

DATE: January 13, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-05072

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Stephanie C. Hess, Esq., Department Counsel

FOR APPLICANT

Josiah M. Black, Esq.

SYNOPSIS

Applicant began using marijuana in about September 1992 while he held a secret security clearance for his work as a student researcher at a university-affiliated research laboratory. He continued to smoke marijuana on average twice per year until approximately August 2002. After being interviewed for his continued suitability for access to classified information, Applicant realized drug use could negatively jeopardize his clearance so he resolved to abstain in the future. Applicant has been drug free since and intends no future involvement. While there is little risk of future drug use, his disregard of the laws pertaining to illegal drug use reflects extremely poor judgment. Clearance is denied.

STATEMENT OF CASE

On October 10, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant which 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 the Applicant. ⁽¹⁾ DOHA recommended referral to an administrative judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked. The SOR was based on drug involvement (Guideline H) and personal conduct (Guideline E) because of marijuana use from 1992 until at least summer 2002. The Government also alleged Applicant is statutorily disqualified from having his clearance renewed under 10 U.S.C. § 986, citing his intent to continue to use marijuana once or twice per year.

On October 17, 2003, Applicant, acting *pro se*, filed his response to the SOR allegations and requested a determination without a hearing. On December 8, 2003, counsel for Applicant entered his appearance and requested a hearing before a DOHA administrative judge. The case was assigned to me on March 22, 2004. Pursuant to formal notice dated March 23, 2004, a hearing was scheduled for April 22, 2004. At the hearing held as scheduled, the Government submitted two exhibits: Applicant's November 2001 security clearance application and a sworn statement executed before the Defense Security Service (DSS) on November 21, 2002. Applicant's case consisted of one exhibit, the DSS report of its investigation of Applicant in 2003, and testimony from two witnesses (the director of the university research foundation employing Applicant and Applicant's wife) in addition to his own. A transcript of the proceeding was received on ay 5,

2004.

FINDINGS OF FACT

The Government alleged as security disqualifying that Applicant used marijuana approximately twice a year while possessing a secret clearance from 1992 to at least summer 2002, (2) purchased marijuana on at least one occasion for \$10, and intended to use marijuana in the future once or twice a year. Because of this intent to continue use, the Government also alleged Applicant was disqualified from having his clearance renewed under 10 U.S.C. § 986 that prohibits the Department of Defense from granting or renewing a security clearance to a Department of Defense contractor employee who "is an unlawful user of, or is addicted to, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." In his Answer, Applicant admitted he had used marijuana occasionally between 1992 and 2002, but had completely discontinued involvement since his interview with the DSS agent. Applicant admitted he had paid for marijuana only on the one occasion alleged. He denied any intent to use marijuana in the future, as he realized following his DSS interview that it would not be in his best interest to continue marijuana use, and had stated during his interview that he would consider stopping marijuana and discarding the marijuana he had in his home if it might cause him to lose his clearance. His admissions are incorporated as findings of fact. After a complete and thorough review of the evidence, I make the following additional findings:

Applicant is a 33-year-old laser scientist employed full-time at a research foundation since August 1994. He had worked at the university-affiliated research facility as an undergraduate student and was initially granted a confidential security clearance in August 1989. He has held a secret-level clearance since April 1991, and is required to maintain that clearance for his continued employment.

While still in high school, Applicant began designing and building a carbon dioxide laser system. Directed to the local university for information, Applicant was hired the summer after he graduated to work at the laser research laboratory affiliated with the institution. That fall, Applicant commenced his undergraduate studies in chemistry at the university. He continued to work as a student technician researcher at the laboratory and was granted a confidential-level security clearance for his duties. His clearance was upgraded to secret in April 1991. In about September 1992, during his junior year, and while he held a secret-level clearance for his student duties at the laboratory, (3) Applicant began to use marijuana on limited social occasions, enjoying its euphoric and relaxing effects. During his last two years of college, he shared a marijuana cigarette with friends on eight to ten occasions. While Applicant was aware of the illegality of marijuana use, he did not consider his off-duty social use in his home or in the homes of friends or family to pose a risk to security.

On earning his degree, he was hired on full-time as a scientist at the research laboratory in August 1994. He used marijuana thereafter on a "handful" of occasions, including twice in 1996 with his then roommate. In June 1997, Applicant married his girlfriend, who he had known since high school and been dating since his junior year in college. Before a camping trip with another couple in about August 1997, Applicant and spouse baked brownies laced with marijuana that they ingested on the camping trip. Neither Applicant nor his spouse now recalls whose idea it was to bake the brownies or who transported them to the campsite. The marijuana was obtained from her brother.

