

DATE: March 26, 2007

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 06-11055

DECISION OF ADMINISTRATIVE JUDGE

ERIN C. HOGAN

APPEARANCES

FOR GOVERNMENT

D. Michael Lyles, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant admits to the illegal use of marijuana while on a winter camping trip in December 2003. The Government did not meet its burden of proof regarding an alleged use of marijuana in the fall of 2005. The marijuana use was minimal and not recent. Applicant has mitigated the security concerns raised under the drug involvement concern. Clearance is granted.

STATEMENT OF CASE

On August 28, 2006, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance.⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline H, Drug Involvement; and Guideline E, Personal Conduct.

On September 13, 2006, Applicant responded to the SOR allegations. Applicant elected to have his case decided on the written record. Department Counsel submitted the government's file of relevant material (FORM) on December 19, 2006. The FORM was mailed to Applicant on December 21, 2006, and received on January 2, 2007. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not respond. The case was assigned to me on February 28, 2007.

PROCEDURAL ISSUES

In his response to the SOR, Applicant denies all of the allegations in the SOR. As to the allegation in SOR ¶ 1.a, he admits to using marijuana in December 2003 but denies using marijuana in fall 2005.

Applicant's social security number was incorrect on the SOR. The SOR has been amended to reflect his correct social security number.

Department Counsel submitted Item 7, Report of Investigation, Personal Subject Interview, as part of the documentary evidence to support allegations in the SOR. This document is an unsworn, unsigned summary of the interview OPM conducted with Applicant on February 21, 2006. Enclosure 3 of the Directive, Additional Procedural Guidance, ¶ E.3.1.20, states in part: "Official records or evidence compiled or created in the regular course of business, **other than DoD personnel background reports of investigation (ROI)**, may be received and considered by the Administrative Judge without authenticating witnesses ... " (*emphasis added*). It goes on to say "An ROI may be received **with** an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence" (*emphasis added*).

Department Counsel claims the Report of Investigation is reliable, relevant and admissible citing ISCR Case No. 95-0817 (App. Bd. Feb. 21, 1997) and FRE 803(6) and FRE 803(8) in support of his position. In ISCR Case No. 95-0817, the Appeal Board considered "**the Certified Results of Interview**", which were admissions by the Applicant made to a Defense Investigative Service investigator to be admissible under Paragraph 22 and under the Federal Rules of Evidence (FRE) 803 "Hearsay Exceptions: Availability of Declarant Immaterial". Paragraph 22 specifically deals with adverse statements made against Applicant by third parties. That situation is not applicable in this case. FRE 803 (6), permits various types of documents to be admitted into evidence provided they were " ... made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, **all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902 (11), Rule 902 (12) ...**" (*emphasis added*). The ROI offered by the Government is not a Certified Results of Interview. It is an unsworn summary of a personal subject interview conducted by an unknown person. It is not signed by the interviewer nor interviewee, nor authenticated by an appropriate witness. It does not comply with FRE 902(11), which requires the document to be certified by the custodian or other person authorized to make the certification. It is also not clear who prepared the ROI and when the ROI was prepared which raises further questions of reliability.

Department Counsel has not offered any rule that states authentication of personal interview statements are not required when the Applicant elects a decision on the written record. It was within the Government's discretion to request a hearing which would have circumvented the evidentiary issues raised here. (2) They chose not to do so and should not be permitted to use in a FORM what they could not in a hearing without authentication. I will not consider Item 7 due to its unreliability, inadmissibility under ¶ E3.1.20, and in the interest of fairness.

