

KEYWORD: Drugs

DIGEST: Applicant's marijuana use commenced in February 1997, when he was about 30-years-old, and continued, with varying frequency, while he was on vacations in Jamaica, until about February 2003. In August 2004, he declared he "may or may not use it again." In September 2005, his position had changed and he indicated he will not use marijuana as long as he is "under consideration for clearance, while holding clearance, or in any employment that may require any security clearance." His marijuana use and refusal to provide a clear and unambiguous expressed intent to discontinue any substance abuse leave grave doubts as to his security eligibility. Clearance is denied.

CASENO: 05-01321.h1

DATE: 02/27/2006

DATE: February 27, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-01321

DECISION OF CHIEF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's marijuana use commenced in February 1997, when he was about 30-years-old, and continued, with varying frequency, while he was on vacations in Jamaica, until about February 2003. In August 2004, he declared he "may or may not use it again." In September 2005, his position had changed and he indicated he will not use marijuana as long as he is "under consideration for clearance, while holding clearance, or in any employment that may require any security clearance." His marijuana use and refusal to provide a clear and unambiguous expressed intent to discontinue any substance abuse leave grave doubts as to his security eligibility. Clearance is denied.

STATEMENT OF THE CASE

On August 25, 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 Personnel 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, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn written answer, dated September 14, 2005, Applicant responded to the SOR allegations, and elected to have his case decided on the written record, in lieu of a hearing. Department Counsel submitted the government's written case on December 2, 2005. A complete copy of the file of relevant material (FORM) [\(1\)](#) was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Any such

submissions were due by January 8, 2006. He chose not to respond. The case was assigned to another Administrative Judge on January 27, 2006, but transferred to me on February 10, 2005, due to caseload considerations.

FINDINGS OF FACT

Applicant admitted one of the two factual allegations pertaining to drugs under Guideline H (subparagraph 1.a.). Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 53-year-old employee of a defense contractor, and is seeking to obtain a security clearance. He was previously granted a security clearance in about 1983,⁽²⁾ but contends it was subsequently administratively discontinued when his employer decided to reduce their number of active clearances.⁽³⁾ Applicant received a B.S. degree (industrial technology) in December 1979. He has been with his current employer since June 1979, and presently holds the position of principal plant engineer. He submitted no evidence on the quality of his performance.

He is a substance abuser whose choice of illegal substances is marijuana. He started using marijuana in about February 1983, when he was a 30-year-old employee of a government contractor, and continued using it, with varying frequency, until at least February 2003.⁽⁴⁾ His use generally occurred while on annual vacations with his wife and several friends at a resort community in Jamaica where marijuana is, as Applicant characterized it, "pervasive in the culture and is used nearly everywhere."⁽⁵⁾ He claims marijuana was offered by taxi drivers, porters, and others,⁽⁶⁾ and he occasionally received the substance when someone "passed a joint" to him at a bar.⁽⁷⁾ Despite Applicant's somewhat cavalier attitude regarding his marijuana use, in Jamaica, the use of even small amounts marijuana, known as "ganga," is illegal, and violators are subject to mandatory prison sentences.⁽⁸⁾ His marijuana use was "casual,"⁽⁹⁾ and "purely recreational and social."⁽¹⁰⁾ He contends he has abstained since February 2003,⁽¹¹⁾ and there is no evidence to rebut his contention.

In August 2004, Applicant was interviewed by a Special Investigator for the Office of Personnel Management (OPM), and he furnished a sworn written statement. Regarding his future intentions pertaining to marijuana, he stated: We will be making more trips to Jamaica in the future and I may or may not use it again. It will not affect my life or work.⁽¹²⁾

In September 2005, upon being presented with the SOR, Applicant revised his earlier position regarding future marijuana use:⁽¹³⁾

As stated in the summary of the interview conducted 25 August 2004, when asked if I would use marijuana again, I responded that I may or may not use it again. This was based on the premise that I will continue to vacation in Jamaica and would surely be in similar situations where marijuana is present and in use. I did not at that time realize the significance of this answer. I have not, in fact, used marijuana since being requested to obtain a security clearance for use in my job. . . . I had no reason to consider the extremely casual use of marijuana to be of any significance. Understanding this, **I will not use marijuana or any other illegal drug while under consideration for clearance, while holding clearance, or in any employment that may require any security clearance.** (Emphasis added).

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

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 Section E2.2., Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (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 pertinent 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.

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

Guideline H - Drug Involvement: 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.

