

DATE: October 31, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 01-17513

**DECISION OF ADMINISTRATIVE JUDGE**

**JOHN G. METZ, JR.**

**APPEARANCES**

**FOR GOVERNMENT**

Jonathan A. Beyer, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant's abuse of marijuana between 1974 and 1996 was mitigated where Applicant had stopped using marijuana in 1996 and demonstrated a clear intent to refrain from future drug abuse by his abstinence for six years and commitment to a drug-free lifestyle because of family concerns. Applicant had not falsified his sworn statement where record evidence demonstrated he had not used drugs since 1996, and reported possible use after that date out of an abundance of caution. Clearance granted.

**STATEMENT OF THE CASE**

On 9 May 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding [\(1\)](#) that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On 31 May 2002, Applicant answered the SOR and requested a hearing. The case was originally assigned to a different Administrative Judge, but was re-assigned to me on 2 July 2002 due to a change in regional assignments. I set the case for hearing on 23 August 2002, and issued a notice of hearing on 26 August 2002 for a hearing 25 September 2002.

At the hearing, the Government presented two exhibits--admitted without objection--and no witnesses; Applicant presented 13 exhibits--11 admitted without objection, two admitted over objection--and the testimony of one witness, himself. DOHA received the transcript on 3 October 2002.

**FINDINGS OF FACT**

Applicant admitted the allegations of the SOR, except that he denied subparagraphs 1.a. (asserting drug use in 1997-1998), 1.a.(1) (asserting increased drug use from 1975-1978), 1.a.(7) (asserting annual drug purchases on his behalf 1982-1985), 1.a.(12) (alleging drug use 1997-1998), 1.d. (alleging an intent to use drugs in the future), and paragraph 2. (alleging a false statement to the DSS); accordingly, I incorporate the admissions as findings of fact.

Applicant--a 46-year old employee of a defense contractor--seeks access to classified information. He has not previously had a security clearance. He has an undergraduate degree in systems science mathematics from an engineering school in the mid-west (Tr. 6), and a master's and doctor's degrees in operations research from a major east coast engineering school (Tr. 6).

On 20 February 1999, Applicant executed a Security Clearance Application (SCA)(SF 86) (G.E. 1) on which he answered "yes" to a question requiring Applicant to disclose his history of drug abuse in the last seven years (question 27). Applicant indicated that from 1 August 1991 to 1 August 1998, he used marijuana 6-10 times. (2)

On 3 August 1999, Applicant executed a sworn statement to a Defense Security Service (DSS) special agent detailing his history of drug abuse, including periods of time more than seven years ago (G.E. 2). (3) After describing his drug use in detail up to 1996, Applicant stated "Since 1996, I may have used marijuana once or twice at a party, 2-3 puffs." Applicant testified credibly that when he made this statement, he was unsure about the last time he had reunited with some of the school friends he used marijuana with, but erred on the side of caution. He had since checked his e-mail records and confirmed that the last time he was with those friends was 1996 (Tr. 75).

Applicant began using marijuana when he went to college in 1974. He initially used out of curiosity, but discovered he liked the feeling and his use increased. By 1975, he was using marijuana 6-7 times a year. He did not use marijuana during his junior year in college (1976-1977), because he had a different set of friends that year, but resumed use after his junior year, using weekly by 1978. From 1978-1980 he used about once a month. During that time, he had friends buy between a quarter-ounce and half-ounce of marijuana for his use. He also drove once under the influence of marijuana. In 1981, he used marijuana weekly, but by 1982-1985, his marijuana use had tapered to about once every month to once every three months. He had friends buy between a quarter-ounce and half-ounce of marijuana once or twice a year during this time (Answer).

Between 1985-1988, Applicant used marijuana once or twice. (4) He used no marijuana between 1988-1993. He used marijuana approximately once every two months from 1993-1994. From 1994-1996, his use tapered to once or twice a year. He had friends buy a quarter-ounce of marijuana once during this period. He gave much of this marijuana away (Answer).

In addition to his marijuana abuse, Applicant used cocaine as much as twice between 1980-1982, and tried a hallucinogenic mushroom once in 1995-1996 (Answer).

