

DATE: December 11, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-15135

DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

John B. Glendon, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 46 years old and has worked for a federal contractor since 1989. He obtained a secret clearance in 1990 and a top secret security clearance in 1998. He used marijuana from at least 1990 to 2004 while holding these clearances. Even after he completed his application to update his security clearance he used drugs. He continues to frequent the same place, and associate with the same people he used drugs with in the past. Applicant failed to mitigate the security concerns raised by Guideline H, drug involvement. 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. On July 26, 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) of the Directive. Applicant answer to the SOR was in writing and undated. He elected to have a hearing before an administrative judge. In his answer, Applicant admitted all of the allegations under Guideline H. 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 15, 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 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 four exhibits for admission in to the record. They were marked as Applicant's Exhibits A-D and were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on November 29, 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 46 years old and has worked as a technician staff member for a federal contractor since 1989. He is single, lives with his parents and provides them support. Applicant was in the Army from 1983 to 1985. Applicant tested positive for marijuana use and was administratively processed for discharge from the Army, due to drug abuse. Applicant received a general discharge under honorable conditions. He has an associates degree in electronic engineering and is the communication security custodian manager for his unit, responsible for ensuring the accountability of more than 1000 pieces of equipment each day. Applicant has held a secret security clearance since 1989 and a top secret clearance since 1998. He is aware that his company has a drug-free work policy, but it is not enforced by random drug testing.

Applicant started to use marijuana when he was in high school in approximately 1976. He was arrested in December 1982, and charged with possession of a class D controlled substance, marijuana. Applicant admitted he did possess marijuana, but the charge was later dropped. (3) Applicant continued to use marijuana up until January 2004. Applicant used marijuana while maintaining a secret and later a top secret clearance. He estimated he used marijuana four times since being granted a top secret clearance. He estimated he used marijuana once a year from 1990 through 2003. His employer does not know about his drug use.

Applicant never purchased or sold marijuana. He used it with friends usually at a private residence, after meeting them at a social club. When he used marijuana it would be after he had been drinking alcohol. He has been friends with these people for 15-20 years and continues to go to the club approximately four times a week. He continues to associate with the same friends and continues to drink alcohol. His friends continue to offer him marijuana, but now Applicant claims he refuses the offer and has abstained from using marijuana since January 2004. He is aware that marijuana use is illegal and that each time he used it, it was a criminal offense. He is also aware that his use of marijuana reflected bad judgment.

Applicant completed his security clearance application (SCA) on November 11, 2002. Questions 27 and 28 asked about his drug history in the last seven years. Applicant listed he had used marijuana four times from 1998-2002. He was confused as to the wording of Question 28 and believed it only referred to drug use if he was a law enforcement officer, prosecutor or courtroom official. These questions highlighted the government's interest in applicants' drug use. Applicant used drugs twice after completing his SCA and while continuing to hold a top secret clearance, even though he was reminded by the questions raised in the SCA that the government considered drug use a security concern. He was aware that using drugs while his security clearance application to continue his clearance was pending might have a negative impact on the results. He was also aware that if he was ever arrested for drug abuse or possession, his employer might find out and he could lose his job. (4)

Applicant has not used illegal drugs since January 2004. He admitted he used drugs with friends he would meet at a "social club." He realizes he is taking a risk by continuing to associate with these friends who continue to use marijuana. He continues to go to the club and is aware that drugs are still used at the club. He is aware that if the police raid the club and he is present, he could be arrested. (5) Applicant also continues to drink alcohol with these friends and admits alcohol affects his judgment. (6) He claims he has cut back on his drinking. In the past, his parents have expressed concern that he was drinking too much. Applicant has taken a "ServSafe" alcohol course. This is a training course for bartenders to educate themselves on serving alcohol responsibly. (7) Applicant completed the eight hour course because he infrequently serves as a back-up bartender at his "social club" and the bar required it. (8) Applicant also attended a "first offenders alcohol awareness program" after being charged with operating under the influence of alcohol in 1997. (9) The charge was eventually dismissed after Applicant satisfied certain terms. In his sworn statement made on September 24, 2003, Applicant stated: "I currently drink on a daily basis, usually consuming three to four beers a night from approximately 6 pm to 8 pm." He further stated: "I have evaluated my drinking habits and realize that I may have an alcohol problem." Applicant claimed he was going to cut back on his drinking, not drive impaired, and look into a program that would help with his drinking problem. He claims he now only drinks twice a week, at the "social club" and does not drink to the point it would impair his driving. He has not looked into a program about his drinking issues.

