

DATE: April 30, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-24365

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Nygina T. Mills, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Forty-nine year old Applicant's irregular, but sustained, abuse of marijuana - including purchase, possession, use, and sale - during 1970-2001, a period during which he held a security clearance; as well as his occasional abuse of hashish - including purchase, possession, and use - during 1970-82, again, a period during which he held a security clearance; and his changing position vis-a-vis substance abuse, referring to his July 2001 declaration that he may continue to abuse marijuana in the future, and that it will be his "judgment call" as to whether or not he will do so, contrasted with his more recent (November 2002) statement that he will not use marijuana in the future, leave grave doubts as to his continued security eligibility. Furthermore, the application of 10 U.S.C. § 986 disqualifies him from such eligibility. Clearance is denied.

STATEMENT OF THE CASE

On October 15, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, 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 Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn written statement, dated November 4, 2002, Applicant responded to the allegations set forth in the SOR, and elected to have his case decided on the written record, in lieu of a hearing. Department Counsel submitted the government's written case on February 21, 2003. A complete copy of the file of relevant material (FORM) [\(1\)](#) was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Any such submissions were due by April 3, 2003. A timely submission was received and, without objection being interposed by Department Counsel, the materials were made part of the record. The case was

assigned to this Administrative Judge on April 21, 2003.

FINDINGS OF FACT

Applicant has admitted all of the factual allegations pertaining to Drugs under Guideline H. Those admissions are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 49-year old employee of a defense contractor, and is seeking to retain a security clearance, a clearance held since 1980. ⁽²⁾

Applicant was a poly-substance abuser whose choice of illegal substances was marijuana and hashish. He commenced using marijuana in about 1970 while at a music concert, and continued using it on an irregular, but sustained, basis, in varying amounts and frequencies, until about March 2001. ⁽³⁾ In fact, there is no evidence to rebut his assertion that he last used marijuana in November 2002, ⁽⁴⁾ or that he has abstained from further marijuana use since that time. He smoked marijuana in both cigarettes and pipes. ⁽⁵⁾ His general motivation for using marijuana was that it relaxed him, he enjoyed it, and it apparently suited him in social and recreational settings. ⁽⁶⁾ Applicant used marijuana before, during, and after he attended college, as well as during the period (1980-98) in which he held a security clearance. ⁽⁷⁾ He characterized the frequency of his use of marijuana during this period by using the term "many." ⁽⁸⁾ Applicant's wife also joined him in using marijuana from about 1978 until 1984, but she has abstained since 1984. ⁽⁹⁾ During the period of his marijuana use, he also purchased varying quantities of marijuana, and on one occasion, sold it as well. ⁽¹⁰⁾

Applicant used hashish on an occasional basis during 1970-82. ⁽¹¹⁾ There is no evidence to rebut his assertion that he last used hashish in 1982, or that he has abstained from further hashish use since that time. He smoked it in pipes or by igniting it to produce smoke to be inhaled. ⁽¹²⁾ His general motivation for using hashish was that it relaxed him, it furnished an enjoyable sensation, and it, too, apparently suited him in social and recreational settings. ⁽¹³⁾ Applicant used hashish before, during, and after he attended college, as well as during the period (1980-82) in which he held a security clearance. ⁽¹⁴⁾ During the period of his hashish use, he also purchased it on one occasion. ⁽¹⁵⁾

In July 2001, Applicant indicated he had no future intentions of using hashish, citing the fact that it is not as easily available as marijuana and was too inconvenient to use. ⁽¹⁶⁾ Regarding his future intentions pertaining to marijuana, he stated: ⁽¹⁷⁾

. . . I can truthfully state that it is possible that I will use marijuana in the future if it is offered to me. I can also state that I may not partake in marijuana use as my social situation in going to car races is not for the express purpose of marijuana use. My use of marijuana is not automatic in social situations where it is offered to me. If marijuana is offered to me I will make a judgment call at that time to partake or not to partake in marijuana use.

