

DATE: November 14, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-11340

**DECISION OF ADMINISTRATIVE JUDGE**

**DARLENE LOKEY ANDERSON**

**APPEARANCES**

**FOR GOVERNMENT**

Martin H. Mogul, Department Counsel

**FOR APPLICANT**

Elena Corinne Harper Barnes, Personal Representative

**SYNOPSIS**

Applicant's intermittent use of marijuana from 1983 through 1988 and again in 1994 or 1995 and once in 1999, with a possibility or probability that he may use marijuana in the future, has not been mitigated by sufficient evidence of reform and rehabilitation. Clearance is denied.

**STATEMENT OF THE CASE**

On March 22, 2002, 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, as amended and modified, issued a Statement of Reasons (SOR) to the 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 the Applicant and recommended referral to an Administrative Judge to determine whether his clearance should be denied or revoked.

The Applicant responded to the SOR in writing on April 22, 2002, and requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned on July 15, 2002. A notice of hearing was issued on August 1, 2002, scheduling the hearing for August 28, 2002. At the hearing the Government presented two exhibits. The Applicant presented one exhibit. The Applicant also testified on his own behalf. The official transcript (Tr.) was received on September 9, 2002.

**FINDINGS OF FACT**

The Applicant is 33 years old, married, and has a Bachelor's of Science in Aeronautical Engineering. He is employed as an Engineer for a defense contractor and is applying for a security clearance in connection with his employment.

The Government opposes the Applicant's request for a security clearance, on the basis of allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Guideline H - Drug Involvement). The Government alleges that the Applicant is ineligible for clearance because he has abused illegal substances.

The Applicant began using marijuana in high school in 1983. He usually used it on weekends. He continued to use marijuana until he moved to Kenya in 1988. While in Kenya he did not use marijuana. In 1992, he returned to the United States. He then used marijuana one time between 1994 and 1995. In 1999, while on paternity leave from his employer, he used marijuana with a friend in Wisconsin. (Tr. p. 27).

During an interview with the Defense Security Service, the Applicant indicated that he may use marijuana in the future. The Applicant explained at the hearing that he is clearly resolved not to use marijuana while he has a security clearance and while employed for the defense contractor. (Tr. p. 31 and Government Exhibit 2). He does not rule out the fact that he could possibly use marijuana in the future if his circumstances change. (Tr. p. 50). He states, "For example, the law against marijuana could change, or I could travel in a certain country where it's not illegal and at that point, I wouldn't have any inhibition to use it, if I control it." (Tr. p. 31).

He further stated that he does not consider the use of marijuana to be something that would compromise his ability to keep classified information secure. (Tr. p. 51). The Applicant also indicated that he and his wife have had an ongoing discussion about the use of illegal drugs. His wife does not use them, and she does not approve of him using them. He states that his understanding with his wife is that there is no agreement that he will never use marijuana in the future. (Tr. p. 52).

The Applicant explained that he is reluctant to rule out his use of marijuana in the future because he has experienced some benefit from its use. Specifically, it has allowed him, on occasions, to be creative. He discovered that while under the influence of marijuana he could write backwards with his left hand just as easily as he could write forward with his right hand. (Tr. p. 59). He states that he has no intentions of using marijuana while it is illegal in this country. (Tr. p. 32).

Paragraph 2 (Guideline E - Personal Conduct). The Government alleges that the Applicant has engaged in 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.

On January 26, 2001, during an interview with DSS, the Applicant stated that he could not say that he would never use marijuana in the future. He stated that he might use marijuana if a circumstances arose where it would not effect his linear thinking. He further stated that he was not going to let his job interfere with his freedom. (*See*, Applicant's Answer to SOR and Tr. pp. 34-35).

The Government alleges that during a follow up interview on January 30, 2001, the Applicant confirmed his earlier statement that he would not rule out future marijuana use under what he considered to be appropriate circumstances, and that he did not want his job to interfere with his freedom. The Applicant denied that he made this statement during his second interview. He states that he did not reiterate that he did not want his job to interfere with his freedom during his second interview. (Tr. p. 35).

Paragraph 3 (Guideline B - Foreign Influence). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has foreign contacts that could create the potential for foreign influence that could result in the compromise of classified information.

