

DATE: January 22, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-10057

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Nygina T. Mills, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Fifty-three-year-old Applicant's lengthy 34-year history of marijuana abuse, commencing when he was in college and continuing until at least November 2000, including approximately 14 years during which he has held a security clearance; his knowledge that doing so was illegal; his contention that marijuana use is "pretty harmless;" his initial refusal to stop using drugs; and his eventual security clearance review-generated promise that he will abstain from smoking marijuana in the future while holding a security clearance position; raise grave questions and doubts as to his security eligibility and suitability. Clearance is denied.

STATEMENT OF THE CASE

On July 10, 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. The SOR 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 July 30, 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 November 13, 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. He took advantage of that opportunity and timely submitted his response on December 5, 2003. Department Counsel did not object to his submission. The case was assigned to me on January 16, 2004.

FINDINGS OF FACT

Applicant has admitted both factual allegations pertaining to personal conduct under Guideline E (subparagraphs 1.a. and 1.b.). Those admissions are incorporated herein as findings of fact.

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 53-year-old employee of a defense contractor, and is seeking to retain the SECRET security clearance initially granted to him in 1986.

Applicant was an illegal substance abuser whose substance of choice was marijuana. He commenced using marijuana in 1966, when he was a freshman in college, usually on the weekends in social settings, "because everyone was doing it back then and [Applicant] was curious as to what it was like."⁽²⁾ Thereafter, until 2000, with the exception of approximately three to four years when he abstained,⁽³⁾ Applicant continued to smoke marijuana with varying unspecified frequency. At some point prior to December 2000, the frequency averaged one time every two months.⁽⁴⁾ Applicant generally smoked marijuana with friends while in college,⁽⁵⁾ and at home with his wife thereafter.⁽⁶⁾ His most recent use of marijuana occurred in November 2000.⁽⁷⁾

His initial motivation for using marijuana was curiosity because others were using it, and he continued to use it because it had a relaxing effect on him and he liked it.⁽⁸⁾ He continued using it with his wife after his marriage because he liked and enjoyed the effect it had on him and because it increased his wife's sexual arousal.⁽⁹⁾

While Applicant abused marijuana during his college years, he generally contributed to the purchase of the substance but was unable to purchase large quantities for himself because he did not have sufficient funds to do so.⁽¹⁰⁾ After 1970, he generally purchased small quantities of the substance every two years at the cost of approximately \$70.00 per purchase.⁽¹¹⁾ He has chosen not to divulge the identity of the friend who regularly has supplied him with marijuana for the past 10 years.⁽¹²⁾ He has never cultivated marijuana.⁽¹³⁾ He has never sold the substance.⁽¹⁴⁾

When Applicant first obtained his security clearance in 1986 he was abusing marijuana. During the ensuing 14 years, and continuing until about 2000--a total of about 14 years--he abused marijuana, with the exception of the three or four year period of abstinence.

In December 2000, Applicant expressed his views regarding marijuana:⁽¹⁵⁾

My views on marijuana have remained the same over these past years. I believe it should be legalized under certain circumstances. It is a "pretty harmless" drug as perception altering substances are concerned. I believe it is safe when used for recreation so should be legalized and controlled as alcohol and tobacco are.

. . . I have given it some thought over the years, but saw it as a misdemeanor crime and not being such a big deal. I don't think it should effect my clearance, as I have been open and honest with this information. I think that having someone's marijuana use possibly [sic] adversely effect ones security clearance, is going to force people to lie about their drug use. . . . As stated above, I have given some thought to my smoking marijuana and my holding a clearance with the company. I did not think it was or is a big deal.

Initially, in his statement of December 2000, Applicant stated his future intentions were "to continue smoking marijuana" because he enjoys the effects it has on him, and he has "no intentions of stopping [his] use of the drug."⁽¹⁶⁾ Apparently, upon further consideration, and seemingly as an afterthought,⁽¹⁷⁾ Applicant altered his position and added the following comments:⁽¹⁸⁾

. . . Marijuana is really a very insignificant part of my life. . . . Using marijuana has no comparison to the importance I place on my job. There is no principle involved in this as far as my continued use of marijuana. The principle is to obey the law and not place myself in the position of defending this illegal activity. Although I do have my personal views on

the legality of marijuana, I will not place my views above my responsibilities of holding a security clearance with the US Government. I made a statement earlier referring to my continued use of marijuana. I would like to amend that statement. I have no intention of smoking marijuana in the future, while holding a security clearance with the US Government.

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 marijuana abuse. [\(19\)](#)

Applicant has been employed by the same company since August 1986. The quality of his performance has not been disclosed.

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 set forth 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 guidelines most pertinent to an evaluation of the facts of this case:

Personal Conduct - Guideline E: 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, are set forth and discussed in the Conclusions section below.

