

DATE: March 26, 2007

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-08747

DECISION OF ADMINISTRATIVE JUDGE

EDWARD W. LOUGHRAN

APPEARANCES

FOR GOVERNMENT

Gina Marine, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 32-year-old employee of a defense contractor. He smoked marijuana, sometimes on a daily basis, for about four years from 1998 to September 2002, while holding a Top Secret clearance and access to Sensitive Compartmented Information. Applicant was cited or arrested for his marijuana possession and use on three occasions. He was cited for attempting to board an airplane with marijuana in his luggage, and was stopped by the police on two occasions for speeding after he smoked marijuana while driving. Applicant's last arrest for marijuana occurred about five weeks after he stated to his Facility Security Officer that he did not intend to use illegal drugs in the future. Applicant failed to mitigate his drug involvement. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On May 16, 2005, DOHA issued a Statement of Reasons⁽¹⁾ (SOR) detailing the basis for its decision—security concerns raised under Guideline H (Drug Involvement) of the Directive. Applicant answered the SOR in writing on May 23, 2005, and elected to have a hearing before an administrative judge. The case was assigned to another administrative judge on June 9, 2006, and reassigned to me on December 18, 2006. The Notice of Hearing was dated January 5, 2007. Applicant did not receive the Notice of Hearing within fifteen days of the hearing. Department Counsel provided the information to the Applicant. Applicant waived the 15 day written notice requirement.⁽²⁾ With the consent of the parties, I convened a hearing on January 26, 2007, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government offered eight exhibits that were marked as Government Exhibits (GE) 1 through 8, and admitted without objection. Applicant testified and offered eight exhibits that were marked Applicant Exhibits (AE) A through H, and admitted without objection. DOHA received the hearing transcript (Tr.) on February 5, 2007.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR, are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 32-year-old employee of a defense contractor. He served in the United States Army from 1993 to 1998, and received an Honorable Discharge. Applicant graduated from college in 2004. He is divorced and has one child. Applicant received a Top Secret security clearance in 1994, while serving in the Army. As part of his background investigation, Applicant made an affirmative statement that he did not intend to use illegal drugs in the future. Since leaving the Army, Applicant worked for several defense contractors, all requiring a security clearance.⁽³⁾

Several months after Applicant left the Army, he began to smoke marijuana. Applicant attributed the marijuana use to curiosity, and that he enjoyed the company of his friends that smoked marijuana:

It was more curiosity. I mean, once I felt comfortable because, I mean, outside of them being marijuana smokers they were good guys. They were cool people to hang around outside of them being marijuana smokers.⁽⁴⁾

Once he started smoking marijuana, Applicant did it on a regular basis. He would smoke marijuana mostly on the weekends, several times a month. Initially he would pay a share of the price for the marijuana, eventually purchasing it on his own. Applicant knew using marijuana while holding a security clearance was against Department of Defense policy, and also against the law. Illegal drug use was also against his employer's policy.⁽⁵⁾

Applicant was cited on July 2, 2001, for speeding, and possession of marijuana. Applicant and a few friends were in his car smoking marijuana and riding around. Applicant was later stopped for speeding for traveling 80 miles per hour (MPH) in a 65 MPH zone. The police officer discovered remnants of a marijuana cigarette in the ashtray. Applicant was fined, ordered to serve 100 hours of community service, and his driver's license was suspended. Charges were dismissed after Applicant completed his community service.⁽⁶⁾

By about June 2002, Applicant's marijuana use had increased to an almost daily occurrence.⁽⁷⁾ In July 2002, Applicant attempted to transport marijuana on a plane. He had two marijuana cigarettes in his luggage when it was discovered by the airport security personnel. Applicant was cited for possession of marijuana. Applicant lost the citation. He contacted the airport and their law enforcement and security personnel, but no record of the citation was discovered.⁽⁸⁾

Applicant submitted a security clearance application, Standard Form 86 (SF-86), on July 30, 2002. At that time, Applicant possessed a Top Secret clearance and access to Sensitive Compartmented Information (SCI).⁽⁹⁾ Applicant listed the above two marijuana citations. He listed his marijuana use from April 1, 1998 to July 13, 2002, as "socially" and "periodically." Under remarks, Applicant wrote:

