

DATE: March 30, 2004

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-08091

**DECISION OF ADMINISTRATIVE JUDGE**

**ELIZABETH M. MATCHINSKI**

**APPEARANCES**

**FOR GOVERNMENT**

Nygina T. Mills, Esq., Department Counsel

**FOR APPLICANT**

Michael A. Blanchard, Esq.

**SYNOPSIS**

Applicant used marijuana with varying frequency from 1994 to October/November 2002, including at times daily during his last two years of college. As of February 2003, he intended to limit his future involvement with marijuana to rare occasions when the drug was offered by friends. After it became clear to him that any use of marijuana could cost him a security clearance and his defense job, Applicant resolved to forego any future involvement with illegal drugs. Given the absence of any evidence of drug use since 2002, the statutory prohibition against granting security clearances to current drug users under 10 U.S.C. § 986 does not apply. Yet given the extent of his drug abuse history and his ongoing association with his former college roommate with whom he used marijuana in the past, it is too soon to conclude that his drug involvement will not recur. Clearance is denied.

**STATEMENT OF CASE**

On June 27, 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).

On July 8, 2003, Applicant filed his *pro se* response to the SOR allegations and requested a hearing before a DOHA administrative judge. The case was assigned to me on August 27, 2003, and pursuant to notice dated September 11, 2003, a hearing was scheduled for October 2, 2003. Counsel for Applicant entered his appearance on September 15, 2003, and ten days later formally moved for a brief continuance, which was granted. An amended notice was issued on September 30, 2003, rescheduling the hearing for October 29, 2003.

At the hearing held as rescheduled, the Government submitted two exhibits. Applicant and his mother testified on his behalf and he submitted three exhibits. A transcript of the hearing was received November 5, 2003.

## FINDINGS OF FACT

The SOR allegations concern Drug Involvement (Guideline H) based on marijuana use from 1994 to November/December 2002, purchase of marijuana from about 1999 to at least May 2001, and an expressed intent to use marijuana in the future, albeit rarely when offered it by friends. DOHA alleged Applicant's use of marijuana to late 2002 with intent to continue use disqualified him from having a security clearance granted or renewed pursuant to 10 U.S.C. § 986. In his response to the SOR, Applicant admitted using and purchasing marijuana as alleged and indicating in February 2003 he would use marijuana in the future very rarely when offered by friends. However, Applicant added that after an opportunity to reassess, he had no intent to use marijuana or any other illegal drug again. Applicant's admissions are accepted and incorporated as findings of fact. After a complete and thorough review of the evidence, I render the following additional findings:

Applicant is a 24-year-old engineer who has been employed by a defense contractor since July 2002. Due to his ineligibility for an interim secret clearance, Applicant has been temporarily assigned to duties that do not require access.

Following an initial exposure to marijuana at age fifteen, Applicant used it on one or two more occasions as a high school student. In Fall 1997, he matriculated into the state university. During his first two years of college, Applicant smoked marijuana about once per month when it was offered to him by friends. He used marijuana with greater frequency during his last two years, and purchased it for personal consumption, spending about \$200 to \$300 total. From October 1999 until he graduated in May 2001, Applicant smoked marijuana sometimes daily for a week or two and other times none at all, with his use averaging out to once to twice per week. On one occasion, he tried hashish when it was offered by a friend.

In May 2001, he earned a Bachelor of Science degree in mechanical engineering. While he was looking for an engineering position, he worked as a carpenter and as a waiter/bartender at a local country club. Away from the university environment, his use of marijuana became progressively less frequent to where it was twice monthly as of December 2001. <sup>(2)</sup>

By December 2001, he decided to "*pretty much stop using marijuana.*" On three or four occasions thereafter, he accepted marijuana offered to him.

In July 2002, Applicant went to work for his present defense contractor employer. Needing a secret clearance for his duties, Applicant executed a security clearance application (SF 86) on July 19, 2002. In response to question 27 regarding use of any illegal drug since age 16 or in the past seven years, Applicant disclosed use of marijuana 100 times from October 1999 to December 2001.

As a condition of his employment, Applicant submitted to a drug urinalysis in July 2002 which was negative for substances tested. Applicant assumed from the drug test that the company had a policy against illegal drug use, both on and off the job.

