

DATE: September 30, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-09930

**DECISION OF ADMINISTRATIVE JUDGE**

**ROBERT ROBINSON GALES**

**APPEARANCES**

**FOR GOVERNMENT**

Erin C. Hogan, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Thirty-seven-year-old Applicant's abuse of marijuana, commencing at college in 1985, and continuing thereafter until December 2001--a period of about 16 years; his initial contention that what he did during his "private time" was of no business to anyone else, ostensibly including the authorities, the Government, and his employer; and his conditional vow that so long as he possesses a security clearance, if one is granted to him, he will not use marijuana; despite his purported abstinence since December 2001, leave grave doubts as to his security eligibility. Clearance is denied.

**STATEMENT OF THE CASE**

On April 3, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn written statement, dated April 28, 2003, Applicant responded to the allegations set forth in the SOR, and elected to have his case decided on the written record, in lieu of a hearing. Department Counsel submitted the government's written case on July 8, 2003. A complete copy of the file of relevant material (FORM) [\(1\)](#) was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Any such submissions were due by August 28, 2003. He chose not to do so. The case was assigned to this Administrative Judge on September 16, 2003.

**FINDINGS OF FACT**

Applicant has admitted one (subparagraph 1.a.) of the two factual allegations pertaining to Drugs under Guideline H. That admission is incorporated herein as a finding of fact. He denied the remaining allegation.

After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 37-year-old employee of a defense contractor, and is seeking to obtain a security clearance.

Applicant was a substance abuser whose choice of illegal substances was marijuana. He commenced using marijuana in about 1985 while attending college, and continued using it on a regular sustained basis, generally on a weekly or twice weekly basis, until about May 1989.<sup>(2)</sup> Upon graduating, he continued using marijuana on a more irregular, but sustained basis, on about 40 occasions until December 2001.<sup>(3)</sup> Applicant subsequently characterized the frequency and quantity of his marijuana usage as "several times" and "very infrequently."<sup>(4)</sup> There is no evidence to rebut his assertion that he last used marijuana in December 2001 or that he has abstained from further marijuana use since that time. He smoked marijuana in both cigarettes and pipes.<sup>(5)</sup> His initial motivation for using marijuana was attributed to curiosity,<sup>(6)</sup> but his subsequent motivation was that he enjoyed marijuana because the effects of it left him somewhat euphoric and paranoid.<sup>(7)</sup> All of his marijuana use occurred in social and recreational settings.<sup>(8)</sup>

On two occasions during the period of his collegiate marijuana use, Applicant purchased unspecified quantities of marijuana, paying about \$5.00 per cigarette.<sup>(9)</sup>

In February 2002, Applicant was interviewed by a Special Agent of the Defense Security Service (DSS), and he furnished a sworn written statement. Regarding his future intentions pertaining to marijuana, he stated:<sup>(10)</sup>

... As for my intentions of continuing to use marijuana in the future, I do not believe that it is anyone's business as to what I do in my private time. However, I recognize that illegal drug usage violates security policies and procedures. Therefore, if I possess a security clearance, I will no longer use marijuana. I still have some friends who occasionally use marijuana; however, I do not feel that they could pressure me to use illegal drugs or narcotics.

In April 2003, upon being confronted with the SOR, Applicant seemingly modified his position. He denied that he "may continue to use marijuana in the future."<sup>(11)</sup> He explained the comments in his statement should have been construed to indicate he would discontinue marijuana use.<sup>(12)</sup> He is now willing to submit to a urinalysis test to demonstrate his compliance.<sup>(13)</sup>

Applicant was never arrested during his period of illegal substance abuse.

He has never undergone any drug treatment or rehabilitation as a result of his substance abuse.<sup>(14)</sup>

Applicant has been with his current employer since May 1989, and presently holds the position of staff engineer. The quality of his performance has not been revealed.

## **POLICIES**

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An Administrative Judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision in Section E2.2., Enclosure 2, of the Directive, are intended to assist the

Administrative Judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an Administrative Judge should consider are: (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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline most pertinent to an evaluation of the facts of this case:

**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.**

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, pertaining to this adjudicative guideline are set forth and discussed in the Conclusions section below.

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security,"<sup>(15)</sup> or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded both standards are one and the same. In reaching this Decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the Government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the Government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the Government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship 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. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

### CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

With respect to Guideline H, the Government has established its case. Applicant's improper and illegal drug abuse, including the purchase, possession, and use of marijuana, is of concern, especially in light of his desire to have access to the nation's secrets. The Directive clearly expresses the Government's concern regarding drug involvement in provision E2.A8.1.1.1. (*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). Drug abuse is defined in provision E2.A8.1.1.3.: *(the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction)*. And provision E2.A8.1.1.2.1. generally identifies and defines drugs: *(drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens))*. Applicant's overall conduct pertaining to his illegal substance abuse clearly falls within Drug Involvement Disqualifying Condition (DC) E2.A8.1.2.1. *(any drug abuse)*, and DC E2.A8.1.2.2. *(illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution)*.

