

DATE: December 31, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-27288

DECISION OF ADMINISTRATIVE JUDGE

JOHN G. METZ, JR.

APPEARANCES

FOR GOVERNMENT

Kathryn A. Trowbridge, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's recreational abuse of marijuana from October 1992 to May 1997, with additional use in January 2001, after applying for a clearance, is not mitigated where Applicant's demonstrated intent to refrain from drug abuse varied directly with his perception of personal risk of adverse consequences. However, record does not support allegation of falsification of his previously disclosed drug abuse history on a November 2002 interrogatory. Clearance denied.

STATEMENT OF THE CASE

On 17 December 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 2 January 2003, Applicant answered the SOR and requested an administrative decision on the record. Applicant did not respond to the Government's File of Relevant Material (FORM)--issued 16 July 2003; the record closed 24 August 2003, the day the response was due at DOHA. The case was assigned to me on 15 September 2003, and I received it the same day to decide if clearance should be granted, continued, denied, or revoked.

FINDINGS OF FACT

Applicant admitted using marijuana about 25 times between October 1992 and January 2002⁽²⁾, LSD once in November 1992, and hallucinogenic mushrooms twice in late 1995 (paragraph 1), but denied having falsified his 21 November 2002 interrogatories by misrepresenting his drug use (paragraph 2); accordingly, I incorporate the admissions as findings of fact, except that I conclude that Applicant last used marijuana in January 2001.

Applicant--a 28-year-old employee of a defense contractor--seeks access to classified information. He has not previously held a clearance.

On 8 November 1999, Applicant executed a Security Clearance Application (SCA)(SF-86)(Item 4) on which he truthfully disclosed his illegal drug use to that date: marijuana approximately 25 times from October 1992 to June 1998, (3) hallucinogenic mushrooms twice between October and December 1995, and LSD once in November 1992. On 12 January 2001, he executed a sworn statement disclosing that he last used marijuana on 1 January 2001, after partying with friends. He stated that he had not used marijuana after graduating from college in 1997 because he feared being caught by a random drug test. He used on New Year's Day because his friends were using and he knew his employer--the same employer who nominated him for his clearance and the same employer for whom Applicant had a background investigation pending since November 1999--did not administer random drug tests. Nevertheless, Applicant insists that he will not use drugs in the future, even though he still associates with people who do use drugs.

On 21 November 2002, Applicant executed drug interrogatories proposed to him by DOHA. The interrogatories refer generally, but not by date, to the Applicant's statement to the DSS. In response to a series of questions, Applicant stated that he had not used any illegal drugs and had decided to stop using drugs on 1 January 2002 because it was illegal, unhealthy, and would limit his career opportunities. Elsewhere in the interrogatories, Applicant states that having a clearance will open up a variety of opportunities to him.

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 6.3. 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. . .

E2.A8.1.2.5. . . . 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.

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.

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.A5.1.2.2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, . . . [or] determine security clearance eligibility or trustworthiness. . . ;

E2.A5.1.2.3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, . . . in connection with a personnel security or trustworthiness determination;

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 the Applicant has not mitigated the conduct. Applicant was a recreational abuser of marijuana from approximately October 1992 to 1997. And although he disclosed this drug abuse in his November 1999 clearance application--at which point he was put on notice that drug use was against Government policy--he later used drugs with friends when the opportunity presented itself. This use was inconsistent with his later-stated intent to refrain from marijuana use in the future. Further, his past use was without regard to its illegality, his past periods of abstinence are directly related to his perception of the likelihood of being caught, and his statement of future intent to refrain is directly related to the career-enhancing affect of having a clearance. Yet when he considered the likelihood of being caught low, he freely used drugs with his friends. His use was recent, in that it occurred during his background investigation, and neither isolated nor aberrational. Nevertheless, his use of mushrooms in 1995 and his use of LSD in 1992 seems experimental at worst and unlikely to recur.

Although Applicant now vows to refrain from marijuana abuse having "matured," I find that vow neither credible nor

sufficient to constitute a demonstrated intent to refrain from drug abuse in the future, particularly given the circumstances of Applicant's past use. Accordingly, I resolve Guideline H against Applicant.

The Government has not established its case under Guideline E. Applicant truthfully disclosed his drug abuse history on his clearance application, and later disclosed a more recent use to the DSS. Yet, the Government posits that Applicant's answers to a poorly worded and vague interrogatory--one that apparently has not been updated since before DISCR was redesignated DOHA--constitute a deliberate falsification of a drug abuse history that Applicant previously disclosed. This is simply not credible.

Applicant's explanation that he read the question as calling only for any drug use after the referenced DSS interview is much more credible. Further, his statement that he decided to refrain from future drug use in January 2002, does not necessarily imply that he used drugs into January 2002, notwithstanding his later admission to the SOR allegation. I resolve Guideline E for Applicant.

FORMAL FINDINGS

Paragraph 1. Guideline H: AGAINST THE APPLICANT

Subparagraph a: Against the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Paragraph 2. Guideline E: FOR THE APPLICANT

Subparagraph a: 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 (Directive).
2. Aside from this admission to a last use in January 2002, there is no record evidence to support that date. Applicant's January 2001 statement puts his last use in January 2001. The allegation for January 2002 appears to be based merely on Applicant's November 2002 interrogatories, in which he stated that he decided to stop using drugs in January 2002. However, there is nothing in the interrogatories to suggest that the statement signifies continued use to January 2002.
3. Although he later amended the ending date to May 1997, because he could not recall using marijuana after graduating from college in 1997.