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

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security,"⁽¹⁴⁾ or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded both standards are one and the same. In reaching this Decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. 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." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon considering of all the facts in evidence, and after applying all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

The government has established its case under Guideline H. Applicant's improper and illegal marijuana use is of concern, especially in light of his desire to have access to the nation's secrets. The Directive clearly expresses the government's concern regarding drug involvement in provision E2.A8.1.1.1. (*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*). Drug abuse is defined in provision E2.A8.1.1.3. (*the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction*). Provision E2.A8.1.1.2.1. generally identifies and defines drugs as (*drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens)*). Applicant's overall conduct pertaining to his illegal substance abuse clearly falls within Drug Involvement Disqualifying Condition (DI DC) E2.A8.1.2.1. (*any drug abuse*).

Applicant did not simply experiment a few times, as a teenager or young adult, out of curiosity and then quit. Rather, he commenced using marijuana when he was already a 30-year-old employee of a federal contractor, notwithstanding the illegal nature of his endeavor, and exhibited a continuing pattern of questionable judgment, irresponsibility, and immature behavior. While he claims his wife is aware of his marijuana use, and it occurred while he was with her and friends on vacation, it is unclear if she too participated in that conduct. Although he characterized his marijuana use over the years as "extremely casual use," in reality, it was occasional substance abuse, occurring periodically over a period of about seven years, 1997-2003.

One controversial issue in this case pertains to Applicant's future intentions. Applicant avoided the issue that his drug abuse violates U.S. law, Jamaican law, and DOD policy. While there has been no development of his employer's drug policy, as a government contractor, it is presumed that it's policy coincides with the government's "zero tolerance" policy. I construe Applicant's initial position in this regard as follows: He is indifferent towards the use of marijuana, but apparently sees nothing wrong with abusing it and may continue to do so if the opportunity during a Jamaican vacation presents itself. However, he now claims he will not do so as long as he is "under consideration for clearance, while holding clearance, or in any employment that may require any security clearance."

Applicant's recent position is not only internally inconsistent, it is conditional. Applicant's newly pronounced intentions, in the absence of a clear and unambiguous expressed intent to discontinue substance abuse, regardless of circumstances, falls within DI DC 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*). As stated above, improper or illegal involvement with drugs raises questions regarding the individual's willingness or ability to protect classified information. Applicant's words and actions have created doubt over his willingness to steadfastly

discontinue illegal marijuana use, even after he has ceased holding a security clearance, should he be granted one. There is a continuing concern that he will resume his use of marijuana after he no longer has a security clearance and may be unable to protect classified information he has in his mind. Furthermore, that doubt negates any application of Drug Involvement Mitigating Condition (DI MC) E2.A8.1.3.3. (*a demonstrated intent not to abuse any drugs in the future*).

The presence or absence of rehabilitation and other pertinent behavioral changes are significant factors in the overall adjudicative process. Despite a lengthy period of substance abuse, supposedly followed by abstinence, Applicant has not undergone any drug awareness, education, or treatment program, in order to achieve a better self-understanding of the behavioral and psychological effects of his actions and the motivation therefor. While there is no requirement to undergo treatment or attend any of the aforementioned programs, exposure to at least the educational and psychological components of those programs might be beneficial to Applicant. Likewise, simply claiming that his motivation for using marijuana was because it was "pervasive in the culture and is used nearly everywhere," and his use was "casual," and "purely recreational and social," does not demonstrate true insight into the actual motivation for the course of conduct which he had chosen.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my evaluation of the evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under Enclosure 2 of the Directive. Applicant has failed to mitigate or overcome the government's case. The evidence leaves me with grave questions and doubts as to Applicant's security eligibility and suitability. Accordingly, allegations 1.a. and 1.b. of the SOR are concluded against Applicant.

For the reasons stated, I conclude Applicant is not eligible for access to classified information.

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: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

DECISION

In light of all 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.

Robert Robinson Gales
Chief Administrative Judge

1. The government submitted six items in support of its contentions.
2. Item 5 (Security Clearance Application (SF 86), dated February 17, 2004), at 4.
3. *Id.*
4. Item 3 (Response to SOR, dated September 14, 2005).
5. Item 6 (Affidavit, dated August 25, 2004), at 1.
6. *Id.*
7. Item 3, *supra* note 4.
8. U.S. Department of State, Bureau of Consular Affairs, *Things You Should Know Before You Go Abroad, Hard Facts*, dated February 22, 2006, found online at www.travel.state.gov; *see also* Jamaica On Line, *Before You Go, What You Should Know: Drugs*, found at www.visitjamaica.com.
9. Item 3, *supra* note 4.
10. Item 6, *supra* note 5, at 2.
11. *Id.* at 1.
12. *Id.* at 1-2.

13. Item 3, *supra* note 4.

14. Exec. Or. 12968, "*Access to Classified Information*," as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995, and further modified by memorandum, dated November 10, 1998. However, the Directive, as amended by Change 4, dated April 20, 1999, uses both "clearly consistent with the national interest" (Sec. 2.3.; Sec.2.5.3.; Sec. 3.2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), and "clearly consistent with the interests of national security" (Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (Enclosure 2, Sec. E2.2.2.)