

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. 06-09782

**DECISION OF ADMINISTRATIVE JUDGE**

**PHILIP S. HOWE**

**APPEARANCES**

**FOR GOVERNMENT**

James Norman, Esq., Department Counsel

Pamela C. Benson, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant is 35 years old with a fiancée and a child. He works for a defense contractor in the computer software business field. Applicant smoked and purchased marijuana from 1989 to 2006, two days before his interview with a Government investigator. Applicant claims he stopped smoking marijuana through his own will power. Applicant did not mitigate the drug involvement security concern. He is precluded from receiving a security clearance under 10 U.S.C. § 986 (c) (2). 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 July 11, 2006, DOHA issued a Statement of Reasons <sup>(1)</sup> (SOR) detailing the basis for its decision-security concerns raised under Guideline H (Drug Involvement) of the Directive. Applicant answered the SOR in writing on August 7, 2006 and elected to have a hearing before an administrative judge. The case was assigned to me on September 19, 2006. On October 13, 2006, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government and the Applicant submitted exhibits that were admitted into evidence. DOHA received the hearing transcript (Tr.) on October 31, 2006.

**FINDINGS OF FACT**

Applicant's admissions to the SOR allegations are incorporated as findings of fact. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following additional findings of fact:

Applicant is 35 years old, engaged to be married and with a five month old child. He works for a defense contractor as the manager of the product team. Applicant earned a bachelor's degree in accounting in 1994. He received a masters

degree in business administration (MBA) in 1996, and in 1999 and 2000 he obtained additional education to be a software engineer. He received a promotion and raises from his employer for his work performance. Applicant got very good evaluations from his employer. (Tr. 32-48, 56; Exhibits C-N)

Applicant started smoking marijuana in 1989 and continued doing so until January 14, 2006, when he claims he ceased using it. He used it frequently in college. He stopped using it from 1996 to 2000, in part to see if he could get a 4.0 grade in graduate school. He did get his 4.0 grades. He resumed smoking marijuana in 2000, using it a few times a month. He continued using it at that rate until January 2006. He claims he stopped using marijuana in January 2006 through the use of his will power, not with any professional treatment or evaluation. From 1989 to 2006 Applicant purchased marijuana for his use. Applicant arranged his own drug test on October 5, 2006, that showed he did not have the presence of cannabis or cocaine in his body that day. (Tr. 31, 49-58, 60-67; Exhibit B, D)

Applicant used cocaine 12 times while in college from 1989 to 1991. He has not used it since then. (Tr. 30, 68)

Applicant did not smoke marijuana during his work hours. His employer had a drug free workplace policy during the time Applicant has worked for him. Applicant has not disclosed his marijuana use to his employer and supervisors, and preferred that they not know of his illegal drug use. Nor did he disclose to his employer the purpose or issues in this hearing. His parents do not know he smoked marijuana. His fiancée knows he smokes marijuana. (Tr. 51-56)

Applicant considers his illegal drug use to be a mistake and the result of terrible judgment. He denies he is a drug addict, but has no professional evaluation to support his personal opinion on any possible dependence or addiction he has to illegal drugs. (Tr. 50, 57, 58, 67)

Applicant used marijuana after he completed his security clearance application (SCA) on October 25, 2004. He knew the Government had a concern about illegal drug use, but Applicant continued to use marijuana until January 14, 2006, two days before he had an interview with a Government investigator. On the SCA Applicant listed his drug use for 2000 to 2004, not going back to 1997 as part of the seven-year period requested by the Question 27 concerning illegal drug use. In answer to Question 29 regarding purchase of illegal drugs in the past seven years, Applicant answered "no", when in fact he had purchased marijuana in that time period for his own use. (Tr. 59-64)

Applicant's work or school performance was affected by his drug use. Using marijuana made him sleepy. He stopped using illegal drugs while working on his MBA so he could try to improve his academic performance and get a 4.0 grade average. (Tr. 55, 62, 63)

## POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information with Industry*

§ 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

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. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline that must be carefully considered in making the overall common sense determination required.

In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. Those assessments include: (1) the nature, extent, and seriousness of the conduct;

(2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 (See Directive, Section E2.2.1. of Enclosure 2). Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. See Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996). All that is required is proof of facts and circumstances that 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. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at \*\*6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. See Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance. ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "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. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. See Exec. Or. 12968 § 3.1(b).

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: *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. E2.A8.1.1*

10 U.S.C. § 986 (c) (2) disqualifies any person who "is an unlawful user of, or is addicted to, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))".

## CONCLUSIONS

The Government established by substantial evidence and Applicant's admissions each of the allegations in the SOR. The evidence shows Applicant used marijuana between 1989 and 2006 several times per month, except for the 1996 to 2000 period. From 1989 to 1991 he used cocaine approximately 12 times. Disqualifying Conditions (DC) 1 (Any drug abuse. E2.A8.1.2.1) and DC 2 (Illegal drug possession, including purchase. E2.A8.1.2.2) apply.

I considered all the Mitigating Conditions (MC) under the drug involvement security guideline. The only one that might apply is MC 3 (A demonstrated intent not to abuse drugs in the future. E2.A8.1.3.3). Applicant stopped his drug use in 1996 only to resume it in 2000. He claims he stopped using marijuana on January 14, 2006, through the use of his will power and without any professional evaluation or treatment. I am not persuaded that he will not use illegal drugs in the future based on his 17-year record of illegal drug use. I do not find his explanation credible or persuasive that will power alone made him stop using marijuana, considering he used it for two years after completing his SCA and while working in a company with a drug free policy. During this time he also worked on government contracts or projects and knew the government had a policy against illegal drug use. Therefore, no MC apply.

The "whole person concept" I conclude against Applicant. He knowingly used illegal drugs between 1989 and 2006, especially while working for a company that had a drug free workplace policy. He used it while working on government projects. He used it after 2004 when he completed his SCA and answered Questions 27 and 29 about illegal drug use, knowing that the government had a security concern about illegal drug use. He did not make the full disclosure required in answer to Question 29. His explanation of why he did not disclose his use is not persuasive. He had a selfish motivation for smoking marijuana. He did not convince me that he would not resume drug use in the future. He presented no evidence of professional treatment, rehabilitation, or evaluation of his long-term illegal drug use. Based on all the evidence, I conclude that Applicant has not mitigated the drug involvement security concerns. I also conclude that the Smith Amendment 10 U.S.C. § 986 precludes Applicant from obtaining a security clearance because he is an unlawful user of marijuana, and his long-term use shows he may be addicted to it.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline H: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against 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.

Philip S. Howe

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 (Directive).