

KEYWORD: Drugs

DIGEST: Applicant's marijuana abuse commenced in June 1993, when he was about 22-years-old, and continued, with varying frequency, until about August 1998. He declared no intention to use marijuana in the future and purportedly abstained until April 2003, when, at the age of 32, and in a party mood, he again abused marijuana on one occasion. He is indifferent towards the use of marijuana, but now claims he will not use it as long as he possesses a security clearance or has knowledge of sensitive information after the clearance expires. His marijuana abuse and refusal to provide a clear and unambiguous expressed intent to discontinue any substance abuse leave grave doubts as to his security eligibility. Clearance is denied.

CASENO: 04-04302.h1

DATE: 02/07/2005

DATE: February 7, 2005

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-04302

**DECISION OF ADMINISTRATIVE JUDGE**

**ROBERT ROBINSON GALES**

**APPEARANCES**

## **FOR GOVERNMENT**

Jason Perry, Esquire, Department Counsel

## **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant's marijuana abuse commenced in June 1993, when he was about 22-years-old, and continued, with varying frequency, until about August 1998. He declared no intention to use marijuana in the future and purportedly abstained until April 2003, when, at the age of 32, and in a party mood, he again abused marijuana on one occasion. He is indifferent towards the use of marijuana, but now claims he will not use it as long as he possesses a security clearance or has knowledge of sensitive information after the clearance expires. His marijuana abuse and refusal to provide a clear and unambiguous expressed intent to discontinue any substance abuse leave grave doubts as to his security eligibility. Clearance is denied.

### **STATEMENT OF THE CASE**

On May 26, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR 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 Applicant, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In sworn written answers, dated June 21, 2004 and August 1, 2004, respectively, Applicant responded to the SOR allegations, and elected to have his case decided on the written record, in lieu of a hearing. Department Counsel submitted the government's written case on November 16, 2004. A complete copy of the file of relevant material (FORM) [\(1\)](#) was provided to Applicant, and he was afforded an opportunity to file objections and submit material in

refutation, extenuation, or mitigation. Any such submissions were due by December 24, 2004. He chose not to respond. The case was assigned to me on February 1, 2005.

### **FINDINGS OF FACT**

Applicant has admitted all of the factual allegations pertaining to drugs under Guideline H (subparagraphs 1.a. through 1.c.). Those admissions are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 34-year-old employee of a defense contractor, and is seeking to obtain a security clearance. He was previously granted a SECRET security clearance in July 2000,<sup>(2)</sup> but contends it subsequently became inactive.<sup>(3)</sup>

Applicant is a substance abuser whose choice of illegal substances is marijuana. He started using marijuana in about June 1993, when he was a 22-year-old college student, and continued using it, with varying frequency,<sup>(4)</sup> until about April 2003.<sup>(5)</sup> He contends he abstained from August 1998 until April 2003,<sup>(6)</sup> and there is no evidence to rebut his contention. As to any marijuana abuse thereafter, the record is silent. His initial and subsequent motivation for using marijuana was attributed to curiosity and a desire to participate in the activities of the group.<sup>(7)</sup> His most recent use, at the age of 32, occurred because he was "in a partying mood."<sup>(8)</sup>

During the period of his earlier marijuana abuse, the substance was generally provided by others and passed around the group for each participant to take a hit from a marijuana cigarette or a pipe. In April 2003, Applicant purchased one marijuana joint, paying \$20.00.<sup>(9)</sup>

In August 2003, Applicant completed an SF 86, and in response to inquiries regarding his use of illegal drugs, he responded that he had used marijuana from January 1996 through April 2003 on an estimated three occasions.<sup>(10)</sup> That estimate is at odds with his admissions of December 1999,<sup>(11)</sup> as it minimizes his earlier stated frequency. In the SF 86, he also denied ever purchasing any marijuana.<sup>(12)</sup> That denial is at odds with his later admission of December 2003.<sup>(13)</sup>

In December 1999, Applicant was interviewed by a Special Agent of the Defense Investigative Service (DIS), and he furnished a sworn written statement. Regarding his future intentions pertaining to marijuana, he stated: "Now being out of an environment where the usage of marijuana was so prevalent, I have no desire or intention to continue its use." (14)

In December 2003, Applicant was interviewed by a Special Agent of the Defense Security Service (DSS), and he furnished another sworn written statement, this time modifying his position regarding future marijuana use. (15)

I understand that while I [hold] a clearance I will not participate in the use of marijuana or any other illegal substance and it is my intention to not do so. I am indifferent toward the use of marijuana, and at some point may possibly use it, however, I have no immediate intention to pursue its use.

In June 2004, Applicant clarified his earlier positions regarding future marijuana use: (16)

. . . with regards to my future usage of marijuana, we discussed the topic of 'never in a lifetime.' I could not with good conscience state 'never' given the absoluteness and the number of years such a term represents. The term never restricted even the possibility of medicinal use, which seemed too rigid. I do fully understand that while holding a clearance or having knowledge of sensitive information after a clearance expires, I will not take part in any drug related activities that would put myself or the information I possess at risk.

Applicant attended a university from 1993 until 1997, and received an M.S. degree in March 1997. He has been with his current employer since August 2003, and presently holds the position of software engineer. He submitted no evidence on the quality of his performance.

## **POLICIES**

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's

eligibility for access to classified information (Mitigating Conditions).