I have used marijuana socially since 1998, but I have realized that using it can adversely affect my career. I will seek ALL steps possible to help me conquer this problem and I hope my past shortcomings will not be held against me in this clearance process.⁽¹⁰⁾

Based upon the information in the SF-86, Applicant's Facility Security Officer (FSO) interviewed Applicant on August 1, 2002. Applicant admitted the two citations for possession of marijuana. He told the FSO that the last time he smoked marijuana was July 13, 2002, and that he had no intention of smoking marijuana again. Applicant was employed with a different defense contractor at the time of the first citation. The FSO checked with the FSO of Applicant's previous employer. The previous employer's FSO stated that Applicant did not report the first citation. The FSO submitted a Report of Adverse Action on August 1, 2002, detailing the above information.⁽¹¹⁾

Despite Applicant's statement to his FSO that he had no intention of smoking marijuana again, Applicant continued to smoke marijuana. On the morning of September 4, 2002, Applicant was driving his car and smoking marijuana. I take administrative notice that September 4, 2002, was a Wednesday. Applicant was driving on the freeway and was stopped at approximately 8:33 A.M., for speeding. The police officer clocked Applicant at 78 MPH. The police officer detected the odor of marijuana smoke from the car. He asked the Applicant if he was smoking marijuana, and Applicant stated that he smoked marijuana at his home. Applicant was arrested. A search incident to the arrest revealed rolling papers

and 5.5 grams of marijuana. Applicant was charged with possession of marijuana and possession of drug paraphernalia. Applicant received probation before judgment for the paraphernalia charge, and received a fine of \$500, which was suspended, and \$55 court costs. The possession of marijuana charge was placed on the STET docket, with the condition that Applicant complete 40 hours of community service and complete a controlled dangerous substance program. On November 30, 2005, the court ordered the records of Applicant's arrest and court hearings expunged.⁽¹²⁾

Applicant sought counseling through his Employee Assistance Program. He attended three counseling sessions for cannabis abuse on September 30, October 25, and November 1, 2002. On November 26, 2002, his counselor wrote, "Applicant demonstrated increased knowledge of the effects of cannabis on his mind and body as well as the impact it can have on his future."⁽¹³⁾ Applicant reported abstinence from marijuana, which was verified by a clean urine screen on November 1, 2002. The counselor did not make any further treatment recommendations at that time.⁽¹⁴⁾

Applicant was interviewed by a Special Agent of the Defense Security Service on October 20, 2003, and provided a written statement. Applicant discussed his marijuana use in the statement. Applicant consistently, with one exception, stated his marijuana use was from April 1998 to September 2002.⁽¹⁵⁾ Applicant discussed his arrests and his counseling in November 2002. Immediately after discussing his counseling, Applicant wrote:

I was motivated to stop smoking marijuana because I realized that it was going to destroy my life and career and I have a child to support. I have not used any marijuana since Sep 03 and I do not intend to smoke any marijuana in the future.⁽¹⁶⁾

Applicant testified that "Sep 03" was a mistake, and that the statement should have read, "Sep 02."⁽¹⁷⁾ After considering Applicant's response to the SOR, all the evidence, and gauging Applicant's credibility on this matter, I am convinced Applicant intended the statement to read "Sep 02." When the statement is read in its entirety, the only logical conclusion is that there was a typographical error. The entire focus of the statement, as it related to Applicant's marijuana use, was that it ended around the time he was arrested in September 2002. The statement was taken in October 2003. Common sense dictates that the investigator would have followed up on a statement by Applicant that he smoked marijuana as recently as one month previous to the interview. The fact that the investigator did not follow up on this aspect, bolsters Applicant's assertions that the statement should have read "2002." The only evidence that Applicant used marijuana after September 2002, is the statement and Applicant's response to the SOR. There is no other independent evidence of marijuana use after September 2002.

