

KEYWORD: Drugs

DIGEST: Forty-one-year old Applicant's marijuana use commenced during his early teens and continued until at least May 2002. Based on his verbal admissions, it is also probable the substance abuse has not yet ceased. Applicant last claimed to have no intentions of stopping his use of marijuana as recently as September 2003. He does not concede that drug use violates the law, but only that drug possession is a violation, and sees nothing wrong with using marijuana and may continue to do so if the opportunity--a party, club, concert, or festival--presents itself. His long-term marijuana abuse and refusal to provide a clear and unambiguous expressed intent to discontinue it leaves grave doubts as to his security eligibility. Furthermore, 10 U.S.C. § 986 disqualifies him from eligibility for a security clearance. Clearance is denied.

CASE NO: 02-24905.h1

DATE: 06/07/2004

DATE: June 7, 2004

In Re:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-24905

**DECISION OF ADMINISTRATIVE JUDGE
ROBERT ROBINSON GALES**

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Jr., Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Forty-one-year old Applicant's marijuana use commenced during his early teens and continued until at least May 2002. Based on his verbal admissions, it is also probable the substance abuse has not yet ceased. Applicant last claimed to have no intentions of stopping his use of marijuana as recently as September 2003. He does not concede that drug use violates the law, but only that drug possession is a violation, and sees nothing wrong with using marijuana and may continue to do so if the opportunity--a party, club, concert, or festival--presents itself. His long-term marijuana abuse and refusal to provide a clear and unambiguous expressed intent to discontinue it leaves grave doubts as to his security eligibility. Furthermore, 10 U.S.C. § 986 disqualifies him from eligibility for a security clearance. Clearance is denied.

STATEMENT OF THE CASE

On September 3, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to 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 a Statement of Reasons (SOR) to Applicant. The SOR 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 a clearance should be granted, continued, denied, or revoked.

In a sworn, written answer, dated September 22, 2003, Applicant responded to the allegations set forth in the SOR, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the government's written case on February 18, 2004. A complete copy of the file of relevant material (FORM) [\(1\)](#) was provided to Applicant, and he was afforded, until March 30, 2004, an opportunity to file objections and submit material in refutation, extenuation, or mitigation. No further response was made. The case was assigned to me May 14, 2004.

FINDINGS OF FACT

Applicant has admitted two of the factual allegations (subparagraphs 1.a. and 1.c.) pertaining to drug involvement under Guideline H. Those admissions are incorporated herein as findings of fact. He denied the factual allegation in subparagraph 1.b. and ignored the conclusory allegation in subparagraph 1.d.

After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 41-year-old employee of a defense contractor, and is seeking to obtain a SECRET security clearance.

Applicant is a substance abuser whose illegal substance of choice is marijuana. He commenced using marijuana in his early teens while in high school⁽²⁾ and continued using it, with varying frequency, until at least May 2002,⁽³⁾ when he was interviewed by a special agent of DSS. His marijuana abuse occurred with no set pattern, but generally took place "when it was around" at parties, clubs, concerts, and festivals.⁽⁴⁾ He smoked marijuana in cigarettes, pipes, and bongs.⁽⁵⁾ When asked to quantify his marijuana use Applicant indicated his average use over the years would be monthly.⁽⁶⁾ Applicant's marijuana use is "common knowledge among [his] social group."⁽⁷⁾

Applicant admitted to a DSS agent during a subject interview purchasing marijuana in the past, but he had not done so in over one year.⁽⁸⁾ Applicant now denies making those admissions and claims he never purchased marijuana.⁽⁹⁾ Considering the nature of Applicant's openness regarding his marijuana use and future intentions, I chose to give greater weight to his position in this regard than the unsworn recollections of the DSS agent. Accordingly, Applicant did not purchase marijuana during his period of marijuana use.

Applicant has never sought, been referred to, nor received any treatment or counseling for his use of marijuana or any other illegal substance.⁽¹⁰⁾ He has never been diagnosed as a substance abuser or substance dependent by a credentialed medical professional.⁽¹¹⁾ Furthermore, he has never been arrested for any illegal substance abuse-related conduct.⁽¹²⁾

Applicant's motivation for using marijuana is that it makes him feel relaxed and does not cause adverse behavioral effects.⁽¹³⁾ He enjoys smoking marijuana and has no intentions of stopping its use.⁽¹⁴⁾ At the same time, he has no "specific" intentions of continuing his marijuana use, although he might do so when the opportunity presents itself in the context of his normal social activities.⁽¹⁵⁾

Applicant challenges the legal status of marijuana use and possession. He contends there is no law against smoking marijuana, and he knows of only the prohibition against possessing the substance.⁽¹⁶⁾ Applicant maintains his employer would not have a problem with his marijuana use and he does not care if he receives a security clearance.⁽¹⁷⁾

Applicant was married in 1987, and has two children. He divorced in 1994. He received a bachelor of science degree in an unspecified discipline in 1990.⁽¹⁸⁾

Applicant has been employed by his current employer, a government contractor, since March 1983, and presently serves as a customer service engineer. The quality of his performance has not been developed in the record.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision in Section E2.2., Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in

making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable 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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline most pertinent to an evaluation of the facts of this case:

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.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, pertaining to this adjudicative guideline are set forth and discussed in the Conclusions section below.

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.

The statutory mandate applies to any DoD officer or employee, officer, director, or employee of a DoD contractor, or member of the Army, Navy, Air Force, or Marine Corps on active duty or in an active status, who is under consideration for the issuance or continuation of eligibility for access to classified information and who falls under one or more of the following provisions of the statute:

(1) has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year;

(2) is an unlawful user of, or is addicted to, a controlled substance (as defined in Section 102 of the Controlled

Substances Act (21 U.S.C. 802));

(3) is mentally incompetent, as determined by a mental health professional approved by the Department of Defense; or

(4) has been discharged or dismissed from the Armed Forces under dishonorable conditions.

