

KEYWORD: Drugs; Personal Conduct

DIGEST: Applicant is a self-employed electrician. For several years, when on vacation in a Carribean island, he occasionally smoked marijuana on a public beach with island residents and other vacationers. He has not smoked marijuana in two years, and does not intend to do so in the future. He failed to reveal an arrest for simple assault in 2002 when completing his security clearance application in 2004. He did reveal a previous driving while intoxicated arrest and his marijuana use. He has mitigated the government's concerns under Guidelines H and E. Clearance is granted.

CASENO: 04-11921.h1

DATE: 01/26/2006

DATE: January 26, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-11921

DECISION OF ADMINISTRATIVE JUDGE

MARY E. HENRY

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

William John Hickey, Esq.

SYNOPSIS

Applicant is a self-employed electrician. For several years, when on vacation in a Caribbean island, he occasionally smoked marijuana on a public beach with island residents and other vacationers. He has not smoked marijuana in two years, and does not intend to do so in the future. He failed to reveal an arrest for simple assault in 2002 when completing his security clearance application in 2004. He did reveal a previous driving while intoxicated arrest and his marijuana use.

He has mitigated the government's concerns under Guidelines H and E. Clearance is granted.

STATEMENT OF THE CASE

On June 10, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, 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 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 Applicant. Specifically, the SOR set forth security concerns arising under Guideline H, Drug Involvement, and Guideline E, Personal Conduct, of the Directive. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On July 28, 2005, Applicant submitted a notarized response to the allegations and requested a hearing.

This matter was assigned to me on November 17, 2005. A notice of hearing was issued on November 23, 2005, and a hearing was held on December 21, 2005. Three government exhibits and eight Applicant Exhibits were admitted into evidence. Two documents were admitted for the limited purpose of administrative notice. Applicant and two witnesses testified. The hearing transcript was received on January 5, 2006.

FINDINGS OF FACT

Applicant admitted, with explanation, the allegations in subparagraphs 1.a., 2.a., and 2.a.(a) of the SOR. He, however, denied that he intentionally and deliberately falsified his answers in his security application.⁽¹⁾ His admissions are incorporated here as findings of fact. After a complete review of the evidence in the record and upon due consideration, I make the following additional findings of fact:

Applicant is a 47-year-old electrician and the chief executive officer/owner of a company providing power services to the computer and communications industry.⁽²⁾ His company seeks to provide services to the government.⁽³⁾ He completed a security clearance application (SF 86) in April 2004.⁽⁴⁾

Applicant graduated from high school, and attended college for two years.⁽⁵⁾ Following four years of intensive training through the union, he became a licensed electrician.⁽⁶⁾ He owns his own business.⁽⁷⁾ He is married and has a ten-year-old son.⁽⁸⁾ He coaches his son's baseball team and his family takes karate lessons.⁽⁹⁾ His finances are solid.⁽¹⁰⁾

Applicant and his wife own a time share in a Caribbean island.⁽¹¹⁾ Between January 1997 and January 2004, they have vacationed in their time share for one week each year.⁽¹²⁾ Some years, but not every year he vacationed on the island, he smoked a marijuana cigarette with island locals, one or maybe two evenings during his vacation.⁽¹³⁾ He would go to the beach and relax in a gazebo near the water.⁽¹⁴⁾ The island locals provided the marijuana cigarette, which he smoked/shared with others sitting in the gazebo.⁽¹⁵⁾ He estimated he shared a marijuana cigarette may be ten times during this period.⁽¹⁶⁾ Applicant smoked the marijuana for recreational purposes; is not a regular user, but is an acknowledged occasional user; and is not dependent upon drugs.⁽¹⁷⁾ He did not purchase or sell the drug nor did he pay any money to use it.⁽¹⁸⁾ At this time, he did not realize that smoking marijuana was illegal on the island, although he now realizes it is.⁽¹⁹⁾ He did know that marijuana was illegal in the United States (U.S.), and has never used in the U.S.⁽²⁰⁾ He has not smoked marijuana in the last two years, and has expressed an intent not to smoke it any time and any where.⁽²¹⁾ He does not associate with drug users.⁽²²⁾

In April 2002, Applicant attended a sporting event.⁽²³⁾ After drinking, he took a walk.⁽²⁴⁾ He observed a woman who appeared to need assistance.⁽²⁵⁾ He put his arm around her waist and escorted her towards the women's bathroom.⁽²⁶⁾ She reported him to the event security.⁽²⁷⁾ They took him in custody until the local police arrived.⁽²⁸⁾ The police arrested and charged him with simple assault, a misdemeanor.⁽²⁹⁾ They transported him to the police station, photographed and fingerprinted him, then placed him in lockup. He appeared in court, but as part of a pretrial diversion program, the court directed him to perform 40 hours of community service, which he did.⁽³⁰⁾ At the conclusion of his service, the court dismissed his case before making a determination.⁽³¹⁾ He understood from the prosecutor that the dismissal of his case meant that his arrest and criminal charge never existed.⁽³²⁾