Applicant did not simply experiment, while a teenager, out of curiosity, and stop. Instead, motivated by social pleasures, euphoria, and paranoia, notwithstanding the illegal nature of his endeavor, he exhibited a pattern of questionable judgment, irresponsibility, and immature behavior, and continued his substance abuse of marijuana, initially on a regular basis and subsequently on an irregular, but sustained, basis for approximately 16 years. Applicant was 35-years-old when he acknowledged last having used marijuana. Applicant placed his drug-induced social pleasures above the drug laws.

One controversial issue in this case pertains to Applicant's future intentions. Applicant's initial contention was that what he did during his "private time" was of no business to anyone else, ostensibly including the authorities, the Government, and his employer. He did, however, concede that drug abuse violates the law as well as security policies and procedures. Thus, he concluded that if he is granted a security clearance, and so long as he possess such clearance, he will not use marijuana. I construe Applicant's position in this regard as follows: He sees nothing wrong with abusing marijuana, regardless of how illegal it may be to do so, and may resume such marijuana abuse once he no longer possesses his clearance. I consider his position as a conditional vow not to use marijuana in the future. A conditional vow such as Applicant's seemingly falls within DC E2.A8.1.2.5. *(Failure to successfully complete a drug treatment program prescribed by a credentialed medical professional. 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 stated above, improper or illegal involvement with drugs raises questions regarding an individual's willingness or ability to protect classified information. Applicant's words and actions have muddied the waters in this particular area.

The presence or absence of rehabilitation and other pertinent behavioral changes are significant factors in the overall adjudicative process. Despite a period of substance abuse which lasted for approximately 16 years, Applicant has not undergone any drug awareness, education, or treatment program, in order to achieve a better self-understanding of the behavioral and psychological effects of his actions and the motivation therefor. This is not to suggest that there is any such requirement to undergo treatment or attend any of the aforementioned programs, but exposure to at least the educational and psychological components of those programs might be beneficial to Applicant. Likewise, simply superficially claiming that curiosity, relaxation, enjoyment, and euphoria were motivators, does not demonstrate true insight into the actual motivation for the course of conduct which he had chosen.

While Applicant's purported period of abstinence may have commenced in December 2001, and continued thereafter to the close of the record, it was only during the past five months that the purported abstinence was based upon a conscious decision to cease his substance abuse, at least so long as he possessed a security clearance. Without answers to these important questions, as well as the development of counter measures to the resumption of substance abuse-relapse prevention, the likelihood of recurrence becomes greater. It becomes even greater when the individual expresses reservations to total abstinence and currently maintains friends with individuals who occasionally use marijuana in his presence.

In this instance, Applicant's newly adopted position does not, in my estimation, constitute a "demonstrated intent not to abuse any drugs in the future," as set forth in Drug Involvement Mitigating Condition (MC) E2.A8.1.3.3. Under the evidence presented, I possess little confidence that Applicant's substance abuse will not recur. Moreover, I believe Applicant's earlier declared future intent is deserving of more weight than his more recent security clearance review-generated modifications and clarifications. Even with new "clarified" intentions and a period of abstinence, more time is simply necessary.

I do not take this position lightly, but based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my evaluation of the evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under Enclosure 2 of the Directive, I believe that Applicant has failed to mitigate or overcome the Government's case. The evidence leaves me with grave questions and doubts as to Applicant's security

eligibility and suitability. Accordingly, allegations 1.a. and 1.b. of the SOR are concluded against Applicant.

For the reasons stated, I conclude Applicant is not eligible for access to classified information.

### **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 THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against 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.

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Robert Robinson Gales

Chief Administrative Judge

1. The government submitted six items in support of its contentions.
2. Item 6 (Statement, dated February 14, 2002), at 1.
3. *Id.*
4. Item 4 (Response to SOR, dated April 28, 2003), at 2.
5. *Id.*
6. *Id.*
7. *Id.*, at 1.
8. *Id.*, at 3-4.
9. *Id.*, at 2.
10. *Id.*, at 2.
11. Item 4, *supra* note 4, at 1.
12. *Id.*, at 2.
13. *Id.*, at 2-3.
14. Item 6, *supra* note 2, at 2.
15. See Exec. Or. 12968, "Access to Classified Information;" as implemented by Department of Defense Regulation 5200.2-R, "Personnel Security Program," dated January 1987, as amended by Change 3, dated November 8, 1995, and further modified by memorandum, dated November 10, 1998. However, the Directive, as amended by Change 4, dated April 20, 1999, uses both "clearly consistent with the national interest" (*see* Sec. 2.3.; Sec.2.5.3.; Sec. 3.2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), and "clearly consistent

with the interests of national security" (*see* Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (*see* Enclosure 2, Sec. E2.2.2.)