

DATE: December 30, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-18628

DECISION OF ADMINISTRATIVE JUDGE

JOHN G. METZ, JR.

APPEARANCES

FOR GOVERNMENT

Robert J. Tuider, Esquire, Department Counsel

FOR APPLICANT

Sheldon I. Cohen, Esquire

SYNOPSIS

Applicant's recent drug use on five annual camping trips between 1994 and 2001 was not mitigated where Applicant had used drugs while possessing a security clearance and was aware of government policy proscribing drug use--having first obtained a clearance in 1986 despite recreational drug abuse in college and a high school arrest for possession with intent to distribute. Clearance denied.

STATEMENT OF THE CASE

On 20 August 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 4 September 2002, Applicant answered the SOR and requested a hearing. The case was assigned to me on 18 October 2002, and received 21 October 2002. I set the case for hearing on 20 November 2002, and issued a notice of hearing on 21 November 2002 for a hearing 17 December 2002.

At the hearing, the Government presented four exhibits--admitted without objection--and no witnesses; Applicant presented five exhibits--admitted without objection--and the testimony of five witness, including himself. DOHA received the transcript on 27 December 2002.

FINDINGS OF FACT

Applicant admitted the allegations of the SOR; accordingly, I incorporate the admissions as findings of fact.

Applicant--a 41-year old employee of a defense contractor--seeks to retain the access to classified information he has held since first being granted a clearance by the DoD in January 1987.

Applicant has a history of drug abuse, specifically marijuana, beginning in 1978. In Fall 1978, his senior year at a

parochial high school, Applicant and a friend bought a pound of marijuana for \$400 that they intended to split evenly--having split the cost evenly--and sell to their friends. While working at the school one Saturday (as a computer programmer), Applicant decided to begin the process of evenly weighing the marijuana for distribution to his friends. He was caught by one of the members of the religious order that ran the school, who confiscated the marijuana. The following Monday, Applicant was asked to resign from the school, and turned over to local police officers, who arrested Applicant, took him to the police station, booked him, and charged him with possession with intent to distribute. Released on his own recognizance pending a court date, Applicant avoided a formal disposition of the charges when his parents spoke to a youth counselor for the court, and the charges were dropped. Nevertheless, Applicant testified that this incident affected him profoundly (Tr. 111).

Applicant graduated from high school in Spring 1979, and went off to college at a major parochial university nearby, where he obtained an bachelor of arts degree in physics in Spring 1983. Between 1978 and 1983, Applicant used marijuana 12 times in social settings at college, reporting no effect on him. Applicant went on to graduate school at a major public university in a nearby state, where he received a master of arts degree in physics in June 1986. (2) In September 1983, he had a DUI arrest in this college town, pleaded guilty, and ultimately received a typical first-time DUI sentence. He has had no further adverse incidents related to alcohol consumption.

After receiving his master's degree, Applicant went to work for a government contractor, working on a contract at a military research facility. In 1986, Applicant was being processed for his first clearance. Although the clearance application is not in the record, Applicant apparently reported his drug involvement as chronicled above, because he was interviewed in August 1986 to provide the details of his 1978 arrest for possession with intent to distribute and his marijuana use between 1978 and 1983. At the time, Applicant stated **"I will not use marijuana, narcotics, or dangerous drugs in the future."** (3) Applicant received a secret clearance in January 1987 (G.E. 1). Between September 1987 and November 1995, Applicant obtained his doctoral degree in applied mathematics from a night program at a major state university in a different nearby state.

In January 1988, Applicant became a direct employee of the military research facility where he had been a contractor, continuing his access to classified information. He remained a government employee until August 1997, when he went back to work for the same contractor--and at the same military research facility--where he had been employed before entering government service.

In April 1994, Applicant was invited by a friend to participate in an annual camping trip with his old high school friends. Between April 1994 and April 2001, Applicant went on seven of the eight camping trips, missing only the 1998 trip (because of his son's illness, described below). On five of the seven trips he made, possibly including the first trip (1994) and certainly including the last trip (2001), Applicant smoked marijuana around the campfire one evening of each trip. Smoking marijuana made Applicant feel relaxed and elated.

In August 1997, Applicant left government employment, and returned to work for his old government contractor. During this time with the contractor, Applicant provided a urine sample as part of the "drug free workplace" program run by the government. Applicant tested negative for illegal drugs. Applicant remained with this employer until December 1999, when he went to work for his current employer, and was no longer employed on-site at the military research facility.