When Applicant completed his security clearance application, he answered "no" to question 26, which asked if in the last seven years, he had ever been arrested for, charged with or convicted of any offenses not previously listed, specifically noting that he must identify cases sealed or otherwise stricken from the record.⁽³³⁾ Applicant admitted that his "no" answer was false.⁽³⁴⁾ Based on information provided to him at the disposition of his assault case and his misreading of the question, he did not list this incident because he believed not only that his case had been expunged, but that expungement meant that it never existed.⁽³⁵⁾ He did list his arrest in 1998 for Driving While Intoxicated (DWI) and his marijuana use.⁽³⁶⁾

Applicant's wife and a long-time friend and business associate testified on his behalf. Both describe him as trustworthy and law abiding.⁽³⁷⁾ Neither have ever seen him use illegal drugs, although his wife knew that he smoked marijuana while on vacation.⁽³⁸⁾ He has full access to secured sites for business and is trusted by business.⁽³⁹⁾ Two business clients submitted statements attesting to his trustworthiness and honesty, and his straightforward approach to his work and business.⁽⁴⁰⁾

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 and mitigating conditions 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.⁽⁴¹⁾ The government has the burden of proving controverted facts.⁽⁴²⁾ The burden of proof is something less than a preponderance of the evidence.⁽⁴³⁾ 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 him.⁽⁴⁴⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁴⁵⁾

No one has a right to a security clearance⁽⁴⁶⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽⁴⁷⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽⁴⁸⁾ Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." The decision to deny an individual a security clearance is not necessarily a determination as to the allegiance, loyalty, and patriotism of an applicant.⁽⁴⁹⁾ 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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

Drug Involvement - Guideline H: 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.

Personal Conduct - Guideline E: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulation could indicate that the person may not properly safeguard classified information.

CONCLUSIONS

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

The government has established its case under Guideline H. Drug Involvement Disqualifying Condition (DI DC) E2.A8.1.2.1. (*Any drug abuse*⁽⁵⁰⁾), and DI DC E2.A8.1.2.2. (*Illegal drug possession, including cultivation, process, manufacture, purchase sales, or distribution*) apply. Between January 1997 to January 2004, Applicant used marijuana, an illegal drug under the Control Substances Act of 1970 and the laws of the Caribbean island, once or twice some years during his one week Caribbean vacation. His use consisted of smoking a shared marijuana cigarette with others. He did not purchase, cultivate, manufacture, distribute, or sell drugs. He was given the marijuana cigarette by citizens of the island. His conduct clearly falls under these disqualifying conditions.

I considered all the Drug Involvement Mitigating Conditions (DI MC) and conclude that DI MC E2.A8.1.3.3. (*A demonstrated intent not to abuse any drugs in the future*) applies.⁽⁵¹⁾ In his sworn statement and at the hearing, Applicant stated that he did not intend to use marijuana again. Although he has not used marijuana in two years, he has not returned to the Caribbean island in two years. While this fact is a negative, I find his expressed intent not to use Marijuana in the future credible and entitled to greater weight.

I have also considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. I am persuaded by the totality of the evidence, that Applicant cannot be compromised because of his occasional use of marijuana while on vacation. He has a solid work record and is respected by his colleagues and customers. Because they trust him, customers have provided him access to work sites containing sensitive and/or proprietary information. He is viewed as honest by those who work with him and those who deal with him in business. He has developed a successful business through hard work and client trust. He has mitigated the government's concerns under Guideline H.

To established its case under Guideline E, the government must show that Applicant's omission, concealment or falsification in regards to the 2002 arrest was a relevant and material fact and was deliberate. The government alleges that Applicant falsified material facts on his latest security clearance application when he failed to list his arrest for DUI in September, 2002. Thus, Personal Conduct Disqualifying Conditions (PC DC) E2.A5.1.2.2. (*The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire...*) and PC DC E2.A5.1.2.3. (*Deliberately providing false or misleading information concerning relevant and material matters to an investigator...*) apply. Although he admits that his answer to Question 26 is false, Applicant has denied the government's allegation of intentional falsification.⁽⁵²⁾ When an allegation of intentional falsification is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or

state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omissions occurred. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun.9, 2004)).

The government has established Applicant was arrested for simple assault on April 1, 2002, a material fact. This, his "no" answer to question 26 is false. At the time he completed the security clearance application, he knew that he had been arrested as he was taken to police headquarters and fingerprinted. However, before any court proceedings regarding the charges commenced, the court directed him to perform 40 hours of community service through its pre-trial diversion program. Upon proof of the completion of his service, the court dismissed his case. He relied upon the legal representation given him about the impact of the dismissal and expungement of his case. To his understanding, the dismissal and expungement of his case meant he had never been arrested or charged with this crime. Thus, he did not need to report it.

