

DATE: April 7, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-20314

DECISION OF ADMINISTRATIVE JUDGE

JOHN G. METZ, JR.

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esquire, Department Counsel

FOR APPLICANT

David E. McGehee, Esquire

SYNOPSIS

Applicant's more than 30 years of marijuana abuse was not mitigated where Applicant used marijuana in the mid-1980s while in a cleared status, retained his clearance in 1992 based on his cessation of marijuana abuse in 1985, but resumed and increased his drug abuse in 1994--while still in a cleared status--when he used marijuana to self-medicate his sexual dysfunction, without regard for its illegality or its prohibition by both company and government policy. Applicant's violation of company sexual harassment policy and misuse of company computers to send nude photographs over the internet cast additional doubt on his fitness for access to classified information. Clearance denied.

STATEMENT OF THE CASE

On 9 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 5 September 2002, Applicant answered the SOR and requested an administrative determination on the record. He later changed his mind and requested a hearing. The case was assigned to me on 7 January 2003 and received by me the same day. On 10 January 2003, I set the case for hearing, and issued a Notice of Hearing (NOH) on 13 January 2003 for a hearing on 28 January 2003. On 27 January 2003, Applicant requested a continuance to obtain counsel. I granted the continuance, and on 24 February 2003 issued a second NOH setting the case for hearing on 11 March 2003.

At the hearing, the government presented five exhibits--admitted without objection--and no witnesses; Applicant presented eight exhibits--seven admitted without objection, one admitted over objection--and the testimony of four witnesses, including himself. DOHA received the transcript on 19 March 2003.

FINDINGS OF FACT

Applicant admitted the allegations of the SOR, except for subparagraphs 1.e. and 2.a. and c.; accordingly, I incorporate

those allegations as findings of fact.

Applicant--a fifty-seven-year-old employee of a defense contractor--seeks to retain the access to classified information he has had since approximately 1982. He has a doctoral degree in mechanical engineering and has been with his current employer, albeit not always in the same location, since approximately January 1981.

Applicant has an extensive history of marijuana abuse--at various frequencies over the years, to include periods of abstinence--going back to 1967. He acknowledges that his marijuana use was illegal at all times he used it, as well as contrary to both company and government policy after he obtained his clearance, regardless of whether his use occurred on duty or off (Tr. 64; 91-92).

Applicant began using marijuana in approximately 1967, and used it what he described as "experimentally" until approximately 1971, during his undergraduate years. He went to work for his current employer in approximately January 1981 and obtained his first security clearance in approximately February 1982. He has been an exemplary employee for his company for over 20 years (A.E. E).

On 14 September 1992, Applicant executed a Personnel Security Questionnaire (PSQ)(DD Form 398)(G.E. 5) to begin a periodic reinvestigation of his clearance. He truthfully answered "yes" to two questions requiring him to disclose his history of drug use/possession (question 22.a.) and his history of drug activity (question 22.b), and with the attention to detail typical of engineers⁽²⁾ described both:

22. A. Drug Use/Possession

Drug Name: Marijuana

First Used: 67-01

Last Used: 85-01 App

Other Dates: Between 1967 and 1985 smoked marijuana on occasion at social gatherings.

Frequency: Two to three times per yr.

Total times used: 30

Location: Various [state]

Future intent: No interest in future use

Explanation: Social smoking at parties, no abuse or addiction. No loss of control or consciousness.

22. B. Drug Activity

Drug Name: Marijuana

of times

participated: 3

Drug Activity: Purchase

Dates: Between 1967 and 1985 smoked marijuana on occasion at social gatherings.

Location: Various [state]

Current Activity: No current activity

Future intent: No interest in future use of marijuana or other drugs.

Explanation: Social smoking at parties, no abuse or addiction. No loss of control or consciousness.

On 21 January 1993, Applicant gave a sworn statement to the Defense Security Service (DSS)(G.E. 4) that confirmed the above drug involvement and acknowledged Applicant's understanding that his security clearance required him to remain drug free: [\(3\)](#)

I listed my total involvement with illegal drugs on my PSQ and I have previously been interviewed by DIS concerning this involvement. I have not used or in any way been involved with illegal drugs since that which I reported on my PSQ and I don't intend to be in the future.

