

DATE: December 29, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 06-05736

**DECISION OF ADMINISTRATIVE JUDGE**

**ROBERT J. TUIDER**

**APPEARANCES**

**FOR GOVERNMENT**

Eric Borgstrom, Esq., Department Counsel

**FOR APPLICANT**

*Pro se*

**SYNOPSIS**

Applicant was unable to overcome security concerns raised by his 20-year admitted use of marijuana. Clearance is denied.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On June 12, 2006, DOHA issued a Statement of Reasons (SOR) <sup>(1)</sup> detailing the basis for its decision—security concerns raised under Guideline H (Drug Involvement) of the Directive. Applicant answered the SOR in writing on June 26, 2006, and elected to have a hearing before an administrative judge.

Department Counsel indicated he was ready to proceed on August 8, 2006, and the case was assigned to me August 9, 2006. On September 18, 2006, DOHA issued a notice of hearing scheduling the case to be heard on October 4, 2006. On September 22, 2006, DOHA issued an amended notice of hearing changing the location of the hearing, but leaving the date the same. The case was conducted as scheduled to consider whether it was clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The government offered two exhibits, which were admitted without objection as Government Exhibits (GE) 1 and 2. The Applicant offered eight documents, which were admitted without objection as Applicant Exhibits (AE) A through H. DOHA received the transcript on October 18, 2006.

**FINDINGS OF FACT**

Applicant's partial admissions to the SOR allegations are incorporated as findings of fact. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

At his hearing, Applicant testified and I found him to be a credible witness.

Applicant is a 36-year-old man, who is employed for a defense contractor as a member of technical staff, level III - digital signal processing engineer. He has held that position since September 2005. Applicant has been married to his wife since August 1997, and they do not have any children. Applicant seeks a security clearance for the first-time.

Applicant was awarded a bachelor of science degree, majoring in electrical engineering, in May 1992, and was awarded a master of science degree in electrical engineering in May 1995. After completing his master's degree, he pursued a Ph.D. in electrical engineering, and passed his Ph.D. qualifying examination. He is one class and a dissertation away from being awarded his Ph.D. Tr. 60. He did not complete his Ph.D. because he was offered his present job, which he views as "an unprecedented opportunity." Response to SOR.

Applicant admitted having used marijuana, at least one or two times a year, from approximately September 1985 to July 2005. He used marijuana more frequently while in college, sometimes up to once a week. He occasionally purchased marijuana for his own use, and obtained marijuana from friends on other occasions. The last time he claimed he smoked marijuana was in July 2005, at home with a friend.

In September 2005, he received a formal offer from his present employer. The letter, among other things, advised they were a drug free workplace. AE 3(a). Also, in September 2005, he completed and signed his security clearance application. GE 1. His admitted use of marijuana led to further inquiries.

In December 2005, Applicant was interviewed by an Office of Personnel Management (OPM) contract investigator, and provided an unsworn statement. The investigator testified at Applicant's hearing and stated he began working as an investigator in May 2004 after going through a two-week training course followed by working for an experienced investigator for two weeks. Tr. 15. Subsequent to his initial training, the investigator also received one week of additional classroom training and undergoes annual "check rides" from his supervisor. Tr. 16. He estimates he handles about 20 to 25 cases per month. Tr. 17. As an investigator, he typically takes handwritten notes during an interview and transcribes those notes within one to two weeks never altering his handwritten notes. Tr. 18.

Included in the Applicant's Personal Subject Interview was the sentence, "However subject admits that he plans on using it (marijuana) again." Also, "Subject's future intentions toward his marijuana usage is that he would like to continue to smoke it one to two times a year." GE 2, p. 2. and p.3. These statements formed the basis of SOR ¶¶ 1.d., and 1.e.

Applicant strongly disagrees with these statements. At his hearing, he testified:

"It says "The subject admits that he plans on using it again." That statement is really a speculative one, if I - this is going back, you know, six months or more but my recollection of the event was that what I had said was that I didn't - that if wasn't forbidden by rules that I would like to have the option of, you know, being to make, you know, normal life decisions going forward, and that - that not that I had any specific plans and that he must - he (investigator) presumably misinterpreted it, during the note taking process, and so I never - and I specifically made a note that I would be willing to permanently cease, indefinitely, usage of any sort of it was forbidden by the process of getting a security clearance."

"So part of that point - I really had no - nothing in my mind about what I planned to do in the future, it was more just a statement of - that I didn't really have any plans at all, that I would just - but I would assume that life might, you know, that if life didn't change because of new rules imposed on me, that, you know, potentially I might have continued but that's really - that would really be entirely speculation, I had no specific - I didn't like plan that day to go out and smoke that night or something like that, it wasn't anything - and I since haven't so I think that's sort of a - you know a moot point." Tr. 63-64.

Referring to future marijuana usage, Applicant stated, "So I assert that I had no - I have no - had no specific plans and the fact that I haven't continued is enough to prove that it would be an incorrect statement, even if - regardless of how it was interpreted." Tr. 65.

