

DATE: October 12, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 06-03795

DECISION OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This 25 year old Applicant used Marijuana from 2000 until at least September 2005. He has stated that he stopped using Marijuana, and he will not use it in the future. However, he never informed the Government when he last used it. Because of the recency of his Marijuana usage, and because in his SCA (Security Clearance Application), dated September 22, 2005, he indicated that he intended to continue using Marijuana, it is too soon to determine that Applicant will not use Marijuana in the future. Mitigation has not been shown. Clearance is denied.

STATEMENT OF THE CASE

On April 27, 2006, the Defense Office of Hearings and Appeals (DOHA), under 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 under Guideline H (Drug Involvement) 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 conduct proceedings and determine whether clearance should be granted or denied.

In a signed and sworn statement, dated May 18, 2006, Applicant responded to the SOR allegations (RSOR). He requested that his case be decided on the written record in lieu of a hearing.

On June 19, 2006, Department Counsel prepared the Department's written case. A complete copy of the File of Relevant Material (FORM) was provided to Applicant, and he was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did submit a response to the FORM. The case was assigned to this Administrative Judge on October 10, 2006.

In the FORM, Department Counsel offered five documentary exhibits (Exhibits 1-5), which have been admitted without objection. Applicant offered one documentary evidence (Exhibit A) which has also been admitted without objection into the record.

FINDINGS OF FACT

The Government opposes Applicant's request for a security clearance, based upon the allegations set forth in the SOR. The SOR contains five allegations, 1.a. through 1.e., under Guideline H (Drug Involvement). Applicant denied 1.a., and he admitted all of the other SOR allegations. The admitted allegations are incorporated herein as findings of fact.

In the FORM, Department Counsel moved to amend allegation 1.e., to remove the language indicating that Applicant was entitled to a waiver in a meritorious case, because a waiver does not apply under 10 U.S.C. 986 (c)(2). There being proper grounds for the stated amendment and no objection raised by Applicant to this proposed amendment, the amendment to allegation 1.e. is granted.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR and the admitted documents, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 25 years old. He is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 (Guideline H - Drug Involvement)

The Government alleges in this paragraph that Applicant is ineligible for clearance because it states that he has used illegal substances.

1.a. In his SCA, (Exhibit 4), dated September 22, 2005, Applicant stated that he has used Marijuana from May 2000 to the present, and he estimated that he used it 90 times. In his RSOR, he averred that he decided not to use Marijuana in the future, but he never gave any indication when, if at all, he actually stopped using Marijuana (Exhibit 3). Despite the fact that Department Counsel raised, in the FORM, the issue that Applicant had not indicated when he stopped using Marijuana, Applicant again failed to address this question in his response to the FORM (Exhibit A). Therefore, there is no way to know when Applicant stopped using Marijuana. Even if the RSOR is to be taken as credible, all that can be ascertained is that on some date before May 18, 2006, Applicant no longer used Marijuana. Based on the fact that at the time Applicant completed his SCA, he planned to continue using Marijuana in the future, and that he may have used it as recently as May 17, 2006, it is far too soon to determine that he will not use Marijuana in the future.

1.b. Applicant used Vicodin, that had been prescribed to a friend, in October 2003.

1.c. Applicant used Ecstasy (MDMA) on approximately three occasions during the years 2000 and 2001.

1.d. Applicant purchased Ecstasy (MDMA) on approximately three occasions during the years 2000 and 2001.

1.e. In this paragraph the Government argues that under 10 U.S.C. 986, Applicant is disqualified from having a security clearance granted or continued, because he is currently continuing to use Marijuana. Since the evidence indicates that Applicant is not using any illegal substance at this time, 10 U.S.C. 986 does not apply in this case.

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence.

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in acts of alcohol abuse and conduct that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be

a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

CONCLUSIONS

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

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance.

Paragraph 1 (Guideline H - Drug Involvement) With respect to Guideline H, the Government has established its case. Applicant's improper and illegal drug abuse, including the possession, and use of Marijuana and Ecstasy and the

purchase of Ecstasy is of concern, especially in light of his desire to have access to the nation's secrets. Applicant's overall conduct pertaining to his illegal substance abuse clearly falls within Drug Involvement Disqualifying Condition (DC) (E2.A8.1.2.1.), any drug abuse, and DC (E2.A8.1.2.2.), illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.

Because Applicant last used Marijuana in at least 2005 or possibly 2006, I can not conclude that Applicant's conduct comes within Mitigating Condition (MC) (E2.A8.1.3.1), the drug involvement was not recent. While MC (E2.A8.1.3.3.), Applicant's stated intention not to continue using Marijuana in the future, could be argued to apply, I find that it is too recent after his last usage to find that this MC is controlling.

In this case, the Government has met its initial burden of proving by substantial evidence that Applicant has used illegal drugs under Guideline H. Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's case against him. Accordingly, Paragraph 1 Guideline H of the SOR is concluded against Applicant.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: For 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.

Martin H. Mogul

Administrative Judge