Applicant apparently remained drug free until some time in 1994, when he met the woman he would marry in July 1995. They met at a party in early 1994 and began dating. When they decided to become intimate, Applicant told her about his sexual dysfunction. Although she had used marijuana only "minimally" before (Tr. 102-103), she suggested that marijuana might relax him and at least lessen his "performance anxiety." He tried it and found that it worked to improve his sexual performance. For the year and a half that they dated before marrying, Applicant and his spouse used marijuana approximately once per month before sexual relations, because she lived in another state and they only got together once per month. After they married, they used marijuana approximately once per week before sexual relations. They used a small pipe to smoke the marijuana (Tr. 95, 105). He used enough to get a "buzz." She used marijuana to keep him company and share the moment.

On 20 March 2001, Applicant provided another sworn statement to the DSS (G.E. 2) describing his more recent drug abuse (in his own handwriting):

Having admitted to the occasional use of the illegal drug, marijuana, the following elaboration is provided: My use of marijuana is limited to sharing small quantities with my wife in the privacy of our home, usually in connection with intimate relations. Typical use is 3-4 times a month, always on weekends, since our marriage in July, 1995. I have never used marijuana at work, during working hours, or during the week when my performance at work could be compromised. I have never used marijuana in quantities sufficient to impair judgment, nor do I drive a motor vehicle or operate tools or machinery while under the influence of any substance, legal or illegal.

On several occasions I have purchased small quantities of marijuana (less than 1 ounce) for personal consumption. Such quantities typically last 2-3 years at our rate of consumption. I have never purchased marijuana with the intent to sell or otherwise profit from the purchase. I have never used, purchased, sold or otherwise trafficked in any other illegal drug. [\(4\)](#)

Applicant now insists that he stopped using marijuana in approximately mid- 2000 (Tr.64), only bought marijuana once (not including the purchase of one joint while in vacation in the Caribbean in 1998 (Tr. 93), and will not use marijuana in the future (Tr. 68). He acknowledged that he has made a similar statement in the past and returned to marijuana abuse (Tr. 68-69). Although he does not remember making the 1992 drug disclosures, he acknowledges that the information on his PSQ could only have come from him and his recollection of his drug abuse between 1967 and 1985 would have been better in 1992 than 2000 (Tr. 111-113).

Applicant provided urinalysis testing results demonstrating that he tested negative for marijuana metabolite on 6 drug screens that he took between 28 January 2003 and 4 March 2003 (A.E. F). He has never been subjected to a random drug screening at work (Tr. 64).

On 30 October 2000, Applicant was disciplined by his employer for violating company sexual harassment policy and for misuse of company email systems (G.E. 3). Applicant brought in a picture portfolio that included nude photographs to show them to a coworker who had expressed an interest in posing (not necessarily nude) for him. Another employee overheard the conversation, was offended, and reported Applicant to management. During the company investigation, Applicant acknowledged sending nude photographs via company email to the woman (not a company employee) who had posed for them. [\(5\)](#)

Applicant had several extra-marital affairs in the 1980s (Tr. 44) that were a contributing factor in his 1990 divorce from his first wife. This conduct was adjudicated in his 1992 periodic reinvestigation (G. E. 5).

Applicant's character references consider him an extremely honest and trustworthy person. They believe his past abuse of marijuana is no impediment to his having a clearance. Both have had clearances themselves and are aware that marijuana use is illegal, contrary to most company drug abuse policies, and contrary to government policy for both cleared and uncleared employees and for cleared contractor personnel. One is president of his small company, a company that prohibits all illegal drug use by its employees on-duty or off- (Tr. 28-29).

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); [\(6\)](#)

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

E2.A8.1.2.5. . . . 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 event;

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

Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 amended Title 10 U.S. Code to add a new section, §986 [the Smith Amendment], precluding the initial granting or renewal of a security clearance by the Department of Defense (DoD) under four specific circumstances. On 7 June 2001, the Deputy Secretary of Defense issued implementing regulations under DoD 5200.2-R; the Director, DOHA issued Operating Instruction 64 (O.I. 64) on 10 July 2001.

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:

E2. A5.1.2.1. Reliable unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances;

E2. A5.1.2.5. A pattern of dishonesty or rule violations.

