

KEYWORD: Drugs; Personal Conduct

DIGEST: The Applicant's admitted marijuana use ended 15 months before the record closed, and he indicates a credible intent not to use marijuana in the future. The Applicant did falsify a Government questionnaire about his marijuana use. However, that conduct was isolated, not recent and he provided correct information voluntarily, and without being confronted, at the first opportunity. Under the whole person standard, adverse inference is overcome. Clearance is granted.

CASENO: 04-07373.h1

DATE: 01/19/2006

DATE: January 19, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-07373

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Ken Roberts, Esquire

Dempsey, Roberts & Smith

SYNOPSIS

The Applicant's admitted marijuana use ended 15 months before the record closed, and he indicates a credible intent not to use marijuana in the future. The Applicant did falsify a Government questionnaire about his marijuana use. However, that conduct was isolated, not recent and he provided correct information voluntarily, and without being confronted, at the first opportunity. Under the whole person standard, adverse inference is overcome. Clearance is granted.

STATEMENT OF THE CASE

On April 21, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the 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 the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on May 13, 2005, and requested a hearing. The case was received by the undersigned on June 13, 2005, and a Notice of Hearing was issued on July 6, 2005. Amended Notices of Hearing were issued on July 14, 2005, and July 27, 2005.

A hearing was held on August 24, 2005, at which the Government presented six documentary exhibits. Testimony was taken from the Applicant, who called five additional witnesses and also submitted 17 exhibits. The transcript was received on September 6, 2005.

FINDINGS OF FACT

The Applicant is 37, single and has a high school diploma with three years of college. He is employed by a defense contractor as Systems Administrator, and he seeks to obtain a DoD security clearance in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a security clearance, based upon the allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

Paragraph 1 (Guideline H - Drug abuse). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he abuses illegal drugs.

The Applicant first began using marijuana in about 1985. He continued to use it on an irregular basis until approximately 2002. According to the Applicant, he used marijuana at least "several dozen times" until his last use sometime before April 2004. He also purchased marijuana on occasion during the period that he was using it. (Government Exhibit 6 at 6-8.)

The Applicant testified that he stopped using marijuana for several reasons. He did not desire it any more, he was getting older, and he did not want to put himself in a position where he could be vulnerable to coercion. The Applicant understands that his company prohibits illegal drug use in the workplace. (Transcript at 107-108.)

Paragraph 2 (Guideline E - Personal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he intentionally falsified material aspects of his personal background during the clearance screening process.

On December 23, 2002, the Applicant completed an official DoD questionnaire in which he stated that he had never used marijuana. (Government Exhibit 1, question 27.) This statement was a false answer to a material question pertaining to the Applicant's former involvement with illegal substances.

The Applicant was subsequently interviewed by a Special Agent of the Defense Investigative Service (DIS) in April 2004. In that interview, before being confronted about it, the Applicant voluntarily revealed his drug abuse and his falsification of the questionnaire. (Government Exhibit 6 at 6-8, Transcript at 86-87.)

The Applicant stated that he had falsified his drug information for several reasons. He did not feel that his occasional marijuana use could constitute a security risk, he believed it to be a violation of his privacy and he did not see how it could be an issue. He also stated, "I was strongly counseled by friends not to disclose." (Government Exhibit 6 at 8.) It turns out that some of these people work at his employer and have security clearances. (Transcript at 85-86, 104-106.)

He further stated that he had wrestled with the drug use question for several months after initially receiving the questionnaire to fill out. He stated, "The reasons I am now disclosing these facts are 1) I realize it is not for me to judge security risks, 2) I relinquish certain privacies as a matter of course of getting a security clearance, 3) this is a judgment I make, not my friends, and 4) I am an inherently honest person, and it bothers me greatly to live with even a small duality, and therefore it is an issue for me." (Government Exhibit 6 at 8.)

Question 21 of the same questionnaire asked the Applicant whether he had ever been charged with or convicted of any felony offense. He answered, "NO" to this question. In fact, it appears that the Applicant had been arrested for Felony Hit and Run in connection with an accident in 1989. However, he was actually charged with a misdemeanor offense of Hit and Run. (Government Exhibit 3.) The Applicant has consistently argued that, to the best of his knowledge, he had only been charged with a misdemeanor. (Transcript at 91-93.) He denied this particular allegation in the SOR.

Mitigation.

Two of the Applicants closest friends testified on his behalf. One is a non-practicing attorney, the other is a medical doctor. Each stated that the Applicant is one of the most trustworthy, ethical people that they know. These men have trusted the Applicant in important areas of their lives and would do so again. (Transcript at 16-18, 27-30.)

