

DATE: February 20, 2007

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 06-18340

DECISION OF ADMINISTRATIVE JUDGE

ROBERT J. TUIDER

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Applicant was unable to overcome security concerns raised by his 28-year admitted use of marijuana. 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 September 28, 2006, DOHA issued a Statement of Reasons (SOR) ⁽¹⁾ detailing the basis for its decision-security concerns raised under Guideline H (Drug Involvement) of the Directive. Applicant answered the SOR in writing on October 16, 2006, and elected to have a hearing before an administrative judge.

The case was assigned to me on November 8, 2006. On November 29, 2006, DOHA issued a notice of hearing scheduling the case to be heard on December 20, 2006. The case was conducted as scheduled to consider whether it was clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The government offered seven documents, which were admitted without objections as Government Exhibits (GE) 1 through 7. The Applicant offered four documents, which were admitted without objections as Applicant Exhibits (AE) A through D. I held the record open to afford the Applicant an opportunity to submit additional documents. Applicant submitted three additional documents post-hearing, which were admitted without objections as AE E through J. DOHA received the transcript on January 3, 2007.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated as findings of fact. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 47-year-old man who since March 2005 has been employed by a defense contractor as a digital design

engineer IV. Applicant has been married to his wife since May 1998, and they have two children, ages five and two. He is a first-time applicant for a security clearance.

Applicant was awarded a bachelor of science degree, majoring in electrical engineering, in May 1982. He more recently attended a university extension course on computer programming from March 1999 to June 1999.

Applicant has an admitted extensive history of drug use spanning an approximate 28-year period. Between October 1977 to January 2005, he estimates that he used marijuana, on at least 1,000 occasions, at times to include daily use. During this period, he purchased marijuana with varying frequency. While he was in college, he used cocaine and psilocybin mushroom with varying frequency. Also, while in college he used PCP on at least two occasions, and used LSD on a least one occasion. (SOR ¶¶ 1.a. through 1.f.) Applicant asserts that he stopped using any form of drugs at age 45 in January 2005. He submitted his security clearance application in April 2005. GE 1.

Reasons Applicant gave for giving up drug use after such a lengthy period include his age, pressure from his wife, the fact he has two young children, responsibilities of married life, and the potential of taking a drug test for his current position. Reasons Applicant gave for continuing to use drugs for such a lengthy time was that he "sort of liked the high and sort of the escape," and "I guess I must have been partially addicted and I did like the high. There must have been some at least partial addiction factor than just to use it." Tr. 52.

Applicant also testified his more recent use of marijuana occurred in the company of an established group of trusted friends. He described these friends as "good guys," who were family oriented and employed as professionals. Tr. 56. Applicant still associates with these friends on occasion, but not as much as when he smoked marijuana with them. According to Applicant, these friends respect his decision to quit using marijuana and do not try to exert influence on him to use marijuana. He added that his marijuana usage tapered off beginning in 2000 and decreased up until he quit in January 2005.

Applicant submitted a letter from a licensed marriage family therapist with training and experience in chemical dependency and abuse. Based on her review of Applicant's employee files and two interviews on November 16, and 30, 2006, she was of the opinion that Applicant had stopped using marijuana two years ago on his own volition. She added it was her opinion that Applicant is not now using or abusing any narcotics and is unlikely to resume using any drugs. AE A.

Also, at his hearing, Applicant submitted a written statement of intent never to use drugs again with the understanding his clearance would automatically be revoked for any violation. AE B. Applicant provided two work-related reference letters from supervisory personnel attesting to his good character and the overall positive contribution he has made as an employee. AE C and D.

Applicant submitted two post-hearing documents that addressed drug rehabilitation. The first document from a human resources representative. She stated she initially thought Applicant's employer would be able to facilitate a voluntary drug testing program. After further investigation she determined the employer was unable to administer such a program due to lack of resources and not having a process to administer such a program. AE F.

The second document from a Ph.D. credentialed psychologist stated he met with Applicant three times on January 2, 5, and 12, 2007. In his assessment, he concluded Applicant "appears to be psychologically well-adjusted and genuine in his oath to remain abstinent from the use of any illicit substance." AE J. Applicant's cover letter to these two documents stated a willingness "to go beyond the requirements and submit myself to an independently administered testing program to help instill the greatest possible confidence in my commitment to abstinence." AE E.