In a sworn statement on 23 March 2001 (G.E. 2), in response to a question by the DSS agent, Applicant described his future intentions regarding drug abuse:

In the future, I may smoke marijuana, if offered by trusted friends in a private setting. I have no intention in seeking to purchase any illegal drug. Should abstinence be a condition of employment, I would comply. P.S. "Why." I enjoy the mild intoxication of marijuana.

Applicant testified, consistent with his Answer, that he considered the question a hypothetical--along the lines of "could he conceive of any circumstance under which he might use marijuana again"--and denied that his answer to the question implied an intent to use drugs in the future (Tr. 76). His statement clearly indicated he would refrain if it was a condition of access to classified information, a condition he was not aware of until he received a copy of the adjudication guidelines. He indicated he had no intent to use drugs in the future (Tr. 85-87). He had not used drugs for about six years and saw no reason to bring drugs back into his life (Tr. 93).

Applicant testified that he had stopped using marijuana from 1988-1993 when he was serving as a professor in a state university. When he did not receive tenure, he experienced a sense of rebellion against his current conservative lifestyle, and joined a caving club. While the club had strict rules about caving while under the influence of drugs or alcohol, the members of the club did use drugs and alcohol while on caving trips, just not while actually caving (Tr. 57-63). He then got a job in 1994 and moved away from the area. Between 1994-1996, he used marijuana occasionally, but only when he returned to visit these caving friends. (5) However, he claimed to have learned a lot about life and dealing with disappointments when he did not get tenure. He lost his job in 1995 and 2000 because the company lost the contract

which employed Applicant. Despite this adversity, Applicant did not turn back to marijuana use. His wife was diagnosed with cancer in 1999 and had a recurrence in 2002 (Tr. 66-67; A.E. L., M.), but Applicant did not return to drugs. (6) Applicant asserts that keeping his job and health insurance, and the illegality of drug use, motivated him to refrain from drug use; however, a more important consideration was that drug use was not part of the life he and his wife wanted to live. He last used marijuana in 1996.

Applicant's supervisor--who does not appear to be aware of the allegations in the SOR--observes Applicant to be a trustworthy and honest person of high moral standing, and recommends him for access to classified information (A.E. C.).

## **POLICIES**

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section F.3. and in Enclosure (2) of the Directive. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

Considering the evidence as a whole, the following adjudication policy factors are most pertinent to this case:

### **DRUG INVOLVEMENT (GUIDELINE H)**

E2.A8.1.1. The Concern:

E2.A8.1.1.1. 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.

E2.A8.1.1.2. Drugs are defined as mood and behavior-altering substances.

E2.A8.1.1.2.1. 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

E2.A8.1.1.2.2. Inhalants and other similar substances,

E2.A8.1.1.3. Drug abuse is the illegal use of a drug or use of a legal drug in a manner

that deviates from approved medical direction.

E2.A8.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A8.1.2.1. Any drug abuse (see above definition);

E2.A8.1.2.2. Illegal drug possession, including . . . purchase,

E2.A8.1.3. Conditions that could mitigate security concerns include:

E2.A8.1.3.1. The drug involvement was not recent;

E2.A8.1.3.3. A demonstrated intent not to abuse any drugs in the future.

### **PERSONAL CONDUCT (GUIDELINE E)**

E2A5.1.1. The Concern: 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. . .

E2. A5.1.2. Conditions that could raise a security concern and may be disqualifying include:

None.

E2.A5.1.3. Conditions that could mitigate security concerns include:

None.

### **Burden of Proof**

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."

### **CONCLUSIONS**

The Government has established its case under Guideline H, but I consider the conduct mitigated. Applicant abused marijuana, on and off, for more than twenty years, from 1974 to 1996. <sup>(7)</sup> Clearly, the illegality of the conduct did not affect Applicant's decision to use marijuana. However, Applicant has been drug free since 1996, six years, as he matured and realized that drug use was not part of the life he wanted to live. I recognize that Applicant was forty or so when he came to this realization, so his continued drug abuse until then cannot be excused as youthful mistakes. Yet, maturity and judgment come, if at all, when they will; what is most important in security determinations is that they come.

