

DATE: December 28, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-10465

DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

John B. Glendon, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 48 years old and the president of a company that contracts with the federal government. As a young man he used marijuana, but has not used it for many years and does not intend to in the future. He was arrested in 2005 while waiting to attend a rock concert. He was accused of possessing marijuana, but none was confiscated. He contested the charge and it was dismissed. He answered the questions on his security clearance application honestly. Applicant successfully mitigated the security concerns under Guideline H, drug involvement, and Guideline E, personal conduct. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On August 7, 2006, under the applicable Executive Order ⁽¹⁾ and Department of Defense Directive, ⁽²⁾ DOHA issued a Statement of Reasons (SOR), detailing the basis for its decision-security concerns raised under Guideline H, (drug involvement) and Guideline E (personal conduct) of the Directive. Applicant's answer to the SOR was undated and received September 5, 2006. He elected to have a hearing before an administrative judge. In his answer, Applicant admitted SOR ¶¶ 1.a, 1.c and denied the allegations in ¶¶ 1.b and 2.a. The case was assigned to me on October 12, 2006. A notice of hearing was issued on October 27, 2006, scheduling the hearing for November 16, 2006. I conducted the hearing as scheduled to consider whether it is clearly consistent with the national interest to grant or continue a security clearance. The Government offered three exhibits for admission in to the record and were marked as Government Exhibits (GE) 1-3. The exhibits were admitted into evidence without objection. Applicant testified on his own behalf, and offered one exhibit consisting of numerous character letters for admission to in the record. It was marked as Applicant's Exhibits (AE) A and admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on December 5, 2006.

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 48 years old and has two grown children. He has a bachelor's degree in economics and a master's degree in business. He is the president and founder of a company that contracts with the federal government.

Applicant admits he hurriedly filled out his security clearance application (SCA), had difficulty loading the electronic application on his laptop computer, and did not recognize the seriousness of the process.⁽³⁾ He now does. He admits he was very rushed in completing the SCA. He stated he did not give the SCA the scrutiny it deserved.⁽⁴⁾ He failed to list his foreign travel, which was quite extensive, and failed to provide parts of his educational background.⁽⁵⁾

Applicant admitted he used marijuana in the past. He recalled using marijuana as a college and graduate student. He believed that after approximately 1982 he likely used marijuana six times. He believed he has not used it since he became a parent in 1985, but he could not remember when his last use was. He admits it could have been after 1985, but can not remember. He does not believe using marijuana is morally wrong, but recognizes its illegality and that is why he does not use it any longer.⁽⁶⁾ He admits using illegal drugs does not reflect good judgement. He does not believe marijuana is in the same category as other drugs because it is not addictive.⁽⁷⁾ He has no intention of using marijuana in the future. However, he does not rule out the use for medicinal purposes if marijuana was legal.

Applicant was arrested on March 15, 2005, and charged with criminal possession of marijuana-5th degree in a public place. Applicant was waiting outside of a concert hall to attend a rock concert with his son and his son's girlfriend, and two business associates. They were all arrested and accused of smoking marijuana, which he vehemently denies. They were handcuffed and searched and nothing was found.⁽⁸⁾ He was separated from his companions and booked. He called his company's corporate counsel who dispatched a local attorney.⁽⁹⁾ He pled not guilty and believed the charge was dismissed, but never followed up on the final disposition of the charge, although he was told by his attorney that the charge would be dismissed if he remained crime free for six months. Applicant had no criminal arrests prior to the incident or since. There was no evidence presented that Applicant possessed marijuana on the date of his arrest.

