

DATE: June 26, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-02413

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Deputy Chief Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's past drug use over a thirty year period raises security concerns. Applicant is disqualified from having a security clearance under a provision of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, 10 U.S.C. Section 986 ("The Smith Amendment") as statutory provision (2) applies to anyone who "is an unlawful user of, or is addicted to, a controlled substance (as defined in Section 102 of the Controlled Substance Act (21 U.S.C. 802)." Applicant's recent use of marijuana and cocaine falls within this statutory prohibition as he knowingly and willfully continued this drug use against the government's security policies. While he has a good employment record, such excellence on the job does not erase the security significance of his acknowledged drug use after applying for a security clearance. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on October 22, 2002. (Item 1) The SOR detailed reasons why the Government could not make the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.⁽¹⁾ The SOR alleges specific concerns over drug use (Guideline H). Applicant responded to these SOR allegations in an Answer notarized on November 20, 2002, where he admitted all of the allegations except for 1.d. and 1.p. and requested a hearing. (Item 2) The case was assigned to Department Counsel who attested it was ready to proceed; and the case was assigned to me. Subsequently, a mutually convenient date for hearing was agreed to; and a Notice of Hearing was issued which set the matter for January 28, 2003, at a location near where Applicant works and lives. On January 10, 2003, Applicant requested his case be decided on a written record as he wanted to "recall" his request to have a hearing. (Item 4)

The case was assigned to Department Counsel to prepare for a decision on the administrative record. On February 7, 2003, she prepared the File of Relevant Material (FORM) for the Applicant's review and advised Applicant that he had 30 days to submit objections and/or information before the FORM was submitted to an administrative judge and that he

had the right to be represented by counsel. Included in the items provided to Applicant was a copy of the DOHA Operating Instruction No. 64 for Processing Procedures for Cases Subject to 10 U.S.C. 986. (Item 9)

A Personnel Security Specialist (PSS) sent the FORM to Applicant on February 18, 2003, and again notified the Applicant that he had 30 days from receipt of the letter to submit objections and/or information before the FORM was submitted to an administrative judge. Applicant received the FORM and submitted a response (Exhibit A) which DOHA received on April 2, 2003. On April 11, 2003, Department Counsel indicated she did not object to Applicant's submission. On April 14, 2003, the case was assigned to me.

STATUTORY REQUIREMENTS

A provision of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, 10 U.S.C. Section 986 ("The Smith Amendment"), mandates restrictions on the granting or renewal of security clearances. This statutory limitation was implemented within the Department of Defense by a June 7, 2001, memorandum, and within DOHA by Operating Instruction (OI) 64, issued on July 10, 2001. (Item 9) Statutory provision (2) applies to anyone who "is an unlawful user of, or is addicted to, a controlled substance (as defined in Section 102 of the Controlled Substance Act (21 U.S.C. 802)." This case falls within this statutory provision.

FINDINGS OF FACT

After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following Findings of Fact:

Applicant, 50 years old, has worked for Defense Contractor #1 in State #1 since July 1998. (Item 5; Exhibit A)

Applicant was married in 1980. (Item 5; Exhibit A)

Drug Use

In completing a Security Clearance Application (SF 86) in October 1999, Applicant only admitted marijuana use three to six times per year from July 1992 to ay 1990. (Item 6) When interviewed by the Defense Security Service (DSS) in October 2000, Applicant admitted much more extensive drug use (Item 7):

- **Marijuana:** Applicant began using in September 1972 while in college; his use increased from 1973 to 1977. He would purchase marijuana paying \$15 for once ounce every four to six weeks and would occasionally resell small amounts to friends. He once purchased a one-fourth pound baggie of marijuana for \$40. From 1977 to 2000 Applicant used marijuana three to six times yearly. He was detained by Canadian custom officials in summer 1979 for possession of drug paraphernalia. He never sought counseling for his use of marijuana. At the time of his DSS interview in October 2000 Applicant stated that he intended "to use marijuana on a recreational basis in the future." (Item 7) In fact, he used marijuana again in July 2002. (Item 8) In his April 2003 response Applicant stated that he does not intend to use drugs in the future. (Exhibit A) He submitted to a five panel drug screen in March 2003; no drug use was detected. (Exhibit A) However, given his past conduct and contrary statement to DSS in 200, I can give this April 2003 statement and the one-time negative drug test limited weight. Further, this new statement of a decision not to use drugs in the future was not subject to cross examination by the Government as on January 10, 2003, Applicant requested his case be decided on a written record as he decided to "recall" his request to have a hearing. (Item 4)
- 1990-1991. He purchased cocaine in the 1970's on two occasions and paid \$100 per gram and purchased again in the 1990-91 period. He would snort cocaine up his nostrils. He would become jittery and grind his teeth while under the effects of cocaine. In September/October 1999 Applicant used cocaine at the home of friends. He did so after he completed his SF 86 in summer 1999. (Item 7) Applicant does not intend to use cocaine again. (Item 7) Given his past conduct I can give his April 2003 statement and the one-time negative drug test limited weight as his new statement of a decision not to use drugs in the future was not subject to cross examination by the Government as on January 10, 2003, Applicant requested his case be decided on a written record as he decided to "recall" his request to have a hearing. (Item 4) not intend to use LSD in the future. (Item 7) to use speed in the future. (Item 7)

