

DATE: October 9, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-00576

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esquire, Deputy Chief Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's past drug use raises security concerns as Applicant continued his illegal drug use in November 2001 after he applied for a security clearance even though he understood such marijuana use was against his company's and the government's security policies. He has a fine employment record and has recently made a commitment to avoid drug use in the future, so he is no longer an "illegal user" under the Smith Act. However, given the recency of his commitment, it is too soon to conclude that he has demonstrated his intent not to abuse drugs in the future. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on February 21, 2003. The SOR detailed reasons why the Government could not make the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. [\(U\)](#) The SOR alleges specific concerns over drug use (Guideline H). Applicant responded to these SOR allegations in an Answer notarized on March 25, 2003, where he admitted all of the allegations and requested a decision be made without a hearing. Subsequently, he changed his mind and on June 3, 2003, requested that he have a hearing.

The case was assigned to Department Counsel who on July 2, 2003, attested it was ready to proceed. After the case was assigned to me on July 2, 2003, a mutually convenient date for hearing was agreed to. A Notice of Hearing issued on July 15, 2003, set the matter for August 1, 2003, at a location near where Applicant works and lives. At the hearing the Government offered two Government exhibits which were admitted into evidence. (Exhibits 1-2) The Applicant represented himself and testified; he offered three exhibits which were admitted into evidence. (Exhibits A-C) The transcript (TR) was received on August 11, 2003.

FINDINGS OF FACT

After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I

make the following Findings of Fact:

Applicant, 25 years old, accepted a job offer and completed his Security Clearance Application in November 2000. He has worked for a defense contractor since January 2001. (Exhibit 1; Exhibit A; TR 18-19)

Applicant attended a state university and received a Bachelor of Science (BS) degree in December 2000. (Exhibit 1)

Drug Use

Applicant began using marijuana every three or four months when he was a junior in high school in 1995. He continued to use marijuana in college three or four times and also spent \$10 to \$20 to purchase marijuana two or three times while in college. (Answer; Exhibit 2; TR 16-17)

In the SF 86 in response Question 27 about his drug use, Applicant answered "Yes" and revealed marijuana use fifteen times from November 1995 to June 2000. (Exhibit 1)

Later when he was interviewed by a Defense Security Service (DSS) agent in November 2001, Applicant disclosed he had again used marijuana subsequent to his having applied for access to classified information in November 2000. To the DSS agent Applicant stated his intent to "consider using" marijuana in the future as he felt "there is nothing wrong with it." However, he would not use it at work. "The chances are greater that I will smoke it in the future rather than not." (Answer; Exhibit 2; TR 17-18; 20-22)

In August 2003 Applicant testified that his last drug use was one joint of marijuana in November 2001. He has not used or purchased any controlled substance since November 2001; and he does not plan to use any drugs in the future. He understood⁽²⁾ the company policy precluded any drug use from the point he accepted the job; he also knew that any drug use was illegal. (TR 15-16; 18-20; 22-29) When he asked his co-worker and supervisor to provide references, he did not advise them of his past drug use as he had not used marijuana at work. (TR 19-20)

Reference

Applicant's college friend from 1996 and roommate until 2000 provided a reference that Applicant is of "exemplary character." (Exhibit A)

Applicant's team leader, a scientist at Company #1, has known Applicant for two and one half years and stated that Applicant has always been a "hardworking and ethical employee with the utmost integrity in dealing with company matters." (Exhibit B)

Applicant's senior manager at Company #1 provided a reference on Applicant's behalf. He has supervised Applicant since January 2001 and observed that he has been a "truthful employee and a hard worker." He stated that Applicant has demonstrated that he is an "honest" individual. He recommends him for a security clearance. (Exhibit C)

STATUTORY REQUIREMENTS

A provision of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, 10 U.S.C. Section 986 ("The Smith Amendment"), mandates restrictions on the granting or renewal of security clearances. This statutory limitation was implemented within the Department of Defense by a June 7, 2001, memorandum, and within DOHA by Operating Instruction (OI) 64, issued on July 10, 2001. Statutory provision (2) disqualifies a person unless the person "is not an unlawful user⁽³⁾ or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act)." SOR 1.d. alleges that Applicant's future intent to use marijuana brings his case within this statutory provision.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified

information. But the mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole, I weighed relevant Adjudication Guidelines as set forth below:

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.

Drugs are defined as mood and behavior altering:

[First] 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

[Second] 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.

Conditions that could raise a security concern and may be disqualifying include:

1. Any drug abuse (see above definition);
2. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution;

Conditions that could mitigate security concerns include:

1. The drug involvement was not recent;

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue Applicant's access to classified information. The Applicant then presents evidence to refute, explain, extenuate, or mitigate in order to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance. Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

CONCLUSIONS

Drug Use

The Government established security concerns over Applicant's intermittent marijuana use from 1995 to 2001. He used marijuana again in November 2001 even after he successfully passed a drug test for the company and applied for a security clearance in November 2000. Indeed in November 2001 he stated to DSS: "The chances are greater that I will smoke it [marijuana] in the future rather than not."

Subsequently, Applicant made a commitment to avoid all future drug use and has not used any marijuana since November 2001. He has not purchased marijuana since he graduated from college in December 2000. Thus, he no longer falls within the Smith Amendment prohibition as he is no longer a current drug user and has made a commitment not to use drugs again in the future. Hence, he is no longer an "unlawful user." Further, to his credit he has references that attest to his excellence at work. Thus, after considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraphs 1.b. and 1.d.incorporated under SOR Paragraph 1.

On the other hand, these favorable references are diminished by his admission that when he asked his supervisors to provide these references, he did not advise them of his past recent drug use. Given his knowing use of marijuana after he applied for his security clearance, it is too soon to conclude he has mitigated his past drug use. Applicant used drugs

again in November 2001 even though he knew such drug use was against his company's and the government's policies. This use raises sizeable questions about his judgment overall. I cannot conclude he has met the mitigation guidelines. Under MC 2, his drug involvement was not an isolated or aberrational event. Nor has he yet persuasively established (under MC 3) a demonstrated intent not to abuse any drugs in the future. He did not make a firm commitment to avoid future drug use until after he received his SOR in February 2003. Thus, after considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule against Applicant on subparagraph 1.a. and 1.c. incorporated under SOR Paragraph 1.

FORMAL FINDINGS

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1. Guideline H: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: For 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.

Kathryn Moen Braeman

Administrative Judge

1. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), as amended by Change 4, April 20, 1999.
2. While he stated he did not know of the government's security concerns over marijuana use until he received the SOR in February 2003, he later conceded he did know that he had to take a drug screen after he accepted the job in November 2000. In November 2000 he passed the drug screening as he had not used marijuana for the previous year. (TR 24-25)
3. Applicant's statement in November 2001 that he intended to use marijuana in the future brought him within this statute's "unlawful user" provision. (Exhibit 2;TR 31-33)