

DATE: January 21, 2003

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 01-21292

DECISION OF ADMINISTRATIVE JUDGE

CHARLES D. ABLARD

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's admitted use of marijuana during the time he held a security clearance accompanied by his avowed intention to abstain from further marijuana use if it is necessary to retain a clearance, is identical to his vow made five years earlier. Despite that vow, he resumed such use. In light of his continuing substance abuse while holding a security clearance, questions and doubts are raised as to his continued security eligibility and suitability. Clearance is denied.

STATEMENT OF THE CASE

On August 22, 2002, the Defense Office of Hearing Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Information Within Industry* as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with national interest to grant or continue a security clearance for the Applicant. DOHA recommended the case be referred to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn written statement dated September 16, 2002, Applicant responded to the SOR requesting an administrative determination of the case in lieu of a hearing. A File of Relevant Material (FORM) was submitted to the Applicant by Department Counsel on October 10, 2002 providing the Government's case and Applicant was afforded an opportunity to file objections and submit material in response to the FORM. Applicant did not submit any additional information in response. The undersigned was assigned to the matter on December 20, 2002.

FINDINGS OF FACT

Applicant has admitted some of the factual allegations as to drug abuse under Guideline H (Subparagraph 1.a.) and personal conduct under Guideline E (Subparagraph 2.a.) These admissions are incorporated as a finding of fact. He denied the allegations in Subparagraph 1.b. and failed to respond to Subparagraph 1.c.

Applicant is a forty year old employee of defense contractor who submitted a security questionnaire in October 2000 and a sworn statement to an investigator in ay 2001. In that statement he admitted use of marijuana over a period of eighteen years. In an earlier statement in September, 1983 he also admitted recreational use of marijuana and stated that, if such would jeopardize his security clearance, he would not use it in the future. Apparently, he has held a clearance since that time. Applicant made a similar statement in the 2001 statement regarding his intention for future use. He now states that he intends to continue infrequent use of marijuana, presumably if it does not jeopardize his clearance.

Based upon the two uncontested statements provided by the Applicant, I find that the Applicant used marijuana at various times from approximately 1983, the date of the prior investigation, and May 2001, a date of use to which he admits.

Applicant has indicated an intent to use marijuana in the future in his investigatory response subject to the qualification that he will cease use if such is necessary to keep a security clearance. Applicant has admitted to use while holding a clearance in his May 2001 statement.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Directive in Enclosure 2 includes policy factors which could raise or mitigate a security concern and which must be given binding consideration in making determinations on security clearances. Guidelines H and E are controlling in the present case and 10 U.S.C. 986 is applicable.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. Directive, ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Exec. Order No. 10,865 § 2. *See* Exec. Order No. 12,968 § 3.1(b).

Under Guideline H, the [i]mproper or illegal involvement with drugs, raises questions regarding an individual's willingness or ability to protect classified infomation. Drug abuse or dependence may impair social or occupational fnctioning, increasing the rist of an unauthorized disclosure of classified information. Directive, ¶ E.2.A8.1.1.1.

Applicable conditions that could raise security concerns and may be disqualifying include the following:

(1) Any illegal drug use. Directive, ¶ E2.A8.1.2.1.

(2) 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. Directive, ¶ E2.A8.1.2.5.

A demonstrated intent not to abuse any drugs in the future is a condition that could mitigate security concerns, and arguably is applicable in this case. *See* Directive, ¶ E2.A8.1.3.3.

Regardless of any mitigation, the Department of Defense is prohibited from granting or renewing a security clearance for a person who is an "unlawful user" of controlled substances. 10 U.S.C. § 986(c)(2).

Under Guideline E, conduct involving questionable judgment or an unwillingness to comply with rules and regulations could indicate that an applicant may not properly safeguard classified information. Directive, ¶ E2.A5.1.1. An applicable condition that could raise a security concern and may be disqualifying is Applicant's pattern of rule violations including a violation of a written or recorded agreement with the agency. Directive, ¶ E2.A5.1.2.5. .

CONCLUSIONS

With respect to Guideline H, the Government has established its case. In the defense industry the security of classified

material is entrusted to civilian workers who must be counted upon to safeguard such information at all times. The Government has concerns when information indicates that a worker may be involved in drug use particularly while holding a security clearance. Such is an indication of poor judgment and unreliability. The Applicant has failed to offer evidence of mitigation in accordance with mitigation standards. His statements that he only used marijuana while on camping trips and that he would give it up if he couldn't keep his security clearance are conditional and are unpersuasive. The fact that he obtained a clearance before when making a similar statement does not persuade me today. The Applicant has failed to overcome or mitigate the evidence offered by the Government.

