

DATE: February 14, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-02880

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

After he applied for a security clearance in April 1999, Applicant used marijuana once in April 1999 even though he understood the importance of remaining drug-free. Again, two days later Applicant showed poor judgment in accepting a small bag of marijuana (5 grams) to take to a party which led to his arrest for possession. In December 1999 he was granted a conditional discharge based on his remaining drug free; while on probation, he did not use drugs and passed drug tests in March and June 2000. But despite knowing the risks, Applicant used marijuana again in July 2000 after he completed probation and while he had an interim security clearance. This repeated use is too recent to demonstrate his rehabilitation from the criminal charge and drug use even though he has changed his life style and performs well at his job. 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 September 7, 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 criminal conduct (Guideline J). Applicant responded to these SOR allegations in an Answer initially submitted on September 14, 2001, and later notarized on November 7, 2001, where he admitted all allegations; he requested a hearing.

The case was assigned to Department Counsel; on December 12, 2001, she attested the case was ready to proceed. On that day the case was assigned to me. Subsequently, a mutually convenient date for hearing was agreed to, and a Notice of Hearing was issued on December 19, 2001. The matter was set for January 10, 2002, at a location near where Applicant works and lives. At the hearing the Government presented three exhibits which were admitted into evidence (Exhibits 1-3). The Applicant testified but proffered no exhibits; he requested additional time to submit evidence and was granted seven days until January 17, 2002, to submit his evidence and the Government had five days until January 22, 2002 to review his evidence. (TR 14-17, 41, 49) His exhibit A was submitted on January 15, 2002; the Government

did not object. Thus, the document was admitted into evidence, and the record closed. (Exhibit A) The transcript (TR) was received on January 18, 2002.

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 23 year old employee of a defense contractor who began work there in April 1999. He applied for a security clearance in April 1999 by executing a Security Clearance Application (Standard Form 86) (SF 86). He graduated from a technical school in April 1999 with a diploma. He is single. (Exhibits 1, A; TR 13-14) He was granted an interim security clearance in May 1999. (Answer; TR 17, 23)

Drug Abuse and Criminal Conduct

In his SF 86 Applicant admitted no use of illegal drugs. The questions on the form gave him an "inkling" that use of drugs would raise a security concern. (Exhibit 1; TR 27-28) However, immediately after he completed the form, he used marijuana with a friend, Mr. M in April 1999 because of peer pressure. Then two days⁽²⁾ after completing the form he was arrested going to a party at a friend's house with Mr. M. Prior to going to the party another person gave them a small bag of marijuana (approximately four or five grams) which Applicant was carrying as they arrived at the party. The local police had raided the party just prior to their arrival, so Applicant and his friend were searched and the marijuana discovered. He did not use marijuana the night of the party. He was arrested for possession of marijuana under 50 grams. He hired an attorney (at a cost of approximately \$2,000) who delayed the court proceedings until December 1999; he was granted a conditional discharge, fined \$780 and given six months probation. While on probation he was required to submit to drug tests in March and June 2000 which came back negative. He has paid the fine. However, after he completed probation, he again used marijuana in July 2000 at a picnic at Mr. 's house. Other than these two times he has never used marijuana or any other drugs. (Exhibits 2 & 3; TR 19-22, 24-26, 28-34, 37, 39-40)

Applicant concedes that his decision to use marijuana was a bad one which he regrets. He had an interim security clearance at that time of his July 2000 marijuana use. He was aware that use of marijuana was illegal and against Department of Defense policy. He understood the drug policy from the questions on the security form. (TR 23, 32, 36-37, 40)

Applicant subsequently made a decision not to use marijuana again as he values his job and is good at it. He now lives in his own apartment and no longer associates with the people with whom he had used drugs. (TR 33, 38) In January 2002 he stated his intention to avoid any use of marijuana. (TR 34-36)

Evaluation

Applicant began as a trainee at his defense contractor's organization. During his three years at the company he moved very quickly into being a highly regarded employee as he is reported to be motivated, timely, respectful and extremely valuable to their program according to his initial and current supervisors. His employers have entrusted him with sensitive material, and they have never questioned⁽³⁾ his integrity. His supervisors predict he will have a "bright future" with the organization. (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:

None

Guideline J - Criminal Conduct

A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

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

- a. Allegations or admissions of criminal conduct
- b. A single serious crime or multiple lesser offenses.

