

DATE: November 29, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-13508

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant abused marijuana from 1995 to at least April 2006, while he held a confidential-level security clearance. Drug involvement concerns are not mitigated where he intends to use marijuana in the future given the opportunity. As an unlawful user of illegal drugs, Applicant is precluded from being renewed a security clearance under 10 U.S.C. § 986. Alcohol consumption concerns raised by his excessive drinking in 1997 are mitigated since he drinks in moderation and is careful to not drive after drinking. 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. As required by Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan. 2, 1960), as amended, DOHA issued a Statement of Reasons (SOR) on January 18, 2006, detailing the basis for its decision—security concerns raised under Guideline H (Drug Involvement) and Guideline G (Alcohol Consumption) of the Directive. Applicant answered the SOR in writing on February 8, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on April 3, 2006. Pursuant to notice of May 9, 2006, I convened a hearing on June 7, 2006, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. One government exhibit (Ex. 1) was admitted, and one additional document marked for identification was accepted for administrative notice. Applicant's case consisted of his testimony and one exhibit (Ex. A), a character reference letter from his supervisor. DOHA received the hearing transcript (Tr.) on June 16, 2006.

FINDINGS OF FACT

Under Guideline H Applicant was alleged to have used marijuana approximately twice monthly as of August 2005 with intent to continue use; to have purchased marijuana; to have been placed on supervised probation for two years following his arrest in September 2001 for illegal possession of Class D substance (marijuana), distributing/dispensing Class D controlled substance, and conspiracy to violate the Controlled Substances Act; and to be statutorily disqualified

from having a clearance continued or renewed under 10 U.S.C. § 986. Under Guideline G, Applicant was alleged to have consumed alcohol at times to excess from about September 1997 to at least August 2005, and to have been treated in an inpatient alcohol program in about spring 1997. Applicant admitted the allegations with the exception of ¶ 1.d, intent to continue to use marijuana in the future. After a thorough review of pleadings, exhibits, and transcript, I make the following findings:

Applicant is a 51-year-old millwright in the maintenance department of a defense contractor firm. He began working there in August 1975, and in about March 1981, he left to join the U.S. Navy. After he was discharged, he returned to the company. Applicant has held a confidential-level security clearance for most of his employ.

Applicant started drinking a few beers on the weekends as a senior in high school when the drinking age was 18. Alcohol did not pose a problem for him until 1997 when his marriage began to deteriorate. He started drinking alcohol after work when he got home and consumed up to twelve beers a night on the weekends for about a month. In an effort to prove to his spouse that he could quit drinking, he voluntarily admitted himself to an inpatient alcohol program in spring 1997. During his 11-day stay, he was placed on Klonopin medication for anxiety. While it was suggested to him that he stop drinking, he was not to his knowledge diagnosed as alcohol dependent.

Following his discharge, he attended three or four Alcoholics Anonymous (AA) meetings but felt they were not for him. He continued to consume alcohol while taking the Klonopin, and found that it took only four to six beers to get "pretty buzzed."

In September 1997, he and his spouse separated after eight years of marriage. Applicant realized that he had to get his life under control. He stopped going to bars and has generally limited his consumption to a few beers while watching a sporting event. As of August 2005, he was drinking two to three nights per week, two to three beers at a sitting. He consumed "a few extra" at his birthday party in September 2005, but was careful to not drive after drinking. In early 2006, he began to work out two to three times per week and abstained from alcohol during that time. At a emorial Day cookout, he drank four or five beers. He did not consider himself intoxicated on that occasion in May 2006, but he "probably had a little buzz on." (Tr. 48) Applicant intends to continue to consume beer and/or wine in moderate amount (a couple of beers on a Thursday night and then a few over the weekend, Tr. 53). He sees nothing wrong with having a couple of beers while watching a baseball game after a hard day at work, and he stays away from hard liquor. His girlfriend is not a drinker.

Applicant began using marijuana in 1995. He continued to smoke the drug about once a month, and purchased it on occasion, until about September 2001 when he was arrested on drug charges. Aware that one of his two sisters was supporting her social security disability income by distributing marijuana, Applicant agreed to deliver to his sister a Federal Express package containing marijuana that she had arranged to be sent to his home. Unbeknownst to Applicant, the police had him under surveillance. He was arrested outside of his sister's home and charged with distributing/dispensing a Class D controlled substance, conspiracy to violate the Controlled Substances Act, and possession of a Class D substance (marijuana). In about June 2002, his case was continued without a finding and he was placed on two years probation. He was ordered to undergo counseling. Applicant did not use marijuana during his probation because of the possibility of random drug testing. His case was dismissed in June 2004.

Within a couple of weeks of his discharge from probation, Applicant resumed using marijuana about once monthly. Applicant last purchased marijuana in summer 2005. He used marijuana thereafter when it was offered to him by friends, most recently in April 2006. Someone brought marijuana over to his house and he took "a few hits." Applicant does not consider himself to be involved with illegal drugs since he only takes a couple of hits when it is offered to him. Applicant regards alcohol as much worse than marijuana notwithstanding the latter's illegality. As for his future intent, Applicant does not plan on looking for marijuana but will probably use it if presented the opportunity:

Sometimes it presents itself, the opportunity, you know what I mean, where I just don't think I'm hurting anybody. I don't see nothing wrong with me sitting in the house, I'll tell you the truth, and like I said, if the ball game is on like that, me having a couple of tokes, because it just relaxes me.

(Tr. 63-64). He hopes to give up marijuana completely in the near future ("I'm going to completely stop smoking eventually, soon." Tr. 65).

