

DATE: September 30, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-18633

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Between 1998 and December 31, 2001, Applicant used marijuana about 40 times. Although Applicant signed a drug-free policy statement with his present employer indicating he would not engage in future drug use, he nevertheless used marijuana again on December 31, 2001. In April 2002, Applicant provided a sworn statement indicating he would not use marijuana under certain conditions. While Applicant has stated in October 2002 and May 2003 he will not use drugs again, his violation of the policy-statement in late 2001, coupled with his conditional statement in May 2002 regarding future drug use, and the lack of independent character evidence to support Applicant's present intentions, Applicant has not mitigated the adverse evidence under the drug involvement and personal conduct guidelines. Clearance is denied.

STATEMENT OF CASE

On September 19, 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, amended April 4, 1999, 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 clearance should be denied or revoked. Applicant provided his answer to the SOR on October 23, 2002. Applicant elected to have his case decided on a written record. The Government provided a copy of the File of Relevant Material (FORM) on April 18, 2003. Applicant received the FORM on April 24, 2003. He furnished his response on May 14, 2003, which was within the 30 day period allowed for receipt of a response. The case was received by the undersigned for decision on June 30, 2003.

FINDINGS OF FACT

The SOR alleges drug involvement (Guideline H) and personal conduct (Guideline E). On October 23, 2002, Applicant admitted the factual allegations of the SOR with some clarification. His marijuana use (described by Applicant as experimental) never became a problem during four years of college. Applicant does not intend to use marijuana in the

future. Applicant regrets his one-time use of marijuana after signing a drug-free statement and taking a drug test sponsored by his employer. Applicant claims if he had known his drug use would have hindered his job opportunity, he would have done things differently.

According to his sworn statement (Item 5) dated May 14, 2002, Applicant started using marijuana in his freshman year of college in 1998. ⁽¹⁾ He used the drug at social gatherings with a group of friends. The drug put Applicant in a good mood and made him feel relaxed. After using the drug once a month for three years, his last use of the drug was December 31, 2001 (when Applicant was 23 years old) after signing a drug-free statement and taking a urine test. ⁽²⁾ Other than contributing to the purchase of marijuana he smoked with others, Applicant has never sold, trafficked, manufactured, produced or distributed marijuana. Applicant ended his sworn statement by indicating, "My intentions for future use are to refrain from using marijuana or any other illegal drug while under security clearance, or after signing a drug-free policy with an employer." (Item 5) Based on the foregoing statement in, I find Applicant had not completely ruled out using marijuana in the future in May 2002.

Applicant noted in his response to the FORM he has been drug-free since his last stated use on December 31, 2001. As he indicated in his answer to the SOR, Applicant modified his intention on future drug use by stating, "I will reiterate that I have no intent of [drug] usage in the future." Applicant claimed his one time use of marijuana after his urine test and signing the drug-free statement resulted from a lack of judgment and not considering the policy. Applicant provided documentation reflecting he took a random drug test in March 2003 given by his company. Even though the documentation does not include the results, Applicant noted that he was advised by telephone the results were negative.

Applicant holds himself accountable for his actions and has learned from his mistakes.

POLICIES

Enclosure 2, page 16 of the Directive, sets forth disqualifying conditions (DC) and mitigating conditions (MC) which must be given binding consideration in making security clearance determinations. These conditions must be considered in every case according to the pertinent guideline; however, the conditions are in no way automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security case presents its own unique facts and circumstances, it should not be assumed that the conditions exhaust the entire realm of human experience or that the conditions apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Conditions most pertinent to evaluation of the facts in this case are:

Drug Involvement (Guideline H)

Disqualifying Conditions (DC):

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

Mitigating Conditions (MC):

1. The drug involvement was not recent;
2. The drug involvement was an isolated or aberrational event;
3. A demonstrated intent not to use any drugs in the future.

Personal Conduct (Guideline E)

Disqualifying Conditions (DC):

5. A pattern of dishonesty or rule violations, including violation of any recorded agreement between the individual and the agency.

Mitigating Conditions (MC):

There is no corresponding condition to mitigate DC 5, therefore, the general policy factors of the whole person concept (next section) must be examined to determine whether a rule violation is mitigated.

General Policy Factors (Whole Person Concept)

Every security clearance case must also be evaluated under additional policy factors that make up the whole person concept. Those factors (found at pages 16 and 17 of Enclosure 2 of the Directive) include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 behavioral changes; (7) the motivation for the conduct; and, (8) The potential for pressure, coercion, exploitation, or duress; (9) and, the likelihood of continuation or recurrence.