. Furthermore, while a demonstrated intent not to abuse any drugs in the future is a condition that could mitigate security concerns, the Applicant has expressed such intent only conditionally and did not discontinue use when a similar condition was stated by him in 1983. Under these circumstances, the Department of Defense is prohibited from granting or renewing a security clearance for a person who is an "unlawful user" of controlled substances. 10 U.S.C. §986

The Applicant's lengthy history and pattern of rule violations stemming from his continued use of marijuana despite such use being both illegal and against Defense Department policy raises grave concerns over his willingness to comply with rules and regulations and indicate a possible inability to safeguard classified information. There are no apparent applicable conditions under the Directive that would mitigate these security concerns.

For the reasons stated, I conclude that the Applicant is not eligible for access to classified information.

FORMAL FINDINGS

Formal findings for or against the Applicant on the allegations in the SOR as required by Section E3.1.25 of Enclosure 3 of the Directive are:

Paragraph 1 Guideline H: Against Applicant

Subparagraph 1. a. Against Applicant

Subparagraph 1. b. Against Applicant

Subparagraph 1. c. Against Applicant

Paragraph 2 Guideline E: Against Applicant

Subparagraph 1. a. Against 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.

Charles D. Ablard

Administrative Judge

Findings of Fact: On 8 September 1983, as part of a previous security investigation, Applicant admitted using marijuana approximately twice a month from about 1977 or 1978 until 1983. He purchased marijuana three to five times during this period. In his 1983 statement, Applicant claimed he intended to continue to use marijuana socially, but would give it up if it meant he wouldn't get a clearance. Item 7 at 2.

On his security clearance application, dated 24 October 2000, Applicant, a 40-year-old employee of a defense contractor, admitted using marijuana from 5 August 1999 to 5 September 2000, while he had a security clearance. Items 2 and 5. He claims he used marijuana recreationally approximately eight times since 1999. He reiterated his intent to continue to use marijuana socially, but "would consider ceasing usage of marijuana if my secret clearance is dependent on this." Item 6 at 1.

Policies:"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to "United States citizens . . . whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Order No. 12,968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. Directive, ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Exec. Order No. 10,865 § 2. *See* Exec. Order No. 12,968 § 3.1(b).

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. ISCR Case No. 01-20700 at 3 (App. Bd. Dec 19, 2002). *See Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at *6-8 (App. Bd. May 9, 2001). The applicant then bears the burden of demonstrating that it is clearly consistent with the national interest to grant or continue the applicant's clearance. "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive, ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Exec. Order No. 12,968 § 3.1(b).

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Applicable conditions that could raise security concerns and may be disqualifying include the followed intent not to discontinue use will almost invariably result in an unfavorable determination. Directive, ¶ E2.A8.1.2.5.

A demonstrated intent not to abuse any drugs in the future is a condition that could mitigate security concerns, and is arguably applicable in this case. *See* Directive, ¶ E2.A8.1.3.3.

Regardless of any mitigation, the Department of Defense is prohibited from granting or renewing a security clearance for a person who is an "unlawful user" of controlled substances. 10 U.S.C. § 986(c)(2).

Under Guideline G of the Directive, conduct involving questionable judgment or an unwillingness to comply with rules and regulations could indicate that an applicant may not properly safeguard classified information. Directive, ¶ E2.A5.1.1. An applicable condition that could raise a security concern and may be disqualifying is Applicant's patter of

rule violations including a violation of a written or recorded agreement with the agency. Directive, ¶ E2.A5.1.2.5. There are no apparent applicable conditions under the Directive that would mitigate these security concerns.

Conclusions: The Government established a *prima facie* case that conditions exist under Guidelines H and E that Applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. The evidence of record demonstrates that Applicant is an "unlawful user" of a controlled substance, marijuana. He readily admits that he intends to continue to use marijuana unless it will mean his clearance will not be renewed. It appears that Applicant was granted a security clearance in the past based on a similar offer to quit using marijuana. Nevertheless, Applicant continued to use marijuana after being granted a clearance that was apparently based on that offer. Under the circumstances, Applicant has not refuted or mitigated the evidence against him to demonstrated that it is in the national interest to grant him a security clearance. Furthermore, as an "illegal user" of a controlled substance, Applicant is barred from being granted a security clearance. 10 U.S.C. § 986.