Several of the Applicant's co-workers also testified on his behalf, including his current and immediate past supervisors. These people also state that they would trust the Applicant in important areas of their lives, including safe-guarding their children. In addition, the Applicant is described as an ethical, trustworthy person with integrity who takes his job

responsibilities very seriously. (Transcript at 51, 66-67, 75, 80.)

Finally, several other co-workers of the Applicant submitted letters of recommendation on his behalf. The Applicant is described as "responsible" (Applicant's Exhibit C) and "a man of his word" (Applicant's Exhibit D).

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case will be set forth under CONCLUSIONS, below.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- a. The nature, extent and seriousness of the conduct

- b. The circumstances surrounding the conduct, to include knowledgeable participation

- c. The frequency and recency of the conduct

- d. The individual's age and maturity at the time of the conduct

e. The voluntariness of participation

f. The presence or absence of rehabilitation and other pertinent behavior changes

g. The motivation for the conduct

h. The potential for pressure, coercion, exploitation or duress

i. The likelihood of continuation or recurrence."

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in acts of drug abuse and falsification that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the granting of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant has used marijuana (Guideline H); and that he falsified a Government questionnaire concerning his marijuana use (Guideline E).

The Applicant, on the other hand, has successfully mitigated the Government's case. Turning first to his marijuana use, the Applicant has mitigated the security significance of this conduct. While the Applicant used marijuana for several years, he was not a habitual user. The marijuana use ended at least 15 months before the hearing, and there was no extensive use for years before that. His testimonial evidence, which was credible, clearly indicates that he has made the decision to move forward in his life without marijuana. It is clear that his decision to stop using marijuana was not a hard one for him to make and one that he is comfortable with.

Disqualifying Conditions E2.A8.1.2.1. *Any drug abuse*, and E2.A8.1.2.2. *Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution* apply to this case. However, Mitigating Conditions E2.A8.1.3.1. *The drug involvement was not recent*, and E2.A8.1.3.3. *A demonstrated intent not to use drugs in the future* also applies. Paragraph 1 is found for the Applicant.

The Applicant did knowingly falsify his Security Clearance Application concerning his use of marijuana. What is also obvious is that the Applicant was very disturbed by his conduct. It is to his benefit that he came forward voluntarily and discussed these issues without being confronted, when he was interviewed by the Defense Security Service. As previously discussed, during that interview he admitted both the marijuana use and his falsification. Based on all of the evidence presented, it is clear that his decision to falsify the questionnaire was an aberration brought on by fear and bad advice. The testimony of his witnesses, none of whom were among those who gave him the bad advice, was uniformly to the Applicant's benefit. His own testimony showed a man who had made a bad mistake, agonized over that bad mistake, and took what was to him the first opportunity to correct that mistake.

The Applicant answered Question 21, concerning past felony arrests or charges, to the best of his knowledge and belief. It had been 13 years since the incident and the fact is the Applicant was charged with a misdemeanor. Since the Applicant denied this particular allegation, the Government had to show that he intentionally falsified the answer. The Government's evidence does not support that conclusion, especially when the Applicant openly admitted to the more

serious incident of falsifying information on recent marijuana use.

Disqualifying Condition E2.A5.1.2.2. *The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities* applies to this case. However, Mitigating Conditions E2.A5.1.3.2. *The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily,* and E2.A5.1.3.3. *The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts* also apply. In my opinion, the Applicant has mitigated the allegations and Paragraph 2 is found for the Applicant.

In addition, application of the General Factors is appropriate and supports a decision in the Applicant's favor. The Applicant is motivated to be truthful with the Government in the future (factor g.), he shows considerable evidence of rehabilitation (factor f.), and, under the circumstances of this case, the probability that the Applicant will use drugs or falsify questionnaires in the future is virtually nil (factor i.). I have specifically considered in my decision the fact that the Applicant continued to use marijuana for at least a year after filling out the questionnaire. I weighed this, and the fact of his falsification, against the testimony of the Applicant and his witnesses that he is a trustworthy person who has moved past drug abuse and admits he made grave errors. Using the whole person concept, weighing all the evidence, I find that the Applicant is eligible for a clearance.

On balance, it is concluded that the Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the Government's Statement of Reasons.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1: For the Applicant.

Subparagraph 1.a.: For the Applicant.

Subparagraph 1.b.: For the Applicant.

Paragraph 2: For the Applicant.

Subparagraph 2.a.: For the Applicant.

Subparagraph 2.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 the Applicant.

Wilford H. Ross

Administrative Judge