

DATE: April 22, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-24965

DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This 55 year old Applicant was granted Secret-level security clearances in 1979 and 1988.

He has admitted using marijuana while holding those security clearances, but did not reveal his use of marijuana on a security clearance application he filed in 1998. In 1998, in an attempt to elicit the full history of Applicant's use of marijuana, an agent of the Defense Security Service questioned him several times. As a result of that investigation, Applicant's security clearance was revoked in 1999. In 2001, Applicant, filed a security clearance application in which he denied ever using a controlled substance while holding a security clearance. While Applicant submits evidence of competence and hard work in his Federal job, these submissions do not mitigate the breach of trust implicit in his use of drugs while he held two security clearances. Clearance is denied.

STATEMENT OF THE CASE

On September 3, 2002, pursuant to Executive Order No. 10,865, *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, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant that specified reasons why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

In the SOR the Government alleged that Applicant was disqualified from obtaining a security clearance because of his illegal drug involvement (Guideline H) demonstrating a history of marijuana use while he held security clearances in 1979 and 1988, and personal conduct (Guideline E) demonstrating questionable judgment, based upon his continued use of marijuana and his failure to reveal his drug use on security clearance applications and in interviews with Defense Security Service agents.

By Memorandum dated November 15, 2002, Applicant responded to the allegations set forth in the SOR and requested that his case be determined on the written record in lieu of a hearing. The Government submitted its File of Relevant Material (FORM) on December 3, 2002. By letter dated December 3, 2002, a copy of the FORM was forwarded to the Applicant, with instructions to submit additional information and/or any objections within 30 days of receipt. Applicant received the FORM on December 16, 2002. Applicant did not submit any information within the set time period. Applicant telephoned DOHA on December 31, 2002, to request extra time to file his response to the FORM, and for good cause shown, Department Counsel granted Applicant an extension of time until January 21, 2003 to file his response to the FORM. The case was assigned to me for a decision on February 3, 2003.

FINDINGS OF FACT

Applicant admitted the factual allegations of the SOR as set forth in paragraphs 1.a and 1.b, involving Criterion H (Drug Involvement), and paragraphs 2.a, 2.b, 2.c, 2.e, and 2.f, involving Criterion E (Personal Conduct). Accordingly, Applicant's admissions are incorporated as findings of fact.

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

Applicant is a 55-year-old senior analyst employed by a Government contractor. On March 20, 2001, Applicant signed a completed Security Clearance Application, Standard Form 86 (SF 86) that he had prepared.

Question 31 on the SF 86 completed by Applicant reads: "Your Investigation Record-Investigations/Clearance. Has the United States Government ever investigated your background and/or granted you a security clearance?" In response to Question 31, Applicant replied in the affirmative and stated that his background had been investigated and, as a result, he had been granted Secret clearances in 1979 and 1988. Question 20 on the SF 86 completed by the Applicant asks if during the last 10 years Applicant has left a job under unfavorable conditions. In response to Question 20, Applicant stated that, as a Federal employee, he had left a job under unfavorable conditions when his security clearance was revoked in July 1999, pursuant to a finding that he had used illegal drugs and had omitted or concealed or falsified that illegal use on a security clearance application

Question 32 on the SF 86 completed by the Applicant reads: "Your Investigation Record - Clearance Actions: To your knowledge have you ever had a clearance or access authorization denied, suspended, or revoked, or have you ever been debarred from government employment?" In response to Question 32, Applicant replied in the affirmative that he had lost his security clearance in July 1999. Question 27 on the SF 86 completed by the Applicant reads: "Your Use of Illegal Drugs and Drug Activity - Illegal Use of Drugs: Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana. . . ?" In response to Question 27 Applicant admitted to illegal use of the drug marijuana "occasionally" from January 1, 1976 to July 4, 1998.

Question 28 on the SF 86 completed by the Applicant reads: "Your Use of Illegal Drugs and Drug Activity - Use in Sensitive Positions: Have you EVER illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official; while possessing a security clearance; or while in a position directly and immediately affecting public safety?" In response to Question 28 Applicant denied using illegal drugs or controlled substances while possessing a security clearance, even though his drug use as described in his response to Question 27 encompassed the period of time that he said he held security clearances in his response to Question 31 and his response to Question 20 indicated that he had left a job under unfavorable conditions when his security clearance was revoked pursuant to a finding that he had used illegal drugs and had omitted or concealed or falsified that illegal use on a security clearance application.

Question 29 on the SF 86 completed by the Applicant reads: "Your Use of Illegal Drugs and Drug Activity - Drug Activity: In the last 7 years, have you been involved in the illegal purchase, manufacture, trafficking, production, transfer, shipping, receiving, or sale of any narcotic, depressant, stimulant, hallucinogen, or cannabis for your own intended profit or that of another?" In his response to Question 29, Applicant denied purchasing or trafficking in illegal drugs. In his response to the SOR, Applicant admitted to contributing money on occasion to purchase marijuana for his use and the use of others. (Applicant's response to the SOR, dated 15 November 2002, at 1-2.) He stated that his use of

marijuana occurred occasionally at social events and never affected his ability to carry out his official duties.