Applicant has stated his heaviest use of marijuana was the last four months he used it, when it was on an almost daily basis. He attributed the heavy use to the stress surrounding his separation from his wife. He testified that through his counseling, he now handles stress better.⁽¹⁸⁾

Applicant believes marijuana should be legalized, but does not actively pursue that agenda. He stated:

Honestly I feel like it would be a good thing because if marijuana was legal then I guess - - I don't know. It would be something I wouldn't have to worry about if I wanted to smoke or something like that, I guess.⁽¹⁹⁾

Applicant testified that he still feels the urge to use marijuana, and that if marijuana was legal and would not affect his career, that he would use it again.⁽²⁰⁾

Applicant testified that he has distanced himself from his friends that used marijuana. Applicant's last exposure to marijuana was when he smelled marijuana smoke while at a New Year's Eve party at a hotel this past holiday season.⁽²¹⁾

Applicant is highly regarded by his employer, and in his community. His latest performance appraisal reported Applicant as, "Very Good - Results clearly exceed most position requirements. Performance is of high quality and is achieved on a consistent basis."⁽²²⁾ Character letters on his behalf praise him as dependable, professional, enthusiastic, friendly, warm, welcoming, responsible, honest, and courteous.⁽²³⁾

POLICIES

"[N]o one has a 'right' to a security clearance." (24) 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." (25) The President 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." (26) An applicant has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance. The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials. (27) Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information. (28) The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant. 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. (29)

The Directive sets forth potentially disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the adjudicative process factors listed in ¶ 6.3 and ¶ E2.2.1., of the Directive.

Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, pertaining to the adjudicative guideline are set forth and discussed in the conclusions section below.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

Guideline H, Drug Involvement

Improper or illegal involvement in 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.

The information presented by the government of Applicant's possession and use of marijuana between 1998 and September 2002, raises Drug Involvement Disqualifying Conditions (DI DC) ¶ 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*). Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction. Marijuana is a mood or behavior altering substance that is banned under the Controlled Substance Act of 1970.

The Drug Involvement Mitigating Conditions (DI MC) to consider in Applicant's case are ¶ E2.A8.1.3.1 (*The drug involvement was not recent*); ¶ E2.A8.1.3.2 (*The drug involvement was an isolated or aberrational event*); ¶ E2.A8.1.3.3 (*A demonstrated intent not to abuse any drugs in the future*); and ¶ E2.A8.1.3.4 (*Satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse and a favorable prognosis by a credentialed medical professional*). Applicant admitted using marijuana for a four-year period, with the last four months on an almost daily basis. Clearly this was not an isolated or aberrational event. DI MC ¶ E2.A8.1.3.2 is not applicable. Applicant' substance abuse counseling does not meet the strict requirements of DI MC ¶ E2.A8.1.3.4, but it will be considered when looking at the "whole person."

Applicant used marijuana for about four years, while working for federal contractors, and while holding a Top Secret clearance, with access to SCI. Applicant was not an adolescent when he started smoking marijuana. He had already served almost five years in the military, and held a Top Secret clearance, when he decided to start smoking marijuana out of "curiosity." He was aware of the policy of the Department of Defense relating to the use of illegal drugs. He knew marijuana use was illegal, and that he was committing a crime every time he possessed and used marijuana. Applicant

continued to use marijuana after he was cited on July 2, 2001, for speeding and possession of marijuana. Applicant was cited again in July 2002, for possession of marijuana, after he attempted to board an airplane with marijuana in his bags. That also did not deter Applicant from using marijuana. Applicant did not immediately report the citation, but did list his marijuana use and two citations on the security clearance application he submitted on July 30, 2002. This led Applicant's FSO to question Applicant about his marijuana use. On August 1, 2002, Applicant told the FSO that he last used marijuana on July 13, 2002, and that he had no intention of smoking marijuana again. Despite that promise, Applicant continued to use marijuana until September 2002, when Applicant was arrested at about 8:30 on a Wednesday morning while he was speeding and smoking marijuana.

Applicant's statements at his hearing cause me concern. Applicant admits he still has the urge to smoke marijuana. While not an active crusader, he does support the legalization of marijuana. He also admitted that if marijuana was legal and would not affect his career, that he would smoke it again. For four years, Applicant was unconcerned that he was committing illegal acts, and jeopardizing his career. Applicant stated that the almost daily use of marijuana during the last four months of his use was related to the stress of his separation from his wife. I am concerned that should Applicant once again be placed in a stressful position, that his urge to use marijuana will resurface and he will once again succumb to the temptation to smoke marijuana. Applicant's actions in the past have shown that respect for the law alone, or even the threat of loss of his job, have been unable to keep him from using drugs.