Applicant smoked marijuana with his spouse on one occasion thereafter, in July 2001 at his spouse's family's beach house. Her brother, who was present and used as well, provided the drug. Applicant's spouse has not used marijuana since.

In conjunction with a periodic reinvestigation of his clearance suitability, Applicant executed a security clearance application (SF 86) on November 8, 2001. Applicant responded affirmatively to inquiries into any illegal drug involvement in the last 7 years and any use ever while in a sensitive position (including while possessing a security clearance) and indicated he used marijuana approximately 15 times from September 1, 1991 to July 1, 2001. (4)

In about August 2002, Applicant smoked marijuana with his brother-in-law in Applicant's new condominium. Applicant's spouse was present but did not use marijuana on that occasion.

On November 21, 2002, Applicant was interviewed by a DSS special agent concerning his illegal drug use. Applicant

related his involvement with marijuana began in approximately 1992, after he had been granted his secret clearance in 1991. He described limited use approximately twice per year with friends, his wife, and his wife's family at social gatherings with a most recent use about three months before the interview. Applicant admitted he had a very small quantity of marijuana in his home that he maintained was not enough to roll one cigarette and over one year old. He expressed his intent to limit his use of illegal substances in the future to marijuana once or twice per year. He also expressed a willingness to consider ceasing his use of marijuana and discarding the small amount that was in his home "if it might cause [him] to lose [his] security clearance." By the end of the interview, Applicant was concerned that his use of marijuana while holding a security clearance was a problem for the Department of Defense. After executing a sworn statement reflecting his drug use and intentions, Applicant informed the DSS agent that he intended to return home that evening and destroy the marijuana he had stored there.

At the end of the work day on November 21, 2002, Applicant informed his spouse that he could not smoke marijuana in the future. They both resolved to abstain from any future drug involvement, and Applicant flushed down the sink the marijuana that had been in his kitchen cabinet. The marijuana in his possession had been left by his brother-in-law and was not purchased by Applicant.

Applicant told the DSS agent in November 2002 that he could recall paying a friend \$10 on one occasion in exchange for a small baggie of marijuana. At his hearing, he testified this "friend" was his brother-in-law to whom he had given the \$10 "as an offering" since he had never paid him in any way for the marijuana used in the past. He characterized it as "[his] turn to buy a round of drinks, that sort of thing." Applicant subsequently testified to having no recall of receiving a small baggie of marijuana in exchange for the money, but guessed he gave his brother-in-law the \$10 with the assumption it was being used toward marijuana. Applicant had better recall when it came to whether he had paid his brother-in-law for the marijuana kept in his kitchen cabinet until November 2002, flatly denying any purchase of that marijuana. Based on the record evidence, I find Applicant gave his brother-in-law \$10 for marijuana sometime in 2001 or before in exchange for a small quantity of the drug.

As of April 2004, Applicant and his spouse had limited personal contact (a couple of times per year) with her brother who had relocated to another state. They do not knowingly associate with individuals who use illegal drugs.

The director of the laboratory employing Applicant considers him to be an "ideal employee." Applicant has proven to be a very talented, dedicated worker, careful with classified documents. With only 12 full-time staff members and their program being the only classified program in the university system, security briefings have been infrequent. Neither Applicant nor the laboratory's director was specifically apprised of the Department of Defense's policy against drug use.

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. Or. 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.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of

the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See ISCR Case No. 95-0611 at 2* (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *ISCR Case No. 01-20700 at 3* (App. Bd. Dec. 19, 2002); *see Directive ¶ E3.1.15*. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." *ISCR Case No. 01-20700 at 3*.

Considering the evidence as a whole, I find the following adjudicative guidelines to be most pertinent to this case:

Drug Involvement

The Concern:

a. 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.A8.1.1.1.)

b. Drugs are defined as mood and behavior-altering substances, and include: (E2.A8.1.1.2.)

(1) 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) (E2.A8.1.1.2.1.), and

c. Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction. (E2.A8.1.1.3)

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

a. Any drug abuse (see above definition); (E2.A8.1.2.1.)

b. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution. (E2.A8.1.2.2.)

e. 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. (E2.A8.1.2.5)

Conditions that could mitigate security concerns include:

a. The drug involvement is not recent; (E2.A8.1.3.1.)

b. A demonstrated intent not to abuse any drugs in the future. (E2.A8.1.3.3.)