Applicant denied the Government's allegation in the SOR, enumerated 2.d under Guideline E, that he failed to reveal the full extent of his marijuana use in a June 1998 interview with a Defense Security Service agent and that, because he was not forthcoming about his drug use, a second interview with a Defense Security Service agent was required in September 1998. Applicant states that he provided all the information asked of him but does not deny that the agent visited him several times in order to question him and obtain the information. (Applicant's response to SOR, dated 15 November, 2002, at 4.) Applicant attached to his memorandum an Enclosure, which he identified as "Enclosure (1): Personnel History of: [Applicant], Letters of Achievement, Commendations, Awards and Letters of Reference" The Enclosure comprised 41 pages and was characterized by Applicant as "documentation of my character, both personal and professional, my dedication to country, Navy and family." (Applicant's response to SOR, dated 15 November 2002, at 6.)

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to "United States citizens

. . . whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Order No. 12,968, *Access to Classified Information*, §3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. *See* Directive, Enclosure 2.

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted on to safeguard classified information and material twenty-four hours a day. The Government is therefore properly concerned where available information indicates that an applicant for a security clearance may be involved in conduct that demonstrates poor judgment, untrustworthiness, or unreliability on the part of an applicant. These concerns include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (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; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. Directive, E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Exec. Order No. 10,865 § 2. *See* Exec. Order No. 12,968 § 3.1(b).

Adjudicative Guidelines H, Drug Involvement (Attachment 8 to Enclosure 2) and E, Personal Conduct (Attachment 5 to Enclosure 2) are most pertinent to this case. The relevant provisions of Guideline H which apply to the facts of this case are:

E2.A8.1.1. *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.

E2.A8.1.1.3 and E2.A8.1.2.1: Any drug abuse, defined as any illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

E2.A8.1.2.2: Illegal drug possession, including...purchase.

E2.A8.1.2.5: *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.

Conditions that could mitigate security concerns regarding drug involvement include:

E2.A8.1.3.1: The drug involvement was not recent;

E2.A8.1.3.2: The drug involvement was an isolated or *aberrational* event;

E2.A8.1.3.3: A demonstrated intent not to abuse any drugs in the future.

The relevant provisions of Guideline E which apply to the facts of this case are:

E2.A5.1.1. *The Concern*: Conduct involving questionable judgment, untrustworthiness, unreliability, *lack of candor*, *dishonesty*, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

E2.A5.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A5.1.2.2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations [or] determine security clearance eligibility or trustworthiness.

E2.A5.1.2.3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official . . . or other official representative in connection with a personnel security or trustworthiness determination.

E2.A5.1.3. Conditions that could mitigate security concerns include:

E2.A5.1.3.2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.

(Italics in original.)

Under the provisions of the Directive, a decision to grant or to continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. *See* Directive, 5. and 6.

It is worth noting that Applicant's allegiance, loyalty, and patriotism are not at issue in this proceeding. Section 7 of Executive Order 10,865 specifically provides that 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 that I have based this decision, in whole or in part, or any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

Burden of Proof

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 an applicant's admissions or by other evidence) and establishes 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.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. Where the facts proven by the Government or admitted by the applicant raise doubts about the applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. In *Department of the Navy v. Egan*, supra, at 531, the Supreme Court concludes that "[t]he clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." Accordingly, I interpret the Court's guidance to mean that doubts against an applicant's security worthiness are to be resolved against the Applicant.

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 each allegation set forth in the SOR:

With respect to Guideline H, the Government has established its case. Applicant has admitted the Guideline H drug involvement specified in the SOR and identified as disqualifying conditions under paragraphs E2.A8.1.1, E2.A8.1.1.3, and E2.A8.1.2.1 of Guideline H. He used drugs from approximately 1976 through at least 1998 and contributed money on occasion to purchase marijuana for his own use and that of his companions. He used marijuana while he held secret clearances in 1979 and 1988. Applicant offers in mitigation his assertions that his drug use ended in 1998 and therefore is not recent (E2.A8.1.3.1). He states that his drug use, when it occurred, was episodic and not regular, that he used marijuana in social settings and never before or while at work, and that his judgment was not impaired as a result of his drug use. He directs our attention to his enclosed Personnel History containing evidence of numerous awards, letters of commendation, and promotions received while in Government employment as evidence that his work was not impaired by his drug use.

