

DATE: February 19, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-25855

## **DECISION OF ADMINISTRATIVE JUDGE**

**MARTIN H. MOGUL**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Jennifer Campbell, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Forty six year old Applicant has abused marijuana, including purchase, possession, and use, for a minimum of 26 years. In a September 2002 declaration he stated that he continues to use and is psychologically addicted to the use of marijuana. The application of 10 U.S.C. § 986 disqualifies him from eligibility. Additionally, Applicant failed to provide the required information regarding his drug usage and his termination from employment as a result of drug usage to the Government in a Security Clearance Application (SCA), and he knew or should have known his responses were materially incorrect and incomplete. litigation has not been shown. Clearance is denied.

### **STATEMENT OF THE CASE**

On May 1, 2003, 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. The SOR detailed reasons under Guideline H (Drug Involvement), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct), 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 conduct proceedings and determine whether clearance should be granted or denied.

In a signed and sworn statement, dated June 6, 2003, Applicant responded to the SOR allegations. He requested that his case be decided on the written record in lieu of a hearing. On September 4, 2003, Department Counsel submitted the Department's written case. A complete copy of the file of relevant material (FORM) was provided to Applicant, and he was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not submit a response to the FORM. The case was assigned to this Administrative Judge on October 27, 2003.

In the FORM, Department Counsel offered thirteen documentary exhibits (Exhibits 1 -13), which were admitted without

objection. Applicant offered no documentary evidence into the record.

## FINDINGS OF FACT

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR and the documents, and upon due consideration of that evidence, I make the following findings of fact:

[Applicant is a 46 year old employee of a defense contractor](#) who seeks a security clearance on behalf of Applicant. He is married and [is a high school graduate](#).

### **Paragraph 1 (Guideline H - Drug Involvement)**

The Government alleges in this paragraph that Applicant is ineligible for clearance because he abuses illegal substances. Applicant first used marijuana in 1976 when he was 19 years old. In a signed, sworn statement he made to a DSS agent in October 2001, Applicant stated that he stopped using marijuana after his arrest in 1994 for possession of a controlled substance. However, Applicant stated in another signed, sworn statement he made to a DSS agent in September 2002, "I have continued to use marijuana mostly on weekends, even after my discharge for drug usage, and I still do to this date." He also [stated, "I believe I am psychologically addicted to the use of marijuana ..."](#) (Exhibit 8).

[Applicant has purchased much of the marijuana that he has used over the years](#). In 1977 he was arrested for use and possession of dangerous drugs. In 1994 he was arrested for being in possession of a controlled substance. He failed a drug test at his place of employment in 1993, and he was ordered to attend a drug abuse program, which he completed. In 1994, after failing a second company drug test he was terminated from his employment.

[Applicant](#) has continued to use marijuana after he received a security clearance in 1990, and after he completed his most current SCA in 2000 (Exhibits 4 and 8).

### **Paragraph 2 (Guideline J - Criminal Conduct)**

The Government alleges in this paragraph that Applicant is ineligible for a clearance because he [was engaged in criminal activity](#). In 1994, he was arrested for possession of a controlled substance and being under the influence of a controlled substance. In 1977, he was arrested for use and possession of dangerous drugs.

[On August 14, 1996, Applicant was cited for a vehicle code violation for failing to wear his seat belt. He was required to appear in court for this offense. He did not appear, and a bench warrant was issued for his arrest. The warrant is still outstanding.](#) **Paragraph 3 (Guideline E - Personal conduct)**

The Government alleges in this paragraph that Applicant is ineligible for a clearance because he furnished untruthful information to the Government in four separate questions and responses when Applicant completed a signed, sworn Security Clearance Application (SCA) on April 3, 2000 (Exhibit 4).

Question #24 asks, "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?" Applicant answered "No" to question #24. He did not provide any information regarding his arrest in 1994 for being in possession of a controlled substance and his arrest in 1977 for use and possession of dangerous drugs.

Question #27 asks, "[Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance . . . ?](#)" Applicant answered "No" to question #27. He did not provide any information regarding his marijuana usage which extended from 1976 to at least 2002.

Question #28 asks, "Have you ever illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official; while possessing a security clearance . . .?" Applicant answered "No" to question #27. He failed to provide the information that he used marijuana during the period in which he possessed a security clearance, which was granted to him in 1990.