An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision in Section E2.2., Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider are: (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 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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline most pertinent to an evaluation of the facts of this case:

**Guideline H - Drug Involvement: 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.**

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, pertaining to this adjudicative guideline are set forth and discussed in the Conclusions section below.

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security,"<sup>(17)</sup> or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded both standards are one and the same. In reaching this Decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the government to establish a case

which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

## CONCLUSIONS

Upon considering of all the facts in evidence, and after applying all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

The government has established its case under Guideline H. Applicant's improper and illegal drug abuse, including the purchase, possession, and use of marijuana, is of concern, especially in light of his desire to have access to the nation's secrets. The Directive clearly expresses the government's concern regarding drug involvement in provision E2.A8.1.1.1. (*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*). Drug abuse is defined in provision E2.A8.1.1.3.: (*the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction*). Provision E2.A8.1.1.2.1. generally identifies and defines drugs: (*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)*). Applicant's overall conduct pertaining to his illegal substance abuse clearly falls within Drug Involvement Disqualifying Condition (DI DC) E2.A8.1.2.1. (*any drug abuse*), and DI DC E2.A8.1.2.2. (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution*).

Applicant did not simply experiment a few times out of curiosity and then quit. Rather, he commenced using marijuana when he was a young adult, notwithstanding the illegal nature of his endeavor, and exhibited a continuing pattern of questionable judgment, irresponsibility, and immature behavior. Although he characterized his marijuana use over the years as experimentation, in reality, it was occasional substance abuse, initially for a period of about five years, 1993-98. After professing no intention of continuing marijuana abuse in the future, and purportedly abstaining for five years, in April 2003, he not only resumed his substance abuse on at least one occasion, he also broadened his substance abuse by purchasing marijuana. Applicant was 32-years-old when he acknowledged last having used marijuana. Based on his conduct and evolving comments regarding future marijuana abuse, as well as his lack of candor over his past abuse, it is also possible the substance abuse has not yet ceased.

One controversial issue in this case pertains to Applicant's future intentions. Applicant avoided the issue that drug abuse violates the law. I construe Applicant's position in this regard as follows: He is indifferent towards the use of marijuana, but apparently sees nothing wrong with abusing it and may continue to do so if the opportunity--a large party or vacation break--presents itself. However, he now claims he will not do so as long as he possesses a security clearance or has knowledge of sensitive information after the clearance expires. His most recent position is not only internally inconsistent, it is conditional. Applicant's newly shaped intentions, in the absence of a clear and unambiguous expressed intent to discontinue substance abuse, falls within DI DC E2.A8.1.2.5. (*Failure to successfully complete a drug treatment program prescribed by a credentialed medical professional. 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*). As stated above, improper or illegal involvement with drugs raises questions regarding this individual's willingness or ability to protect classified information. Applicant's words and actions, especially after he had already been granted a security clearance in July 2000, have created doubt over his willingness to discontinue illegal marijuana use. Furthermore, that doubt negates any application of Drug Involvement Mitigating Condition (DI MC) E2.A8.1.3.3. (*a demonstrated intent not to abuse any drugs in the future*).

The presence or absence of rehabilitation and other pertinent behavioral changes are significant factors in the overall adjudicative process. Despite lengthy periods of substance abuse separated by a lengthy period of abstinence, Applicant has not undergone any drug awareness, education, or treatment program, in order to achieve a better self-understanding of the behavioral and psychological effects of his actions and the motivation therefor. While there is no requirement to undergo treatment or attend any of the aforementioned programs, exposure to at least the educational and psychological components of those programs might be beneficial to Applicant. Likewise, simply claiming that curiosity and a party mood are motivators, does not demonstrate true insight into the actual motivation for the course of conduct which he had chosen.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my evaluation of the evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under Enclosure 2 of the Directive. I believe that Applicant has failed to mitigate or overcome the government's case. The evidence leaves me with grave questions and doubts as to Applicant's security eligibility and suitability. Accordingly, allegations 1.a. through 1.c. of the SOR are concluded against Applicant.

For the reasons stated, 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 of the Directive, are:

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

### **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.

Robert Robinson Gales

Chief Administrative Judge



1. The government submitted six items in support of its contentions.
2. Item 4 (Security Clearance Application (SF 86), dated August 18 2003), at 8.
3. *Id.*, at 7.
4. Item 5 (Statement of Subject, dated December 14, 1999), at 2-3.
5. Item 6 (Statement, dated December 19, 2003), at 2.
6. *Id.*; Item 5, *supra* note 4, at 3.
7. *Id.*, Item 5, at 2.
8. Item 6, *supra* note 5, at 2.
9. *Id.*
10. Item 4, *supra* note 2, at 7.
11. Item 5, *supra* note 4, at 2-3.
12. *Id.*, at 8.
13. Item 6, *supra* note 5, at 2.
14. Item 5, *supra* note 4, at 3.
15. Item 6, *supra* note 5, at 2.
16. Item 3 (Response to SOR, dated June 21, 2004), at 2.
17. Exec. Or. 12968, "*Access to Classified Information*," as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995, and further modified by memorandum, dated November 10, 1998. However, the Directive, as amended by Change 4, dated April 20, 1999, uses both "clearly consistent with the national interest" (Sec. 2.3.; Sec.2.5.3.; Sec. 3.2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), and "clearly consistent with the interests of national security" (Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (Enclosure 2, Sec. E2.2.2.)