

DATE: December 26, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-00649

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esquire, Department Counsel

FOR APPLICANT

Warren J. Borish, Esquire

SYNOPSIS

Applicant's long-term marijuana abuse was discovered by his employer's random drug tests in June 1998 despite his adulterating his first urine sample. He used marijuana again, and then tested positive. Despite his successful drug treatment and favorable prognosis by an expert who evaluated him, Applicant's extensive use of marijuana while he had a clearance is too recent to conclude beyond doubt that he can be trusted to avoid any drug use in the future. After he was granted a security clearance in 1979 and knew of the Government's prohibition against drug use, Applicant used amphetamines until September 1990, cocaine until 1990, and marijuana until at least June 1998. Another security concern is his personal conduct in providing misleading information at the time of a random drug test and on his 1996 Security Clearance Application. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on April 13, 2001. The SOR detailed reasons why the Government could not make the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.⁽¹⁾ The SOR alleges specific concerns over drug abuse (Guideline H) and personal conduct (Guideline E). Applicant responded to these SOR allegations in an Answer notarized on May 22, 2001, where he admitted all allegations and provided explanations; he requested a hearing. On May 29, 2001, his counsel entered his appearance.

The case was assigned to Department Counsel, who on June 15, 2001, attested it was ready to proceed. On June 15, 2001, the case was assigned to Judge Claude Heiny. On June 18, 2001, the case was re-assigned to Judge Paul J. Mason for caseload reasons; on July 16, 2001, he set it for hearing on August 9, 2001. Subsequently, Applicant's counsel requested a continuance as two to three of their anticipated witness would not be available on that date because of schedule conflicts; counsel stated that government counsel did not object to this request for a continuance. The case was re-assigned to Judge Jerome H. Silber, who on July 27, 2001, set it for hearing for September 5, 2001. While the parties all appeared for the hearing, Judge Silber was injured in the courthouse; and the case was again continued. Finally the

case was re-assigned to me on September 10, 2001. A mutually convenient date for hearing was agreed to, and a Notice of Hearing was issued on September 13, 2001, to set the matter for October 15, 2001, at a location near where Applicant works and lives.

At the hearing the Government presented four exhibits which were admitted into evidence (Exhibits 1-4). The Applicant testified and his counsel called three other witness, including one expert; Applicant's counsel also proffered seven exhibits which were all admitted into evidence. (Exhibits A-E) The transcript (TR) was received on October 23, 2001.

FINDINGS OF FACT

After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following additional Findings of Fact:

Applicant is a 46 year old employee of a defense contractor who began work there in May 1979 and is now a senior member of the professional staff. He was granted a Defense Department Secret security clearance in July 1979. He had a technical excellence award from his company in 1981, a "good news award" in 1996, and an excellence award in 1999. While his rating dropped to a 4 (out of a 1 to 5 rating system, where 5 is the lowest) in the early 1990's, he is now rated as a 3, fully successful. He has never been disciplined, warned or counseled with regard to his employment. (Exhibits 1, 3; Exhibits B, C; D, E; TR 47-59)

After Applicant's mother died when he was 17 years old, he has supported himself. Applicant was married in 1978, but divorced in July 1993 and has a son who lives with his wife. (Exhibits 1, 3)

Drug Abuse

After he had been granted a security clearance⁽²⁾

in 1979, Applicant had used amphetamines until September 1990, cocaine until 1990, and marijuana until at least June 1998. Applicant was given a random drug test by his employer on June 11, 1998, where he had adulterated his urine sample with a substance he had found on-line. Initially, he was interviewed by a doctor in June 1998 and lied about his drug use because he was afraid of the consequences. While initially Applicant denied adulterating his urine sample and his recent use of marijuana, after he was shown the chain of custody, he admitted it. He used marijuana again the following weekend; and on June 23, 1998, he tested positive for marijuana during a drug test given by his employer. Then he admitted he had a history of marijuana use. Applicant was removed from his place of employment for three weeks until July 1998, placed on sick leave, and referred to a drug counseling program which he attended from June 1998 to April 1999; he also attended five Narcotics Anonymous (NA) meetings. He was subsequently tested for drugs for a year on a weekly basis and tested clean. He successfully completed the year rehabilitation program and now is tested for drugs only on a random basis. He has been drug-free since June 23, 1998. Subsequently, his conduct was reported to the Defense Security Service (DSS) as required by the National Industrial Security Program Operating Manual. (Answer; Exhibits 1, 2, 3, 4; TR 62-70, 73-75; 79; 81-82; 86-88; 89; 122 -123; Exhibit F) Applicant was aware of the DoD policy prohibiting any drug use since 1979 when he was initially granted access to classified information. While he went to NA in 1990 to address his use of amphetamines, he never voluntarily sought drug treatment until after he tested positive on his drug test at work in June 1998. (TR 85-86)