Job Performance

Applicant has received favorable performance reviews from 1993-2002 (Exhibit A, Attachments 3-10)

References

Applicant has a favorable reference letter from his manager who has known him for almost thirteen years. This manager has "great respect and trust" in Applicant who is a valuable asset to the contractor. The manager is "confident in his abilities to perform his job in the future." (Exhibit A, Attachment 1)

A former supervisor who has known Applicant since the late 1980's also provided a favorable letter concerning his ability, stability, character and honest. Applicant worked for this individual from 1990 to 1995 when the office was consolidated. He entrusted Applicant with "the most sensitive of internal processes and he always remained a steadfast and trustworthy associate. (Exhibit A, Attachment 2)

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. But the mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole, I weighed relevant Adjudication Guidelines as set forth below :

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:

[First] 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

[Second] 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:

1. Any drug abuse (see above definition);
2. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution;

Conditions that could mitigate security concerns include:

1. The drug involvement was not recent;
3. A demonstrated intent not to abuse any drugs in the future;

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue Applicant's access to classified information. The Applicant presents evidence to refute, explain, extenuate, or mitigate in order to overcome the doubts raised by

the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance. Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

CONCLUSIONS

Drug Use

The Government established security concerns over Applicant's intermittent marijuana use that spanned the 30-year period 1972 to 2002, his intermittent cocaine use that spanned the period from 1973 to 1999, and his experimental use of LSD in 1974, as well as his experimental use of speed and Quaaludes in the 1970's. He also purchased marijuana in the 1970's and cocaine in the 1990's. He was detained by Canadian custom officials in summer 1979 for possession of drug paraphernalia. In fact, he continued to use both marijuana (in October 2000 and in July 2002) and cocaine (October 1999) even after he had applied for a security clearance in September 1999. At the time of his DSS interview in October 2000 he stated that he intended "to use marijuana on a recreational basis in the future." Thus, his conduct falls within disqualifying conditions 1 and 2, detailed above.

Further, Applicant is disqualified from having a security clearance under a provision of the Smith Amendment. This statutory provision (2) applies to anyone who "is an unlawful user of, or is addicted to, a controlled substance (as defined in Section 102 of the Controlled Substance Act (21 U.S.C. 802)." Applicant's recent use of marijuana and cocaine falls within this statutory prohibition.

To his credit, Applicant has a successful work record and favorable references which indicate partial rehabilitation. Applicant in April 2003 stated he has no longer any intent to use drugs in the future and provided a March 2003 negative drug screen. However, given his thirty-year history of intermittent use of marijuana and cocaine, this very recent statement of commitment to avoid drugs in the future is not sufficiently persuasive to mitigate fully his past drug use over a thirty year period given his earlier statement to DSS in October 2000 that he planned to continue recreational use of marijuana. However, his experimental use of LSD, speed and Quaaludes which was limited to the 1970's is mitigated under Mitigation Condition (MC) 1, as that drug involvement was not recent. Further by not using again for almost thirty years, this drug use falls within MC 3. Also, his use and purchase of marijuana and cocaine in the 1970's as well as his detention in 1979 by Canadian custom officials for possession of drug paraphernalia is mitigated under MC 1. Thus, he has mitigated his past drug use in part. On the other hand, for Applicant to continue to use drugs after he completed his SF 86 and knew, or should have known, such drug use was against the government's policies raises sizeable questions about his judgment overall. With respect to those drugs he fails to meet the test of MC 3, a demonstrated intent not to abuse any drugs in the future as his recent decision to stop using drugs is too recent to be given the test of his commitment over time given his long history.

After considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraphs 1.a., 1.b., 1.c., 1.e., 1.h., 1.i., 1.j., 1.m., 1.n., 1.o., but against Applicant on subparagraphs 1.d., 1.f., 1.g., 1.k., 1.l., 1.p. incorporated under SOR Paragraph 1.

FORMAL FINDINGS

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1. Guideline H: AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: Against Applicant

Subparagraph 1.h.: For Applicant

Subparagraph 1.i.: For Applicant

Subparagraph 1.j.: For Applicant

Subparagraph 1.k.: Against Applicant

Subparagraph 1.l.: Against Applicant

Subparagraph 1.m.: For Applicant

Subparagraph 1.n.: For Applicant

Subparagraph 1.o.: For Applicant

Subparagraph 1.p.: 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 the Applicant.

Kathryn Moen Braeman

Administrative Judge

1. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), as amended by Change 4, April 20, 1999.