Applicant states that he last used drugs five years ago, in 1998. In 1982 Applicant stated to a Defense Department investigator that he was giving up the use of drugs at that time. Had this occurred, Applicant would have demonstrated his intent not to abuse drugs in the future, mitigating factor E2.A8.1.3.3 under Guideline H. However, Applicant admits to using marijuana for the next 16 years, until at least July of 1998. Thus, Applicant's drug involvement spanned a period of many years and was not isolated or aberrational, but appears to be a part of his on-going social life. Mitigating condition E2.A8.1.3.2 thus does not apply. Absent Applicant's ability to demonstrate that he was able to stop using drugs, his assertion that his last drug abuse occurred in 1998 and thus is not recent lacks credibility and cannot mitigate, pursuant to E2.A8.1.3.1, Applicant's long-standing pattern of drug abuse.

Applicant's enclosed Personnel History contains many references to his hard work and effective occupational functioning during the time he has admitted using drugs. However, these positive references do not speak to the basic security concern expressed in paragraph E2.A8.1.1.1 of Guideline H, which is that illegal drug involvement, which alters mood and judgment, raises questions about an individual's willingness or ability to protect classified information and may increase the risk of unauthorized disclosure of classified material.

With respect to Guideline E, the Government has also established its case. Applicant admits personal conduct under paragraph E2.A5.1.1 of Guideline E that puts in question his judgment, trustworthiness, reliability, honesty and willingness to properly safeguard classified information. His continuing drug abuse while holding two security clearances and his attempts to conceal that information raises serious questions under paragraphs E2.A5.1.2.2 and E2.A5.1.2.3 about his security clearance eligibility and trustworthiness. Applicant used marijuana in the years 1976 until at least July 1998, and this drug use occurred even though he held a secret clearance granted in 1979 and a secret clearance granted in 1988. Applicant also used marijuana for 7 years (1982 to at least 1989) despite his assertions in 1982 to a Defense Security Service agent that, because of his family responsibilities, he had no intention of using marijuana in the future.

Applicant failed to reveal his marijuana use when he completed a SF 86 in April 1998 and did not discuss the matter until an interview with a security investigator in June 1998. Applicant lost his security clearance in 1999 because of his

marijuana use and his failure to reveal it on his SF 86. Additionally, he failed to reveal his use of marijuana when he completed a SF 86 in March 2001 and denied ever using a controlled substance while holding a security clearance even though, in response to another question on the SF 86, he admitted to occasional drug use during periods when he had held security clearances.

Applicant denies that he failed to reveal the full extent of his marijuana use in his June 1998 interview with a Defense Security Service agent, an omission that required an additional interview to elicit the full and accurate history of his marijuana use. Applicant states that he gave all the information asked of him during two "official" interviews and in several more informal interviews which occurred when the Defense Security Service agent visited him, often unannounced. Applicant states that he failed to treat the agent with sufficient respect at the time of the interviews and further asserts that he was under considerable stress from his work responsibilities at the time of the encounters with the Defense Security Service agent. Applicant's amplifying statements do not demonstrate that he was initially forthcoming or fully cooperative when interviewed about his use of marijuana by the Defense Security Service agent. Applicant has failed to mitigate, under paragraph E2.A5.1.3.2, the disqualifying conditions described in paragraphs E2.A5.1.2.2 and E2.A5.1.2.3 of Guideline E. The falsifications on the Forms SF 86 he filed in 1998 and 2001 were not isolated incidents. While the falsifications filed in 1998 are not recent, those filed in 2001, in connection with the security clearance application herein under review, are recent. While Applicant eventually provided correct information, he did so only after repeated inquiries by an agent of the Defense Security Service, leading to a conclusion that Applicant lacked candor and was unwilling to comply with rules and regulations, thus raising concerns about his willingness or ability to safeguard classified information.

It is the combination of drug use and drug-related falsifications that establish Applicant's current ineligibility for access to the nation's secrets. However sincere Applicant may now be in his intentions, he has not established his ability to conform and sustain his conduct to the standards of good judgment, reliability, and trustworthiness required of anyone seeking a security clearance.

In my evaluation of the record, I have carefully considered each piece of evidence in the context of the totality of the evidence and under all of the Directive guidelines that were generally applicable or might be applicable under the facts of this case. Under the whole person concept, I conclude that Applicant has a serious problem relating to his drug use and his continuing lack of candor about the drug use, leading to a series of falsifications about his conduct while he held security clearances. I have carefully considered all evidence presented by Applicant as mitigating or extenuating, and I find that Applicant's evidence falls far short of being convincing. Under the totality of the facts and circumstances of this case, I conclude that Applicant has not established mitigation or extenuation for any of the SOR allegations.

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, Drug Involvement (Guideline H): **AGAINST THE APPLICANT.**

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Paragraph 2, Personal Conduct (Guideline E): **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

Subparagraph 1.f.: 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. Clearance is denied.

Joan Caton Anthony

.Administrative Judge