

DATE: June 8, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-05912

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Michael H. Leonard, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's occasional use of marijuana on three separate occasions during the period estimated as January 1994 to Easter Sunday 1997--while in his late 30s--as well as his stated position that, if given the opportunity to smoke marijuana while socializing with friends in the future, he might do so--a position which he stated in May 2000 and restated in April 2001, and only rejected in May 2001--is of concern, especially in light of his desire to have continued access to the nation's secrets. In the absence of a "demonstrated intent" not to abuse any drugs in the future, grave questions and doubts are raised as to his security eligibility and suitability. Clearance is denied.

STATEMENT OF THE CASE

On March 2, 2001, 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 4, 2001, but notarized on April 5, 2001, 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 April 11, 2001. 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 submitted a handwritten response on May 14, 2001. Department Counsel interposed no objection to the submission. The case was initially assigned to Administrative Judge Kathryn Moen Braeman on June 5, 2001, but, due to caseload considerations, was subsequently reassigned to, and received by, this Administrative Judge on June 7, 2001.

FINDINGS OF FACT

Applicant has admitted the factual allegations pertaining to drug involvement under Guideline H (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 43 year old male employed by a defense contractor, and he is seeking to retain a security clearance, the level of which has not been disclosed.

Applicant was an illegal substance abuser whose substance of choice was marijuana. He experimented with marijuana on about three occasions--while in his late 30s--during the period estimated as January 1994 to Easter Sunday, 1997.⁽²⁾ While he used marijuana socializing with friends and acquaintances at parties when it was offered to him,⁽³⁾ Applicant's motivation for doing so is unknown, although he conceded his use was "recreational."⁽⁴⁾ His marijuana use was occasioned by feelings of becoming light headed, dizzy, and high.⁽⁵⁾

Although, supposedly, he has not used marijuana since April 1997, Applicant's motivation for ceasing such marijuana use is unknown. In May 2000, during an interview with a special agent of the Defense Security Service (DSS), and the following year, in April 2001, in response to the SOR,⁽⁶⁾ with regard to future intent, Applicant stated:⁽⁷⁾

In the future if given the opportunity to smoke marijuana while socializing with friends I might engage in smoking marijuana.

In May 2001, in response to the FORM, Applicant apparently underwent a conversion regarding future intent and, admitting his marijuana use was a mistake, altered his views. As of May 14, 2001, he vowed to abstain from any future illegal marijuana activity because it might place his job in jeopardy.⁽⁸⁾ There is no evidence to rebut Applicant's contention that he has abstained since May 26, 2000. The record is silent regarding possible marijuana used during the period from April 1997 to May 2000, and there is no allegation that the marijuana use continued beyond "about April 1997."

Applicant has never undergone any treatment or rehabilitation related to his marijuana abuse.⁽⁹⁾

During the period of his marijuana abuse, Applicant never purchased marijuana and he never sold marijuana.⁽¹⁰⁾

While Applicant seeks "continued access to classified information,"⁽¹¹⁾ it is not clear if he possessed a security clearance at the time of his marijuana use.

Applicant has been employed by the same company since August 1984. 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 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:

[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 substances, and include:

- (i) 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
- (ii) 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);
- (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.

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.

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," ⁽¹²⁾ 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 endeavored to draw only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have attempted to avoid 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 that 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 that 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 Criterion H, the Government has established its case. Applicant's improper and illegal occasional use of marijuana on three separate occasions during the period estimated as January 1994 to Easter Sunday 1997, is of concern, especially in light of his desire to have continued access to the nation's secrets. Applicant was not a teenager who simply experimented one time out of curiosity and stopped. Instead, as a seemingly more mature person in his late 30s, and motivated by social pleasures not further explained, and notwithstanding the illegal status of his endeavor, he exhibited a pattern of questionable judgment, irresponsibility, and immature behavior, and continued his marijuana use on two other occasions during that three year period. Applicant's overall conduct pertaining to his marijuana use clearly falls within Drug Involvement Disqualifying Condition (DC) E2.A8.1.2.1.

It might reasonably be argued the drug involvement, ending in about April 1997, was not recent, a condition recognized under Drug Involvement Mitigating Condition (MC) E2. A8.1.3.1. However, while the presence or absence of rehabilitation and other pertinent behavioral changes are significant factors in the overall adjudicative process, the presence or absence of one particular condition is not controlling.

Despite marijuana use on three occasions covering a three year period--conduct which I believe takes it out of consideration as isolated or aberrational in nature under C E2.A8.1.3.2.-- accompanied by a period of abstinence, Applicant has seemingly 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 therefore. Likewise, simply superficially claiming that continued social pleasures at the parties he attended were motivators, does not signify true insight into the actual motivation for following the course of conduct which he had chosen. Applicant continued to abuse marijuana to enhance his pleasure. Without the development of meaningful countermeasures to the resumption of substance abuse--relapse prevention, the likelihood of recurrence becomes greater.

In this instance, while crediting Applicant with the wisdom of finally ceasing his marijuana use and remaining abstinent since about April 1997, I believe both the successful completion of a drug treatment and rehabilitation program, as well as confirmed abstinence for a reasonable period should be required to demonstrate the truly successful transformation from substance abuser to an abstinent, drug-free person, and to provide the basis for a conclusion that such conduct will not continue or recur at some party in the future. I am aware there may be no such mandate, but under the evidence presented, I possess little confidence that Applicant's substance abuse is a thing of the past that will not recur.

In this regard, I am particularly concerned about Applicant's longstanding failure, until one month ago, to understand the significance of the situation regarding substance abuse. Until his recent purported conversion, it was clearly Applicant's position that in the future, if given the opportunity to smoke marijuana while socializing with friends, he might engage

in smoking marijuana. That orientation, initially professed by Applicant in May 2000, and reiterated in April 2001, cannot be construed as a "demonstrated intent not to abuse any drugs in the future," as set forth in MC E2.A8.1.3.3. Furthermore, as pointed out in DC E2.A8.1.2.5., "an expressed intent not to discontinue use, will *almost invariably* result in an unfavorable determination."

It is to be acknowledged that as of May 14, 2001, Applicant seemingly rejected future illegal substance abuse by abruptly vowing to forego marijuana in the future. That simple pledge, accompanied only by a newly discovered superficial understanding that the use of marijuana is a mistake which might cause the loss of access to classified information and place his job in jeopardy, does not, in my estimation, sufficiently constitute a "demonstrated intent not to abuse any drugs in the future." Moreover, I remain unconvinced of Applicant's credibility in this regard. Furthermore, I am troubled by Applicant's failure to appreciate the illegality of his endeavor.

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 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 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.

Robert Robinson Gales

Chief Administrative Judge

1. The Government submitted five items in support of its contentions.
2. *See* Item 5 (Statement of Subject, dated May 26, 2000), at 1. *See also*, Item 3 (Response to SOR, dated April 4, 2001).
3. *Id.*, Item 5, at 1-2.
4. *Id.*, at 3.
5. *Id.*, at 2.
6. *See* Item 3, *supra* note 2.
7. *See* Item 5, *supra* note 2, at 3.

8. *See* Response to FORM, dated May 14, 2001, at 2.

9. *See* Item5, *supra* note 2, at 3.

10. *Id.*, at 2.

11. *See* Response to FORM, *supra* note 8, at 2.

12. *See* Executive Order 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.)