Applicant began his use of drugs at age 14. He smoked marijuana from age 14 until age 43 at various frequencies. Sometimes he also purchased marijuana; for example from June 1997 to June 1998 he spent approximately \$1,000 on that drug; he used marijuana mostly on weekends. He began his use of amphetamines at age 16 and gradually increased the amount until he stopped in September 1990 (and spent on the average of about \$30 per week) after he had gone to Narcotics Anonymous. He also ingested barbiturates in 1997 at age 16 and also used hallucinogenic drugs from June 1971 to June 1974 above 15 times a year. He used cocaine two to four times a year from 1971 to 1990. Although his wife advised him to stop using drugs, he did not stop. He viewed himself as a light to moderate drug user. (Answer; Exhibits 1, 2, 3; TR 62-65; 75-81; 84-85; 120-122)

Dr. D, who has a MD in internal medicine and a PhD in toxicology and pharmacology, has been a specialist in medical toxicology since 1981 and is a professor at a university with previous experience and research at a government agency.

He was qualified as an expert in the fields of pharmacology, toxicology, and the diagnosis and treatment of substance abuse. (Exhibit G; TR 90-96) Applicant first came to Dr. D for evaluation in August 2001; he saw Applicant for one hour. Dr. D assessed Applicant as a weekend user of marijuana in 1998; he observed that individuals who use drugs "tend to lie" especially as he had a lot to lose by telling the truth about his drug usage. The fact that he subsequently told the truth about his past drug use to a DSS investigator was a positive indicator of rehabilitation. His prognosis on his ability to remain drug free in the future was "very good that he will probably stay off of it [marijuana]." Dr. D admitted that there are no certainties⁽³⁾ in this area, but opined that "with a certain degree of medical certainty he will not go back [to drug use]." (TR 97-109; 110-112, 113-118)

Personal Conduct

In June 1996 Applicant executed a Security Clearance Application (Standard Form 86) (SF 86) and denied any drug use in answer to Question 29 even though he was using drugs as he was "afraid of the consequences" of a truthful answer. (Exhibit 1; TR 71, 83)

Dr. D opined that Applicant lied about his drug use and continued to use drugs because of fear which was "a driving force" in his life; and he was afraid of losing his job. (TR 112-113)

References and Evaluations

The director of a center at Applicant's company, who was formerly a manager of a group within the center, has been Applicant's supervisor from September 1996 to March 2001, but knew him previously as they were in the same department. The organization works on matters that are classified, and Applicant needs a security clearance to do this work. This supervisor assessed Applicant as a skilled professional with a lot of valuable experience who is every reliable and dependable at work. He reported that Applicant does his job "adequately, and if not better than average." His most recent evaluation gave him a "3" which indicated he was rated as having a "perfectly acceptable performance, and sometimes exceeds expectations." With respect to one recent project the director was disappointed in Applicant's performance. Under his supervision, Applicant improved in meeting deadlines and showed an increase of ownership and responsibility. This manager never observed that Applicant came to work under the influence of drugs or alcohol; but he was aware of the positive drug test and the extensive subsequent testing, which concerned him. However, he has no hesitation about working with him in the future. He reported that Applicant has a reputation in the workplace for being hardworking, honest, and ethical. (TR 18-26; 26-27; 27- 37; Exhibit B)

Applicant's current manager, who has worked for Applicant's employer for twenty years, has known Applicant for that entire period. For the past six months of 2001 he has been the manager of the group and supervised Applicant and sixteen other professionals. He views Applicant as a "good" professional with a network of contacts which makes him an asset to the company. He views Applicant as a "fairly reliable individual, dependable." While he never saw Applicant come to work under the influence of drugs or alcohol, Witness #2 is aware that there is concern over his drug history from a security point of view. Nevertheless, he has no reservations about working with him in the future on classified projects. (TR 38-46)

Another manager, Applicant's first level supervisor when he came to the company in 1979 and for three or four subsequent years, continues to work with him on projects. He assessed Applicant as a competent and qualified engineer and a major asset to the company. He has confidence in him despite his knowledge of Applicant's past drug use and his successful rehabilitation efforts. (Exhibit A)

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. But the mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole in evaluating this case, I weighed relevant Adjudication Guidelines as set forth below :

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.

Drugs are defined as mood and behavior altering:

[First] 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) and

[Second] Inhalants and other similar substances.

Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

Conditions that could raise a security concern and may be disqualifying include:

- (1) Any drug abuse (see above definition);
- (2) Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution;

Conditions that could mitigate security concerns include:

- (1) The drug involvement was not recent;

Guideline E - Personal Conduct

Conduct involving questionable judgment, untrustworthiness, unreliability, 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 also include:

- (2) The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;
- (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;
- (5) A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency;

Conditions that could mitigate security concerns include:

None

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue Applicant's access to classified information. Then the Applicant presents evidence to refute, explain, extenuate, or mitigate in order to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance. Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

CONCLUSIONS

Drug Abuse

The Government raised security concerns over Applicant's drug abuse, but did not allege that 10 U.S.C. Section 986 applied. (4) After he was granted a security clearance in 1979 and knew of the Government's prohibition against drug use, Applicant used amphetamines until September 1990, cocaine until 1990, and marijuana until at least June 1998. Applicant's long-term drug abuse was discovered by random drug tests by his employer in June 1998, where he first adulterated his urine sample and later tested positive. Although he attended NA in 1990, he never otherwise voluntarily sought drug treatment until after his positive drug test in 1998. Further his drug purchases of marijuana of approximately \$1,000 in 1998 indicate that his drug use was more than minimal.

