

DATE: April 21, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-13145

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 32-year-old engineer who made a serious mistake in judgment from October 1998 to April 1999, when he became involved in the illegal importation of up to 25,000 pills of ecstasy, which he also used and sold. He also used and sold marijuana during the same period. He cooperated with law enforcement after he was apprehended receiving a shipment of ecstasy. His criminal conduct misconduct and drug use was too extensive and is still too recent to establish rehabilitation. No mitigation has been established. Clearance is denied.

STATEMENT OF THE CASE

On October 22, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons

why DOHA could not make the preliminary affirmative finding required under the Directive that it

is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and

determine whether a clearance should be granted, denied or revoked.

On November 15, 2002, Applicant submitted a response to the allegations set forth in the SOR, and elected to have a decision made by a DOHA Administrative Judge on the written record, i.e., without a hearing. Department Counsel issued a File of Relevant Material (FORM) on February 3, 2003. The FORM instructed Applicant that any response to the FORM had to be submitted within 30 days of its receipt by Applicant. The response was due by March 15, 2003, but Applicant did not submit any additional information. The matter was assigned to me for resolution on March 21, 2003.

FINDINGS OF FACT

Applicant is a 32-year-old software engineer. The SOR contains five allegations, 1.a. - 1.e., under Guideline H (Drugs) and one allegation, 2.a, under Guideline J (Criminal Conduct), relating directly to the allegations under 1.a. - 1.e. Applicant has consistently admitted all of the SOR allegations.

After considering the totality of the evidence derived from the contents of the FORM, I make the following FINDINGS OF FACT as to each SOR allegation:

Guideline H (Drugs)

1.a. - Applicant sold ecstasy on a regular basis from approximately October 10, 1998 to at least April 1, 1999;

1.b - Applicant aided his friends and associates to illegally import ecstasy from overseas to the United States, by accepting deliveries of approximately 20,000 to 25,000 pills of ecstasy through the United States Postal Service, and then transferring the drugs to a local dealer, during the period from approximately October 10, 1998 to at least April 1, 1999;

1.c. - Applicant used ecstasy on a regular basis from approximately October 10, 1998 to at least April 1, 1999;

1.d. - Applicant used marijuana on a regular basis from approximately October 10, 1998 to at least April 1, 1999;

1.e. - Applicant purchased both marijuana and ecstasy on a regular basis from approximately October 10, 1998 to at least April 10, 1999.

Guideline J (Criminal Conduct)

2.a. - the information in SOR 1.a - 1.e., above, constitutes separate violations of Federal criminal law.

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant

in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing 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 (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Because Applicant chose to have this matter decided without a hearing and without submitting any additional information in response to the FORM, all credibility determinations and findings of fact are necessarily based entirely on the contents of the FORM.

Considering the evidence as a whole, I find the following specific adjudicative guidelines to be most pertinent to this case:

GUIDELINE H (Drugs)

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

1. Any drug abuse;
2. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution;

Condition that could mitigate security concerns include:

1. The drug involvement was not recent.

None of the other possible mitigating conditions are established by the record evidence.

Guideline J (Criminal Conduct)

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

1. Allegations or admissions of criminal conduct;
2. A single serious crime or multiple lesser offense

Condition that could mitigate security concerns:

None that are established by the evidence of record⁽¹⁾.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of

whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either by the Applicant's admissions or by other evidence) and proves conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the Applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence

of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the Applicant.

CONCLUSIONS

Applicant was a 29-year-old junior engineer when he became involved in serious drug activity, including his participation in the importation of 20,000 to 25,000 pills of ecstasy, which he also used and sold. He also used and sold marijuana during the same period, six months in 1998 and 1999. Since he was caught in the act of accepting the shipment of ecstasy, he cannot credibly claim that he voluntarily withdrew from the criminal enterprise in which he was an important part. In addition, although he cooperated with law enforcement when apprehended, it is impossible to escape the conclusion that he cooperated in order to stay out of jail, rather than from a voluntary withdrawal from the criminal enterprise.

Applicant's input into this adjudication is limited to his written submissions, Items 3, 4, and 5. I have considered as possible mitigation his statements in *Item 3* that: (1) he has never been convicted or charged with any crime; (2) he has never been addicted to or needed rehabilitation for his drug use; (3) he became an informant for Federal law enforcement to "catch and convict other individuals engaged in this activity; (4) he has not been involved with drugs for the past three years; (5) he has moved away from the place where the illegal acts occurred; in *Item 4* (his SF 86); (6) the fact of his involvement with ecstasy and marijuana in 1998/1999; and in *Item 5* (his sworn statement to DSS), the details of his drug involvement, apprehension, and cooperation with the authorities.

I have carefully considered Appellant's statements. While his knowing involvement in drugs is admitted and otherwise

proved, nothing he has said qualifies as mitigation to the extent that it even comes close to outweighing the significant disqualifying evidence.

Under Guideline H (Drugs), both Disqualifying Conditions 1 and 2 apply, but none of the possible Mitigating Conditions have been established by Applicant. The serious drug activity is still too recent (MC 1); was not an isolated incident (MC 2), and there is no clear evidence of rehabilitation (MC 6). Regardless of how sincere Applicant may be, it is simply too soon to conclude that he has demonstrated rehabilitation.

Under Guideline J (Criminal Conduct), both Disqualifying Conditions 1 and 2, are clearly established but, as with Guideline H, none of the possible Mitigating Conditions have been established. The criminal activity is still too recent (MC 1); cannot be considered an isolated incident (MC 2), and there is no clear evidence of rehabilitation (MC 6).

It is fundamental to the DoD security clearance program that access to the nation's secrets is a privilege and not a right. This means that the burden of proof as to eligibility is ultimately on an applicant for a clearance. It also means that any doubts must be construed against the person seeking the clearance. In the present case, while it appears that Applicant's drug involvement and his drug-related criminal conduct lasted for a six month period that ended three years ago, it was such a serious demonstration of bad judgment, unreliability, and untrustworthiness, that a doubt continues to exist as to his suitability to hold a security clearance.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Guideline H (Drugs) 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

Guideline J (Criminal Conduct) Against the Applicant

Subparagraph 2.a. 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.

BARRY M. SAX

ADMINISTRATIVE JUDGE

1. The drug involvement covered a six month period ending about three years ago. In context, the fact that the involvement was not simply using marijuana, but being involved in selling ecstasy and in the illegal importation of up to 25,000 pills of ecstasy, three years is still too recent to be considered a mitigating condition.