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 alleged security concerns over Applicant's drug abuse. Immediately after he applied for a security clearance in April 1999, Applicant used marijuana once in April 1999 even though he understood the importance that the government placed on remaining drug-free. Two days later Applicant showed poor judgment in accepting a small

bag of marijuana (5 grams) to take to a party which led to his arrest for possession. In December 1999 he was granted a conditional discharge based on his remaining drug free; he passed drug tests in March and June 2000. After being granted an interim clearance in ay 1999 and after completing probation in June 2000, Applicant used marijuana again in July 2000 despite his knowledge of the DoD drug policy. He never sought drug treatment and does not have a favorable diagnosis by a credential medical professional.

Even though his drug involvement was very limited and Applicant testified in January 2002 that he has decided not to use marijuana again, the recency of his marijuana use and the recency of his commitment to abstinence⁽⁴⁾ do not meet the mitigation⁽⁵⁾ guidelines. In assessing the strength of his most decision to avoid drugs in the future, I have looked at him as a whole person. To his credit he has stopped having any relationship with the individuals he knew when he used drugs and has made a commitment to stop using drugs. Had he not re-used under peer pressure in July 2000, he would have been a better candidate for mitigation under MC 2, as the drug involvement in April 1999 could have been considered an isolated or aberrational event. However, he has abstained from marijuana for only eighteen months which is too short a period of time given his decision to use again in July 2000. He failed to live up to this commitment to the court and to the government to avoid drugs. Thus, it is too soon to conclude that he has persuasively demonstrated his power to avoid any drug use for the future. While he values his job and has done well in it according to his supervisors, his choice to use marijuana twice after applying for and then receiving an interim security clearance shows poor judgement. Since he never reported his drug-related arrest to the company, I conclude that their favorable endorsement was given without knowledge of his drug use and arrest. Thus, I conclude he does not meet conditions that could extenuate these security concerns over his marijuana use and arrest. After considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule against Applicant on Paragraph 1 and subparagraph 1.a, 1.b., and 1.c.

Criminal Conduct

The Government maintains security concerns over Applicant's criminal conduct: his state arrest for possession, a misdemeanor. In December 1999 he was fined, but granted a conditional discharge⁽⁶⁾ based on his remaining drug free. To his credit Applicant was never convicted and never served any time in prison as he passed two drug tests in March and June 2000. There is no evidence that he has subsequently been involved with any criminal activity.

To rebut and overcome the Government's case, Applicant would have to demonstrate he has mitigated this past conduct. Applicant took a positive step in avoiding drug use and in passing court-ordered drug tests in March and June 2000 and completed probation in June 2000. This arrest and conviction might arguable be mitigated under condition (a) as the criminal behavior was not recent and as the incident was a misdemeanor. However, by his use in July 2000, he failed to sufficiently meet other mitigation conditions: (d) . . . the factors leading to the violation are not likely to recur; and (f) there is clear evidence of successful rehabilitation. Applicant did not present sufficient evidence of successful rehabilitation: by using marijuana again in July 2000 he failed to live up to his commitment to the court and to the government to avoid drug use. Again, since he never reported his drug-related arrest to the company, I conclude that his supervisors favorable endorsement should be diminished as there is no evidence they knew of this 1999 drug arrest. After considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule against Applicant on subparagraph 2.a.

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.: Against Applicant

Subparagraph 1.c.: Against Applicant

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a.: 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. Applicant did not report his arrest to his company. He claimed the "first time" he was aware that there was a problem was when the Defense Security Service (DSS) interviewed him about his unlisted drug use and April 1999 arrest in August 2000. (TR 19, 39)
3. Since Applicant never reported his drug-related arrest to the company, I conclude that his supervisors favorable endorsement should be lessened as there is no evidence they knew of this 1999 drug arrest.
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 (2) disqualifies persons who currently are unlawful users of, or addicted to, controlled substances. 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 the Smith Amendment (10 U.S.C. Section 986) does not apply as the Applicant's drug use ceased eighteen months ago.
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. Thus Applicant does not fall under provision (1) of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, 10 U.S.C. Section 986 which mandates restrictions on the granting or renewal of security clearances: 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.