

DATE: May 7, 2002

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 01-21285

DECISION OF ADMINISTRATIVE JUDGE

JOHN G. METZ, JR.

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's recreational abuse of marijuana in the mid 1980s and between October 1994 and March 2001 was mitigated where Applicant had stopped using marijuana in March 2001 and stated a clear intent to refrain from future drug abuse--both because of his employment requirements and his family situation. Clearance granted.

STATEMENT OF THE CASE

On 11 February 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 arch 2002, Applicant answered the SOR and requested a hearing. On 8 April 2002, DOHA assigned the case to me; I received and set the case the same day and on 9 April 2002 issued a notice of hearing for 25 April 2002.

At the hearing, the Government presented three exhibits--admitted without objection--and no witnesses; Applicant presented no exhibits, and the testimony of two witnesses, including himself. DOHA received the transcript on 3 May 2002.

FINDINGS OF FACT

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

Applicant--a 33-year old employee of a defense contractor--seeks access to classified information. He has six years prior enlisted service in the U.S. military.

On 7 December 2000--in anticipation of a June 2001 start date with his new employer--Applicant truthfully disclosed his drug abuse history on a Security Clearance Application (SCA)(SF 86)(G.E. 1).⁽²⁾ In a sworn statement on 23 March 2001 (G.E. 2), Applicant described his drug abuse history:

I first used marijuana when I was in high school in 1986 or 1987. My use at that time was experimental and I would smoke marijuana once a month at parties until September 1988. I joined the military in October 1988 and was discharged in October 1994. During my time in the military I never smoked marijuana or used any other illegal drugs. I have used marijuana approximately 26 times in the past seven years. The first time I used marijuana in the past seven years was in October 1994, with temporary housemates when I first moved to [city, state]. During my two years in [state], I used marijuana approximately eight times. My motivation for using marijuana was a demonstration of independence on my part after having so many restrictions placed on me during my time in the military. Since moving from [state], I have used marijuana on average approximately two times per year while visiting friends in [city, state]. I listed my last use of marijuana as January 2000 on my personnel security questionnaire, which I completed in December 2000. Since the completion of my personnel security questionnaire, I have used marijuana on four occasions. Once in January 2001 while on academic break from [university] and visiting friends in [city, state]. I also used marijuana on three occasions in March of 2001 while on vacation in [foreign country] where marijuana use is legal. I have never used any illegal controlled substance other than marijuana. I have never used any illegal controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official; while possessing a security clearance; or while in a position directly and immediately affecting the public safety. I have never bought, nor sold an illegal controlled substance for the purposes of profit or otherwise with the exception of the marijuana I used while in [foreign country]. I purchased a small quantity while in [foreign country] for approximately \$8.00. During every other occurrence of marijuana use, friends or acquaintances in a social atmosphere supplied the marijuana for free. I have never cultivated, processed or manufactured any illegal controlled substances and have never been arrested or detained by law enforcement official for illegal drug use or possession. As I had done during my six years in the [military], I fully expect to honor my responsibilities and obligations to [employer] by not using marijuana or any other illegal controlled substance while employed with them.

Applicant's Answer to the SOR admitted the allegations, and provided additional information corroborating his excellent academic performance between Fall 1997 and Spring 2001--during which period he was awarded undergraduate and graduate degrees in mathematics. Further, he stated that he had passed multiple random drug screening while in the military, and had purchased marijuana only while overseas in a country where he believed such purchases to be legal.

At the hearing, Applicant testified consistently and credibly with his sworn statement and answer. Pressed by Department Counsel on the point that his commitment to refrain from drug use seemed conditioned on his being in a cleared status, Applicant conceded that he might have felt that way in the past, but that the pain and embarrassment of the clearance process to both himself and his family made him realize that he needed to refrain from drug use, regardless of his clearance status (Tr. 36).

Applicant's co-worker and supervisor--a retired military officer with 20 years experience in counter-intelligence and counter-terrorism--considered Applicant a good security risk who now recognized the importance of a drug-free lifestyle. Applicant has been married two years. He took and passed a pre-employment drug screen in May 2001.

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.

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 was a recreational abuser of marijuana from 1986 to 1988, and again from 1994 to March 2001--conduct inconsistent with the holding of a clearance. Clearly, the illegality of the conduct (at those times the conduct was illegal) did not affect Applicant's decision to use marijuana. However, Applicant has clearly understood the importance of a drug-free lifestyle to a security clearance determination, and remained drug-free while in the military (and subject to drug screening) and since being employed by the contractor in June 2001. Department Counsel argues the risk that Applicant might return to marijuana use if not in a cleared status, and Applicant conceded that he might have considered that at one time, but not now--given his experience with the clearance process. (3) Applicant has stated an unequivocal intent to refrain from drug abuse in the future, without regard to his clearance status, and recognizes that the risks to his future and his family's future far outweigh any imagined benefit of resumed drug use. Department Counsel's argument to the contrary, while not unreasonable, does require some speculation about what Applicant might do in the future while not in a cleared status. I conclude it unlikely that Applicant will return to marijuana use in the future. That this motivation is more rooted in Applicant's unwillingness to put himself and his family through the clearance process ordeal he has been

through than a fear of criminal consequences does not render the motivation invalid or insufficient to support the mitigating factor. Accordingly, I find Guideline H. 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

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

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FORMAL FINDINGS

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Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

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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. As he had truthfully disclosed his drug abuse history on a Personnel Security Questionnaire (PSQ)(DD Form 398-2) executed on 1 April 1988--at the time of his enlistment in the U.S. military.
3. Department Counsel also argues the applicability of the disqualifying factor pertaining to use after being granted a security clearance; I conclude that the plain language of this factor limits its applicability to those case where an applicant uses drugs after being granted a clearance, the implication being use while in a cleared status. The record seems clear that Applicant has never used drugs while in a cleared status, and recognizes the requirement to not do so.

4. 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).
5. As he had truthfully disclosed his drug abuse history on a Personnel Security Questionnaire (PSQ)(DD Form 398-2) executed on 1 April 1988--at the time of his enlistment in the U.S. military.
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