

KEYWORD: Drugs

DIGEST: This 47-year-old Software Engineer began using marijuana beginning in 1977, and last used it in January 2004. He used other illegal drugs as well at different points in this 27-year period. No mitigation has been established. Clearance is denied.

CASENO: 04-01576.h1

DATE: 03/02/2005

DATE: March 2, 2005

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In Re:

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SSN:-----

Applicant for Security Clearance

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ISCR Case No. 04-01576

**DECISION OF ADMINISTRATIVE JUDGE**

**BARRY M. SAX**

**APPEARANCES**

**FOR GOVERNMENT**

Edward W. Loughran, Esquire, Department Counsel

**FOR APPLICANT**

Ronald Gold, Esquire

Oldman, Cooley, Leighton, Sallus, Gold & Birnberg

**SYNOPSIS**

This 47-year-old Software Engineer began using marijuana in 1977, and last used in January 2004. He used other illegal drugs as well at different points in this 27-year period. No mitigation has been established. Clearance is denied.

**STATEMENT OF THE CASE**

On July 8, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding required under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether a clearance should be granted, denied or revoked.

On August 6, 2004, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made by a DOHA Administrative Judge after a hearing. The matter was assigned to me for resolution on September 15, 2004. A Notice of Hearing was issued on October 4, 2004, setting the hearing for November 30, 2004. At the hearing, the Government introduced five exhibits (GX 1 - 5). Applicant testified, called two other witnesses and introduced 7 exhibits (Applicant's Exhibits (AX) A - G). Applicant also submitted post hearing exhibits, stapled together (AX H1 - H4). All exhibits were admitted as marked. The transcript was received at DOHA on December 14, 2004.

## FINDINGS OF FACT

Applicant is a 47-year-old Software Engineer for a defense contractor. The July 8, 2004 SOR contains eight allegations under Guideline H (Drugs). In his August 6, 2004 Response to the SOR, Applicant denies allegations, 1.a., 1.b., 1.c., 1.d., 1.e., and 1.f. He admits allegations 1.g. and 1.h. All the admitted allegations are accepted and deemed to be Findings of Fact.

After considering the totality of the evidence, I make the following additional Findings Of Fact as to the status, past and present, of each SOR allegation:

### Guideline H (Drugs)

#### Applicant:

1.a. - used marijuana, with varying frequency, from approximately 1977 to at least January 2004, when it came in the mail from a cousin and he decided to try it (Tr at 72, 73, 108). After evaluating Applicant's various claims, I conclude he used marijuana approximately 50 times in his life.

1.b. - has purchased marijuana (Tr at 104);

1.c. - may continue to use marijuana in the future;

1.d. - continued to use marijuana in at least January 2004. Applicant used the marijuana sent him by a cousin in early 2004 one time and then flushed the rest down the toilet (Tr at 56, 61).

1.e. - used methamphetamine one time in approximately 1992 or 1993 (GX 3). At the hearing, Applicant said the date of use was actually in 1982 (Tr at 107). I accept the later date as correct but, in overall, it makes no difference in the outcome.

1.f. - used cocaine, with varying frequency, from about 1987 to at least 1989, and bought it on occasions (Tr at 106, 107). At the hearing, Applicant stated he had use it only three times (Tr at 123).

1.g. - used psilocybin (mushrooms) one time in approximately 1985 (Tr at 107);

1.h. - use LSD one time, in approximately 1979.

Applicant denied all allegations from 1.a - 1.f., and admitted only 1.g. and 1.h. However, on balance, I find that all eight allegations are supported by the evidence of record (GX 4 and Tr).

Applicant has recently tested negative for drugs (AX B4) and has received praise from friends and work colleagues (AX B1, AX B2, AX B3, and Tr at 23-33).

## **POLICIES**

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing participation; (3) the frequency and recency of the conduct; (4) the individual'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 or recurrence (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and

collectively, in reaching my overall conclusion.

Because each security case presents its own facts and circumstances, it should not be assumed that the factors cited above exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable financial judgment and conduct.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of

whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination based on the "whole person" concept required by the Directive, the Administrative Judge is not permitted to speculate, but can only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make

critical judgments as to the credibility of witnesses.

In the defense industry, the security of classified information is entrusted to civilian workers

who must be counted on to safeguard classified information and material twenty-four hours a day.

The Government is therefore appropriately concerned where available information indicates that an applicant for a security clearance, in his or her private life or connected to work, may be involved

in conduct that demonstrates poor judgment, untrustworthiness, or unreliability. These concerns include consideration of the potential, as well as the actual, risk that an applicant may deliberately

or inadvertently fail to properly safeguard classified information.

An applicant's admission of the information in specific allegations relieves the Government

of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either

by the Applicant's admissions or by other evidence) and proves conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the Applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence

of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the Applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended, at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

### CONCLUSIONS

Counsel for Applicant extensively questioned the agent for the Defense Security Service (DSS) as to the circumstances of the interview and the contents of the written statement (Tr 40 - 87). After considering all of the evidence of record, I conclude the statement accurately reflects what Applicant told the agent and that Applicant signed off on the language. At the hearing, Applicant was candid about his drug use. "Marijuana is a problem for me if I have it around. I would have to confirm that. That could be true" (Tr at 108). He stopped for a period of years, but began again when his cousin sent him some in the mail in January 2004 (Id). His "drug abuse is a result of some very difficult psychological problems and alienation from my family" (Tr at 109).

Applicant has not been able to expressly state (or demonstrate) an intent not to use drugs again. At the hearing, in discussing what he had previously said on this point, he stated that when he said "I do not promise confirmed that I will never smoke marijuana again," he meant that like an alcoholic, he could only promise that he would try to abstain and be "honest about it" (Tr at 109, 110).

Applicant claims continuing attendance at Alcoholics Anonymous (AA) since 1991 (Tr at 112 - 114). Applicant established that he led a busy life between full-time employment, attending school and getting high grades (AX Supp X C), he had little time to use drugs or "get high" (Tr at 120). However, Applicant was still not able to refrain from using marijuana when the occasion arose in January 2004.

Based on the entire record, I conclude that Applicant has used drugs on and off for many years, and that his last use of his drug of choice, Marijuana, was only a year ago. His negative conduct in continuing to use marijuana is more persuasive than the positive letters of documentation, the recent test results, and his school grade reports. He remains ambiguous about his future use of marijuana and has not shown an ability to refrain from its use, despite the pressure of the present adjudication,

Under Guideline H, Disqualifying Conditions (DC) 1 (any drug use) and DC 2 (illegal drug possession, including cultivation, processing, manufacture, purchase, or distribution) are applicable.

At the same time, Applicant has not demonstrated any of the possible Mitigating Conditions because: (1) the drug use is still recent; (2) was not an isolated or infrequent event; and Applicant has not demonstrated his intent not to abuse any drugs in the future. In the year that must pass before Applicant can reapply for a clearance, he will have the opportunity to conform both his conduct and his thought processes concerning his drug use.

### **FORMAL FINDINGS**

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

Guideline H (Drugs) Against the Applicant

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. Against the Applicant

Subparagraph 1.e. Against the Applicant

Subparagraph 1.f. Against the Applicant

Subparagraph 1.g. Against the Applicant

Subparagraph 1.h. 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.

Barry M. Sax  
Administrative Judge