While Applicant subsequently made a decision not to use marijuana or other illegal drugs, the recency of his marijuana use and the recency of the commitment to drug abstinence do not meet the mitigation (5) guidelines. First, his drug involvement was not an isolated or aberrational event. In assessing the strength of his most 1998 decision to avoid drugs in the future, I have looked at him as a whole person. While he is to be commended for his abstinence from marijuana since June 1998 his 1998 drug treatment, and has the favorable prognosis of an expert, it is too soon to mitigate his past conduct when one takes into account the length and extent of his use of marijuana and other drugs while he had access to classified material and knew of the Government policy prohibiting any drug use. Despite the favorable expert opinion, it is too soon to conclude that he has persuasively demonstrated his power to avoid any drug use in the future. While he values his job and has done well in it according to company managers and his evaluations, Applicant's choice to use marijuana repeatedly while on a job requiring a security clearance shows poor judgement. Further, his conduct at the time of the 1998 drug test in adulterating the sample and lying initially, and then using drugs again, shows more poor judgment. Thus, I conclude he does not meet conditions that could mitigate these security concerns over his marijuana use.

On the other hand his use of the other drugs, though extensive, was not subsequently repeated in the past ten years or more. Thus, I conclude that other drug use can be mitigated as that drug involvement was not recent. After considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I find against Applicant on Paragraph 1 and subparagraph 1.a., 1.f., 1.g., and 1.h., but for Applicant on subparagraphs 1.b. through 1.e.

Personal Conduct

The Government advanced security concerns over personal conduct issues as Applicant's behavior (6) reflects questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations and could indicate that he may not properly safeguard classified information. Despite his ability to perform well in his professional capacities, Applicant has had repeated examples where he has demonstrated poor judgment and unreliability in his personal conduct by falsifying his security form in 1996 concerning his current and past drug use as well as his misrepresenting his drug use at the time of his random drug test in 1998. Thus, doubt remains as to whether he is fully rehabilitated given this repeated pattern of rule violations in his personal life and given his long history of questionable conduct in using drugs while have a security clearance as discussed above. Given the seriousness and the repeated nature of his questionable conduct, he has not fully established that his personal conduct should be mitigated. While his past drug use might explain his past falsification because of his concern over losing his job, that explanation does not provide justification. Hence, after considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I find against Applicant on subparagraphs 2.a. through 2.b. under SOR Paragraph 2.

FORMAL FINDINGS

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1. Guideline H: AGAINST APPLICANT

Subparagraph 1.a. Against Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g: Against Applicant

Subparagraph 1.h.: Against Applicant

Paragraph 2. Guideline E AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against 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 the Applicant.

Kathryn Moen Braeman

Administrative Judge

1. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), as amended by Change 4, April 20, 1999.
2. I do not accept Applicant's claim that despite his drug use that he never improperly failed to protect classified information and would do so in the future. Knowing the Government's prohibition against drug use after he was granted access, his actions had the potential to put classified information at risk. (TR 61, 70-71)
3. I do not accept this medical expert's claim that despite his drug use that Applicant could properly protect classified information in the future as that opinion is beyond the scope of his expertise. He was not qualified as an expert on how to handle classified material. Knowing the Government's prohibition against drug use after he was granted access, Applicant's past actions in using drugs nevertheless had the potential to put classified information at risk.
4. The Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 mandated restrictions on the granting or renewal of security clearances which was implemented within the Department of Defense by a June 7, 2001, Memorandum, and within DOHA by Operating Instruction (OI) 64, issued on July 10, 2001. Provision (1) disqualifies persons with convictions in both State and Federal courts with sentences imposed of more than one year, regardless of time actually served. The policies apply to all pending cases in which a final decision had not been issued as of the June 7, 2001, date of the memorandum. In this instance I have determined that 10 U.S.C. Section 986 does not apply as the Applicant's drug use ceased in 1998 according to his testimony and subsequent drug tests.

5. Conditions that could mitigate security concerns include:

- (1) The drug involvement was not recent;
- (2) The drug involvement was an isolated or aberrational event;

(3) A demonstrated intent not to abuse any drugs in the future; (4) Satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable diagnosis by a credentialed medical professional.

6. Conditions that could raise a security concern and may be disqualifying also include:

(2) The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; (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; (5) A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency