

KEYWORD: Drug Involvement

DIGEST: Between 1993 and 2003, Applicant used marijuana. In 2002-2003, he used marijuana while holding a position of public trust in a federal agency. He also purchased marijuana up to at least 1997. Although Applicant self-reported his past drug-related behavior, the record is not sufficient to overcome the drug involvement security concerns raised by his actions. Clearance is denied.

CASE NO: 05-02371.h1

DATE: 05/23/2006

DATE: May 23, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 05-02371

**DECISION OF ADMINISTRATIVE JUDGE**

**JUAN J. RIVERA**

**APPEARANCES**

**FOR GOVERNMENT**

Ray T. Blank, Jr., Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

## **SYNOPSIS**

Between 1993 and 2003, Applicant used marijuana. In 2002-2003, he used marijuana while holding a position of public trust in a federal agency. He also purchased marijuana up to at least 1997. Although Applicant self-reported his past drug-related behavior, the record is not sufficient to overcome the drug involvement security concerns raised by his actions. Clearance is denied.

## **STATEMENT OF THE CASE**

On June 13, 2005, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guideline H (Drug Involvement). The SOR informed Applicant that, based on information available to the government, DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to grant him access to classified information.<sup>(1)</sup> On July 13, 2005, Applicant answered the SOR (Answer) and requested a clearance decision based on the written record without a hearing.

Department Counsel prepared a File of Relevant Material (FORM) on January 25, 2006. The FORM was mailed to Applicant on January 27, 2006. He acknowledged receipt of the FORM on February 9, 2006. On March 20, 2006, Applicant submitted a two-page statement in response to the FORM, and did not object to the admissibility of documents contained in the FORM. The case was assigned to me on April 10, 2006.

## **FINDINGS OF FACT**

In his July 2005 answer to the SOR, Applicant admitted subparagraph 1.b. He denied subparagraph 1.a, because it was not technically correct (his denial is discussed later on the decision), and failed to respond to subparagraph 1.c. I considered the last allegation denied. His admissions are incorporated herein as findings of fact. After a thorough review of the pleadings, Applicant's answer to the FORM, and the evidence, I make the following additional findings of fact:

Applicant is 40 years old. From 1992 to 1998, he worked as line cook, cook, and manager of several food service companies. He attended one semester of college in 1994. After taking computer analytics training at a technical/trade school in 1998, Applicant began working in the technology information field as a network operations specialist. In 2000, he was hired as a network engineer for a company doing business with the Department of Defense (DOD), and requires access to classified information to work on DOD contracts. Applicant married his wife in October 2000. His wife delivered a baby girl in 2002 that passed away four months after her birth.

In June 2003, Applicant submitted a security clearance application (SF 86)<sup>(2)</sup> in which he disclosed he used marijuana sporadically and infrequently from 1993 to 2003. He estimated he used marijuana twice per year during the disclosed period.

In April 2004, a government investigator conducted a following up interview to discuss Applicant's use of marijuana. Applicant stated that from 1993 to 1997, he smoked one or two marijuana cigarettes, approximately once a week, with his friends. After 1997, his use of marijuana decreased to smoking marijuana one to four times a year. Applicant stated he had not purchased marijuana since 1996.<sup>(3)</sup>

In his answer to the SOR, Applicant denied allegation 1.a, because it alleged he used marijuana with varying frequency from June 1993 to at least 2004. He clarified he considered his use of marijuana as "declining to two to three times a year" rather than "with varying frequency." He was adamant about the fact he has not used marijuana since December 2003. Applicant was 38 years old the last time he used marijuana. He admitted to purchasing marijuana, and confirmed his last purchase was in 1997.<sup>(4)</sup>

In his SF 86, Applicant disclosed that he used marijuana while holding a sensitive position, and that he was granted a security clearance by a federal agency outside of DOD. Applicant's response to the FORM clarifies his answer to SF 86 question 28. He has never been employed as a law enforcement officer, prosecutor, courtroom official, and to his knowledge, has never been in a position directly and immediately affecting public safety. He clarified that he has held a "position of public trust" with his current employer as a result of his work as a contractor for a federal agency. He is not sure whether his contractor position at the federal agency could be considered as a sensitive position.

Applicant explained that he had stopped using marijuana prior to his wife's pregnancy. His wife delivered a baby girl in April 2002, and the baby passed away four months later. After his daughter's death, he went into an extended period of depression and used marijuana between 2002 and 2003. Applicant adamantly stated he has not used marijuana since December 2003, and reiterated he does not intend to use marijuana in the future.

## **POLICIES**

The Directive sets forth adjudicative guidelines which must be considered in evaluating an Applicant's eligibility for access to classified information. The administrative judge must take into account both disqualifying and mitigating conditions under each adjudicative guideline applicable to the facts and circumstances of the case. The guidelines are not viewed as inflexible ironclad rules of law. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. Each decision must reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive, and the whole person concept.<sup>(5)</sup> Having considered the record evidence as a whole, I conclude Guideline H (Drug Involvement)<sup>(6)</sup> is the applicable relevant adjudicative guideline.

## **BURDEN OF PROOF**

The purpose of a security clearance decision is to determine whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.<sup>(7)</sup> A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest to ensure each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own.

The government has the initial burden of proving controverted facts alleged in the SOR. To meet its burden, the government must establish by substantial evidence<sup>(8)</sup> a prima facie case that it is not clearly consistent with the national interest for the applicant to have access to classified information. The responsibility then shifts to the applicant to refute, extenuate or mitigate the government's case. Because no one has a right to a security clearance, the applicant carries a heavy burden of persuasion.<sup>(9)</sup> The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of protecting national security.<sup>(10)</sup>

## **CONCLUSIONS**

Under 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. Such conduct may

also be criminal and indicative of a disregard for rules and regulations in place to protect national interests.<sup>(11)</sup> The government established its case under Guideline H by showing that Applicant illegally used marijuana once a week from 1993 to 1997, and one to four times a year from 1997 to December 2003. The government further established that Applicant purchased marijuana until at least 1997. Guideline H Disqualifying Condition (DC) 1: *Any drug abuse*,<sup>(12)</sup> and DC 2: *Illegal drug possession, . . . purchase, . . .*,<sup>(13)</sup> apply.

Applicant used marijuana over a period of 10 years, from the time he was 28 until he was 38. He stopped using marijuana around 2001, and resumed using marijuana from 2002 to 2003. His recent use was the result of the stress and depression caused by a traumatic experience, the loss of his daughter. He stopped using marijuana in December 2003, and has vowed never to use marijuana in the future. Applicant receives credit for his candor and honesty in disclosing his drug related behavior. After considering all the Guideline H Mitigating Conditions (MC), I conclude MC 1: *The drug involvement was not recent*,<sup>(14)</sup> and MC 3: *A demonstrated intent not to abuse any drugs in the future*<sup>(15)</sup> apply. I also find, however, that Applicant's behavior was not isolated as it spanned a period of 10 years.

Applicant's illegal involvement with marijuana raises questions about his ability and willingness to follow the law, and ultimately, to protect classified information. The evidence shows Applicant had a serious and lengthy drug abuse problem. In light of his age during the period he used marijuana, his behavior cannot be attributed to youthful exuberance or stupidity. To the contrary, based on his age and education, I conclude Applicant knew, or should have known, that his use of marijuana was illegal. Applicant's use of marijuana shows no regard for the possible legal consequences of his actions, particularly after holding a position involving public trust. Although Applicant was a government contractor, working for a company doing business with a federal agency, by holding a position that involved public trust, he entered into a fiduciary relationship with the government based on trust and confidence. His use of marijuana violated that trust and confidence placed on him by the federal government.

Although his drug related behavior is not recent and he intends never to use drugs again, under the totality of the circumstances, Applicant's available information failed to show he has been rehabilitated and/or that he has taken steps to prevent future recurrence. Applicant's use of marijuana after his recent traumatic experience raises questions as to his ability and willingness not to use marijuana in the future, and ultimately, on his ability and willingness to follow the law, and to protect classified information. Applicant's past behavior and lack of rehabilitative evidence and/or drug treatment leads me to believe it is likely he will use marijuana again, if confronted with another stressful or traumatic experience. I find Guideline H against the Applicant.

Concerning allegation 1.c, Applicant denied the allegation, and the evidence does not support a finding that Applicant is a marijuana user, or is addicted to a control substance, as required under 10 U.S.C. § 986 (c)(2).<sup>(16)</sup>

I have carefully weighed all evidence, and applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guidelines. Considering all relevant and material facts and circumstances present in this case, including Applicant's answers to the SOR and the FORM, his drug related behavior, the whole person concept, and the adjudicative factors listed in the Directive, I find Applicant has not mitigated the security concerns.

## **FORMAL FINDINGS**

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1, Drug Involvement (Guideline H) AGAINST APPLICANT

Subparagraph 1.a - 1.b Against Applicant

Subparagraph 1.c For 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.

Juan J. Rivera

Administrative Judge

1. Required by Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992) (Directive), as amended.

2. FORM, Item 5.
3. FORM, Item 6.
4. FORM, Item 2.
5. Directive, ¶ E2.2.1. ". . . The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. . . ."
6. Directive, ¶ E2.A8.1.1.
7. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
8. ISCR Case No. 98-0761, at p. 2 (December 27, 1999)(Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.); ISCR Case No. 02-12199, p. 3 (April 3, 2006)(Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.); Directive, ¶ E3.1.32.1.
9. *Egan*, 484 U.S. 518, at 528, 531.
10. Directive, ¶ E2.2.2.
11. Directive, ¶ E2.A8.1.1.1.
12. Directive, ¶ E2.A8.1.2.1.
13. Directive, ¶ E2.A8.1.2.2.
14. Directive, ¶ E2.A8.1.3.1.
15. Directive, ¶ E2,A8.1.3.3.
16. *See*, ISCR Case No. 03-25009 (June 28, 2005) at p. 3.