In 1997, Applicant's oldest son was diagnosed with a rare form of bone cancer. The boy spent 10 months in chemotherapy. This was a stressful time for Applicant and his spouse, but by all accounts, Applicant cared for his young son, his expectant wife, and the rest of the family like the proverbial trooper. The initial crisis has passed, but the son must have corrective surgery every year or so to accommodate his growth to adulthood (Tr. 78).

On 10 February 2000, Applicant executed a Security Clearance Application (SCA)(SF 86) (G.E. 1) on which he answered "yes" to a question requiring him to disclose if he had ever been charged with any drug or alcohol offenses (question 24), and disclosed the 1983 DUI arrest (4) described above. However, he failed to disclose his 1978 drug arrest. He also falsely answered "no" to a question requiring him to disclose his history of drug abuse within the last seven years (question 27), by failing to report his at-least-three-time use of marijuana between April 1994 and April 1999. He similarly falsely answered "no" to a question requiring him to disclose if he had "EVER" used illegal drugs

while possessing a security clearance (question 28). Applicant knew his answers to question 27 and 28 were false at the time he made them (Tr. 113-114).⁽⁵⁾

After executing his SCA, Applicant used marijuana once, possibly twice, on his annual camping trip.⁽⁶⁾ After his April 2001 camping trip, Applicant reported his use of marijuana to his spouse within a few weeks of returning home from the trip. However, he reported only the use on his April 2001 trip (Tr. 83-84, 86, 89).

On 16 July 2001, Applicant executed a sworn statement to a Defense Security Service (DSS) special agent detailing his 1983 DUI arrest and recent history of drug abuse(G.E. 2):

For the past eight years I have participated in an annual camping trip at which marijuana was present. On this trip, and only on this trip, have I smoked marijuana (MJ). This was done in a social setting and produced a sense of relaxation and elation. The last trip was in April 01. . . I do currently associate with users of MJ, but have witnessed such use only on this annual trip. I did not report this usage on my earlier form because I considered lying about it. In the personal interview I felt compelled to be honest and forthright. I have absolutely no intention of using MJ or any other drug in the future. I did not consider my past usage to be detrimental to my ability to uphold the responsibilities of my secret clearances I almost never was in contact with classified materials. I very much regret my past usage and did not fully appreciate its consequences for holding a clearance (underlining in original).

On 8 July 2002, Applicant responded to "Interrogatories Concerning Drugs" posed to him by DOHA to clarify his drug abuse history (G.E. 4). In pertinent part, Applicant indicated that he used "marijuana, once/year, 1 joint, last used April 2001, no future intent." He indicated that he decided to stop using illegal substances "at the end of my last annual camping/canoeing trip, April 2001" because "I used to smoke once a year on an annual outing. I no longer wished to incur any legal risk nor to interfere with my eligibility to hold a security clearance by continuing my infrequent social usage of marijuana." He stated that he no longer associated with any of the people with whom he used the marijuana: "I no longer participate in the annual camping/canoeing trip because I know that marijuana will be present. I no longer maintain my friendships with those whom I know (from past experience) to smoke marijuana." He concluded:

I deeply regret my past marijuana usage. I was naive and unaware of the risks that usage posed to my eligibility to hold a security clearance. I have ceased all usage as of April 2001 and never intend to smoke again nor associate with those who do.

Applicant's written character references (A.E. A-D)⁽⁷⁾ uniformly praise Applicant's reliability, honesty, and trustworthiness, as well as his work ethic (whether at work or at church) and human qualities. Each reference currently holds, or has held, a clearance, and none expresses any reservation about Applicant's fitness for access to classified information. However, two references (A, B) cite their "awareness" of the hearing issues without providing any detail to confirm that they know anything about the hearing beyond the fact that it concerns Applicant's clearance. One (C) specifically states he has no knowledge of the details of the hearing. One (D) does not indicate either way whether he is aware of the specific reasons for concern about Applicant's clearance. Similarly, employment references contained in Applicant's Office of Personnel Management (OPM) file (A.E. E) either report no adverse information about Applicant, or affirmatively praise his honesty and trustworthiness.

Applicant's live character references⁽⁸⁾ paint a similarly praiseworthy picture of Applicant as "salt of the earth:" an honest, trustworthy worker, loyal friend, good husband and father, committed to his job and his children's church and school. Applicant was forthright with two of these references about his past drug use.⁽⁹⁾ However, he was less so with his spouse, who was aware of his marijuana use on only one camping trip in 2001 (Tr. 83-84, 87, 89-90). His coworker knew that Applicant had used marijuana on a camping trip⁽¹⁰⁾ and that he had used marijuana previously and had been arrested in high school for selling marijuana (Tr. 29-30).

