

DATE: June 3, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-10302

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Esquire, Department Counsel

FOR APPLICANT

Lynne M. Giachetti, Esquire

SYNOPSIS

Security concerns persist over Applicant's criminal conduct and drug involvement leading to his 2002 conviction for illegally distributing marijuana following his arrest in December 2001. He sold marijuana for profit while he had a security clearance even though he understood such marijuana distribution was against security policies. While he has a fine employment record, such excellence on the job does not erase the security significance of his choice to become involved with illegal drug sales while holding a security clearance. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on July 20, 2004. The SOR detailed reasons why the Government could not make the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.⁽¹⁾ The SOR alleges specific concerns over criminal conduct (Guideline J) and drug use (Guideline H). Through counsel Applicant responded to these SOR allegations in an Answer notarized on August 6, 2004, where he admitted all of the individual allegations with explanations, denied SOR 1. and 2., and requested a hearing.

After the case was assigned to Department Counsel, on October 1, 2004, he attested it was ready to proceed. The case was assigned to an administrative judge who set it for hearing on November 30, 2002. Because of illness, Applicant's counsel on November 23, 2004, requested a continuance which was granted. On December 8, 2004, the case was re-assigned to me. Subsequently, a mutually convenient date for hearing was agreed to; and a Notice of Hearing issued on February 1, 2004, set the matter for February 22, 2005, at a location near where Applicant works and lives. At the hearing the Government offered a Exhibits 1-7 which were admitted into evidence. Applicant's counsel offered six exhibits which were admitted into evidence. (Exhibits A-F) Applicant testified and called one witness. The transcript (TR) was received on March 3, 2005.

FINDINGS OF FACT

After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following Findings of Fact:

Applicant, 43 years old, is a senior engineer who has worked for Defense Contractor #1 in State #1 since July 1985. Applicant was laid off in 1993 and rehired in 1995. He was granted a Department of Defense (DoD) security clearance in 1985 and a Secret security clearance in 1995. (Exhibits 1, 2, 5; Exhibits E, F; TR 19-22; 35-38) Applicant needs a security clearance to do his job. (TR 44)

Applicant attended a state university in State #1 from 1979 to 1983 and received a Bachelor of Science in Mechanical Engineering (BSME) degree. (Exhibit 1; TR 35)

Applicant lived with his girlfriend (Ms. W) beginning in 1998 and married her in August 2001. (TR 25, 31) Currently, Applicant makes \$75,000 base pay; last year he made \$100,000 with overtime; his wife makes \$25,000 to \$30,000 per year. (TR 55-56)

Criminal Conduct and Drug Involvement

In the summer of 2001 while Applicant held a security clearance and worked for Defense Contractor #1, he decided to sell marijuana (2) for Mr. G, a friend of a friend. For every pound Applicant sold, he was to give Mr. G \$1,500 and keep the rest for profit. He anticipated making between \$5,800-\$7,000 in profits. He sold one pound of marijuana in \$100 bags and had made \$2,000 in profits before the police searched his home in December 2001. They found he had possession of five to six pounds of marijuana. Subsequently, he was arrested in State #1 and charged with Possession of Controlled Dangerous Substance with Intent to Distribute and Possession/ Distribution of Controlled Dangerous Substance in Public Housing. In April 2002 he pled guilty to Possession of Controlled Dangerous Substance and was sentenced to two years probation and fines totaling over \$1,000. He complied with all the terms of probation and paid the fines. However, if he had not been arrested, he testified he would have continued to sell the remaining five pounds of marijuana. Applicant never disclosed his arrest and conviction to his security office. This arrest occurred after he completed his July 2001 SF 86, so he first disclosed this arrest and conviction to the Office of Personnel Management Investigative Service (OPMIS) in December 2002. (Answer; Exhibit 2; TR 30-32; 39-40; 50-54; 59-61; 62) Applicant was 40 years old and had a security clearance in 2001 at the time of these incidents when he sold marijuana, he knew that having a security clearance and involvement with drugs were incompatible. (TR 46; 51)

