

November 14, 1996

---

In Re:

SSN:

Applicant for Security Clearance

---

ISCR OSD Case No. 95-0863

**DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL KIRKPATRICK**

**APPEARANCES**

**FOR THE GOVERNMENT**

Teresa A. Kolb, Esq.

Department Counsel

**FOR THE APPLICANT**

*Pro Se*

**STATEMENT OF THE CASE**

On November 14, 1995, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued the attached Statement of Reasons (SOR) to (Applicant), which 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 the Applicant, and which recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

Applicant responded to the SOR in writing on December 22, 1995, and in his Answer he elected to have the case determined on a written record in lieu of a hearing. Department Counsel submitted the Government's File of Relevant Material (FORM) to Applicant on February 13, 1996. The Government submitted ten items in support of its contentions. Applicant was instructed to submit information in rebuttal, extenuation or mitigation within 30 days of receipt. Applicant received the FORM on February 21, 1996, and he submitted no additional material for consideration.

The case was assigned to the undersigned for resolution on October 11, 1996.

**FINDINGS OF FACT**

Applicant admitted the material facts alleged in SOR subparagraphs 1.a., 1.c., 1.d., 1.e., and 1.f., and those admissions are hereby incorporated herein as findings of fact. The following additional findings of fact are entered as to each paragraph and subparagraph in the SOR:

Applicant is 35 years old, and he is employed as a ----- by a defense contractor. He has had a secret-level Department of Defense security clearance since ay 9, 1984, and he seeks to retain his security clearance. He is married, and he has a daughter.

Paragraph 1 (Criterion N - Drug Abuse). The Government alleges that Applicant is ineligible for clearance because he has used marijuana.

With respect to SOR Subparagraph 1.b., Applicant has denied that he purchased marijuana in 1978. Department Counsel states on page 2 of the FORM that she is not offering any evidence to prove that allegation, so SOR Subparagraph 1.b. will be found in favor of Applicant.

With respect to the other factual allegations of the SOR, all of which pertain to Applicant's use of marijuana, I find that Applicant first used marijuana in approximately 1978 or 1979. From that time until approximately 1981 he smoked marijuana with a frequency of "once per month or maybe once every other month." (Item 8.) He did not use marijuana at all from 1981 until 1990. From 1990 to February of 1995, Applicant smoked marijuana "once every three to six months," at parties or social gatherings. (Item 8.) The last time that he smoked marijuana was on February 4, 1995, and he has no intention of ever smoking marijuana again. He has never purchased, sold, or distributed marijuana. He has never used any other illegal drugs. (Item 8; Answer to SOR.)

On February 6, 1995, Applicant was tested in his employer's random drug testing program, and he tested positive for the active ingredient in marijuana. As a result, his employer suspended him for ten days without pay. (Items 8, 9, and 10; Answer to SOR.)

Seven days later, on approximately February 13, 1995, Applicant returned to work "in hopes of being tested again and testing clean." (Item 8.) He was tested again, but the test still revealed the lingering presence of the active ingredient in marijuana, resulting in Applicant being suspended for fifteen days without pay, and further resulting in his being referred to his employer's Employee Assistance Program (EAP). (Item 8; Answer to SOR.)

Applicant's EAP counselor referred him to a hospital mental health center for counseling pertaining to use of marijuana. Applicant cooperated in that program, attended all of the counseling sessions, viewed films, read the books, and completed his workbook. He received counseling from March 8, 1995 to March 23, 1995. He successfully completed the program, and he was "reinstated at work." (Items 8 and 10; Answer to SOR.)

Paragraph 2 (Criterion I - Poor Judgment). The Government alleges that the information presented under Criterion N will also support adverse findings of poor judgment and unreliability under Criterion I. Accordingly, the findings entered as to Paragraph 1 are incorporated herein and will be considered in determining the issues under Paragraph 2 as well.

Mitigation. In February of 1995, Applicant cooperated in, actively participated in, and successfully completed a drug information and treatment program. Applicant has not used marijuana at all during the past nineteen months, and he states that he will never use marijuana again. Prior to February of 1995, his use of marijuana was very infrequent.

## POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines and policies for determining eligibility for access to classified information, and these guidelines must be given consideration in making security clearance determinations. The following adjudicative guidelines and policies are found to be applicable in this case:

### Criterion N (Drug Abuse)

#### Disqualifying Factors

1. Abuse of cannabis only, not in combination with any other substance.
- b. Occasional abuse, defined as an average of not more than once a month.

#### Mitigating Factors

1. Abuse of cannabis only, as follows: (Use this to assess Disqualifying Factor 1.)

b. Occasional abuse of cannabis, which occurred more than 12 months ago, and the individual has demonstrated an intent not to use cannabis or any other narcotic, dangerous drug or psychoactive substance in the future.

### Criterion I (Poor Judgment)

Criterion I is not supplemented by specific adjudicative factors in Enclosure 2 of the Directive. However, the general adjudication policies expressed at Paragraph F.3. of the Directive have been considered as to each criterion in this case, to include Criterion I. The F.3. factors are set forth below:

"3. Each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate:

a. Nature and seriousness of the conduct and surrounding circumstances.

b. Frequency and recency of the conduct.

c. Age of the applicant.

d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved.

e. Absence or presence of rehabilitation.

f. Probability that the circumstances or conduct will continue or recur in the future."

In DOHA cases the Government has the initial burden to go forward with persuasive evidence in support of the factual and conclusionary allegations in the SOR. If the Government meets this initial obligation, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficiently persuasive to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance

### CONCLUSIONS

In this case the Government has met its initial burden of proving under Criterion N that Applicant used marijuana occasionally from approximately 1978 to 1981 and from approximately 1990 to February 4, 1995, that such behavior included marijuana usage subsequent to Applicant's being granted a secret level security clearance in 1984, that he tested positive for marijuana on two separate occasions during his employer's randomly conducted drug screening tests in February of 1995, and that he received counseling at a hospital's drug treatment program in March of 1995 for his use of marijuana. The Government has also met its initial burden of proving under Criterion I that such conduct demonstrated poor judgment.

In the defense industry, the security of classified industrial secrets is entrusted to civilian employees who must be counted on to safeguard such sensitive information twenty-four hours a day. Applicant's use of marijuana in the past was clearly incompatible with his security responsibilities, because of the obvious potential for unauthorized disclosure of defense secrets resulting from neglect or misadventure caused by the use of illegal substances.

However, Applicant's marijuana usage was never more than once per month, and there were several years during which he did not use marijuana at all. Applicant has not used marijuana for over a year. He successfully completed a hospital's counseling program for marijuana usage. He has expressed a credible intention to never use marijuana again. Considering all of this information, as well as all of the other evidence in this case, I conclude that Applicant has introduced persuasive evidence in rebuttal, explanation, or mitigation which is sufficient to overcome the Government's case against him. I conclude that Applicant's occasional use of marijuana has been mitigated by the passage of time, and

that it has no present adverse security clearance significance.

On balance, it is concluded that Applicant has overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for Applicant as to the factual and conclusionary allegations expressed in the Government's Statement of Reasons.

For the reasons stated, I conclude that Applicant is suitable for access to classified information.

### **FORMAL FINDINGS**

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

Paragraph 1. Criterion N: For the Applicant.

Subparagraph 1.a.: For the Applicant.

Subparagraph 1.b.: For the Applicant.

Subparagraph 1.c.: For the Applicant.

Subparagraph 1.d.: For the Applicant.

Subparagraph 1.e.: For the Applicant.

Subparagraph 1.f.: For the Applicant.

### **DECISION**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Michael Kirkpatrick

Administrative Judge