At the hearing, Applicant testified consistent with his sworn statement and interrogatories, clarifying--if it had not been made clear before--that he used marijuana on multiple camping trips. However, his direct testimony (Tr. 91-108) acknowledged only the use in April 2001. Only on cross-examination and questioning by me did he engage in fuller disclosure of the extent of his drug use while on the camping trips (Tr. 111; 116-118). He acknowledged that the sworn

statement was in his own words and handwriting, but insisted that his intent was to disclose that he had used marijuana on all the camping trips (Tr. 122-123).⁽¹¹⁾ He also acknowledged that he knew his SCA was false when he denied drug abuse within the last seven years (Tr.113-114). He knew that drug use was a security concern for the Government (Tr. 120) and against both company policy and Government policy (Tr. 122), having participated in a random drug screen as a contractor employee and having seen the drug policy posted on workplace bulletin boards.

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. . . or distribution;

E2.A8.1.2.2. . . . Recent drug involvement, especially following the granting of a security clearance . . . will almost invariably result in an unfavorable determination.

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

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

E2.A8.1.3.2. The drug involvement was an isolated or aberrational⁽¹²⁾ event;

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

Burden of Proof

Initially, the Government must prove controverted facts alleged in the SOR. 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, and Applicant has not mitigated the conduct. Applicant abused marijuana, on and off, for more than twenty years, from 1978 to 2001. ⁽¹³⁾ Clearly, the illegality of the conduct did not affect Applicant's decision to use marijuana. Nor did his cleared status affect his decision to use marijuana. Although Applicant testified that his 1978 arrest was a "something" moment in his life, he resumed marijuana use--albeit at recreational levels--while in college. He knew that his level of college drug abuse was antithetical to his having a clearance because he was interviewed about that drug abuse during his first background investigation, prepared a sworn statement forswearing all future drug use, and for seven years after obtaining his clearance demonstrated his intent to refrain by, in fact, refraining from drug abuse. Indeed, Applicant obtained his clearance in 1987 based on his assurances that he would not use drugs in the future.

Despite that assurance, he resumed marijuana use in 1994, and in five of the eight years between 1994 and 2001, Applicant used marijuana. Although Applicant asserts that he was unaware of the security significance of that drug use, that assertion is not credible. Applicant's marijuana abuse in college was only slightly more significant than his abuse between 1994 and 2001, and Applicant clearly understood that his 1978-1983 drug use had security significance in 1986. Although Applicant claimed to have forgotten the significance of drug use while having a clearance, his conduct in February 2000 belies that claim. He specifically recalled that drug use when completing his SCA, deliberately chose to answer the drug use questions falsely, and then immediately felt guilty about the falsifications.

Applicant's drug abuse was recent and it was neither isolated nor aberrational. The fact that his drug abuse was confined to a particular set of circumstances does not lessen its security significance. On the annual occasions when he use marijuana he put himself potentially at risk to disclose classified information, and by keeping that drug use secret until after April 2001 he placed himself in a position to be potentially influenced to reveal classified information. The illegality of his conduct, and the policy proscriptions of both employer and government, played little in Applicant's decision to use. Applicant stated an intent to refrain from drug use in 1986, and he demonstrated an intent to refrain from drug abuse in the future by the most important means: by having not used drugs for more than three years at the time, and continuing drug free until 1994 or so. He has again stated an intent to refrain from drugs in the future--and has been drug free for approximately 20 months--but I cannot conclude that he has demonstrated an intent to refrain under the circumstances of this case.

Applicant's character evidence is impressive. He is universally considered to be honest and trustworthy, a diligent and excellent worker, both at work and in his many community commitments, an involved parent and considerate spouse; indeed, "salt of the earth." However, he was most of these things before he got his first clearance in 1986, and he was all of these things when he resumed marijuana use as early as 1994. He continued to be all of these things when he used marijuana on additional camping trips, including both before and after his son's diagnosis with cancer. He continued to be all of these things when he falsely answered the drug questions on the clearance application, and had such a negative reaction to that conduct that he clearly knew the security significance of his drug use, yet continued to use marijuana on the annual camping trip at least once, possibly twice. He was all of these things when his direct testimony continued to suggest that he has only used marijuana once after 1983, on the camping trip in 2001, revealing the full extent of his drug abuse only after cross-examination. Applicant's assertions of future intent have a hollow ring against the backdrop of these circumstances.