There is no "bright line" rule as to what constitutes "recent" under the Directive. ⁽³⁰⁾ The determination must be based "on a careful evaluation of the totality of the record within the parameters set by the directive." ⁽³¹⁾ If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." ⁽³²⁾

I considered the time since Applicant last used marijuana, and I also considered the facts and circumstances surrounding Applicant's marijuana use, as well as his testimony at the hearing, as detailed above. I further considered Applicant's statement to the FSO that he did not intend to use drugs in the future, followed almost immediately by further drug use. Under the facts and circumstances of this particular case, I conclude Applicant's abstinence since September 2002, is insufficient to mitigate the concerns surrounding his four years of illegal drug use while holding a security clearance. Considering Applicant's previous failed promise, I also do not find Applicant's promise to abstain from the use of marijuana in the future, unless it is legalized, to be sufficient to mitigate Applicant's drug use under DI MC ¶ E2.A8.1.3.3.

Whole Person Analysis

The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. In evaluating Applicant's case, I have considered the adjudicative process factors listed in the Directive.

In evaluating Applicant's case under the whole person, I specifically considered all the facts and conclusions listed above. I considered Applicant's favorable character evidence, his military service, his positive job performance, his drug counseling, and his abstinence from illegal drugs since September 2002. Directive ¶ E2.2.1.6 (*rehabilitation and behavioral changes*), and ¶ E2.2.1.9 (*likelihood of continuation or recurrence*).

I also considered the numerous instances Applicant used illegal drugs for four years, with total disregard that he was committing illegal acts. Directive ¶ E2.2.1.1 (*nature, extent, and seriousness of the conduct*). His use of marijuana was frequent, sometimes daily. Directive ¶ E2.2.1.3 (*frequency and recency*). Applicant started using drugs after he served almost five years in the Army. He was 27 years old when he was last arrested for drugs in September 2002. Directive ¶ E2.2.1.1 (*individual's age and maturity at the time of the conduct*). Applicant used drugs many times without getting caught. The three times he was caught show insight into Applicant's extremely poor judgment. On two of the occasions, Applicant was smoking marijuana while driving, and was stopped while speeding. The last such occasion occurred at around 8:30 A.M. on a Wednesday. Applicant was also caught attempting to transport marijuana aboard an airplane. Directive ¶ E2.2.1.2 (*circumstances surrounding the conduct, to include knowledgeable participation*). Applicant did all

this while holding a Top Secret clearance with access to SCI. Directive ¶ E2.2.1.8 (*potential for pressure, coercion, exploitation, or duress*). This elevates Applicant's poor judgment and disregard for the law to a new level. Applicant continues to feel the urge to use marijuana, and specifically stated he would use it again if it was legal, and would not impact his job. Directive ¶ E2.2.1.7 (*motivation for the conduct*). I cannot determine with any degree of certainty that his marijuana use will not recur. Directive ¶ E2.2.1.9 (*likelihood of continuation or recurrence*).

After weighing the disqualifying and mitigating conditions and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on his drug involvement.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline H: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: Against Applicant

Subparagraph 1.h.: Against Applicant

Subparagraph 1.i.: Against 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 or continue a security clearance for Applicant. Clearance is denied.

Edward W. Loughran

Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).

2. Tr. at 9-10; Hearing Exhibit I.

3. Tr. at 20-22; Applicant's response to SOR; GE 1-2.

4. Tr. at 27.

5. Tr. at 27-29.

6. Tr. at 36-37; Applicant's response to SOR; GE 2 at 8; GE 3, 5, 8.

7. Tr. at 30; GE 2 at 7.
8. Tr. at 37-39; Applicant's response to SOR; GE 2 at 8; GE 3.
9. GE 1, 3.
10. GE 1 at 11.
11. GE 3.
12. Tr. at 40-41; Applicant's response to SOR; GE 1, 2, 6, 7; AE E.
13. AE G.
14. *Id.*
15. AE 2 at 7.
16. *Id.* at 9.
17. Tr. at 22-25, 52-53.
18. Tr. at 30-32, 47-49; AE 2 at 7.
19. Tr. at 33-34.
20. *Id.* at 50.
21. Tr. at 34.
22. AE C.
23. AE D.
24. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).
25. *Id.* at 527.
26. Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960).
27. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).
28. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
29. Exec. Or. 10865 § 7.
30. *See, e.g.*, ISCR 02-10454 at 10 (App. Bd. Nov. 23, 2004).
31. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).
32. *Id.*