It has not gone unnoticed that both Department Counsel and Applicant focused solely on Applicant's drug involvement under Guideline H, in and of itself, with little if any attention being given to that drug involvement in the context of personal conduct under Guideline E, which was the basis of the allegations in the SOR. While the disqualifying and mitigating conditions under Guideline H may be relevant to the discussions herein, their materiality is unclear. My decision in this case may only be made pursuant to the allegations set forth in the SOR, and the allegations therein were made under Guideline E. Nevertheless, for the purposes of discussion, the following adjudicative guidelines are referenced:

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.

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," [\(20\)](#) or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded that 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 that are 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, that 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 that 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 that 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 that 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, an assessment of credibility, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

With respect to Guideline E, the Government has established its case. Applicant's lengthy period of improper and illegal drug abuse, essentially consisting of continuing, irregular use of marijuana from about 1966, when he was in college, until at least November 2000, is of concern, especially in light of his desire to have continued access to the nation's secrets. Applicant did not simply experiment out of curiosity and stop during the 1960s. Instead, motivated by social pleasures--purportedly a common and socially accepted activity which was engaged in by "everyone," as well as the sexual arousal experienced by his wife when they abused marijuana together--notwithstanding the illegal status of his endeavor, he exhibited a pattern of questionable judgment, irresponsibility, and immature behavior. Equally disturbing was the fact that Applicant abstained for three or four years and then resumed his marijuana abuse.

Applicant's overall conduct pertaining to his marijuana abuse clearly falls within Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.1 (*reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*), PC DC E2.A5.1.2.4. (*personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail*), PC DC E2.A5.1.2.5. (*a pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency*), and PC DC E2.A5.1.2.6. (*association with persons involved in criminal activity*).

Applicant's drug abuse over the years in question was known to him to be illegal, but he continued to engage in it for approximately 34 years. As he stated, "I have given it some thought over the years, but saw it as a misdemeanor crime and not being such a big deal." The actions were taken with his wife and friends, and he has declined to identify his supplier. Furthermore, despite Applicant's contention that he is not susceptible to blackmail, his colleagues, family, and children remain unaware of his substance abuse.

It is of substantial concern that Applicant had the opportunity to become and remain abstinent after he had been granted

a SECRET security clearance in 1986, but he failed to seize that opportunity. Instead, his continuing marijuana abuse amounted to a sundering of his fiduciary relationship with the Government. In so doing, he took that special relationship and effectively dashed the trust and confidence that the Government had placed in him.

One controversial issue in this case pertains to Applicant's future intentions. Applicant's initial contention was that his drug abuse, so long as he did not do it at work or while in a travel status was of no one's business, ostensibly including the authorities, the Government, and his employer. He did, however, concede that drug abuse violates the law, but felt marijuana should be legalized. Eventually, he concluded that if he is permitted to retain 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 eliminates PC Mitigating Condition (PC MC) E2.A5.1.3.5. (*the individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*), and furnishes unfavorable consideration for Adjudicative Process Factor (APF) 6 (*the presence or absence of rehabilitation and other pertinent behavioral changes*) and APF 9 (*the likelihood of continuation or recurrence*) set forth above. In this instance, there are no positive steps or pertinent behavioral changes, and the likelihood of marijuana recidivism is significant. It becomes even greater when the individual expresses reservations to total abstinence and currently maintains relationships with individuals who occasionally use marijuana in his presence.

Even if one were to apply the drug involvement conditions under Guideline H, there would remain significant concerns. Applicant's overall conduct pertaining to his marijuana abuse clearly falls within Drug Involvement Disqualifying Condition (DI DC) E2.A8.1.2.1 (*any drug abuse*), DI DC E2.A8.1.2.2. (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution*), and DI 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)*).

In this instance, Applicant's newly adopted position regarding future intent 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 (DI 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, and my application of the pertinent factors under the Adjudicative Process, 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 continued 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 E: 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.

Robert Robinson Gales
Chief Administrative Judge

1. The Government submitted six items in support of its contentions.
2. Item 6 (Statement, dated December 19, 2000), at 1. In his Response to SOR, dated July 30, 2003, at 1 (Item 2), Applicant disputed the year he commenced using marijuana and stated it first occurred in 1967 during his sophomore year. While the exact date is relatively unimportant, I have chosen to accept the time-frame initially provided by Applicant to the investigator during his December 2000 interview.
3. *Id.* Item 6, at 1-2.
4. *Id.*, at 2.
5. *Id.*, at 1.
6. *Id.*, at 2.
7. *Id.*
8. *Id.*, at 1.
9. Item 2, *supra* note 2, at 2.
10. Item 6, *supra* note 3, at 2.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*, at 3-4.
16. *Id.*, at 4.
17. Item 2, *supra* note 2, at 3. Applicant explained he was embarrassed by the questioning pertaining to his substance abuse and became very defensive by what he considered to be an invasion of his privacy.
18. Item 6, *supra* note 3, at 5.
19. *Id.*, at 3.
20. 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" (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" (Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (Enclosure 2, Sec. E2.2.2.)