Personal Conduct

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 also include:

E2.A5.1.2.5. A pattern of dishonesty or rule violations . . . ;

E2.A5.1.2.6. Association with persons involved in criminal activity.

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

E2.A5.1.3.7. Association with persons involved in criminal activities has ceased.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility of those who testified, I conclude the Government established its case with respect to Guideline H, drug involvement, and Guideline E, personal conduct. Applicant used marijuana on about 16 occasions while he held a secret clearance and position of trust with the Government. Introduced to marijuana in college, he continued to use marijuana, albeit infrequently, after he began working full-time as a scientist at the laboratory in August 1994. On at least one occasion, he and his spouse baked brownies containing marijuana and then ingested them on a camping trip with another couple. He also gave his brother-in-law \$10 for marijuana at least once, and had possession of a small quantity of marijuana in his residence as of November 2002. Disqualifying conditions a. Any drug abuse, and b. Illegal drug possession, of guideline H must be considered in determining Applicant's security suitability.

Although he was not a frequent user of marijuana, Applicant clearly enjoyed the drug's relaxing effects. When interviewed by a DSS agent in November 2002, Applicant indicated it was "fun" to use marijuana socially on occasion. He also expressed an intent to use marijuana on a limited basis (once or twice per year) in the future, but would consider ceasing entirely should it cost him his clearance. Based on this stated intent, the Government alleged Applicant was ineligible for clearance renewal under 10 U.S.C. § 986(c)(2), which prohibits the Department of Defense from granting or renewing a security clearance to certain categories of persons, including defense contractor employees, who are "an unlawful user of, or is addicted to, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)). While the statute provides that the Secretary of Defense (or secretary of the relevant military department) may, in a meritorious case, authorize an exception to the statutory prohibition for persons in two statutory categories, an exception is not authorized for persons falling under paragraph (2) of § 986(c).

In the implementation guidance issued June 7, 2001, the Deputy Secretary of Defense indicated this statute did not change the substance of guideline H, the adjudicative guideline for drug involvement. The official policy guidance is as follows: "Anyone who is currently an unlawful user of, or addicted to, a controlled substance is not considered eligible for a security clearance." ⁽⁵⁾ There is no evidence in this case that Applicant was ever physiologically addicted to marijuana. There is no evidence that he used marijuana in the year preceding the SOR. Most important, he resolved as of November 2002 to cease his involvement with illicit drugs. With a last use of illegal drugs in about August 2002, and a credible intent to abstain in the future, there is no basis to conclude he is a current drug user. Paragraph 2. of the SOR is therefore found for Applicant.

Although 10 U.S.C. § 986 does not bar Applicant from being granted a clearance, he bears a particularly heavy burden to overcome the doubts for his security worthiness engendered by his use of marijuana while in position of trust with the Government (*see* DC e. Recent drug involvement, especially following the granting of a security clearance . . . will almost invariably result in an unfavorable determination). Applicant's use of marijuana in college can be attributed to his youth and the environment. The grant of a security clearance does not necessarily immunize one from the irresponsible decisions that college students make when free of parental oversight. His use of marijuana after he began full-time employment at the laboratory is more troubling, but he has been free of drugs since August 2002 and intends not to use any illegal drug in the future. Even though he executed a sworn statement for the DSS expressing an intent to continue to use marijuana once or twice per year, he qualified it and indicated he was willing to give up marijuana if it might cause him to lose his clearance. As reported by the DSS agent, Applicant told him at the conclusion of the interview that because of their discussion, he intended to return home that evening and destroy the marijuana he had there. His spouse corroborates that Applicant flushed the marijuana down the sink and they have both resolved to abstain from any future involvement with illegal drugs. As of his hearing in April 2004, Applicant's contact with his brother-in-law, who provided him the marijuana in recent years, was limited to a couple of times per year at the holidays. Based on the record before me, I conclude there is little risk, if any, of future drug abuse. Accordingly, subparagraphs 1.a., 1.b., and 1.c. are resolved in Applicant's favor.

