

DATE: May 21, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-03905

DECISION OF ADMINISTRATIVE JUDGE

JOSEPH TESTAN

APPEARANCES

FOR GOVERNMENT

Martin H. Mogul, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's failure to unequivocally state that he will not use marijuana in the future precludes application of Mitigating Condition 3. Clearance is denied.

STATEMENT OF THE CASE

On August 17, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, 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 clearance should be denied or revoked.

Applicant responded to the SOR in writing on October 4, 2001, and elected to have his case determined on a written record in lieu of a hearing. Department Counsel submitted the Government's written case on or about January 22, 2002. Applicant did not file a response to the Government's written case. The case was received by the undersigned Administrative Judge on March 11, 2002.

FINDINGS OF FACT

Applicant is forty-one years of age and is employed as a technician by a defense contractor.

Applicant used marijuana with varying frequency, at times two times a week, from approximately January 1990 to at least May 2000. In a signed, sworn statement that he gave to the Defense Security Service (DSS) in July 2000, he stated that under the laws of the foreign country where he is residing, it is legal to use marijuana because "in (his) off time (he is) a member of a band."

In response to SOR Paragraph 1a, applicant stated that he "no longer" uses drugs. In response to SOR Paragraph 1b,

which alleged that applicant "may continue to use marijuana in the future," applicant stated: "I admit that in paragraph 1b that I may continue to use marijuana in the future because I believe under (foreign country) law I am entitled to use marijuana since I was a musician. I am no longer a band member, because I need to concern my self with the job that I have and my future at (his current employer)."

POLICIES

Enclosure 2 of the Directive sets forth Guidelines (divided into conditions that could raise security concerns and conditions that could mitigate security concerns) which must be followed by the Administrative Judge. Based on the foregoing Findings of Fact, the following conditions are applicable:

Drug Involvement

Disqualifying Conditions:

1. Any drug abuse.

Mitigating Conditions:

None.

CONCLUSIONS

In DOHA cases, the Government has the initial burden of producing evidence that reasonably suggests an applicant cannot be relied upon to safeguard classified information. If the Government meets its burden, it has established a *prima facie* case. Once the Government establishes a *prima facie* case, the burden shifts to applicant to produce evidence in refutation, extenuation, mitigation or reformation sufficient to establish that, notwithstanding the Government's *prima facie case*, he or she can be relied upon to safeguard classified information. In view of the Directive's requirement that a security clearance be granted only upon a finding that to do so is clearly consistent with the national interest, the applicant has a heavy burden.

In this case, the Government established a *prima facie* case under Guideline H. The evidence establishes that applicant used marijuana with varying frequency, at times twice weekly, from approximately January 1990 to at least May 2000. Applicant's use of marijuana reflects adversely on his judgment, reliability and trustworthiness, and reasonably suggests that he cannot be relied upon to safeguard classified information.

Applicant failed to rebut the Government's *prima facie* case under Guideline H. His various statements made in response to the SOR, when viewed together, seem to indicate that he is not using marijuana at the present time,⁽¹⁾ but do not unequivocally commit him to abstaining from the use of marijuana in the future. Applicant's inability or unwillingness to unequivocally state he will not use marijuana in the future precludes application of Mitigating Condition 3. Based on the foregoing, I conclude that it is not now clearly consistent with the national interest to grant applicant's clearance request.

FORMAL FINDINGS

PARAGRAPH 1: 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.

Joseph Testan

Administrative Judge

1. Beacuse the evidence does not establish that applicant is currently using marijuana, I conclude that 10 U.S.C. 986 does not apply.