Applicant's drug abuse was not recent and he has demonstrated an intent to refrain from drug abuse in the future by the most important means: by not using drugs for an extended period of time. As an engineer, Applicant tends to focus on literal readings and interpretations of questions put to him. In this context, Applicant's response to the hypothetical put to him by the DSS agent does not constitute a statement of intent to use in the future, particularly where Applicant simultaneously stated an intent to comply with any requirement to abstain, at a time when Applicant was not aware of the clearance adjudication guidelines. Applicant's answer reflects an engineer's inherent unwillingness to give categorical answers where unknown variables make categorical answers unreasonable. I found Applicant's explanations about his answer to the agent credible and thoughtful. If anything, Applicant's answers to the agent--that he could conceive of circumstances where he might use marijuana--demonstrate too much thought and candor by being unwilling to glibly guarantee future conduct. I can conceive a great many things I might do in the future, without indicating that I intend to do them. Applicant's conduct has demonstrated an intent to refrain from drug abuse in the future, because a drug-free lifestyle is what he and his wife have chosen to live, without regard to his clearance status. I conclude it unlikely that Applicant will return to marijuana use in the future. Accordingly, I find Guideline H. for Applicant.

The Government did not establish its case under guideline E. As with his description of his drug history, Applicant's answers demonstrated an engineer's literal reading of the SCA questions. His evidence demonstrates that he listed a precise period of seven years on his SCA--admittedly from the date he initially filled out the questionnaire--from 1991 to 1998, and accurately approximated the number of uses of marijuana (6-10) during that period of time he later reported in his sworn statement, the only source for the allegations in the SOR. His evidence further demonstrates that he did not use marijuana from 1988 to 1993 or after 1996, portions of the period listed on his SCA. His sworn statement

put his last known use in 1996. His explanation for why he stated he might have used after 1996 was credible. Indeed, I found Applicant credible in his explanations of his reasons for stopping marijuana use, his intentions regarding future use, and his possible falsification. I find guideline E. for Applicant.

### **FORMAL FINDINGS**

Paragraph 1. Guideline H: FOR THE APPLICANT

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: For the Applicant

Paragraph 2. Guideline E: FOR THE APPLICANT

Subparagraph a: For the Applicant

### **DECISION**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

**John G. Metz, Jr.**

**Administrative Judge**

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992--and amended by Change 3 dated 16 February 1996 (Directive).
2. Applicant testified credibly that at the time he was preparing his SCA in August 1998, he used dates going back seven years from the time he was completing the SCA, and did not intend to indicate that he had used marijuana as late as August 1998. In September 1998, he was making final corrections on other questions on a draft SCA dated 8 September 1998 (A.E. F.). For reasons that are not clear to Applicant, that SCA was apparently never transmitted to DSS (or never received by DSS). Applicant's SCA was regenerated and transmitted in February 1999 (Tr. 70-74, 79-82).
3. The drug history listed in G.E. 1 is essentially as alleged, and admitted to by Applicant, in the SOR. Applicant's only denials of the drug history in the SOR reflect his contention that he did not use drugs at all during school year 1976-1977 because he had a different group of friends at school (Tr. 83-84), had marijuana bought for him only once or twice between 1982-1985, instead of annually as alleged in the SOR [although he now defers to his sworn statement on the number of purchases (Tr. 84)], and did not use drugs in 1997-1998 (Tr. 84-85).
4. Applicant admitted the SOR allegation that he used marijuana once or twice between 1985-1993. However, he testified credibly (Tr. 57-58) that he did not use marijuana while employed as a college professor, until after he got word that he was not going to receive tenure.
5. Applicant's admitted drug use in subparagraphs 1.a.(8)-(10) corresponds to his SCA entry reflecting marijuana use 6-10 times. However, the fact that Applicant was drug free from 1988-1993, while putting August 1991 as the beginning date on his SCA, tends to corroborate Applicant's claim that he listed dates going back seven years from the date he was completing the SCA, not reflecting dates of actual use.
6. Applicant married in 1985; his wife has never been a drug user (Tr. 56). She was a large part of why Applicant's drug use declined from its peak of weekly use in 1981.

7. Even accepting that Applicant did not use drugs his junior year of college (1976-1977) and from 1998 to 1993, I conclude that the entire period is best evaluated as a whole.