The Applicant was born in Kenya to a mother who was a United States citizen and to a father who was a citizen of Kenya. After the Applicant was born, his mother also became a citizen of Kenya. Prior to 1992, the Applicant was officially considered a dual citizen of both Kenya and the United States, by birth. In 1992, at the age of 23, the Applicant had to make a choice as to whether he wanted to become only a United States citizen or a citizen of Kenya. He chose to renounce his Kenyan citizenship by written proclamation and thereby became exclusively a United States citizen. (Tr. pp. 22 and 46-47).

The Applicant's father, a self-employed agricultural consultant to local farmers and large scale farmers, travels

exclusively through Kenya, Zimbabwe, Zambia and the United States. He is funded through private grants, the University of Zimbabwe and possibly from the United Nations, as well as from his own inheritance. The Applicant maintains some contact with his father. The Applicant's mother is now a United States citizen, once again, and resides in the United States. The Applicant's brother is a citizen of Kenya and presently lives in the United States. He is presently going through the application process of becoming a United States citizen. He is employed as a computer programmer with a private company.

The Applicant also maintains contact with a Kenyan citizen outside of his family, and has offered to pay his way to the United States. The Applicant states that he would also, if the circumstances arose, consider sponsoring or paying for the expenses for one of his relatives to come from Europe to visit his family in the United States. (Tr. p. 57). The Applicant maintains contact with several other friends of his family in Kenya.

The Applicant has a number of relatives residing in Britain and France. His aunt and uncle and several cousins reside in Britain and France. (Tr. p. 39).

## **POLICIES**

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, sets forth policy factors and conditions that could raise or mitigate a security concern; which must be given binding consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent Guideline. However, the conditions are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his or her own common sense. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

### Guideline H (Drug Involvement)

#### Conditions that could raise a security concern:

1. any drug abuse;
2. illegal drug possession, including cultivation, processing, manufacture, purchase, sale or distribution.

#### Conditions that could mitigate security concerns:

None.

### Guideline E (Personal Conduct)

#### Condition that could raise a security concern:

4. Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or pressure.

#### Conditions that could mitigate security concerns:

None.

### Guideline B Foreign Influence

#### Conditions that could raise a security concern:

1. An immediate family member, or person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country;

Conditions that could mitigate security concerns:

None.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence.

The eligibility guidelines established in the DOD Directive identify personal characteristics and conduct that are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing 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 reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence that is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order... shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned."

## CONCLUSIONS

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for clearance may be involved in drug abuse, which demonstrates poor judgment and unreliability.

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation, which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has used illegal drugs, (Guideline H); and that such conduct shows unreliability and untrustworthiness on the Applicant's part (Guideline E). Because of the scope and nature of the Applicant's conduct, there is a nexus or connection with his security clearance eligibility.

Considering all of the evidence, the Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case.

The evidence shows that the Applicant used marijuana intermittently, from 1983 through 1988, a five year period, then again in 1994 or 1995 and again in the summer of 1999. The Applicant may have stopped using marijuana in 1999. The problem is that he has not shown a demonstrated intent not to use drugs in the future. Stating that he may possibly or probably use drugs, if he did not have a clearance, is insufficient evidence to show that he is eligible today. In addition, I am troubled by the Applicant's decision to use marijuana in 1999, four years after he stopped in 1994 or 1995. It is the Applicant's burden to show that he is currently eligible for a security clearance, he has not made it. It is impossible to have confidence in the Applicant's claim that he will not use it in the future. At this time, the Applicant does not meet any of the mitigating conditions or eligibility requirements for access to classified information.

With respect to foreign influence, the Applicant has minimal foreign contacts in Kenya. His only relative in Kenya is his father. He also has several friends in Kenya. He has several relatives in Britain and France. The Applicant does not have frequent contact with any of these individuals. There is little possibility of pressure being placed on them, and through them, on the Applicant. Accordingly, I find that he would not be vulnerable to their foreign influence. The risk is minimal, at best, and not of present security significance. Accordingly, Guideline B is found for the Applicant.

On balance, it is concluded that the Applicant has failed to overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the Government's Statement of Reasons.

### **FORMAL FINDINGS**

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: Against the Applicant.

Subpara. 1.a.: Against the Applicant.

Paragraph 2: Against the Applicant.

Subpara. 2.a.: Against the Applicant.

Subpara. 2.b.: For the Applicant.

Paragraph 3: For the Applicant.

Subpara. 3.a.: For the Applicant.

Subpara. 3.b.: For the Applicant.

Subpara. 3.c.: For the Applicant.

Subpara. 3.d.: For 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 the Applicant.

DARLENE LOKEY ANDERSON

Administrative Judge