Applicant believes he has put his marijuana use behind him and wants to lead a more responsible life and care for his parents. He has received, from his employer, awards for excellence and outstanding achievement, and letters of

(10)

appreciation from customers. Applicant provided character letters from those he works with, however, it is unclear whether these people were aware of Applicant's past drug use when they wrote the letters and if their opinions would be different if they were aware of his use while holding a security clearance. A coworker considers Applicant professional, ethical, knowledgeable, cooperative, having a great deal of integrity and is conscientious in his work. His direct supervisor considers him a terrific worker who always does quality work. He is considered accommodating, ethical, and to have integrity. His friends consider him reliable and dedicated.

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. ⁽¹¹⁾ The government has the burden of proving controverted facts. ⁽¹²⁾ The burden of proof is something less than a preponderance of evidence. ⁽¹³⁾ 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. ⁽¹⁴⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. ⁽¹⁵⁾

No one has a right to a security clearance ⁽¹⁶⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." ⁽¹⁷⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information. ⁽¹⁸⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant. ⁽¹⁹⁾ 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.

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 the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guideline H.

Based on all the evidence, Drug Involvement Disqualifying Condition (DI DC) E2.A8.1.2.1 (*Any drug abuse* ⁽²⁰⁾) and DI DC E2.A8.1.2.2 (*Illegal drug possession, including cultivation, processing, manufacture, purchase sale, or*

distribution) apply. Applicant used marijuana, with varying frequency from approximately 1990 to 2004. He used marijuana while he held a secret and later top secret security clearance, and after he filled out a security clearance application in 2002. While using marijuana he also possessed it and possessed it in 1982 when he arrested.

I considered all 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*), DI MC E2.A8.1.3.3 (*A demonstrated intent not to abuse any drugs in the future*) and DI MC E2.A8.1.3.4 (*Satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a credentialed medical professional*).

Applicant claims he last used drugs in 2003-2004. He also has a long history of drug use and involvement going back to 1982, including use, possession, and a discharge from the Army for drug involvement. I find his drug involvement is not isolated or aberrational. DC MC E2.A8.1.2 does not apply. Applicant claimed he has not used drugs since 2004, and does not intend to use drugs in the future. However, he used drugs for the entire duration that he had a secret and later a top secret clearance until 2004. He used drugs when he was aware his employer had a drug-free policy. He used drugs after having charges dismissed for drug possession and after being discharged from the Army for drugs. He continued to use drugs after he filled out his SCA to update his clearance. He was aware that it was wrong and the impact it would have on his employment, but continued his lifestyle. Most telling is he continues to be around the same friends who continue to abuse drugs and continue to offer him drugs, despite knowing the possible severe ramifications. He continues to frequent the "social club," where drugs are available. He continues to drink with the same friends with whom he admittedly made bad decisions about using drugs and who continue to use them. Applicant has not demonstrated tangible changes in his lifestyle in a measurable way to ensure he will not lapse back into using drugs, nor has he sought any professional help concerning his drug use. Therefore, DI MC E2.A8.1.2.2 and E2.A8.1.2.3 do not apply. Because of the relatively short duration of his abstinence balanced with the lengthy period he used drugs I am unable to apply DI MC E2.A8.1.2.1.

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 excellence and achievement awards from his employer and his claim he intends not to use drugs in the future. I also considered his long history of knowingly using drugs while he held both secret and top secret security clearances, thereby repeatedly breaching a trust with the government. I also considered he continues to socialize at the same place and with the same friends with whom he used drugs. Based on all of the evidence, I find Applicant failed to mitigate the security concerns regarding Guideline H, drug involvement. Therefore, I am persuaded by the totality of the evidence in this case, that it is not clearly consistent with the national interest to grant Applicant a security clearance. Accordingly, Guideline H is decided against 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: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

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. 38.
4. Tr. 34.
5. Tr. 62.
6. Tr. 64.
7. Tr. 69.
8. Tr. 74-75.
9. Tr. 68.
10. AE B.
11. ISCR Case No. 96-0277 at 2 (App. Bd. Jul 11, 1997).
12. ISCR Case No. 97-0016 at 3 (App. Bd. Dec. 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.
13. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
14. ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.
15. ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.
16. *Egan*, 484 U.S. at 531.
17. *Id.*
18. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
19. Executive Order 10865 § 7.
20. E2.A8.1.1.2.1 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.