In November 2002, Applicant changed his position. He indicated his earlier comments were "no longer a valid representation of [Applicant's] intent." ⁽¹⁸⁾ He continued by stating: "I have no intention of seeking to partake in marijuana use, or accept it if it were offered." ⁽¹⁹⁾ And, he added: "[the statement], as originally stated, was also an honest statement, at that time. It no longer applies." ⁽²⁰⁾

In March 2003, Applicant further explained his position regarding future marijuana use: ⁽²¹⁾

I do not deny making the statement. The statement was in response to a hypothetical question and I am not in the habit of giving concrete answers to imaginary situations. As to the allegation . . . , I stated on November 4, 2002, in a sworn statement that my answer is no longer "I don't know," but no.

Applicant was never arrested during his period of illegal substance abuse.

He has never undergone any drug treatment or rehabilitation as a result of his substance abuse. [\(22\)](#)

Applicant has been with his current employer since May 2001, and presently holds the position of senior mechanical engineer. The quality of his performance has not been revealed.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An Administrative Judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision in Section E2.2., Enclosure 2, of the Directive, are intended to assist the Administrative Judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an Administrative Judge should consider are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (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 pertinent 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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

[Guideline H - Drug Involvement]: 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.

Drugs are defined as mood and behavior altering substances, and include:

(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.

Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

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 cultivation, processing, manufacture, purchase, sale, or distribution;

(E2.A8.1.2.5.) Failure to successfully complete a drug treatment program prescribed by a credentialed medical professional. 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.

Conditions that could mitigate security concerns include:

(E2.A8.1.3.3.) a demonstrated intent not to abuse any drugs in the future.

On June 7, 2001, the Deputy Secretary of Defense issued a Memorandum, *Implementation of Restrictions on the Granting or Renewal of Security Clearances as Mandated by the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001*. The memorandum provides policy guidance for the implementation of Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, which amended Title 10, United States Code, to add a new section (10 U.S.C. § 986) that precludes the initial granting or renewal of a security clearance by the Department of Defense under specific circumstances. The situation described above involves one of those specific circumstances.

The statutory mandate applies to any DoD officer or employee, officer, director, or employee of a DoD contractor, or member of the Army, Navy, Air Force, or Marine Corps on active duty or in an active status, who is under consideration for the issuance or continuation of eligibility for access to classified information and who falls under one or more of the following provisions of the statute:

- (1) has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year;
- (2) is an unlawful user of, or is addicted to, a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802));
- (3) is mentally incompetent, as determined by a mental health professional approved by the Department of Defense; or
- (4) has been discharged or dismissed from the Armed Forces under dishonorable conditions.

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security," ⁽²³⁾ or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded both standards are one and the same. In reaching this Decision, I have endeavored to draw only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have attempted to avoid drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the Government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the Government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the Government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegation set forth in the SOR:

With respect to Guideline H, the Government has established its case. Applicant's improper and illegal drug abuse, including the purchase, possession, use, and sale of marijuana, as well as the purchase and use of hashish, is of concern, especially in light of his desire to have continued access to the nation's secrets. Applicant's overall conduct pertaining to his illegal substance abuse clearly falls within Drug Involvement Disqualifying Condition (DC) E2.A8.1.2.1. (*any drug abuse*), and DC E2.A8.1.2.2. (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution*). Moreover, under the circumstances herein, I believe Applicant's lengthy period of illegal substance abuse brings him within the scope of provision 2 of 10 U.S.C. § 986 in that he *is* an unlawful user of a controlled substance.

Applicant did not simply experiment, while a teenager, out of curiosity, and stop. Instead, motivated by social pleasures, notwithstanding the legal status of his endeavor, he exhibited a pattern of questionable judgment, irresponsibility, and immature behavior, and continued his substance abuse of marijuana, on an irregular, but sustained, basis for approximately 29 years, and abuse of hashish, on an occasional basis, for approximately 12 years. In fact, he was 48 years old when he finally made the clear and unambiguous statement that he would no longer use marijuana in the future. Applicant placed his drug-induced social pleasures above his fiduciary responsibilities as a holder of a security clearance and ignored the Government and the drug laws. Such illegal substance abuse, while holding a security clearance, clearly falls within DC E2.A8.1.2.5. (*Failure to successfully complete a drug treatment program prescribed by a credentialed medical professional. 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*). As stated above, improper or illegal involvement with drugs raises questions regarding an individual's willingness or ability to protect classified information. Applicant's actions have seemingly answered those questions.