In November or December 2002, Applicant took a puff off a marijuana cigarette at a party held by his college roommate, with whom he had smoked marijuana in the past. The marijuana was offered to him by someone other than his former roommate. At the time, Applicant did not consider his use to be a big deal. <sup>(3)</sup>

In February 2003, Applicant was interviewed by a Defense Security Service special agent about his illegal drug involvement. As reflected in a signed, sworn statement prepared during that interview, Applicant detailed his use of marijuana, relating that his heaviest use (on average once or twice weekly) was during his last two years of college. With respect to future intentions, Applicant told the agent he would only use marijuana "very rarely, when offered by friends." He denied any intent to purchase marijuana in the future. <sup>(4)</sup>

On receipt of the SOR in July 2003, Applicant realized the use of marijuana raised significant security concerns for the Department of Defense. Applicant resolved not to use any illegal drug in the future.

Applicant and his former roommate from college, who lives in another state, get together "once in awhile," generally in

the context of seeing a professional baseball game. Applicant has informed this friend of his intention not to use marijuana in the future and he has asked him not to use marijuana in his presence.

Circa July 2003, Applicant told his mother that he had been involved with marijuana in college. He left her with the impression his use had been infrequent. Applicant told her that he used marijuana as recently as December 2002 when he visited his friend, and that he had no intent to use marijuana in the future.

During his first eight months on the job for the defense contractor, Applicant frequently met or exceeded job expectations. He demonstrated the ability to work independently and produce high quality technical products. Over the next six months, he continued to display an excellent work ethic. His supervisor has assigned him tasks that would typically be handled by a more senior engineer, and Applicant has proven himself capable of the work.

Sometime between July 2003 and late September 2003, Applicant informed his direct supervisor that he had used marijuana in the past<sup>(5)</sup> and that his clearance was being questioned because he had stated during his clearance interview that the possibility exists that he may use marijuana in the future. Applicant told his supervisor that he "*now understands the seriousness of his actions, and that he has no intention of using marijuana in the future.*" Based on his observations of Applicant's integrity, the supervisor believes Applicant has no intent to use drugs in the future.

On October 8, 2003, Applicant was evaluated at a local mental health counseling center. Applicant described his history of cannabis use as weekly during his last two weeks of college, once per month for six months after May 2001, and then once per year thereafter. He reported a last use one year ago. Based on his self-report and presentation, Applicant was assessed as having no diagnosable symptoms/criteria of a substance abuse problem under the Diagnostic and Statistical Manual for Mental Disorders. Results of a monitored urine screen were negative for all substances tested, including THC.

### STATUTORY REQUIREMENTS

The Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 amended Title 10 of the United States Code (10 U.S.C. § 986) to preclude the initial granting or renewal of a security clearance to individuals who are unlawful users of, or are addicted to, a controlled dangerous substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802). This statutory limitation was implemented within the Department of Defense by a June 7, 2001, memorandum of the Assistant Secretary of Defense, and within DOHA by Operating Instruction 64, issued on July 10, 2001. SOR 1.d. alleges Applicant's marijuana use to November/December 2002 with stated intent of February 2003 to only use marijuana very rarely when offered by friends brings his case within this statutory prohibition.

### 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.

b. Drugs are defined as mood and behavior-altering substances, and include:

(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), and

(2) Inhalants and other similar substances.

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.

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

a. Any drug abuse (see above definition); [\(6\)](#)

b. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.

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.

### **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:

After experimenting with marijuana in high school, Applicant became a frequent user of the drug in college. A once monthly user during his first two years, Applicant's involvement increased significantly in his last two years. From October 1999 to May 2001, once to twice weekly on average, although there were some weeks where he abstained, and he purchased the drug for his personal consumption, spending \$200 to \$300 total. After graduation, he worked as a bartender at a local country club. He used marijuana with coworkers after work with declining frequency over the next six months, although he was still using it about twice monthly as of December 2001. His use since has been limited to rare occasions when offered to him, with his last use of record either in November or December 2002, after he had successfully passed a drug test for his employer and applied for a security clearance. Clearly, disqualifying conditions a. any drug abuse, and b. illegal drug possession, including . . . purchase, apply.

