

DATE: April 21, 2004

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 02-23667

DECISION OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This forty four year old Applicant has used marijuana for many years, through at least November 2003, including after he completed a Security Clearance Application (SCA) and responded to the Statement of Reasons (SOR) . In a May 2002 signed, sworn declaration and in his September 2003 response to the SOR, Applicant indicated that he intended to continue using marijuana in the future. The application of 10 U.S.C. § 986 disqualifies him from eligibility. litigation has not been shown. Clearance is denied.

STATEMENT OF THE CASE

On October 29, 2002, the Defense Office of Hearings and Appeals (DOHA), under 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 an SOR to Applicant. The SOR detailed reasons under Guideline H (Drug Involvement) 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 October 4, 2002, Applicant responded to the SOR allegations. He requested that his case be decided on the written record in lieu of a hearing. On October 29, 2002, a second SOR was issued and on September 30, 2003, Applicant filed a signed and sworn response again he requested that his case be decided on the written record in lieu of a hearing. Subsequently on November 7, 2003, Applicant requested that this matter be decided based on a hearing record.

On January 29, 2004, this case was assigned to this Administrative Judge to conduct a hearing and issue a written decision. A Notice of Hearing was issued to the parties on February 2, 2004, and the hearing was held on March 11,

2004.

At the hearing, Department Counsel offered sixteen documentary exhibits (Government Exhibits 1 through 16), and no witnesses were called. Applicant offered one documentary exhibit (Applicant Exhibit A), and offered his own testimony. All of the documents were entered into evidence without objection. The revised and corrected transcript (TR) was received on March 30, 2004.

FINDINGS OF FACT

The Government opposes Applicant's request for a security clearance, based upon the allegations set forth in the SOR. The SOR contains four allegations, 1.a. through 1.d., under Guideline H (Drug Involvement). In his response to the SOR, Applicant admits three allegations 1a. through 1.c. These allegations are incorporated as findings of fact.

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

Applicant is 44 years old. He is the president and CEO of a company that is pursuing work as a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 (Guideline H - Drug Involvement)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he abuses illegal substances. Applicant estimated that his first usage of marijuana occurred during his senior year in high school in approximately 1978. With some exceptions, he continued to use marijuana approximately two times a week (Tr at 42, Exhibit 11).

There is some dispute as to when, or if, Applicant has stopped his usage of marijuana. In a signed, sworn statement he made to a DSS agent on May 17, 2002, Applicant stated, "If I have marijuana I will use it again." While at the hearing Applicant testified that he had last used marijuana in May 2003 (Tr at 42), in his September 30, 2003 response to the SOR he admitted that he planned to continue using marijuana. In a letter written by Applicant on November 7, 2003, he stated regarding his drug usage, "If eliminating its use entirely creates a new opportunity to secure the desired security clearance, consider it done" (Exhibit 14).

I conclude that Applicant continued using marijuana after his May 2002 statement to the DSS, after the May 2003 date that he claimed to have stopped using marijuana during testimony at the hearing, and after the September 2003 response to the SOR. I believe Applicant continued using marijuana, at least until November 7, 2003, the date of Exhibit 14. While Applicant now claims to have no future intention to use marijuana, based on the inconsistency of his statements, I cannot conclude that he does not plan to continue to use marijuana in the future.

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision.

Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. 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.

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.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- I. The likelihood of continuation or recurrence.

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in acts of alcohol abuse and conduct that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue 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. Finally, as

emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

CONCLUSIONS

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 allegation set forth in the SOR:

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.

In this case, the Government has met its initial burden of proving by substantial evidence that Applicant has used illegal drugs for many years under (Guideline H). Applicant, on the other hand, has not introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's case against him.

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 possession and use of marijuana, 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 intention to continue using marijuana in the future in his signed, sworn statement made to a DSS agent and in his Response to the SOR 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 2003, that he will continue to use marijuana, brings his conduct within the scope of provision 2 of 10 U.S.C. § 986 in that he is an unlawful user of a controlled substance. The application of 10 U.S.C. § 986 disqualifies him from eligibility. Accordingly, Paragraph 1 of the SOR is concluded against Applicant.

On balance, it is concluded that Applicant has failed to overcome the Government's information opposing his request for a security clearance.

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: 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.

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.

Martin H. Mogul

Administrative Judge