The statute also "provides that the Secretary of Defense and the Secretary of the Military Departments concerned may authorize a waiver of the prohibitions concerning convictions, dismissals and dishonorable discharges from the armed forces in meritorious cases." The waiver authority does not apply to current substance abuse or mental incompetence.

Implementing guidance attached to the memorandum indicates that provision 2, described above, "does not change the substance of the existing adjudication guidelines relative to current drug involvement. Anyone who is currently an unlawful user of, or addicted to, a controlled substance is not considered eligible for a security clearance."

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the standard the issuance of the clearance is "clearly consistent with the interests of national security," [\(19\)](#) or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded both standards are one and the same. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

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:

The government has established its case under Guideline H. Applicant's improper and illegal drug abuse, consisting of the possession and use of marijuana, is of concern, especially in light of his desire to have access to the nation's secrets. The Directive clearly expresses the government's concern regarding drug involvement in provision 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*). Drug abuse is defined in provision E2.A8.1.1.3.: (*the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction*). Provision E2.A8.1.2.1. generally identifies and defines drugs: (*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)*). Applicant's overall conduct pertaining to his illegal substance abuse clearly falls within Drug Involvement Disqualifying Condition (DI DC) E2.A8.1.2.1. (*any drug abuse*), and DI DC E2.A8.1.2.2. (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution*).

Applicant did not simply experiment, while a teenager, out of curiosity, and then quit. Rather, he commenced using marijuana while in his early teens, notwithstanding the illegal nature of his endeavor. He exhibited a pattern of questionable judgment, irresponsibility, and immature behavior, and continued his substance abuse of marijuana over the years until at least May 2002--the same month he was interviewed by DSS. Based on his May 2002 verbal admissions, it is also probable the substance abuse has not yet ceased. Applicant is now 41-years-old, and he last claimed to have no intentions of stopping his use of marijuana as recently as September 2003, in response to the SOR. Applicant did not concede that drug use violates the law, but only that drug possession is a violation. In light of his comments regarding future intentions, I construe Applicant's position in this regard as follows: he sees nothing wrong with using marijuana and may continue to do so if the opportunity--a party, club, concert, or festival--presents itself. Applicant's position, in the absence of a clear and unambiguous expressed intent to discontinue substance abuse, falls within DI 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*). As stated above, improper or illegal involvement with drugs raises questions regarding this individual's willingness or ability to protect classified information. Applicant's words and actions have created no doubt over his unwillingness to discontinue illegal marijuana use.

The presence or absence of rehabilitation and other pertinent behavioral changes are significant factors in the overall adjudicative process. Despite a lengthy period of substance abuse, Applicant has not undergone any drug awareness, education, or treatment program, in order to achieve a better self-understanding of the behavioral and psychological effects of his actions and the motivation therefor. While there is no requirement to undergo treatment or attend any of the aforementioned programs, exposure to at least the educational and psychological components of those programs might be beneficial to Applicant. Likewise, simply claiming that enjoyment and relaxation without adverse behavioral effects are motivators, does

not demonstrate true insight into the actual motivation for the course of conduct which he had chosen and continues to follow.

Applicant's continuing drug involvement also falls within 10 U.S.C. § 986. He refuses to state unequivocally that he will no longer use marijuana in the future and has, instead, displayed a somewhat cavalier attitude towards illegal substance use and the necessity of his obtaining a security clearance. Under these circumstances, based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my evaluation of the evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under Enclosure 2 of the Directive, Applicant has failed to mitigate or overcome the government's case. The evidence leaves me with grave questions and doubts as to Applicant's security eligibility and suitability. Accordingly, allegations 1.a., 1.c., and 1.d. of the SOR are concluded against Applicant. On the other hand, the government has failed to establish its case pertaining to allegation 1.b. of the SOR and it is concluded in favor of Applicant. Consequently, under Guideline H and 10 U.S.C. § 986, I conclude Applicant is not eligible for a security clearance.

For the reasons stated, I conclude Applicant is not eligible for access to classified information.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline H: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: For 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 Applicant. Clearance is denied.

Robert Robinson Gales
Chief Administrative Judge

1. The government submitted six items in support of its contentions.

2. Item 6 (Defense Security Service (DSS) Certified Results of Interview, dated May 23, 2002), at 1.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Item 2 (Response to SOR, dated September 22, 2003).

8. Item 6, *supra* note 2, at 1.

9. Item, 2, *supra* note 7.

10. Item 6, *supra* note 2, at 2.

11. *Id.*

12. *Id.*, at 1-2.

13. *Id.*, at 1.

14. *Id.*, at 2; Item 2, *supra* note 7.

15. *Id.*, Item 2.

16. Item 6, *supra* note 2, at 1.

17. *Id.*

18. Item 15 (Security Clearance Application (SF 86), dated April 29, 2002), at 2; Item 4 (SF 86 signature page, dated April 29, 2002).

19. Exec. Or. 12968, "Access to Classified Information;" as implemented by Department of Defense Regulation 5200.2-R, "Personnel Security Program," dated January 1987, as amended by Change 3, dated November 8, 1995, and further modified by memorandum, dated November 10, 1998. However, the Directive, as amended by Change 4, dated April 20, 1999, uses both "clearly consistent with the national interest" (Sec. 2.3.; Sec.2.5.3.; Sec. 3.2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), and "clearly consistent

with the interests of national security" (Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (Enclosure 2, Sec. E2.2.2.)