Burden of Proof

As set forth in the Directive, every personnel security determination must be a fair and impartial overall commonsense decision based upon all available information, both favorable and unfavorable, and must be arrived at by applying the standard that the granting (or continuance) of a security clearance under this Directive may only be done upon a finding that to do so is clearly consistent with the national interest. In reaching determinations under the Directive, careful consideration must be directed to the actual as well as the potential risk involved that an applicant may fail to properly safeguard classified information in the future. The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature.

The Government must establish a *prima facie* case against Applicant under drug involvement (Guideline H) and personal conduct (Guideline E) which establishes doubt about Applicant's judgment, reliability, and trustworthiness. Then, the Applicant has the ultimate burden of demonstrating with evidence in refutation, explanation, mitigation, or extenuation that it is clearly consistent with the national interest to grant or continue his security clearance.

CONCLUSIONS

Drug involvement may impair social or occupational functioning while increasing the risk of unauthorized disclosure of classified information. Applicant's drug involvement falls within DC 1 as constituting drug abuse with marijuana Applicant's drug of choice. Applicant's marijuana abuse was clearly more than experimental as it occurred more than a few times a year. Applicant liked the drug because it relaxed him while putting him in a good mood. Applicant purchased the drug on an occasional basis by contributing to the cost of marijuana that was consumed.

The circumstances of this case make the first three mitigating conditions under the drug involvement guideline potentially applicable. MC 1 should be considered where the drug involvement was not recent. Since Applicant stopped using marijuana at the end of December 2001, Applicant is entitled to some mitigation under MC 1. However, the mitigation Applicant receives under MC 1 is diminished by MC 2, as Applicant's abuse of marijuana was occasional rather than isolated between 1998 and December 2001.

Regarding the overall persuasiveness of Applicant's intention not to use drugs in the future (MC 3), Applicant signed a drug-free policy statement with his employer after September 2001, then used marijuana on December 31, 2001. The fact that Applicant used drugs after signing the policy statement indicating he would not, undermines the credibility of his sworn statement in May 2002, indicating he would not use drugs in the future as long as he held a security clearance or after he had signed a drug-free policy statement with his employer. Furthermore, the conditional language of Applicant's stated intention not to use drugs in the future (in May 2002) also raises a reasonable inference Applicant would use marijuana in the future if he did not possess a security clearance or if he had not signed a drug-free policy statement.

In October 2002 (Item 3), Applicant stated unconditionally he did not intend to use drugs in the future. In May 2003, Applicant reiterated his unconditional intention and provided documentary evidence of taking a drug test. While the unrestricted language tends to demonstrate Applicant's resolve to forego future drug use is strengthening, insufficient time has passed to justify complete confidence Applicant will not resume drug use in the future. In reaching this decision against Applicant under the drug involvement guideline, I have also considered the general policy factors under the whole person concept.

Personal conduct that demonstrates an unwillingness to comply with rules and regulations could signify the individual may not be a suitable candidate to properly safeguard classified information. DC 5 under the personal conduct guideline applies to rule violations. After Applicant was hired in September 2001, he signed a drug-free policy statement with his employer not to use drugs. Applicant violated that written agreement by using marijuana on December 31, 2001.

Because there is no condition that mitigates DC 5 of the personal conduct guideline, Applicant's rule violation must be analyzed under the general factors of the whole person concept to determine whether Applicant's evidence in mitigation has overcome the negative inferences triggered by his rule violation. When Applicant signed the drug-free policy statement, he was 23 or 24 years old. Applicant's marijuana use after signing the statement appears to have been voluntary and prompted by his desire to use marijuana. While Applicant claims he tested negative for drug use in March 2003, he has furnished no independent evidence to buttress his stated intention not to use drugs in the future. Given (1) Applicant's occasional drug use until December 31, 2001, (2) his drug use after signing a statement indicating he would not use drugs, and (3) his statement in May 2002 inferring he could use drugs in the future under certain conditions, Applicant's evidence in mitigation falls short of satisfying his ultimate burden of persuasion under the whole person concept.

FORMAL FINDINGS

Formal findings required by Section 1.25 of Enclosure 3 of the Directive are:

Paragraph 1 (drug involvement, Guideline H): AGAINST THE APPLICANT.

- a. Against the Applicant.
- b. Against the Applicant.

Paragraph 2 (personal conduct, Guideline E): AGAINST THE APPLICANT.

- 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.

Paul J. Mason

Administrative Judge

- 1. Applicant turned 20 years old during his freshman year.
- 2. Applicant began working for his employer in September 2001. (Item 4)