Applicant reported his drug-related arrest on his December 2003 security clearance application (SF 86), but he responded "No" to question 27 concerning any use of illegal drugs, including marijuana, in the last seven years. He was candid about his marijuana involvement during an interview with an Office of Personnel Management (OPM) investigator in August 2005, but now wishes he had not been so frank as he realizes it could cost him the job that he values.

Applicant has been a good worker for the defense contractor. His supervisor, who has known him for the past six years, has not seen any evidence of Applicant being under the influence of alcohol or drugs at the work site. Applicant has also provided for his family, voluntarily paying his spouse child support for their son.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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." *Id.* at 527. 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." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Each security clearance decision "must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy." Directive ¶ 6.3. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

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. (¶ E2.A8.1.1.1) Applicant used marijuana approximately once monthly from 1995 to September 2001 when he was caught with the package of marijuana he intended to deliver to his sister. While on probation from about June 2002 to June 2004, Applicant refrained from marijuana use since he could have been drug tested, but shortly after his case was closed, he resumed his involvement. He purchased marijuana to as recently as summer 2005, and continued to smoke the drug thereafter when it was offered to him by friends. Applicant's illegal drug involvement reflects a disregard for the law. Aggravating the situation, he used marijuana while possessing a confidential-level security clearance, after he had been interviewed by an OPM investigator in August 2005, and even after the SOR was issued. Disqualifying conditions ¶ 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*, apply. 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 it raises serious doubts about an applicant's judgment.

None of the mitigating conditions under Guideline H apply in this case. The record evidence supports use of marijuana as recently as April 2006. When asked about his future intent, Applicant could not rule out the use of marijuana to relax despite knowing of its illegality. Under the circumstances of this case, it is very likely that he will use marijuana in the future. Adverse findings are returned as to the Guideline H ¶¶ 1.a, 1.b, 1.c, and 1.d.

Application of 10 U.S.C. § 986

This case also presents the issue of whether Applicant is--as a matter of law--ineligible for a security clearance based on his illegal drug use. Under 10 U.S.C. § 986, the Defense Department may not grant or renew a security clearance for an applicant who falls under any of four statutory categories. The statutory category at issue here is § 986(c)(2), which provides as follows: "The person is an unlawful user of, or is addicted to, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))."

The Deputy Secretary of Defense issued a June 7, 2001, memorandum implementing the Smith Amendment. Attachment 1 to that memorandum is official policy guidance designed to assist the Department of Defense in implementing the statutory prohibitions. Concerning users of illegal drugs, the policy guidance is that the Smith Amendment did not change the substance of the Guideline H, the adjudicative guideline for drug involvement. In particular, the official policy guidance is as follows: "Anyone who is currently an unlawful user of, or addicted to, a controlled substance is not considered eligible for a security clearance." There is no evidence Applicant was ever physiologically addicted to marijuana, although he clearly enjoys it and sees nothing wrong with using it. However, based on the evidence as a whole, most notably Applicant's continued use of marijuana after the SOR was issued, the absence of an expressed intent to discontinue use, and his statement that he will probably use marijuana if the opportunity presents itself, I conclude Applicant is currently an unlawful user of controlled substances for purposes of 10 U.S.C. § 986. Accordingly, Applicant is ineligible for a security clearance; a waiver is not authorized. SOR ¶ 1.e is resolved against him.

Guideline G--Alcohol Consumption

Excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness. (¶ E2.A7.1.1) Applicant abused alcohol during 1997 when he and his spouse had marital problems. Applicant admitted that his drinking could have cost him his marriage ("I'd seen what it did for me, it got me separated." Tr. 47). For about a month, he engaged in binge drinking on the weekends, when he drank up to 12 beers at a sitting. Although he has shown good judgment in not drinking and driving, and has not allowed alcohol to negatively impact his work, disqualifying condition ¶ E2.A7.1.2.5. *Habitual or binge consumption of alcohol to the point of impaired judgment*, is implicated.

¶ E2.A7.1.3.2. *The problem occurred a number of years ago and there is no indication of a recent problem*, and ¶ E2.A7.1.3.3. *Positive changes in behavior supportive of sobriety*, apply. With the help of an 11-day stay in the alcohol treatment program, Applicant realized he had to change his drinking behavior. Although Applicant continues to consume alcohol, it is usually in moderation, no more than two or three beers when watching a ball game. While he drank more on his birthday in September 2005, he showed good judgment in not operating a motor vehicle under the influence. Absent evidence that he suffers from diagnosed alcohol abuse or alcohol dependence, his present consumption levels do not raise sufficient security concern to revoke the clearance he has held for many years.

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 eligible for a security clearance." ¶ E2.2.1. The security risks presented by Applicant's abuse of marijuana in disregard of the law (¶ E2.2.1.1. *The nature, extent, and seriousness of the conduct*), must be evaluated in the context of the "whole person." Applicant deserves credit for voluntarily entering an alcohol rehabilitation program in 1997, for supporting his family following his marital separation, and for his many years of dedicated service to his employer. His candor about his drug use is also viewed favorably, but it does not eliminate the concerns for his judgment and reliability raised by his continued use of marijuana while in a position of trust.

FORMAL FINDINGS

Formal Findings as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive are hereby rendered as follows:

Paragraph 1. Guideline H: AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c: Against the Applicant

Subparagraph 1.d: Against the Applicant

Subparagraph 1.e: Against the Applicant

Paragraph 2. Guideline G: FOR THE APPLICANT

Subparagraph 2.a: For the Applicant

Subparagraph 2.b: For 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.

Elizabeth M. Matchinski

Administrative Judge