Conceding Applicant's change to a drug-free lifestyle, ⁽⁶⁾ Department Counsel continued to press for revocation of Applicant's security clearance under Guideline E, personal conduct, based on the fact that Applicant used marijuana

while he held a security clearance. Acknowledging that Applicant and the laboratory director both testified to never being briefed on the implications of using marijuana with a clearance, Department Counsel submits it is common sense to recognize that illegal behavior is inconsistent with holding a security clearance. Disregard of a known law while holding a clearance would raise guideline E concerns (*see* E2.A5.1.2.5. A pattern of dishonesty or rule violations). Whether or not Applicant was specifically apprised of the Department of Defense policy, he clearly knew his use of marijuana was illegal. The fact that Applicant did not personally consider his use of marijuana to rise to the level of serious criminal conduct does not mitigate his poor judgment in using marijuana while he had a clearance, including on one occasion after he completed his SF 86 for renewal of his clearance.

Security clearance determinations involve a careful weighing of a number of variables known as the whole person concept. (*See* E2.2.1.) To Applicant's credit, he was candid with the Department of Defense about his marijuana involvement when he completed his SF 86. He also provided significant detail about his drug involvement when interviewed by the DSS agent, admitting an intent to continue his limited use in the future unless it might cost him his clearance. Yet his testimony at his hearing was not completely consistent with his prior disclosures. Applicant had told the DSS agent that he had paid a friend \$10 for a small baggie of marijuana on one occasion. At his hearing, he claimed to have no recall of receiving marijuana in exchange for the money, and testified he gave his brother-in-law the \$10 to be "nice" since he had been provided marijuana free of charge in the past. Applicant's inability to recall the circumstances of his one-time expenditure of money for marijuana is suspect. As evidenced by the following exchange between the undersigned and Applicant, he was reluctant at the hearing to admit to conduct that could raise questions about his judgment and reliability:

Q And marijuana was illegal. Why did you choose marijuana over alcohol?

A I was more, to try it.

Q To try it?

A To see what it was all about.

Q All right, well that could explain the first couple of times but why did you continue to use it?

A It's relaxing, I guess.

Q Okay. Now, with respect to the amount that you had in your residence, and you destroyed after the DSS interview, apparently [it] was in the back of some drawer somewhere.

A Right.

Q In the kitchen?

A Right.

Q Right. You knew, you obviously knew it was there if, when you got back from the DSS interview, you knew to get it to destroy it, right?

A Right.

Q Why were you keeping it?

A No idea.

Q You have no idea why you kept it?

A I really don't.

Q So, would I be wrong to infer that you might have used it, you intended to use it at some point?

A I guess you would infer that. It sounds really bad though.(Tr. 79-80).

While it is credible that he might not recall all the details of his drug use, his testimony regarding the marijuana-laced brownies was also sufficiently sketchy to call into question his trustworthiness, despite his earlier candor with the Government. He was able to recall that his camping companions were his spouse's coworker and her husband but not who transported the brownies or whose idea it was to lace the brownies with marijuana. Despite his change to a drug-free lifestyle, doubts persist as to whether he possesses the requisite good judgment that must be demanded of those with access. Subparagraph 3.a. is resolved against him.

FORMAL FINDINGS

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

Paragraph 1. Guideline H: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Paragraph 2. 10 U.S.C. § 986: FOR THE APPLICANT

Paragraph 3. Guideline E: AGAINST THE APPLICANT

Subparagraph 3.a.: 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. Clearance is denied.

Elizabeth M. Matchinski

Administrative Judge

1. The SOR was issued under the authority of Executive Order 10865 (as amended by Executive Orders 10909, 11328, and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4).
2. On the Government's motion, subparagraph 1.a. was amended at the hearing to correct a typographical error and allege that Applicant used (rather than "use") marijuana approximately twice a year while holding a secret security clearance from about 1992 until at least the summer of 2002.
3. Around his junior year of college, Applicant took off a semester for financial reasons, and worked as a thermal vacuum technician.
4. Applicant testified credibly that he now recalls his use of marijuana began in 1992 rather than 1991.
5. On October 28, 2004, subsection (c)(1) of 10 U.S.C. § 986 was amended to apply to individuals who were incarcerated for not less than one year. There was no change to subsection (c)(2) pertaining to illegal drug use.
6. Department Counsel conceded in her closing that the Government has no indication at this point that Applicant is going to continue to use drugs in the future, and as a result the primary concern of the Government was with his previous use of marijuana while he held a clearance and the negative implications for his judgment, reliability, and trustworthiness. (Tr. 119)