The presence or absence of rehabilitation and other pertinent behavioral changes are significant factors in the overall adjudicative process. Despite a period of poly-substance abuse which lasted for 29 years, Applicant has not undergone any drug awareness, education, or treatment program, in order to achieve a better self-understanding of the behavioral and psychological effects of his actions and the motivation therefor. Likewise, simply superficially claiming that relaxation and enjoyment were initial motivators, and continued enjoyment and social pleasures were eventual motivators, does not demonstrate true insight into the actual motivation for following the 29 year course of conduct which he had chosen. While Applicant's purported period of abstinence may have commenced in March 2001, and continued thereafter to the close of the record, it was only during the past five months that the abstinence was based upon a conscious decision to cease his substance abuse. Without answers to these important questions, as well as the development of counter measures to the resumption of substance abuse-relapse prevention, the likelihood of recurrence becomes greater.

In this instance, Applicant has finally rejected future illegal substance abuse by stating he would forego marijuana in the future. That simple pledge, initially made in November 2002, and clarified in March 2003, overturned 29 years of illegal substance abuse, part of which occurred while he held a security clearance, as well as his cavalier attitude that his future intentions depended on his "judgment call." His previous conditional position has been succeeded by his new unconditional vow. However, his newly adopted position does not, in my estimation, constitute a "demonstrated intent not to abuse any drugs in the future," as set forth in Drug Involvement Mitigating Condition (MC) E2.A8.1.3.3.

Under the evidence presented, I possess little confidence that Applicant's substance abuse will not recur. Moreover, as it pertains to substance abuse, I believe Applicant's earlier declared future intent, calling for a "judgment call," is deserving of more weight than his more recent security clearance review-generated modifications and clarifications. However, even with new good intentions and a period of abstinence, more time is simply necessary. I do not take this position lightly, but based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my evaluation of the evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under Enclosure 2 of the Directive, I believe that Applicant has failed to mitigate or overcome the Government's case. The evidence leaves me with grave questions and doubts as to Applicant's continued security eligibility and suitability. Additionally, by virtue of 10 U.S.C. § 986, I conclude Applicant is not eligible for a security clearance. Accordingly, allegations 1.a. through 1.e. of the SOR are concluded against Applicant.

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

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline H: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Subparagraph 1.d.: Against the Applicant

Subparagraph 1.e.: Against the Applicant

Subparagraph 1.f.: 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.

Robert Robinson Gales

Chief Administrative Judge

1. The government submitted five items in support of its contentions.
2. *See* Item 4, (Security Clearance Application, dated June 13, 2001), at 7.
3. *See* Item 5 (Statement, dated July 24, 2001), at 4-6.
4. *See* Item 2 (Response to SOR, dated November 4, 2002).
5. *See* Item 5, *supra* note 3, at 4.
6. *Id.*, at 3-4.
7. *Id.*, at 6.
8. *See* Item 4, *supra* note 2, at 7.
9. *See* Item 5, *supra* note 3, at 6.
10. *Id.*, at 5.
11. *Id.*, at 3.
12. *Id.*
13. *Id.*
14. *Id.*, at 6.
15. *Id.*, at 3.

16. *Id.*, at 4.

17. *Id.*, at 9.

18. *See* Item 2, *supra* note 4.

19. *Id.*

20. *Id.*

21. *See* Response to FORM, dated March 31, 2003, at 1.

22. *See* Item 5, *supra* note 3, at 8.

23. *See* Executive Order 12968, "*Access to Classified Information*;" as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995, and further modified by memorandum, dated November 10, 1998. However, the Directive, as amended by Change 4, dated April 20, 1999, uses both "clearly consistent with the national interest" (*see* Sec. 2.3.; Sec.2.5.3.; Sec. 3.2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), and "clearly consistent with the interests of national security" (*see* Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (*see* Enclosure 2, Sec. E2.2.2.)