

DATE: January 7, 2003

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 01-18994

DECISION OF ADMINISTRATIVE JUDGE

JOHN G. METZ, JR.

APPEARANCES

FOR GOVERNMENT

Jonathan A. Beyer, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's recreational abuse of marijuana from 1983 to February 2001 was not mitigated where Applicant left open the possibility of future use during a subject interview in February 2001, and her September and December 2002 statements of intent to refrain from drug use in the future were not credible. Clearance denied.

STATEMENT OF THE CASE

On 26 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 18 September 2002, Applicant answered the SOR and requested an administrative decision on the record. On 20 December 2002, Applicant responded to the Government's File of Relevant Material (FORM)--issued 31 October 2002; the record in this case closed 31 December 2002, the day Department Counsel indicated no objection to Applicant's response. The case was assigned to me on 3 January 2003, and I received the case the same day to decide if clearance should be granted, continued, denied or revoked.

FINDINGS OF FACT

Applicant admitted using marijuana about every three months from Spring 1983 (her senior year in college to 26 February 2001 (subparagraphs 1.a. and c.), but denied any intent to use marijuana in the future (1.b.) or being arrested for marijuana possession in January 1991 (1.d.); accordingly, I incorporate the admissions as findings of fact.

Applicant--a 41-year old employee⁽²⁾ of a defense contractor--seeks access to classified information.⁽³⁾

On 9 February 1998, Applicant executed a Standard Form 85/85P (SF-85/85P)(Item 5) on which she reported her illegal drug abuse within the last year (question 21a): infrequent marijuana use between January 1997 and December 1997.⁽⁴⁾

It is not known if she truthfully reported her illegal drug abuse on her 5 June 2000 Security Clearance Application (SCA)(SF-86)(Item 4) because the application included in the FORM is missing questions 17-42 (the privacy portion of the application). Nevertheless, in a sworn statement on 26 February 2001 (Item 6), Applicant described her drug abuse history:

I first started smoking marijuana in my senior year of college (spring of 1983). . . A friend had some and shared it with me one evening. I did not smoke again for a number of months. My husband smokes marijuana occasionally and after we were married (October 1983) we smoked once in a while (once every few months). My husband or one of his friends supplied it. My husband and I continue to occasionally smoke marijuana, once every three months or so. I expect that we might continue to smoke at that rate or less in the future. Smoking marijuana makes me relaxed, hungry, sleepy. I do it because I enjoy it; it occasionally replaces an evening cocktail. . . My husband supplies the marijuana we smoke. I do not know how much he buys, though I believe it is very small amounts. . .

In approximately January 1991, Applicant and her spouse were charged with possession of marijuana and drug paraphernalia, misdemeanor offenses under the state code where Applicant was on a temporary assignment with her company.⁽⁵⁾ In November 1991, Applicant pleaded guilty, and as part of a plea arrangement, received deferred adjudication conditioned on certain requirements that she met. In May 1992, the charges were dismissed upon completion of the probation requirements.⁽⁶⁾

Applicant's three character references⁽⁷⁾ commend her honesty and integrity, and recommend her for access to classified information.

Applicant asserts in her Answer and Response that she told the DSS agent who interviewed her that she would stop using marijuana as a condition of access, but that statement does not appear in the hand-written statement executed by her. She also implies that the "every three months" language in her statement is somehow inaccurate because the agent required Applicant to estimate her frequency of use. However, she never disavows the frequency she provided. Her Response further asserts that she has "matured" and now recognizes that drug use is incompatible with access to classified information. She cites her truthfulness in disclosing her drug abuse as a basis for granting her clearance.

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 6.3. 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. . .

E2.A8.1.2.5. . . . 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.

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 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 the Applicant has not mitigated the conduct. Applicant was a recreational abuser of marijuana from approximately 1983 to February 2001. Her use was recent, even accepting her assertion that she last used in February 2001, and neither isolated nor aberrational. Clearly, the illegality of the conduct did not affect her decision to use marijuana. Although her misdemeanor possession charge in 1991 resolved benignly enough for Applicant, she continued to use marijuana after the incident. Indeed, Applicant continued to use marijuana after February 1998, when she first completed a clearance application and was put on notice about the government's concerns about illegal drug use. She continued to use after June 2000, when she executed a second clearance application. Further, she could not state unequivocally that she would not use marijuana in the future when asked about her future intentions in February 2001, even though the drug question on the SCA put her on notice that drug use was incompatible with access to classified material.

Although Applicant now vows to refrain from marijuana abuse having "matured," I find that vow neither credible nor sufficient to constitute a demonstrated intent to refrain from drug abuse in the future, particularly given the circumstances of Applicant's past use, her contradictory statements about the extent of her drug use, and her stated likelihood of future use. Applicant continued her marijuana abuse until she was 40, despite what should have been a wake-up call when she was 30, and two big warnings--in the form of clearance application questions on drug abuse--when she was 37 and 39, respectively. Accordingly, I resolve Guideline H against Applicant.

FORMAL FINDINGS

Paragraph 1. Guideline H: AGAINST THE APPLICANT

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: 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. Three days shy of her 42nd birthday when the record closed.
3. The record is unclear whether Applicant currently holds a clearance, or has previously applied for a clearance--regardless of whether action has been taken to grant access. Applicant's February 1998 clearance application (Item 5) contains an otherwise illegible entry in question 18 (investigations record) that suggests Applicant had a low-level clearance with an unnamed agency in the past. The record contains no information on what action, if any, was taken as a result of the February 1998 application. Applicant's June 2000 clearance application (Item 4) is silent--and also incomplete--on the question of Applicant's past investigations and clearance.
4. Although not alleged in the SOR, and thus not before me on the merits of this case, Applicant's otherwise truthful response is not complete because it does not disclose her drug abuse before January 1997 or after December 1997 (up to February 1998)--periods of drug use she later disclosed to the government. While I cannot consider this misrepresentation on the merits of the case, I will consider it on the general issue of Applicant's credibility.
5. Applicant's statement, her Answer to the SOR, and her Response to the FORM characterize this incident as mere coincidence, because she was unexpectedly home having lunch with her husband, when the mail brought him a package (allegedly with no return address or other indicia of sender) that she accepted from the mail carrier, that turned out to contain marijuana. Shortly after Applicant and her husband accepted the package, a postal inspector and local police returned to Applicant's house and they were both cited for possession.
6. The disposition of the charge is consistent with first time offender statutes. Applicant's explanation for the incident is fantastical. Assuming the truth of Applicant's claim that her husband always provided the marijuana, but she did not know how he obtained it, it seems extremely unlikely that unnamed individuals sent the husband marijuana without his consent or knowledge. Much more likely, Applicant's husband had his regular supplier mail the marijuana to their temporary address. Although Applicant may be correct that she would not have been charged had she not been home for lunch that day, Applicant cannot escape the security significance of her own conduct. Applicant allowed her husband to procure the marijuana they both used in the past. It is certainly foreseeable that one of those procurements might result in her arrest, if not under the precise circumstances which actually occurred, then under similar circumstances. Applicant did not suggest entrapment by police or postal employees, and it is unlikely that Applicant would have pleaded guilty on advice of counsel if entrapment had been an issue.

7. Partners at her firm who know Applicant to be a trustworthy and exceptional employee, and they appear to be aware of the drug issues in the SOR.