DATE: November 25, 2005

In re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 03-24695

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant used marijuana on a number of occasions, including while holding a security clearance between 1969 and at least 2001. He tested positive for having the marijuana metabolite in his system in April 1999, was referred by his employer for outpatient drug treatment, tested positive again in 2001, and resigned from his job rather than being terminated. Applicant has failed to mitigate the security concerns that arise from his use of marijuana. Clearance is denied.

STATEMENT OF THE CASE

On December 20, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.[(1)] The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline H, for drug involvement. Applicant submitted an answer to the SOR that was received by DOHA on January 27, 2005, and requested a hearing. Applicant admitted all SOR allegations except those contained in SOR subparagraphs 1.a and 1.j.

The case was assigned to me on August 10, 2005. A notice of hearing was issued on September 7, 2005, scheduling the hearing for September 20, 2005. The hearing was conducted as scheduled. The government submitted five documentary exhibits that were marked as Government Exhibits (GE) 1-5, and admitted into the record without objection. Applicant testified, called one witness to testify on his behalf, and submitted six documentary exhibits that were marked as Applicant's Exhibits (AE) 1-6, and admitted into the record without objection. The transcript was received by DOHA on September 29, 2005.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 58-year-old married man. He graduated from high school in June 1965, and earned a certificate in electrical engineering in February 1971 after two years of study. He served on active duty in the U.S. Air Force from April 1966 until April 1970, and was honorably discharged having attained the rank of senior airman (paygrade E-4).

Applicant was employed as a civilian electronic integrated systems mechanic by the Air Force from April 1971 until March 2001, when he was allowed to resign in lieu of being terminated. He has now been employed as a test technician by a government contractor since November 2003. The testimony, certificates, and letters of recommendation he submitted attest to his reputation as a dependable, reliable, and professional employee who is considered to be ethical and possessed of a strong work ethic.

Applicant married in June 1969, was divorced in June 1974, and has one son, age 35, from that marriage. He has been remarried since March 1976, and has two sons from this marriage, ages 29 and 25.

Applicant possessed a secret security clearance while on active duty in the Air Force, and again during his civilian employment with the Air Force from 1971 until 2001. His clearance was apparently administratively terminated when he resigned from that employment.

Applicant first used marijuana in 1969 while on active duty in the Air Force. His reported use consisted of two occasions while in the Air Force, and thereafter from as much as one to two times a week to as little as once every six to eight months between 1970 and 1986. He also reported that he would occasionally purchase between one-eighth to one-quarter ounce of marijuana for his personal use during this time period. Applicant claims he completely discontinued the use of marijuana in 1986 when his employer began random drug testing.

Applicant's vehicle and briefcase were searched by military policemen assigned to the Air Force Office of Special Investigations (OSI) sometime in either late 1991 or early 1992. According to Applicant, a friend's wife called OSI and told them that Applicant was a major drug dealer in an effort to cause problems for her husband's friends while she and her husband were going through a divorce. Applicant consented to the search and an unspecified quantity of marijuana seeds were discovered in his briefcase. Applicant adamantly denies the seeds belonged to him and speculates they were placed in the briefcase by the military policemen who conducted the search. As a result of the discovery of the seeds, Applicant was suspended from work for two days and required to attend a substance abuse program for two years.

Applicant tested positive for the presence of the marijuana metabolite in his system during a random urinalysis administered by the Air Force in April 1999. Applicant admits to using marijuana about four days before the sample was collected, and explained that he had been somewhat stressed from working on his income taxes when a friend came to his house and offered him some marijuana to relax. He was suspended from work as a result of the urinalysis for 14 days in July 1999, required to attend a substance abuse program, placed on probation for two years, and received a "last chance" letter that required him to submit to random drug testing for the next two years.

Applicant's participation in the required substance abuse program began on August 31, 1999, when he commenced a 3-Day Substance Abuse Educational Seminar. He completed the seminar on September 3, 1999, was diagnosed as "drug abuse - cannabis abuse" by a substance abuse specialist, and then began participating in regular group counseling sessions that continued until about February 2001, when he was scheduled to complete the counseling sessions. Applicant was administered an exit urinalysis which tested positive for marijuana.

Applicant denies using marijuana in 2001. He claims the positive urinalysis resulted from his passive inhalation of marijuana smoke while he was doing plumbing work in the apartment of an elderly invalid female drug dealer who his wife was attempting to assist. According to Applicant, he worked in the woman's apartment for about two hours on two consecutive days shortly before providing the urine sample, and while he was in the apartment various people were smoking marijuana. Applicant provided no other evidence, scientific or otherwise, to support his claim of passive inhalation.

