

DATE: June 16, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-01119

ECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This 47-year-old program engineer used marijuana for 29 years, with his last use in October 2003. He also purchased marijuana and has not made a credible case that he will not use the drug in the future. His current drug use brings him within the provisions of 10 U.S.C. 986. Mitigation has not been shown. Clearance is denied.

STATEMENT OF THE CASE

On September 5, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding required under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether a clearance should be granted, denied or revoked.

In a reply to the SOR received on September 23, 2003, Applicant responded to the allegations set forth in the SOR, and elected to have a hearing before a DOHA Administrative Judge. The case was assigned to me on November 4, 2003. A Notice of Hearing was issued on April 8, 2004, and the hearing was conducted on May 10, 2004. The transcript was received at DOHA on May 15, 2004.

FINDINGS OF FACT

Applicant is a 47-year-old plant engineer. The Government opposes Applicant's request for a security clearance based upon the allegations contained in the SOR. There are four allegations under Guideline H (Drugs), two which he admits (1.a. and 1.b.), one he denies, and one he answers with an explanation that I deem to be a denial. The specific admissions found in the response are incorporated herein as Findings of Fact.

After considering the totality of the evidence derived from Applicant's testimony and all exhibits, I make the following additional FINDINGS OF FACT as to each SOR allegation:

Guideline H (Drugs)

1.a. - Applicant used marijuana, with varying frequency, to include two to three times a month, from 1974-1985 and again from 1990 to October 2003 (AX A at page7).

1.b. - Applicant purchased marijuana approximately two to three times a year.

1.c. - Applicant informed an agent of the Defense Security Service (DSS) (GX 2) that he "may continue to use marijuana in the future," but he testified at the hearing that this is no longer accurate, i.e., that he intends not to use marijuana in the future. I find that Applicant has not established such intent as a matter of fact.

1.d. - Applicant's conduct in using marijuana from 1974 to as recently as October 2003 brings him under the provisions of 10 U.S.C. 986(2) as someone who "is" a user of marijuana. [\(1\)](#)

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing 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 (Directive, page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Because each security case presents its own facts and circumstances, it should not be assumed that the factors cited above exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior.

Eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination based on the Directive's "whole person" concept, I am not permitted to speculate, but can only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses.

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 appropriately concerned where available information indicates that an applicant for a security clearance, in his or her private or work life, may be involved in conduct that demonstrates poor judgment, untrustworthiness, or unreliability. 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 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. As required by DoD Directive 5220.6, as amended, at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

CONCLUSIONS

Applicant is a 47-year-old program manager for a defense contractor, for whom he has worked for 21 years. He is college educated and holds an engineering degree. He is married and has two children, 12 and 15 (Tr. at 28, 29). He admits to a level of naivete that is both surprising and disappointing in an individual of his background and experience.

Guideline H (Drugs) - Applicant's drug use began in 1974, some 30 years ago. He used marijuana two or three times a week for 11 years, from 1974 to 1985. He stopped using it between 1985 and 1990 because he then held a security clearance (Tr at 24, 29). He used it again from 1990 to October 2003, according to his exhibit A and his hearing testimony (Tr at 30, 31). This last marijuana use occurred about a year *after* he completed his security clearance application (SCA) in September 2002 *and* after he gave a sworn statement to an agent of the Defense Security Service (DSS) in November 2002, in which he denied any intent to use marijuana in the future (Tr at 19, 32, 35). He also purchased marijuana approximately two or three times a year (GX 2 and Tr at 31, 32). At all relevant times, Applicant knew his drug use violated the laws of his state (Tr at 35). Although Applicant now states an intention not to use marijuana in the future, his testimony and credibility cannot be given much weight

His first statement of possible future marijuana use was that he wouldn't use it again while he possessed a security clearance (Tr at 25, 33). A reasonable inference to be drawn from this statement is that *he would continue* to use it if he didn't receive a clearance. In addition, I find troublesome his statement that he didn't realize how serious marijuana use was viewed by the Government until after he received the SOR in this case and checked DOHA's web site (Tr at 18). Based on the totality of the record, the record compels the conclusion that Applicant's drug use is not safely behind him but, rather, he is likely to use drugs in the future (*see*, Tr at 37).

I have carefully considered the testimony of Applicant's two witnesses, each of whom holds a DoD security clearance. The testimony of the first witness is not particularly helpful to Applicant or to the witness, who also holds a DoD security clearance. He has known Applicant for about 20 years as a friend and fellow employee and knows Applicant to be a recreational user of marijuana (Tr at 40 - 42). The second witness has also known Applicant for many years and has seen him use marijuana. The witness questions whether marijuana *use* is the same or as serious as *abuse* (Tr at 46). Applicant has not told his daughters anything about his drug use and has not give them any guidance of drug use (Tr at 53). He has thus raised a question as to what he would do if someone threatened to tell his daughter about his drug use.

Applying the findings of fact cited above to the standards set forth in the Directive's guidance for Drugs Involvement, I conclude that Disqualifying Conditions (DC) 1 (any drug use) and 3 (illegal drug possession . . . [or] purchase) are clearly applicable. I also conclude that none of the possible Mitigating Conditions (MC) are applicable. Applicant's drug use is certainly recent (last use was seven months prior to the hearing after 20 years of use (MC 1); not an isolated or infrequent event (MC 2); and, considering his qualifying language, there is clearly no demonstrated intent not to abuse drugs in the future (MC 3). Lastly, there is a total absence of any satisfactory (or any) completion of a drug treatment program prescribed by a credentialed medical professional (MC 4).

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Guideline H (Drugs) 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 Applicant.

Barry M. Sax

Administrative Judge

1. The waiver provisions of 10 U.S.C. 986 specifically *do not apply* to drug use and addiction issues.