In 1999 Applicant and his girlfriend, Ms. W, were arguing at their home. Applicant was arrested in January 1999 and charged in State #1 with Domestic Violence/Simple Assault and the case was later dismissed with the judge advising him not to let it happen again. Again in April 1999 Applicant and Ms. W were arguing on the bus on their way home from a baseball game. He was again arrested in State #1 and charged with Domestic Violence/Simple Assault and Terroristic Threats; the case was later dismissed. However, the judge required Applicant to attend family counseling; he and Ms. W attend four sessions required by the court in 1999. Subsequently, he and Ms. W were married in August 2001; they do not fight anymore. (Answer; Exhibit 3; Exhibit A; TR 25-29; 43; 47-49)

In 1997 Applicant got into an argument with his girlfriend, Ms. B after he called her home and a "strange male answered the phone." He called back and when the male would not put her on the phone he went to her house. He got into an argument with three men at her house. Ms. B told them to stop fighting and he went home; he was very angry and continued to call her at home for over two hours and started threatening the men on the phone. Before he could bring charges against these men, Ms. B had filed charges against him for making a terroristic threat and assault; he was arrested and spent two nights in jail. Ms. B got a restraining order against him. Before he went to court, he violated the restraining order by calling Ms. B's house to attempt to collect \$500 she owed him. He plead guilty to violating the restraining order and had to pay a fine and attend anger management courses. (Answer; Exhibit 3; TR 47-49)

Applicant has had a series of alcohol related arrests and convictions in State #1:

in 1982 for Driving While Intoxicated (DWI) where he was fined and lost his license for six months;

in 1986 for DWI where he was found guilty and sentenced to a two year license suspension; in 1991 for Operation of a Vehicle while Intoxicated where he plead guilt and paid a \$500 fine;

in 1993 for Operation of a Vehicle on a suspended license where he was found guilty, fined \$1,500 and his licenses was suspended for one year; and

in 1994 for Driving While Revoked where and was found guilty and fined \$780.

(Answer; TR 40-41)

Job Performance

Applicant's Performance Planning documents from 1987 to 1994 demonstrate he met or exceeded performance requirements. His Performance Evaluations from 1995 to 2004 establish he continued to meet or exceed performance requirements. (TR 15-16Exhibit B) From 1987 to 2001 he received raises and promotions. (TR 16-17; Exhibit C)

The vice president and director, human resources commended Applicant for his 18 years as a "respected employee" who has consistently worked the most overtime in his department. He received several achievement awards for his hard work and dedication. He displays "consistent good performance." Applicant has continued to received raises and promotions. (TR 18; Exhibit D)

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. But the mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole, I weighed relevant Adjudication Guidelines as set forth below :

Guideline J - Criminal Conduct

E2.A10.1.1. The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Guideline H - Drug Involvement

E2.A8.1.1. The Concern: 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.A8.1.1.2 Drugs are defined as mood and behavior altering:

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) and

E2.A8.1.1.2.2. Inhalants and other similar substances.

E2.A8.1.1.2.3. Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue Applicant's access to classified information. The Applicant presents evidence to refute, explain, extenuate, or mitigate in order to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance. Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may

draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

CONCLUSIONS

Criminal Conduct

The Government established security concerns⁽³⁾

over Applicant's criminal conduct from 1982 to 2001 which includes five alcohol-related arrests and convictions, arrests for domestic violence and assault in 1997 and 1999, and finally an arrest in December 2001 for Possession of Controlled Dangerous Substance with Intent to Distribute where he pled guilty in April 2002 to Possession of Controlled Dangerous Substance and was sentenced to probation and fined over \$1,000. Before he was arrested he had sold one pound of marijuana and had made \$2,000 in profits.