On cross-examination, he reread Question 26. He acknowledged that the question directs him to provide information on dismissed cases. He misread the question. While it may have been more prudent for him to have read the question carefully, list the arrest and discussed the circumstances, he reliance upon the representation of the prosecutor does not indicate that this omission was an intentional and deliberate act to deceive the government. He listed his 1998 DWI arrest. He also admitted his casual marijuana use from 1997 through 2004, which would not have been known except for his detrimental admission. He has not denied that he was arrested and charged with simple assault in 2002. When the investigator questioned him about the arrest, he willingly discussed the incident. He also testified about this incident. Because he provided other detrimental information and has been forthcoming about his arrest, the government has not established that he intentionally and deliberately failed to provide this information when he completed his security clearance application. Accordingly, for the reasons stated, I find that it is clearly consistent with the national interest to grant a security clearance to 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): FOR APPLICANT

Subparagraph 1.a: For Applicant

Paragraph 2, Guideline E (Personal Conduct): FOR APPLICANT

Subparagraph 1.a: For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant a security clearance for Applicant. Clearance is granted.

Mary E. Henry

Administrative Judge

1. Applicant's Response to SOR dated July 28, 2005 at 1, 3-4.
2. Tr. at 35, 38-40, 56; Applicant Exhibit H (Company brochure).
3. *Id.* at 44-45.
4. Government Exhibit 1 (Security Clearance Application, dated April 14, 2004) at 1.
5. Tr. at 57-58.
6. *Id.*
7. *Id.* at 38-40.
8. *Id.* at 32.
9. *Id.* at 33.

10. *Id.*; Applicant Exhibit C (Credit report score, dated November 11, 2005); Applicant Exhibit D (Credit summary report for 2003); and Applicant Exhibit E (Credit Report, dated June 11, 2004).
11. Tr. at 61.
12. *Id.* at 48.
13. *Id.*; Government Exhibit 2 (Applicant's signed statement, dated October 7, 2004) at 1.
14. Tr. at 49, 60; Government Exhibit 2, *supra* note 13, at 1.
15. *Id.*
16. Tr. at 49-50.
17. *Id.* at 50, 58; Government Exhibit 2, *supra* note 13, at 1.
18. Tr. at 60; Government Exhibit 2, *supra* note 13, at 1.
19. Tr. at 50, 59; Government Exhibit 2, *supra* note 13, at 2.
20. Tr. at 51.
21. *Id.* at 50, 60-61; Government Exhibit 2, *supra* note 13, at 2.
22. Tr. at 62.
23. *Id.* at 63-64; Government Exhibit 2, *supra* note 13, at 2-3.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*; Government Exhibit 3 (United States Department of Justice, Federal Bureau of Investigation, Criminal records information sheet, dated June 14, 2004) at 3.
30. Government Exhibit 2, *supra* note 13, at 2-3.
31. Tr. at 53-54; Applicant Exhibit B (Case disposition form, dated September 8, 2005) at 1-2.
32. Tr. at 53-54.
33. Government Exhibit 1, *supra* note 4, at 4.
34. Response to SOR, *supra* note 1, at 4.
35. Tr. at 53-54, 63.
36. Government Exhibit 4, *supra* note 4, at 4.
37. Tr. at 26, 35, 56.

38. *Id.* at 30, 34, 36-37; Government Exhibit 2, *supra* note 13, at 2.
39. Tr. at 24-25, 42, 44; Applicant Exhibit F-1 to F-4 (Copies of access passes).
40. Applicant Exhibit A (letter, dated July 21, 2005); Applicant Exhibit G (Affidavit, dated December 19, 2005).
41. ISCR Case No. 96-0277 (July 11, 1997) at 2.
42. ISCR Case No. 97-0016 (App. Bd., December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.
43. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).
44. ISCR Case No. 94-1075 (App. Bd., August 10, 1995) at 3-4; Directive, Enclosure 3, ¶ E3.1.15.
45. ISCR Case No. 93-1390 (App. Bd. Decision and Reversal Order, January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.
46. *Egan*, 484 U.S. at 531.
47. *Id.*
48. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
49. Executive Order No. 10865 § 7.
50. Drug abuse is defined in E2.A8.1.1.2.1 as including drugs materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970. Since Applicant smoked marijuana in a Caribbean island, I have taken administrative notice of the fact marijuana is an illegal substance under the laws of this country.
51. Because Applicant smoked marijuana over a period of time, although only one, maybe two times each year, his use cannot be considered isolated or aberrational; thus Drug Involvement Mitigating Conditions (DI MC) E2.A8.1.3.2. does not apply. Likewise, DI MC E2.A8.1.3.1. does not apply. While he has not used marijuana in two years, he has not returned to his time share since his last use of marijuana.
52. Applicant admitted he was arrested by the police (subparagraph 2.a.), but denied he deliberately falsified his security clearance application. In light of his denial of deliberate falsification, his answer to the allegation in subparagraph 2.a. is deemed a denial.