

DATE: June 22, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No.03-08059

## **DECISION OF ADMINISTRATIVE JUDGE**

**CLAUDE R. HEINY**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Robert E. Coacher, Department Counsel

#### **FOR APPLICANT**

Shannon T. Warren, Esquire

### **SYNOPSIS**

In 1997, Applicant became gravely ill and was not expected to live until Christmas. Applicant was prescribed a four-drug medicinal cocktail, which he took twice a day and caused severe nausea. Applicant used marijuana to counter the nausea. The record evidence is sufficient to mitigate or extenuate the negative security implications stemming from Applicant's drug usage. Clearance is granted.

### **STATEMENT OF THE CASE**

On August 10, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding<sup>(1)</sup> it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR asserted drug involvement concerns. On August 26, 2004, Applicant answered the SOR and requested a hearing. On December 1, 2004, I was assigned the case. On January 6, 2005, a Notice of Hearing was issued scheduling the personal appearance, which was held on January 27, 2005. On February 4, 2005, the transcript (Tr.) of the hearing was received.

### **FINDINGS OF FACT**

The SOR alleges drug involvement concerns. Applicant admits he used marijuana with varying frequency since 1996<sup>(2)</sup>. In October 2002, he declined to state he would never use marijuana again. Those admissions are incorporated herein as findings of fact. After thorough review of the whole record, I make the following additional findings of fact.

The Applicant is 49 years old, has worked as an information technology specialist for a defense contractor since September 1995, and is seeking to obtain security clearance. He is currently the company's liaison with the Air Force. Applicant's duty performance has been excellent. He consistently meets expectations. (App Ex A.) He has received a number of awards for outstanding service and excellent performance.

In 1997, Applicant became gravely ill. His weight dropped from 145 pounds down to 105 pounds and was told he

probably would not live to Christmas. (Tr. 33.) He was diagnosed as HIV positive. He began taking four, doctor-prescribed medication twice a day, which caused him to be extremely ill and nauseous. With the nausea he was unable to keep down his medication. Of course, the medication had no beneficial effect if he was unable to keep it down. His doctor informed him that some patients used marijuana to address the nausea and maintain a healthy appetite.

Applicant knew that marijuana use was illegal, even for medical purposes. However, during a six-month period in 1997, Applicant used marijuana daily. In 1998, Applicant learned he had not been given the correct medications and those medications he was prescribed had a toxic effect on his body. His medication was changed, but the nausea continued. Applicant attributes the nausea to a combination of the medication and gall stones.

In mid-1998, he again changed doctors and changed medication. He continued to use marijuana to combat the nausea. In 1998, he had his gall bladder removed, which helped his overall medical condition. He would have four or five straight days of nausea. (Tr. 35.) However, he was still on medication, still nauseous, and still occasionally using marijuana to combat the nausea.

In 2001, Applicant changed doctors. Applicant changed his routine. He discussed the nausea with his doctor and they decided he should not drink coffee prior to taking his medication. It was also decided he should take his medication with orange juice and take it with meals. Periodically, Applicant has some nausea, but it is usually associated with taking medication on an empty stomach.

In his October 2002 sworn statement, Applicant stated, "I can not say at this time I will never use marijuana for medical purposes again."

Applicant does not now use marijuana. His last use was in the summer of 2002. He will not use marijuana again. He has never bought, sold, or grown marijuana. His change in attitude toward marijuana use was influenced by his improved health and his concern for a security clearance.

### **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 E2.2.1 of the Directive. The government has the burden of establishing 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**

The Government has satisfied its initial burden of proof under Guideline H, drug involvement. The security eligibility of an applicant is placed into question when that applicant is involved with illegal drugs. The improper or illegal involvement with drugs raises questions regarding an applicant'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. Directive E 2.A.8.1.1 From 1997 to 2002, Applicant used marijuana with varying frequency, sometimes daily. Disqualifying Condition (DC) 1 (E2.A8.1.2.1 *Any drug abuse*) applies.

Applicant knows that marijuana use is illegal. However, his use was not experimental or recreational, but to combat nausea. When gravely ill, Applicant was prescribed a four-drug medicinal cocktail which he took twice a day and caused severe nausea. Applicant was facing a life threatening disease made even more severe if he could not keep down his prescribed medications. Following the advice of his doctor, Applicant began to use marijuana to combat the nausea and maintain an appetite. He has changed doctors, changed medication, had his gall bladder removed, given up coffee, and changed how and when he takes his medication. These changes have greatly lessened his nausea. He last used marijuana in the summer of 2002 and intends to never use marijuana again. itigating Condition 3 (E2.A8.1.3.3 *A demonstrated intent not to abuse any drugs in the future*) applies. I find for Applicant as to Drug Involvement.

Under the provisions of 10 U.S.C. 986, any person 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), may not be granted or have renewed their access to classified information. I find this act does not apply because Applicant was not addicted to a controlled substance, nor, at the time of the hearing, a user of a controlled substance.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

### **FORMAL FINDINGS**

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

Paragraph 1 Drug Involvement: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

**DECISION**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

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**Claude R. Heiny**

**Administrative Judge**

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.
2. At the hearing, Applicant indicated his usage started in 1997 when he became gravely ill.