To his credit, Applicant has a very successful work record; however that alone does not establish successful rehabilitation especially in light of the fact that Applicant did not inform his defense contractor employer of his drug-related arrest in December 2001. The mere passage of time is insufficient to mitigate this serious crime which he engaged in while he had a security clearance. He admitted that had he not been arrested he would have continued to sell for profit all of the marijuana in his possession. Thus, his arrest cannot be considered isolated, as he sold marijuana for profit over several months, and testified he would have continued if he had not been arrested in December 2001. While he has paid his fine and completed his probation, given the seriousness of the crime, he would need to show more reform in light of the seriousness of his misconduct. At the time he engaged in this misconduct of selling marijuana for profit, he was holding a security clearance and knew that such conduct was inconsistent with the trust needed for access to classified material.

On the other hand, while he had repeated alcohol-related arrests from 1982 to 1994, there have not been any additional incidents in over ten years. Thus, Applicant has successfully mitigated⁽⁴⁾ these dated incidents under Mitigating Condition (MC) 1. After his last arrest for domestic violence and assault in 1999, he and his girlfriend were ordered by the court to take family counseling; they subsequently married. There have been no documented repeat incidents. Thus, that conduct has been successfully mitigated under MC 1 and 6. Hence, after considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraphs 1.b. through 1.i. but against Applicant on subparagraph 1.a. incorporated under SOR Paragraph 1.

Drug Involvement

The Government established security concerns⁽⁵⁾ over Applicant's sale of marijuana in 2001. He sold one pound of marijuana in \$100 bags and had made \$2,000 in profits. He was only halted by his arrest in December 2001 after the police searched his home and found five to six pounds of marijuana. He was charged with Possession of Controlled Dangerous Substance with Intent to Distribute and Possession/ Distribution of Controlled Dangerous Substance in Public Housing. He pled guilty in April 2002 to Possession of Controlled Dangerous Substance and was sentenced to probation and fined as discussed above. He sold marijuana for a profit repeatedly even while he held a security clearance. Applicant's choice to sell drugs knowing that it was against the law and against security policies raises ample questions about his judgment overall.

Applicant presented insufficient evidence to show he has reformed. Thus, none of the mitigating conditions⁽⁶⁾ apply in his case as his involvement in drugs in 2001 was not isolated or aberrational. Hence, after considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule against Applicant on subparagraph 2.a. incorporated under SOR Paragraph 2.

FORMAL FINDINGS

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For Applicant

Subparagraph 1.g.: For Applicant

Subparagraph 1.h.: For Applicant

Subparagraph 1.i.: For Applicant

Paragraph 2. Guideline H: AGAINST APPLICANT

Subparagraph 2.a.: Against 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 the Applicant.

Kathryn Moen Braeman

Administrative Judge

1. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), as amended by Change 4, April 20, 1999.
2. While Applicant initially claimed had sold marijuana in 2001 because of financial pressures, on cross-examination he conceded that he had been re-employed for five years since the lay off ; and, in fact, he was financially stable at that time. He and his wife had a combined annual income of \$70,000. He decided to sell marijuana to make some "quick money." (TR 54-56) His wife confirmed that they did not have financial problems at that time in 2001. (TR 32-33)
3. **E2.A10.1.2. Conditions that could raise a security concern and may be disqualifying include:**
 - E2.A10.1.2.1 Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.;
 - E2.A10.1.2.2. A single serious crime or multiple lesser offenses.
4. **E2.A10.1.3. Conditions that could mitigate security concerns include:** E2.A10.1.3.1. The criminal behavior was not recent; E2.A10.1.3. 2. The crime was an isolated incident; E2.A10.1.3.3. The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life; E2.A10.1.3. 4. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur; E2.A10.1.3. 5. Acquittal; E2.A10.1.3.6 There is clear evidence of successful rehabilitation.
5. **E2.A8.1.1.2. Conditions that could raise a security concern and may be disqualifying include:** E2.A8.1.1.2 2. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.
6. **E2.A8.1.1.3. Conditions that could mitigate security concerns include:** E2.A8.1.1.3.1.The drug involvement was

not recent; E2.A8.1.1.3.2. The drug involvement was an isolated or aberrational event; E2.A8.1.1.3.3. A demonstrated intent not to abuse any drugs in the future; E2.A8.1.1.3.4. Satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable diagnosis by a credentialed medical professional.