine and marijuana was July 2003, his two-year abstinence in contrast to eight years of sporadic use is not sufficient mitigation or evidence of rehabilitation at this time under Drug Involvement Mitigating Condition (DI MC) E2.A8.1.3.1. (*The drug involvement was not recent*). (2) Applicant's drug involvement consisted of more than one incident and upwards of 25, including three incidents after he applied for a security clearance. Hence, DI MC E2.A8.1.3.2. (*The drug involvement was an isolated or aberrational event*) is inapplicable. (3) In January 2004, Applicant equivocated about his intention to use drugs in the future. In April 2005, he retracted that equivocation. While the retraction may mitigate his prior statement, it does not nullify or discredit it, such that I am persuaded that Applicant has exhibited a clear intention not to abuse drugs in the future, as required under DI C E2.A8.1.3.3. (*A demonstrated intent not to abuse any drugs in the future*). (4) Applicant did not produce any evidence to prove that he completed the 12-hour program ordered by the court. As to the negative drug screen that was submitted as proof of rehabilitation, I give it little weight because there is nothing to indicate that it was a random sample. Hence, there is insufficient evidence to mitigate under DI MC E2.A8.1.3.4. (*Satisfactory completion of a prescribed drug treatment program, including rehabilitation and after care requirements, without recurrence of abuse, and a favorable prognosis by the credentialed medical professional*).

Guideline J: Criminal Conduct

The government also established its case under Guideline J. Based on Applicant's admission and the allegations underlying the DUI conviction, Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1. (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*) applies to this case.

I considered all the mitigating conditions under Guideline J pertinent to the above disqualification and concluded that Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1. (*The criminal behavior was not recent*), and CC MC E2.A10.1.3.2. (*The crime was an isolated incident*) are relevant. I do not find the DUI conviction in 2001 to be recent, albeit the only conviction noted in the record.

Based on the cumulative evidence, which includes Applicant's retraction of a previous statement about his intention to use drugs in the future and the last date of his drug use being July, 2003, I concluded that the evidence does not establish that Applicant is a current user of illegal substances within the purview of 10 USCS § 986 as alleged in the SOR.

I reviewed all the evidence in this case in evaluating Applicant's risk and vulnerability in protecting our national interest, including his present age, truthfulness, the letters of recommendation and his remorse. While those factors signal growth and maturity, they are insufficient to outweigh the fact that Applicant used drugs while on probation for a conviction of a crime that involved the use of alcohol, and within a year and a half of applying for a security clearance. Coupled with a previous cavalier attitude about the seriousness of his illegal conduct, I have doubts about Applicant's suitability for a security clearance at this time. Therefore, I am persuaded by the totality of the evidence in this case that it is not clearly consistent with the national interest to grant Applicant's application. Accordingly, Guideline H is decided against Applicant and Guideline J is decided for Applicant.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1: Guideline H (Drug Involvement) 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.: For the Applicant

Paragraph 2: Guideline J (Criminal Conduct) FOR THE APPLICANT

Subparagraph 2.a.: For the Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant a security clearance for Applicant. Clearance is denied.

Shari Dam

Administrative Judge

1. Item 5 (Answer to SOR, dated April 13, 2005).
2. The Government submitted eleven exhibits in support of its case.
3. Item 11 (Response to FORM, dated July 25, 2005) at 3.

4. Item 6 (Security Clearance Application, dated December 4, 2002) at 2-3.
5. Item 5, *supra* note 1, at 1.
6. Item 8 (Statement of Subject, dated January 2, 2004) at 2.
7. *Id.* at 1.
8. *Id.*
9. Government Exhibit 11, *supra* note 3, at 7.
10. *Id.* at 9 and 10.
11. *Id.* at 2.
12. Item 5, *supra* note 1, at 1.
13. Item 11, *supra* note 3, at 5.
14. ISCR Case No. 96-0277 at 2 (App. Bd., Jul. 11, 1997).
15. ISCR Case No. 97-0016 at 3 (App. Bd., Dec. 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.
16. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).
17. ISCR Case No. 94-1075 at 3-4 (App. Bd., Aug. 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.
18. ISCR Case No. 93-1390 at 7-8 (App. Bd., Jan. 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.
19. *Egan*, 484 U.S. at 528.
20. *Id.*
21. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
22. Executive Order No. 10865 § 7.
23. E.2.A8.1.1.2.1. Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.