FINDINGS OF FACT

Applicant is a 49- year- old employee of a defense contractor. He has been employed by the same company since April 1993. He submitted security clearance applications on February 4, 2005, and October 21, 2004. (3) On both security clearance applications, Applicant indicated in response to question 27 that he used illegal drugs within the past 7 years prior to the date of the application. Specifically, he indicated that he used Marijuana on one occasion in December 2003. (4)

The Defense Office of Hearings and Appeals sent Applicant interrogatories. Question 1 asked "Have you used any narcotic, depressant, stimulant, hallucinogen (to include LSD or PCP) and/or any, Cannabis (to include marijuana and hashish), except prescribed by a licensed physician?" Applicant answered "yes" and indicated that he had used marijuana one or two times over a period of 10 years. The average quantity was less than a joint. He indicated the date he last used was December 2003. He indicates it was not a habitual habit. (5)

The SOR alleges Applicant's last use of marijuana was in the fall 2005. In his response to the SOR, Applicant denies that he used marijuana in the Fall 2005. He believes the OPM agent who interviewed him misinterpreted one of his answers. The last time he used marijuana was in December 2003. Since December 2003, he has not been near marijuana. He does not intend to use marijuana in the future. He is dedicated to his job, his country, his friends and family. There is no way he would falsify any statements because he understands the importance of the background investigation. (6)

POLICIES

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."⁽⁷⁾ In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch.

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. The adjudicative guidelines at issue in this case are:

Guideline H - Drug Involvement: Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules and regulations.⁽⁸⁾

Guideline E - Personal Conduct: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations 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 could mitigate security concerns pertaining to these adjudicative guidelines, are set forth and discussed in the conclusions below.

"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."⁽⁹⁾ An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person.⁽¹⁰⁾ An administrative judge should consider the following factors: (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.⁽¹¹⁾

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information.⁽¹²⁾ Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts admitted by the applicant or proven by Department Counsel. The applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision.⁽¹³⁾ "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security."⁽¹⁴⁾

A person granted access to classified information enters into a special relationship with the government. 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. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

CONCLUSIONS

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

Guideline H - Drug Involvement

Applicant's past history of illegal drug use raises a security concern. He used marijuana approximately two times over a ten year period with the last use occurring in December 2003. Drug Involvement Disqualifying Condition (DI DC) E2.A8.1.2.1 (*Any drug abuse*) applies due to his past illegal use of marijuana.

The drug involvement concern can be mitigated. I find Drug Involvement Mitigating Condition (DI MC) E2.A8.1.3.1 (*The drug involvement was not recent*) applies. In December 2003, Applicant used marijuana. There is no reliable

evidence to suggest that he used marijuana since that time. More than three years have passed since his last use, therefore, his drug involvement is not recent.

DI MC E2.A8.1.3.2 (*The drug involvement was an isolated or aberrational event*) cannot be applied since Applicant has used marijuana on at least one additional occasion prior to December 2003. It is noted that the prior use was remote in time and Applicant's total use of marijuana in the last ten years is less than a joint. The evidence indicates his marijuana use was minimal.

DI MC E2.A8.1.3.3 (*A demonstrated intent not to abuse any drugs in the future*) applies. Applicant does not intend to use marijuana in the future and there is no reliable evidence indicating that he used marijuana since December 2003.

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*) is not applicable. It is not relevant to facts of this case.

Applicant has mitigated the security concerns raised under Drug Involvement.

Personal Conduct

The government has not established a prima facie case under the personal conduct concern. There is no reliable and admissible evidence in the file to support the allegation that Applicant used marijuana while possessing a security clearance. There is no reliable and admissible evidence that supports the allegation that Applicant falsified his response to Question 1 on the DOHA Interrogatories when he stated that he last used marijuana in December 2003. This answer is consistent with the answers provided on his two security clearance applications. I find for Applicant under Guideline E.

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 all the evidence provided and also considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. I find Applicant has mitigated the security concerns raised by the drug involvement concern. He has a favorable 14 year employment history with his employer. While it was not the best judgment to use marijuana in December 2003, the use was minimal and Applicant has not used since that time. 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.

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

Paragraph 2 Guideline E: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

DECISION

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

Erin C. Hogan

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Directive, Enclosure 3, ¶ E3.1.7.
3. Items 1 and 2.
4. *Id.*
5. Item 6, Response to Interrogatories, dated July 31, 2006.
6. Item 5.
7. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).
8. Revised AG, dated August 2006, ¶ 24.
9. Directive ¶ E2.2.1.
10. *Id.*
11. *Id.*
12. Directive ¶ E3.1.14.
13. Directive ¶ E3.1.15.
14. Directive ¶ E.2.2.2.