It may appear that Applicant is unlikely to use marijuana in the future, now that he is aware of the potential legal and security consequences of his conduct. But as noted above, Applicant's conduct indicates he continued to be aware of the illegality and policy proscription of drug abuse. Further, Applicant's similar claim in 1986 got him a clearance then, yet he returned to marijuana use after being granted a clearance. The appropriate disqualifying condition suggests that under these circumstances, a clearance will almost invariably be revoked. As impressive as Applicant's character evidence is, there is nothing in the record to suggest that his is the case for variation. Accordingly, I resolve Guideline H. against Applicant.

FORMAL FINDINGS

Paragraph 1. Guideline H: AGAINST THE APPLICANT

Subparagraph a: 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.

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. And was apparently employed as a graduate assistant by the university (A.E. E).
3. G.E. 3 (emphasis added).
4. Indicated on his SCA as occurring in 1986, but corrected by Applicant to 1983 in his later sworn statement (G.E. 2).
5. The SOR does not alleged falsification, and neither Department Counsel nor I amended the SOR to include falsification as an issue. Consequently, I have not considered Applicant's falsifications on the merits of the case. However, I have considered them on the issue of Applicant's general credibility as a witness.
6. Applicant certainly used it on his April 2001 camping trip, and may have used it on his April 2000 camping trip. I found Applicant's testimony at the hearing to be quite candid in terms of describing his camping trip marijuana abuse, despite a certain inexactness in terms of which trips he used marijuana on. However, for purposes of my decision, the important facts are that Applicant made seven camping trips, skipping only 1998; that he used marijuana on five of those seven trips, specifically including the last trip and possibly the first; that he used marijuana both before and after his son's illness; and that he used marijuana both before and after completing his SCA, on which he knowingly made false answers regarding his drug abuse within the last seven years (encompassing all uses of marijuana from 1994 to February 2000) and while in possession of a clearance.
7. A former supervisor who knew him 1999-2002 (A.E. A), his current supervisor since September 2002 (A.E. B), a current coworker who has known and worker with Applicant since 1985 (A.E. C), and a social acquaintance from church who has known him since 1997 (A.E. D).
8. A peer, co-worker, and supervisor since December 1999, a friend since 1985, a church acquaintance since 1997, and Applicant's spouse of 13 years.
9. His long-time friend of 17 years clearly knew that Applicant had used marijuana on more than one camping trip (Tr.

46). His church acquaintance had a similar, although not as confident, recollection (Tr. 64-66).

10. Responding to a question from Applicant's counsel (Tr. 27-29).

11. And Applicant insisted that the DSS agent would confirm that interpretation of the statement. However, she did not testify, nor did Applicant provide a statement from her which would confirm his claim. Nevertheless, I found Applicant's testimony on this point, as on most points in general, credible. Still, the communication problems engendered by Applicant's carefully worded statement, and his interrogatories, are his, and his alone. A careful reading--but only a careful reading--of Applicant's statement suggests that he intended to say he had used marijuana on the eight camping trips, but only on the eight camping trips. If he had written "On these trips, and only on these trips. . . I used marijuana. . ." the statement would be clear on that point. Applicant's choice of the singular in both places creates the impression, as alleged in the SOR, that Applicant used marijuana only on the last trip in 2001. In the wake of the sworn statement, Applicant's answers to the interrogatories are similarly ambiguous. While they appear to say that Applicant used marijuana on each of the eight trips, they do not say so unequivocally. I will not speculate on why DOHA did not issue an additional interrogatory before issuing the SOR to clarify the issue, or why DOHA did not extrapolate the more expansive drug use in issuing the SOR instead alleging a single instance of drug use on a camping trip in 2001. I engage in this analysis only to demonstrate that the SOR alleged a reasonable interpretation of the drug abuse disclosed by Applicant, and known only by him. The SOR reasonably put Applicant on notice of the guideline at issue, and he more than adequately defended on that issue. Further, Applicant's argument that the agent understood that he meant more than one trip is undercut by the observation that Applicant both admitted the factually incomplete SOR allegation (as is his right), but provided a detailed explanation that did not even hint at the true extent of his camping trip drug abuse. Nevertheless, the more definitive description of Applicant's drug use developed on the record is both fairly within the scope of the SOR, and does not require amendment of the SOR for me to give the drug abuse it's full security significance.

12. Counsel's argument notwithstanding (Tr. 129-130), the iteration of the Directive under which this hearing was held clearly states that the drug use is "isolated or aberrational," not "isolated or infrequent."

13. Even accepting that Applicant did not use drugs between 1983 and 1994, on two of the camping trips he attended or the 1998 trip that he skipped, or after April 2001, I conclude that the entire period is best evaluated as a whole, consistent with Appeal Board guidance that cases not be evaluated in a piecemeal fashion.