

DATE: October 15, 2004

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 03-11655

**ECISION OF ADMINISTRATIVE JUDGE**

**THOMAS M. CREAN**

**APPEARANCES**

**FOR GOVERNMENT**

Jason Perry, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant is a senior engineer for a defense contractor. He used marijuana and LSD, and has abused prescription Ritalin and Percocet from 1992 until March 2003. Applicant has not used drugs since 2003 and is not a current drug abuser, so the provisions of 10 U.S.C. 986 do not apply. Clearance is denied.

**STATEMENT OF THE CASE**

On November 25, 2003, the Defense Office of Hearing and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to not grant a security clearance to Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb 20, 1990), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan 2, 1992), as amended and modified (Directive). Applicant acknowledged receipt of the SOR on January 9, 2004. The SOR alleges security concerns under Guideline H (Drug Involvement) of the Directive.

Applicant answered the SOR on January 26, 2004. Department Counsel submitted the Government's written case on August 9, 2004. Applicant received a complete file of relevant material (FORM) on August 19, 2004. Applicant was informed he had an opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. He submitted material in response to the FORM on September 12, 2004. He elected to have the matter decided on the written record in lieu of a hearing. This case was referred to me on October 12, 2004.

The SOR does not allege a violation of 10 U.S.C. 986 as a disqualifying matter under Guideline H. It does note in a separate, unnumbered paragraph that the provision is applicable will disqualify the Applicant from having a security clearance.

**FINDINGS OF FACT**

Applicant is 34 years old and employed as a senior engineer by a defense contractor. He submitted his Security

Clearance Application on January 29, 2002 (FORM, item 5) listing his use of controlled substances. He used marijuana approximately 80 times starting in 1992 while in college and continuously used marijuana at least quarterly until April 2003. He used LSD three times from 1992 to 1994. He abused a legal prescription for Percocet in January 1999 when he took the drug after he no longer needed it for pain. He abused Ritalin in 1998 and 1999 by using the drug when it had not been prescribed for his use. He used hashish while on a trip to Italy in April 2002.

Applicant was interviewed by a Special Agent from the Defense Security Service (DSS) on April 23, 2003. He admitted all the allegations in the SOR. He admitted to an unsuccessful attempt to grow marijuana and associating with friends who use marijuana. He stated he has not used marijuana recently and that most people in his age group have used marijuana. He stated he would probably continue to use marijuana in the future and would not rule out the use of LSD. He is intrigued by the illegal drug Ecstasy and might use it in the right circumstance or situation. (FORM, Item 6, page 5). However in his September 12, 2004 response to the FORM, Applicant acknowledges the negative impact his drug use has on his employment. He now has a girlfriend who is adamantly against drug use. He realizes he must change his lifestyle and he will not use marijuana or other drugs in the future.

Applicant continued to use marijuana for more than a year after submitting his security clearance application in January 2002. Applicant last used marijuana in April 2003.

### 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 judgement, 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.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be fair, impartial, and a commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶ 6.3.1 through ¶ 6.3.6

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." Directive ¶E2.2.1. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. *Id.* An administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation of recurrence. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

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, 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. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611

at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

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 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determination should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶E2.2.2.

Title 10, United States Code, § 986 (2), prohibits the Department of Defense from granting or renewing a security clearance to any person under consideration for access to classified information who is an unlawful user of or addicted to a controlled substance. The Deputy Secretary of Defense issued a June 7, 2001, memorandum with policy guidance to implement 10 U.S.C. 986 (2). The policy guidance is that the statute did not change the substance of Guideline H and applies to a person who is *currently* an unlawful user of controlled substances. The statute does not create a *per se* or one strike rule for a person who is not currently a drug user.

### CONCLUSIONS

I carefully considered all of the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR:

Under Guideline H (Drug Involvement (DI)) a security concern exists for an individual who is illegally involved in drugs because it 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. Drug abuse is the illegal use of a drug or use of a legal drug in a manner the deviates from the approved medical direction. E2.A8.1.1.3

Applicant's drug involvement falls within Drug Involvement Disqualifying Condition (DI DC) E2.A8.1.2.1 (*Any drug abuse*). Appellant admits to using marijuana at least on a quarterly basis for over ten years. He also admits to using LSD on three occasions. He admits to using Ritalin that was prescribed by a doctor for another patient. He admits to using Percocet in a manner that deviates from approved medical direction. Applicant admits to knowingly associating with people that use marijuana. Applicant stated his intent to continue to abuse drugs in the future. Based on the Applicant's admissions, I conclude that he abused drugs in violation of Guideline H.

Applicant's conduct and statements are not sufficient to raise any of the Drug Involvement Mitigating Conditions (DI MC) of E2.A8.1.3.1 (*the drug involvement was not recent*); E2.A8.1.3.2. (*the drug involvement was an isolated or aberrational event*); or E2.A8.1.3.3 (*a demonstrated intent not to abuse any drugs in the future*). His last reported and known drug use was April 2003, only seven months before the SOR and only 16 months before the FORM was sent to Applicant by Department Counsel. His drug use or abuse was not isolated or an aberrational event since he used or abused three separate drugs over at least ten years. He continued to use drugs even after submitting his security clearance application. He admitted an intent to use drugs in the future. He only declared an intent not to use drugs in the future after learning that his drug use would adversely affect his security clearance and consequently his job. This self-serving declaration is not sufficient to show a demonstrated intent not to abuse any drug in the future. I conclude the Applicant has not established any mitigating conditions under Guideline H.

While Applicant's drug abuse is recent, it is not current to trigger the requirements of 10 U.

S.C. ¶ 986 (2). His September 12, 2004, response to the FORM contains his disavowal of future drug use. His last use of marijuana was April 2003. Since his last use of drugs was over 18 months ago and he stated he will not use drugs in the future, he is not a current drug user.

I carefully considered all of the circumstances in light of the "whole person" concept. I conclude Applicant is not eligible for access to classified information.

### 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 to the Directive, are:

Paragraph 1. Guideline H: AGAINST THE APPELLANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: Against Applicant

### **DECISION**

In light of all of 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.

Thomas M. Crean

Administrative Judge