

DATE: July 31, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 05-11392

**DECISION OF ADMINISTRATIVE JUDGE**

**MARC E. CURRY**

**APPEARANCES**

**FOR GOVERNMENT**

Melvin A. Howry, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant used marijuana sporadically for 28 years, at times while holding a security clearance. Although he has not used for four years, it is too soon to conclude that it no longer poses a security concern in light of the length of time he used it, and his contradictory testimony regarding the extent of his past usage. Clearance is denied.

**STATEMENT OF THE CASE**

On December 19, 2005, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating it was unable to find that it was clearly consistent with the national interest to grant or continue a security clearance. [\(1\)](#) The SOR alleged security concerns under Guideline H, improper or illegal involvement with drugs, Guideline E, personal conduct, and Guideline F, financial considerations.

Applicant answered the SOR on January 19, 2006, admitting all of the allegations except 1.d., and requested a hearing. The case was assigned to me on February 27, 2006. On March 28, 2006, I issued a notice of hearing, scheduling the case for April 12, 2006. It was held as scheduled.

At the hearing, the government provided six exhibits, and Applicant provided two exhibits in addition to the testimony of one witness. Both parties provided one joint exhibit, and I took administrative notice, at the government's request, of 21 U.S.C. § 802 (1970), and 21 U.S.C. § 812 (1970). DOHA received the transcript on April 21, 2006.

At the conclusion of the hearing, I left the record open until April 26, 2006, to allow Applicant the opportunity to submit additional exhibits. On April 24, 2006, Applicant submitted six additional exhibits. Department Counsel did not object to their admissibility, whereupon I marked and admitted them as Exhibits C through H.

**FINDINGS OF FACT**

Applicant's SOR admissions are incorporated into the findings of fact. In addition, I make the following findings of fact.

Applicant is a 57-year-old single man with no children. He earned a bachelor's of science degree in aerospace engineering in 1972, and a master's degree in "reliability and quality control," (2) in 1974. He has been working for the same employer since completing his master's degree, and has held a security clearance for that entire time.

Over the years, Applicant's has performed his job in an exemplary manner. His employer characterizes him as one of the finest engineers in their organization. (3) He serves as a mentor to many of the younger engineers.

Shortly after obtaining his master's degree in 1974, Applicant began smoking marijuana. According to a signed, sworn statement executed in November 2002, he smoked it five times that year, and continued to smoke it approximately two to three times per year until 2002, when he quit due to health concerns. (4) Most of his marijuana usage occurred at parties. He occasionally purchased it, spending approximately \$50.00 per purchase.

At the hearing, Applicant testified that he used marijuana only five times in his life. When asked to reconcile the discrepancy between the number of times he described in the signed, sworn statement, and the number to which he testified at the hearing, Applicant stated he was tired when he completed the signed, sworn statement, and "did a very poor job of proofreading it." (5) I find that Applicant smoked marijuana with a degree of frequency as described in his signed, sworn statement.

In the late 1980s, Applicant entered into a partnership with three real estate developers to build storage-unit complexes. Under the terms of the partnership agreement, he was to provide approximately \$40,000 of investment capital in exchange for a percentage of return on any future profit. Shortly thereafter, the developers told him the venture lacked the necessary investment capital to succeed, and that they could generate the needed capital by purchasing a motel near the projected storage facility. Applicant agreed, and the developers purchased the motel through the partnership. Later, he discovered that the entire business venture was a scam. The developers embezzled all of his investment capital and the motel's profits, leading to the eventual failure of the business. As a result of this scam, Applicant remained embroiled in litigation for the next 10 years.

Among the issues related to this scam that Applicant has litigated were seven state tax liens on revenue that the motel generated between 1991 and 1994. Applicant contended that he should not be individually subject to these revenue tax liabilities because the partnership accrued them. Recently, Applicant's attorney obtained a confirmation from a state auditor that all of the liens, including those alleged in the SOR had expired, rendering any further litigation moot. (6) Applicant is now working with his attorney to remove these liens from his credit reports.

The outstanding liens listed in the SOR totaled approximately \$6,400. Applicant has no delinquent debt, earns a salary of approximately \$138,000 per year, has \$700,000 in savings, and has approximately \$400,000 of equity in his home.

## **POLICIES**

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into Disqualifying Conditions (DC) that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information, and Mitigating Conditions (MC) that may be considered in deciding whether to grant an individual's eligibility for access to classified information.

An administrative judge need not view the adjudicative guidelines as inflexible 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 and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct;

(3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future.

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

**Drug Involvement - Guideline H:** 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.

**Personal Conduct - Guideline E:** Conduct involving questionable judgment

untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

**Financial Considerations - Guideline F:** An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The pertinent disqualifying and mitigating conditions are discussed in the conclusions below.

Since the protection of the national security is the paramount consideration, the final decision in each case must be reached by applying the standard that the issuance of the clearance is "clearly consistent with the national interest."<sup>(7)</sup> In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

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 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. 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.

Applicant's loyalty is 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."

## CONCLUSIONS

### **Drug Involvement**

Applicant used marijuana approximately two to three times per year for nearly 30 years. On some occasions, he purchased it. DC 1<sup>(8)</sup> and DC 2<sup>(9)</sup> apply.

I have considered all of the mitigating conditions and conclude that none apply. Under the whole person concept, Applicant was a mature adult when he began smoking marijuana, who used it while he possessed a security clearance. His decision to stop was motivated by its potential health risks rather than its illegality, and his hearing testimony contradicted his signed, sworn statement regarding the extent to which he had used it in the past. Although Applicant has not smoked marijuana in four years, I am unable to conclude that the risk of recurrence is sufficiently minimal to alleviate the security concern. Applicant has not mitigated the Drug Involvement security concern.

## **Personal Conduct**

For the reasons set forth above, I conclude Applicant has also not mitigated the Personal Conduct security concern.

## **Financial Considerations**

As of November 2005, Applicant had two outstanding state tax liens against his property for delinquent business taxes. DC 1 [\(10\)](#) and DC 3 [\(11\)](#) apply.

These debts arose from a failed business venture in which Applicant was swindled by unscrupulous partners. He retained an attorney and contested these debts, arguing both that he was swindled, and that they accrued in his business capacity rather than his individual capacity. His attorney recently confirmed the liens are no longer valid. He is a wealthy man with no delinquent debts. MC 1, [\(12\)](#) MC 3, [\(13\)](#) and MC 6 [\(14\)](#) apply.

Applicant mitigated the financial considerations security concern.

## **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 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

Paragraph 2: Guideline E AGAINST APPLICANT

Subparagraph 1.a.: Against the Applicant

Paragraph. 3: Guideline F FOR APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: 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.

Marc E. Curry

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

2. Tr. at 38.

3. Exhibit C, Supervisor's Reference Letter, dated April 13, 2006.
4. Exhibit 4, Applicant's Statement, dated November 25, 2002, at 1-2.
5. Tr. at 41.
6. Exhibit B, Letter to Applicant from his Attorney, dated March 9, 2006.
7. *See generally*, Directive, Sec. 2.3., Sec. 2.5.3., Sec. 3.2., and Sec. 4.2.
8. Any drug abuse.
9. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.
10. A history of not meeting financial obligations.
11. Inability or unwillingness to satisfy debts.
12. The behavior was not recent.
13. The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation).
14. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.