DATE: March 8, 2005

In Re:

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

Applicant for Security Clearance

ISCR Case No. 03-04136

DECISION OF ADMINISTRATIVE JUDGE

ROBERT J. TUIDER

APPEARANCES

FOR GOVERNMENT

Jason Perry, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

While holding a security clearance and employed by a defense contractor, Applicant tested positive for marijuana during a random company drug test. He does not dispute the accuracy of the test results, but rather asserts the positive test resulted from his being exposed to the second hand smoke of his fiancee. According to Applicant, his fiancee had been provided marijuana "under the table" by an employee of the medical clinic she utilized for her cancer treatment. Applicant's use of marijuana while holding a security clearance and non-credible explanation raises doubts as to his security eligibility. Clearance is denied.

STATEMENT OF THE CASE

On October 16, 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 sworn written answers, dated November 12, 2003, Applicant responded to the SOR allegations, 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 May 17, 2004. A complete copy of the file of relevant material (FORM)[(1)] was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant timely submitted additional material,[(2)] dated June 13, 2004, without objection from Department Counsel. The case was assigned to me on July 6, 2004.

FINDINGS OF FACT

Applicant has admitted all the factual allegations pertaining to drugs under Guideline H (subparagraphs 1.a through 1.c.). Those admissions are incorporated herein as findings of fact.

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 50-year-old employee of a defense contractor who was suspended on August 28, 2002 as a result of testing positive for marijuana following a random drug test. He has worked for his employer for 25 years, has held a SECRET security clearance since June 25, 1997,[(3)] and "value[s] this responsibility."[(4)]

Applicant is divorced, and is currently living with his fiancee, who was diagnosed with cancer in spring 2002. Between Applicant and his fiancee, they have seven children and have two minor children living with them.[(5)]

Pursuant to his company's substance abuse policy,[(6)] Applicant submitted to a random drug test on August 26, 2002,[(7)] and tested positive for marijuana.[(8)] On August 28, 2002, Applicant was suspended from work as a result of testing positive on this random drug test.[(9)]

Further pursuant to his company's substance abuse policy,[(10)] Applicant was referred to a clinic and attended two sessions for Substance Abuse Evaluation on September 3, 2002, and September 9, 2002.[(11)] He was referred by this clinic to a center for two one-hour sessions for basic drug education on September 11, 2002 and September 19, 2002.[(12)]

Applicant does not contest testing positive for marijuana or other SOR allegations.[(13)] Rather, he contends he was exposed to second hand marijuana smoke from his fiancee's use of marijuana. He further contends his fiancee was provided marijuana "under the table" by her clinic to help her deal with chemotherapy.[(14)] Applicant consistently denied using marijuana.[(15)]

Two counselors advised Applicant "that it was unlikely and there is no evidence that second marijuana smoke results in a positive test."[(16)] After being informed of this, Applicant "stuck to his story and continues to deny smoking marijuana."[(17)]

In Applicant's response[(18)] to Department Counsel's FORM, he submitted a print-out from SPOT, Oregon State University's Student Health Services Q & A Site, which he offered to support his position that he tested positive for marijuana as a result of being exposed to second hand smoke. The pertinent extract from SPOT states, "Exposure to second hand smoke can cause a drug test to be positive. . . . Beyond the information above, determining whether you will or won't pass a THC test based on second-hand exposure is literally a guess by anyone weighing in on the subject, including Spot. Unfortunately, your guess is as good as Spot's"[(19)]

During 2003, Applicant was randomly tested for substance abuse seven times with negative results.[(20)]

Applicant did not submit evidence that would support his contention that *his* exposure to second hand smoke would have resulted in his testing positive for marijuana.

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead they are to be applied by administrative judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, administrative judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive. The government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts must have a nexus to an Applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

BURDEN OF PROOF

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." 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." Executive Order 12968, *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.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has the ultimate burden of establishing his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." *See* Executive Orders 10865 § 2 and 12968 § 3.1(b). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, 484 U.S. at 531. Doubts are to be resolved against the applicant.