Question #20 asks, "Has any of the following happened to you in the last ten years?-Fired from a job . . . Left a job for

other reason under unfavorable circumstances." Applicant answered "No" to question #20. He failed to provide information regarding his termination from employment in 1994 for failure to comply with the company substance abuse policy.

## POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines that must be carefully considered according to the pertinent Guideline in making the overall common sense determination required.

Each adjudicative decision must also include an assessment of: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 (See Directive, Section E2.2.1. of Enclosure 2).

Because each security case presents its own unique facts and circumstances, it should not be assumed that 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.. 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.*

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)**

**The Concern:** 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:

None.

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.

### **(Guideline J - Criminal Conduct)**

E2.A10.1.1. The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;

E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

None.

### **(Guideline E - Personal Conduct)**

E2.A5.1.1. *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. The following will normally result in an unfavorable clearance action or administrative termination of this processing for clearance eligibility:

Condition that could raise a security concern and may be disqualifying also include:

E2.A5.1.2.2. The deliberate omission, concealment, falsification or misrepresentation of relevant and material facts from any personnel security questionnaire, personal history statement or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

Conditions that could mitigate security concerns include:

None.

### **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

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

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 allegations set forth in the SOR:

**Paragraph 1 (Guideline H - Drug Involvement)** With respect to Guideline H, the Government has established its case. Applicant's improper and illegal drug abuse, including the purchase, possession, and use of marijuana during the period from 1976 to at least 2002, is of concern, especially in light of his desire to have 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).

Applicant's stated continued marijuana usage 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). I do not find that any Mitigating Condition (MC) applies to guideline H.

Finally, under the circumstances herein, Applicant's lengthy period of illegal substance abuse plus his indication as recently as September 2002 that he continues to use and is psychologically addicted to marijuana 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. Accordingly, Paragraph 1 of the SOR is concluded against Applicant.

**Paragraph 2 (Guideline J - Criminal Conduct)** The Government has established by substantial evidence that Applicant was involved in illegal activity regarding usage of drugs, including his arrests in 1994 and 1977 for drug related criminal activity, and his failure to appear in court in 1996.

Additionally, while it was not alleged in the SOR, Applicant engaged in criminal activity by intentionally giving false or misleading information on the SCA that he completed on August 2000, which violated Title 18, United States Code, Section 1001, which is a felony. He also used illegal substances for many years, which is clearly criminal conduct.

DC E2.A10.1.2. and DC E2.A10.1.2.1. apply in this case. Applicant has not mitigated this allegation. Paragraph 2 is found against Applicant.

**Paragraph 3 (Guideline E - Personal Conduct)** With respect to Guideline E, the evidence establishes that Applicant provided false and incomplete material information to the Government in response to four questions on the SCA that he executed in August 3, 2000. Applicant knew, or should have known, that the four questions required affirmative responses and information regarding his history of drug usage and his termination from employment because of his failure to comply with company substance abuse policy. There is no reasonable explanation for his failure to provide this information.

The Government relies heavily on the honesty and integrity of individuals seeking access to our nation's secrets. When such an individual intentionally falsifies material facts on a security clearance application, it is extremely difficult to conclude that he nevertheless possesses the judgment, reliability and trustworthiness required of clearance holders. In this case, Applicant's failure to offer any independent evidence indicating that he has reformed and is now reliable and trustworthy, precludes a finding that it is now clearly consistent with the national interest to grant him access to classified information. I resolve Guideline E against Applicant.

In reviewing the Disqualifying Conditions under Guideline E, I conclude that DC E2.A5.1.2.2. applies because the information that Applicant provided in his SCA was known or should have been known by him to be an omission and concealment of relevant and material facts. No Mitigating Conditions apply.

### **FORMAL FINDINGS**

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

#### 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

Subparagraph f: Against the Applicant

Subparagraph g: Against the Applicant

Subparagraph h: Against the Applicant

Subparagraph i: Against the Applicant

Subparagraph j: Against the Applicant

Subparagraph k: Against the Applicant

#### Paragraph 2. Guideline J: AGAINST THE APPLICANT

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

#### Paragraph 3. Guideline E: 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.

Martin H. Mogul  
Administrative Judge