Applicant credibly testified that when he answered Question 27 on the SCA, which asked when he last used an illegal drug, that he honestly and correctly answered "No" that he had not used illegal drugs in the last 7 years. He was charged with possession of marijuana in March 2005, but the charge was dismissed. There was no evidence presented that marijuana was actually confiscated from him on that date. I found Applicant's denial that he used or possessed marijuana on that date credible and truthful. I also find no evidence was presented to show he either possessed or used marijuana in March 2005. Applicant believed his explanation to the investigator of the events that occurred, was sufficient to explain his response to the question.⁽¹⁰⁾

Applicant provided numerous character references from colleagues and friends.⁽¹¹⁾ The letters strongly support his application for a security clearance. He is described as a good father, who is committed to his family. He is actively involved in worthy community projects and gives unselfishly of his time and talents. He is a successful and resourceful business man and is fiercely loyal. He is considered a man of integrity, honesty, professionalism and high ethical standards.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific 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 factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. 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.⁽¹²⁾ The government has the burden of proving controverted facts.⁽¹³⁾ The burden of proof is something less than a preponderance of evidence.⁽¹⁴⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽¹⁵⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁶⁾

No one has a right to a security clearance⁽¹⁷⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁸⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽¹⁹⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽²⁰⁾ 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 consideration of the evidence, I find the following adjudicative guideline most pertinent to the evaluation of the facts in this case:

Guideline H-Drug Involvement is a security concern because 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.

Guideline E-Personal Conduct is a security concern when an individual's conduct involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that could indicate that the person may not properly safeguard classified information.

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 below.

CONCLUSIONS

I have carefully considered all facts in evidence and the legal standards.

Based on all the evidence, Drug Involvement Disqualifying Condition (DI DC) E2.A8.1.2.1 (*Any drug abuse*⁽²¹⁾) and DI DC E2.A8.1.2.2 (*Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution*), apply. Applicant used and therefore possessed marijuana while in college and graduate school, and likely a few other times in the years since, but infrequently, if at all, until 1985 when his son was born.

I considered all of the mitigating conditions and especially considered Drug Involvement Mitigating Condition (DI MC) E2.A8.1.3.1 (*The drug involvement was not recent*); DI MC E2.A8.1.3.2 (*The drug involvement was an isolated or aberrational event*), and DI MC E2.A8.1.3.3 (*A demonstrated intent not to abuse any drugs in the future*). Applicant's last drug use was sometime around 1985, or shortly thereafter. He distinctly remembers that when his son was born he decided it was time to grow up and be a parent and does not recall using marijuana after that time, although he may have used it. I find Applicant's testimony was credible in that he could not remember the exact date of his last use, but it was many years ago. Applicant's use of marijuana is not recent and DC C E2.A8.1.3.1 applies. His prior use was not isolated and can best be described as the actions of a young immature person and therefore aberrational to the mature person he has become. I find DC MC E2.A8.1.3.2 applies. Applicant does not intend to use illegal drugs in the future. However, he provided a caveat of a potential situation he might use marijuana, that is for medicinal purposes, if the drug were legal. His potential use is merely speculative based on a very specific condition. I find DC MC E2.A8.1.3.3 applies.

I have considered all of the personal conduct disqualifying conditions and conclude none apply. I find Applicant did not

intentionally falsify his SCA because he believed he was providing honest information. He later explained to an investigator the circumstances of the incident. Applicant's testimony was credible in that he answered the question on his SCA honestly. There is no evidence he intentionally falsified his SCA. Although Applicant failed to list some of his educational background and foreign travel, I also find he did not do so intentionally, but was remiss not taking the process more seriously.

In all adjudications, the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I considered the whole person. I considered Applicant's past use of marijuana and the circumstances of his arrest. I considered the good character evidence provided. I also considered Applicant's intention not to use drugs in the future. Therefore, I am persuaded by the totality of the evidence in this case, that it is clearly consistent with the national interest to grant Applicant a security clearance. Accordingly, Guidelines H and E are decided for 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: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Paragraph 2. Guideline E: For APPLICANT

Subparagraph 2.a: For Applicant

DECISION

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

Carol G. Ricciardello

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960) as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. Tr. 29-30.
4. *Id.*
5. Tr. 31-38
6. Tr. 57.

7. Tr.58.
8. Tr. 22.
9. Tr. 23.
10. Tr. 20.
11. AE A.
12. ISCR Case No. 96-0277 at 2 (App. Bd. Jul. 11, 1997).
13. ISCR Case No. 97-0016 at 3 (App. Bd. Dec. 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.
14. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
15. ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.
16. ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.
17. *Egan*, 484 U.S. at 531.
18. *Id.*
19. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
20. Executive Order 10865 § 7.
21. E2A8.1.1.2.1 defines drug abuse as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.