CONCLUSIONS

Upon considering all the facts in evidence, and after applying all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

The government has established its case under Guideline H. Applicant's improper and illegal drug abuse, 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 or 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.A8.1.1.2.1. 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 Conditions (DI DC) E.2.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).*

Regrettably, Applicant's explanation lacks credibility. Even if one accepts the fact that an employee or employees working at a legitimate medical clinic provided Applicant's fiancee marijuana "under the table" in conjunction with her treatment, Applicant has failed to demonstrate how *his* exposure to second hand smoke could have tested positive. Applicant offered non-expert evidence from SPOT, which supports the notion that exposure to second hand smoke can result in a positive test result. However, even SPOT goes on to say whether someone would test positive for marijuana exposed to second-hand smoke "is literally a guess by anyone weighing in on the subject, including Spot." This additional information is hardly persuasive as it pertains to Applicant's case. Applicant's explanation is further troubling considering the potential liability he incurred by engaging in such behavior knowing his company's long standing drug policy while holding a security clearance.

Applicant's completion of his company's mandatory drug follow-up program and single use, triggers Drug Involvement Mitigating Condition (DI MC) E2.A8.1.3.4. *(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)*, and DI MC E2.A8.1.3.2. *(The drug involvement was an isolated or aberrational event)*. Successfully completing the aftercare required of him deserves merit. However, it is outweighed by his non-credible explanation and use of drugs under questionable circumstances while holding a security clearance.

I take this position based on the law, as set forth in *Department of Navy v. Egan,* 484 U.S. 581 (1988), my evaluation of the evidence, my application of the pertinent factors under the Adjudicate Process, and my interpretation of my responsibilities under Enclosure (2) of the Directive. I believe the 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, allegation 1.a. of the SOR is concluded against Applicant, and allegations 1.b. and 1.c. of the SOR are concluded for Applicant.

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

In fairness to the Applicant, this decision should not be construed as a determination that the Applicant cannot or will not attain the state of true reform and rehabilitation necessary to justify the award of a DoD security clearance. To the contrary, his mitigating evidence suggests a sound potential for positive reform and outstanding accomplishments in the defense industry. Should Applicant be afforded an opportunity to reapply for a security clearance in the future he may well demonstrate persuasive evidence of his security worthiness.

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.: For the Applicant

In light of all the circumstances presented by the record in this case, it not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Robert J. Tuider

Administrative Judge

1. The government submitted six items in support of its contentions, which were marked as Items 1 through 6.

2. This additional material was marked as Item 7.

3. Item 4, Employer letter dated September 3, 2002.

4. Item 3, Applicant's response to SOR dated November 12, 2003, at 1.

5. Item 5, signed, sworn statement of Applicant, dated October 23, 2002, at 1.

6. Item 3, *supra* note 4, Employer Substance Abuse Business Instruction, dated July 12, 2000, at 10.

7. Item 6, Health Record, at 3; Item 4, *supra,* at 1.

8. *Id.*

9. Item 4, *supra* note 2, at 1.

10. Item 3, *supra* note 4, at 13.

11. Item 6, *supra* note 7, at 1, 2, 5.

12. Item 3, *supra* note 4, at 9.

13. Item 5, *supra* note 5, at 1; Item 3, *supra* note 4, at 1.

14. Item 6, *supra* note 7, at 1, 3, 5

15. Item 3, *supra* note 4, at 1, 3, 4, 5; Item 5, *supra* note 4, at 1, 2; Item 6, *supra* note 7, at 3, 5.

16. Item 6, *supra* note 7, at 3.

17. *Id.*

18. Item 7, Applicant's response to FORM, dated June 13, 2004, at 3.

19. *Id.,* at 1, 3.

20. Item 3, *supra* note 4, at 1.