As recently as February 2003, he told a DSS special agent he "*will only use marijuana in the future very rarely, when offered by friends.*" As a result of this stated intent to continue, the Government submits Applicant is statutorily disqualified from being granted a security clearance under 10 U.S.C. § 986. Implementing guidance from the Assistant Secretary of Defense, and the statutory language itself (any person who is an unlawful user or is addicted), make it clear that the statutory limitation applies to only those persons who are currently users or addicted to a controlled dangerous substance(s). In the absence of any evidence of illegal drug use since late 2002, this case does not fall within 10 U.S.C. § 986. SOR subparagraph 1.d. is therefore resolved in his favor.

Although Applicant is not a current user of illegal drugs, he bears a particularly heavy burden to demonstrate he is security worthy because of his recent drug involvement and his intent as of February 2003 to use marijuana with friends if it is offered to him. <sup>(7)</sup> (See DC e. recent drug involvement with an expressed intent not to discontinue use will almost invariably result in an unfavorable determination). Notwithstanding the negative inferences for his credibility stemming from his present challenge to the accuracy of his February 2003 sworn statement, I am persuaded Applicant no longer intends to use any illegal drug in the future. While the Directive provides for mitigation where there is a demonstrated intent to forego future drug involvement (MC c.), he did not make a firm commitment to avoid all drug use until after he received the SOR in July 2003. His negative drug screen of October 2003 serves as independent corroboration of abstinence during the month prior to his urine screen. Yet, Applicant was able to choose the timing of the screen to ensure a negative result. It is too soon to conclude that his drug involvement is safely of the past. Applicant continues to associate on occasion with his former college roommate with whom he has a significant history of socialization involving marijuana. Applicant's use of marijuana at this friend's home in late 2002, when he understood that this drug use was illegal and against his employer's policies, raises sizable questions about his judgment overall--concerns that are magnified by his apparent lack of candor when apprising his mother and direct supervisor about his drug use. His mother testified Applicant told her he had used marijuana "infrequently." (Tr. 25). His supervisor based his favorable assessment of Applicant's security suitability "on the fact that [Applicant's] past marijuana usage was of an experimental nature and clearly not related to a dependency of any kind." (Ex. C). Adverse findings are returned as to subparagraphs 1.a., 1.b., and 1.c. of the SOR, Applicant having failed to mitigate the security concerns caused by his substantial involvement with marijuana.

### **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: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Subparagraph 1.d.: For 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. When asked at his hearing about the number of times he used marijuana after college, Applicant testified he did not

remember, but guessed maybe five times. (Tr. 74). His statement of February 2003 reflects more extensive use, at least from May 2001 to December 2001.

3. Applicant testified his friends may have been "the vehicle" for his use but they were not the reason he used it. (Tr. 59). When asked why he had used the marijuana when he had reason to believe his employer did not condone such behavior, Applicant responded, "*I just wasn't thinking clearly, I guess . . . I honestly don't know, I mean it was-I had been drinking, and somebody offered it to me and it didn't seem like a bad idea at the time.*" (Tr. 66).

4. Applicant now claims that when he was interviewed in February 2003, he had no intent to use marijuana in the future; that what he meant to say is that anything is possible. (Tr. 44, 51-52, 67). Had Applicant no intent whatsoever to use marijuana, it stands to reason he would have said so, as he did with respect to future purchase. Applicant signed and swore to the accuracy of a statement which states, "*I will only use marijuana very rarely, when offered by friends and do not intend to buy it again.*" (Ex. 2). While I am persuaded that he had no intent to seek out marijuana, he intended to continue his use of marijuana in social settings with friends, albeit on rare occasion. The credibility of Applicant's hearing testimony is further undermined by his response to the SOR wherein he stated, "*I admit giving the response attributed to me and signing the statement. Since that interview, I have had a chance to reassess the gravity of the question, and more importantly, my answer. I now affirm that I never intend to use marijuana, or any other illegal drug again.*" It was not until Applicant received the SOR that he realized marijuana use raises significant security concerns (Tr. 69). In the absence of any reasonable alternative, I am led to conclude that it was the issuance of the SOR that caused Applicant to reassess his attitude toward marijuana.

5. It is not clear exactly what Applicant told his supervisor with respect to the extent of his past marijuana use. The supervisor opined in a reference of September 26, 2003 (Ex. C) Applicant is a very low security risk based on the fact that Applicant's past marijuana usage was "*of an experimental nature and clearly not related to a dependency of any kind.*"

6. Under the provisions of 10 U.S.C. 986, any person who is an unlawful user of, or is addicted to, a controlled substances 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.

7. *Supra* n3.