Applicant resigned from his job at the Air Force base following the second positive urinalysis on or about March 9, 2001. He provided a statement to a Special Agent (SA) from the Defense Security Service (DSS) on October 2, 2003, in which he claimed he resigned from his job of 30 years because his mother was suffering from cancer and he needed to

go out of state to take care of her. Under this version, it apparently was just coincidental that the urinalysis results were received at the same time. At the time Applicant resigned, he was approximately 18 months away from being retirement eligible, and that he commenced new employment in the same area two months after his resignation.

Applicant's supervisor at the time he resigned submitted an affidavit (GE 3) in which he explained that Applicant was aware he was liable to be terminated and sought the assistance of his union. The union worked out an agreement with the Air Force that if Applicant resigned there would not be any adverse entries made on the separation document, and it was therefore hoped he would then be able to reapply for a job with the Air Force at a later date and be able to retire. Applicant was to be terminated from his employment and the termination letter arrived the day after Applicant resigned. Applicant's hearing testimony was consistent with the supervisor's affidavit. (Tr. p. 35)

In addition to his illegal use of marijuana, Applicant sometime in the early 1970s used an amphetamine or amphetamine-type prescription medicine known as 'cross-tops' that had been prescribed for his wife. Applicant denies abusing any other controlled substance, and denies using any controlled substance since April 1999. He also adamantly asserts that his April 1999 marijuana use is the only time he had used marijuana since 1986.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline H, pertaining to drug involvement with its respective DC and MC, is most relevant in this case.

BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.[(2)] The government has the burden of proving controverted facts.[(3)] The burden of proof in a security clearance case is something less than a preponderance of evidence[(4)], although the government is required to present substantial evidence to meet its burden of proof.[(5)] "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."[(6)] Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.[(7)] Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[(8)]

No one has a right to a security clearance[(9)] and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[(10)] Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.[(11)]

CONCLUSIONS

Under Guideline H, illegal drug involvement raises questions about an individual's willingness or ability to protect classified information. Involvement with or use of an illegal drug indicates unwillingness or inability to abide by the law. Cleared employees must respect regulations whether they agree with them or not. If they do not respect the rules on illegal substances, they may not respect the rules designed to protect classified information.

The record establishes that Applicant used and purchased marijuana on a more or less regular basis from about 1969 to 1986. He was found to have marijuana seeds in his brief case in 1991/92, and was disciplined at work and required to attend a substance abuse program. He tested positive for marijuana during a random urinalysis screening in 1999, and was again disciplined at work and required to attend a substance abuse program. Finally he tested positive in yet another urinalysis in 2001, and resigned his employment rather than waiting to be terminated. Disqualifying Conditions (DC) 1:

Any drug abuse; and DC 2: *Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution* apply in this case.

I have considered Applicant's appearance and demeanor while testifying and the substance of his testimony. I have also considered the obviously false explanation he provided to the SA from the DSS in October 2003 as to his reason for resigning. Based on those considerations, I find Applicant's explanations and testimony about how marijuana seeds came to be found in his briefcase in 1991/92, and the marijuana metabolite in his urine in 2001 to be false. The positive urinalysis, and Applicant's unsupported, implausible, and false explanation about how he came to test positive for marijuana in 2001, provide ample evidence to conclusively find he used marijuana as recently as 2001.

Additionally, Applicant's testimony that he did not use marijuana between 1986 and 1999, or after 2001 is not credible. However, DOHA Appeal Board precedent does not permit me to base a finding that he actually used marijuana during those time periods solely on his lack of credibility on the issue, see: ISCR Case No. 02-24452 (August 4, 2004). However, Applicant's false testimony about his overall use of marijuana, together with the statements he provided about his possession of marijuana seeds in 1991-92, and use of marijuana in 2001, must be considered in weighing his overall trustworthiness and the likelihood he is sincere when he indicates he will not use marijuana in the future. I have done so, and conclude Applicant has failed to provide sufficient evidence for me to conclude he will not relapse and use marijuana in the future. Accordingly, I find he is not entitled to application of Mitigating Conditions (MC) 1: *The drug involvement was not recent*; MC 2: *The drug involvement was an isolated or aberrational event*; and MC 3: *A demonstrated intent not to abuse any drugs in the future*. MC 4: *Satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a credentialed medical professional* clearly does not apply based upon Applicant's positive exit urinalysis in 2001.

In all adjudications the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I have considered all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions. Applicant has failed to present sufficient evidence of refutation, extenuation, and mitigation to overcome the case against him. Guideline H is decided against Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline H: Against Applicant

Subparagraph a-j: Against 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 granted.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

2. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

3. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

4. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

5. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

6. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

7. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

8. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15

9. *Egan*, 484 U.S. at 528, 531.

10. Id at 531.

11. *Egan*, Executive Order 10865, and the Directive.