The Applicant was not provided an opportunity to review the Personal Subject Interview the investigator prepared. Tr. 28. The investigator had no independent recollection of these statements, but testified he recorded his interview of Applicant accurately. Tr. 29. Consistent with office procedures, the investigator forwarded his notes to his district office

about a month after the interview. The notes were destroyed approximately three months later. Tr. 33.

Applicant believes that marijuana should be legal. He objects to the "government curtailing of personal freedoms when the freedom of others is not impinged." Response to SOR.

Applicant was awarded a patent in April 2004 from the U.S. Patent and Trade Office for developing an error correcting method for digital communications. Tr. 44, AE 1(a). He is an accomplished individual in his field and a published author whose work has been cited in trade publications. Applicant is clearly a valued and innovative employee whose performance evaluations reflect above average performance. AE 1(a) through (d), AE 2 (a) and (b), and AE 3(a) through (k).

### **POLICIES**

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead they are to be applied by administrative judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, administrative judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive. The government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts must have a nexus to an Applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

### **BURDEN OF PROOF**

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." 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 judgment, 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." Executive Order 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.

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. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has the ultimate burden of establishing his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." *See* Executive Orders 10865 § 2 and 12968 § 3.1(b). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, 484 U.S. at 531. Doubts are to be resolved against the applicant.

## CONCLUSIONS

### **Guideline H - Drug Involvement**

In the SOR, DOHA listed five allegations under drug involvement (SOR ¶¶ 1.a. through 1.e.) to include marijuana use covering a 20-year period.

*The Concern:* 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. Directive ¶ E2.A8.1.1.1.

The government established its case under Guideline H to ¶¶ 1.a., 1.b., and 1.c. Applicant admitted these allegations in his Response to the SOR and reaffirmed those admissions during his testimony. Of particular concern is Appellant's 20-years of marijuana use in varying degrees from September 1985 until July 2005.

It is well established that the best indicator of future behavior is past behavior. Per the Applicant, his marijuana use stopped approximately one to two months before he started his present job with his defense contractor employer, and he recently become drug free after using marijuana for 20 years. Applicant offers nothing beyond his assurances that he is drug free and states he continues to remain drug free as a condition of his employment. There is an additional concern raised by Applicant's behavior, namely his choice to ignore laws prohibiting the use of marijuana. Applicant believes marijuana should be legalized. That is his right. However, he took it one step farther and engaged in a pattern of behavior of violating laws which he did not agree with, i.e. the unlawful use and possession of marijuana. He has used marijuana his entire adult life until recently when it become too cost effective to continue. Applicant submitted no evidence from competent medical authority addressing drug physical or psychological dependency. Unfortunately, 20 years of illegal marijuana use is not mitigated with less than one year of claimed abstinence. Further time and additional evidence is needed before granting a clearance to Applicant.

Regarding SOR ¶ 1.d. alleging Applicant's purported desire to use marijuana in the future on an occasional basis, Applicant and the OPM contract investigator differ on what occurred during Applicant's interview in December 2005. Applicant strongly denies making that statement during his unsworn statement. He recalls saying he wished having the option to choose using marijuana. He further stated he was willing to make a commitment to abstain from future marijuana use. The technique employed by the government to memorialize this interview was an unsworn statement recorded by the OPM contract investigator. Applicant did not have the option or opportunity to review the results of his interview. The investigator prepared Applicant's interview results with the use of his handwritten notes, which were later destroyed. Furthermore, the investigator had no independent recollection of Applicant's interview on this point.

A signed, sworn statement would have established accurately what was said during Applicant's interview avoiding the conflict in this case. Weighing Applicant's recall and credibility against the OPM contract investigator's lack of recall and inability to produce source documents, the reliability of Government Exhibit 2 has been called into question enough to effectively challenge its reliability. On balance and weighing all available evidence, I find for Applicant as to SOR ¶ 1.d. Having decided in favor of Applicant on this point, ¶ 1.e. alleging a violation of 10 U.S.C. § 986 is inapplicable. Accordingly I find in favor of Applicant as to SOR ¶ 1.d.

These facts give rise to Drug Involvement Disqualifying Condition (DI DC) ¶ E2.A.8.1.2.1. *Any drug abuse*; and DI DC ¶ E2.A8.1.2.2. *Illegal drug possession, including cultivation, processing, manufacturer, purchase, sale, or distribution*. Applicant's recent lifestyle change is not enough to overcome his 20 years of marijuana use. Accordingly, no Mitigating Conditions are applicable under this Guideline.

Lastly, I have evaluated Applicant applying the "whole person" concept. This decision should not be construed as a determination that the Applicant cannot or will not attain the state of true reform and rehabilitation necessary to justify the award of a DoD security clearance. To the contrary, his noted achievements and accomplishments suggest sound potential for future service in the defense industry. Should Applicant be afforded an opportunity to reapply for a security clearance in the future he may well demonstrate persuasive evidence of his security worthiness. Further time is needed to evaluate Applicant's recent commitment to remaining drug free.

## **FORMAL FINDINGS**

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1. Guideline H: AGAINST APPLICANT

Subparagraphs 1.a. - 1.c.: Against Applicant

Subparagraphs 1.d. - 1.e.: For 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.

Robert J. Tuidor

Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), 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.