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead they are to be applied by administrative judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, administrative judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive. The

government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts must have a nexus to an Applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

BURDEN OF PROOF

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." 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 has restricted eligibility for access to classified information to "United States citizens . . . whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Executive Order 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has the ultimate burden of establishing his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." *See* Executive Orders 10865 § 2 and 12968 § 3.1(b). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, 484 U.S. at 531. Doubts are to be resolved against the applicant.

CONCLUSIONS

Guideline H - Drug Involvement

In the SOR, DOHA listed six allegations under drug involvement (SOR ¶¶ 1.a. through 1.f.) to include marijuana use covering a 28-year period.

The Concern: 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. Directive ¶ 24.

The government established its case under Guideline H to ¶¶ 1.a. through 1.f. Applicant admitted these allegations in his Response to the SOR and reaffirmed those admissions during his testimony. Of particular concern is Appellant's 28 years of marijuana use in varying degrees from approximately October 1977 to at least January 2005.

Such conduct raises concerns under Disqualifying Conditions (DC) of Guideline H to include: DC 25(a) *any drug abuse*; and DC 25(c) *illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution or possession of drug paraphernalia.*

It is well established that the best indicator of future behavior is past behavior. Per the Applicant, his marijuana use stopped approximately three months before he submitted his security application and approximately two months before he began his employment with a defense contractor.

While I found Applicant to appear sincere, I also found his mitigating evidence lacking. I do believe Applicant highly is motivated to put his drug use behind him. The primary evidence offered is his assurance that he is drug free and he will remain drug free. He cites among his motivating factors to remain drug free the realization his behavior is not consistent with the maturity required of a responsible father and spouse, nor is such behavior consistent with retaining a job as a defense contractor. He submitted evidence from a licensed marriage family therapist with training and experience in chemical dependency and abuse and a Ph.D. qualified psychologist. These two health care professionals collectively conclude in essence that Applicant is not drug dependent. Applicant did not submit any evidence of physical dependency or recent drug testing.

Applicant's last use of cocaine, psilocybin mushrooms, PCP, and LSD occurred before he graduated from college in May 1982. Application of MC 26(a) *the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment*, is applicable following his 25-year abstinence of these drugs. Application of MC 26(b) *a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; and (3) an appropriate period of abstinence*; do not apply. Applicant's continued association with his friends with whom he engaged in illegal drug activity, however benign, and his 28 years of marijuana use in contrast to two years of claimed abstinence preclude application of these MCs.

Applicant's statement of intent to avoid future drug use, AE B, is sufficient to warrant application of MC 26(b)(4) *a signed statement of intent with automatic revocation of clearance for any violation*. Application of MC 26(c) *abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended*; and MC 26(d) *satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional*; do not apply under the facts presented.

There is an additional concern raised by Applicant's behavior, namely his choice to ignore laws prohibiting the use of marijuana, and the continued use of marijuana spanning 28 years of his adult life. Although he submitted evidence from medical authority addressing his lack of psychological drug dependency, he did not submit any evidence addressing physical drug dependency. Unfortunately, 28 years of illegal marijuana use is not mitigated by two years of claimed abstinence.

Lastly, I have evaluated Applicant applying the "whole person" concept. This decision should not be construed as a determination that the Applicant cannot or will not attain the state of true reform and rehabilitation necessary to justify the award of a DoD security clearance. To the contrary, his noted achievements and accomplishments suggest sound potential for future service in the defense industry. Should Applicant be afforded an opportunity to reapply for a security clearance in the future he may well demonstrate persuasive evidence of his security worthiness. Further time is needed to evaluate Applicant's recent commitment to remaining drug free.

FORMAL FINDINGS

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

Paragraph 1. Guideline H: AGAINST APPLICANT

Subparagraphs 1.a. - 1.b.: Against Applicant

Subparagraphs 1.c. - 1.f.: For Applicant

DECISION

In light of all of 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.

Robert J. Tuidor

Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.