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 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 thirty years, from 1967 to at least 2001.⁽⁷⁾ 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 he obtained a clearance in 1981 he used and purchased marijuana until 1985. He ceased his marijuana use in 1985 and the period of abstinence between then and his periodic reinvestigation in 1992 made Applicant eligible to continue his clearance. However, Applicant obtained his renewal 1992 based on his assurances that he would not use drugs in the future.

Despite that assurance, he resumed marijuana use in 1994, and became a regular user of marijuana. That he did so only with his wife in the intimacy of his sexual relations with her is beside the point. 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 many occasions when he use marijuana he put himself potentially at risk to disclose 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 1992, 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 seven 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 24 months⁽⁸⁾--but I cannot conclude that he has demonstrated an intent to refrain under the circumstances of this case.

It may appear that Applicant is unlikely to use marijuana in the future, now that his sexual dysfunction is being addressed by Viagra. But as noted above, Applicant's resumed and continued marijuana abuse even though 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. There is nothing in the record to suggest that his is the case for variation. In addition, 10 U.S.C. §986 prohibits renewal of a clearance held by person who is a user of illegal drugs. Given his extensive history of marijuana abuse and its recency I conclude that Applicant is a user of illegal drugs. Accordingly, I resolve Guideline H. against Applicant.

The government has also established its case under Guideline E. Although Applicant's disciplinary action for misuse of

company email and violation of its sexual harassment policy is comparatively minor, it nevertheless demonstrates Applicant's poor judgment and willingness to bend the rules to his own purposes. Similarly, Applicant's ongoing drug use in the face of known legal and policy proscriptions demonstrates his unwillingness to comply with rules and regulations. However, I consider Applicant's past affairs to have no security significance for this adjudication, both because of the prior adjudication and the passage of twenty years without additional misconduct. Accordingly, I resolve Guideline E. 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

Subparagraph e: Against the Applicant

Paragraph 2. Guideline E: FOR THE APPLICANT

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: 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 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, and by Change 4 dated 20 April 1999 (Directive).
2. Also evident in the other entries on the PSQ.
3. A fact Applicant acknowledged at hearing as well (Tr. 91-92).
4. Noticeably absent from this statement is any claim, now made by Applicant at hearing (Tr. 64), that he had stopped using marijuana shortly after he began treatment for his sexual dysfunction in January 2000 (confirmed by A.E. G) and obtained a prescription for Viagra (prescription confirmed by A.E. G, but not the date of prescription), vitiating any need to continue his marijuana use. Applicant also claimed (Tr. 71-72) that he described his marijuana use in language that suggested continuing use because he has a great bias in favor of active voice in his writing. This claim is incredible for a two reasons. First, the statement consists largely of passive voice sentences that nevertheless describe his drug use as continuing into March 2001. Second, he confuses active voice with present tense. "I stopped using marijuana in January 2000" is a perfectly good active voice sentence that is nevertheless past tense. I conclude that Applicant did not include such a sentence in his March 2001 sworn statement because he had not, in fact, stopped using marijuana then. The SOR alleges--and Applicant admits--marijuana abuse to at least March 2001. Applicant's first claim to have ceased marijuana abuse, and his first report of medical treatment for his sexual dysfunction, appears in his September 2002 answer.

5. Applicant claims that his conduct did not violate company policy (Tr. 45-51; A.E. A, B, C) because the person he showed the portfolio to was not offended, and the complainant was not the alleged "victim" (A.E. D). However, the company concluded otherwise.

6. Under the provisions of *10 U.S.C. 986*, any person who is an unlawful user of. . . a controlled substance s defined in section 107 of the Controlled Substances Act (*21 U.S.C. 802*) may not be granted or have renewed access to classified information (Footnote in original).

7. Even accepting that Applicant did not use drugs between 1985 and 1994, 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.

8. I conclude that Applicant used marijuana at least as late as his March 2001 sworn statement, notwithstanding his assertions that he stopped using marijuana shortly after he was prescribed Viagra for his sexual dysfunction. After at least six years of regular marijuana use, it was part of their bedroom ritual; there's no reason to assume they stopped using marijuana just because the Viagra was effective