

Date: March 27, 1997

In re:

SSN: -----

Applicant for Security Clearance

DOHA Case No. 96-0316

REMAND DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR THE GOVERNMENT

Claude R. Heiny, Esq..

Department Counsel

FOR THE APPLICANT

Pro Se

REMAND ORDER

On February 24, 1997, the Appeal Board (Board) issued a Decision and Order for Remand (Remand) in this case after Department Counsel appealed the decision originally issued on October 25, 1996, where, in light of all the circumstances presented in the case, it had been found to be clearly consistent with the national interest to grant or continue the Applicant's security clearance.

The Remand order found two errors: (1) my interpretation and reliance on the Appeal Board's decision in DISCR Case No. 88-2297 which the Board concluded was "unwarranted and untenable" and (2) my piecemeal analysis of Applicant's past drug use which the Board concluded was "inconsistent with the 'whole person' concept required by the Directive."

On the other hand the Board did not find my credibility determination, also challenged by Department Counsel, was arbitrary, capricious, or contrary to law. Consequently, I reissue the following decision that does not rely on the aforementioned case and which does analyze the Applicant's past drug use in its entirety, consistent with the 'whole person' concept required by the Directive and the Board.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant on May 8, 1996. (Copy attached.) The SOR detailed reasons why the Government could not make the preliminary affirmative finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.⁽¹⁾ The SOR consists of allegations based on Criterion H (drug involvement) in paragraph 1. Applicant responded to the allegations set forth in the SOR in a written Answer, dated May 28, 1996. He chose to have a hearing. On July 9, 1996, this matter was assigned to me to decide whether or not it is clearly consistent with the national interest to grant or

continue a security clearance for Applicant.

On July 22, 1996, a Notice of Hearing set the hearing for August 8, 1996, a date which had been agreed to earlier. At the open hearing the exhibits were admitted through a Stipulation; the Government submitted two exhibits [Government's Exhibits ("GE") 1 through 2]. The Applicant testified, had five other witnesses, and submitted two documents [Applicant's Exhibits ("AE") A through B.] The transcript, initially received on August 23, 1996, was reviewed by the Applicant who notified me on September 6, 1996, that it had numerous errors. Consequently, we asked that a corrected transcript be prepared which I received on October 3, 1996. After Applicant notified me on October 7, 1996, of additional errors on five pages, corrected pages were re-transcribed which I received on October 16, 1996.

FINDINGS OF FACT

The Applicant admitted the factual allegations contained in subparagraphs 1.a, 1.b, 1.d, 1.e, 1.f, 1.g, 1.h, and 1.i. of the SOR; his admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional Findings of Fact:

The Applicant is a 26-year old employee of a defense contractor who started work there on July 31, 1995, and works as a ----- in a ----- department. He now seeks a top secret clearance. TR 9, 29, 60, 66.

Applicant was asked to fill out a National Agency Questionnaire (NAQ) on August 21, 1995, where he revealed his drug use and purchases: cocaine in May 1986, once; LSD in 1987-88, three times; hashish in 1985 to 1988, ten times; and marijuana use from 1985 to May 1995, initially daily until 1988, then three times per week until 1990, one time per week until 1993 and two to three times per month until March 1995. Applicant stated he had no intent to use any illegal substance in the future. He purchased marijuana from 1986 to 1995 approximately ten times for personal use only, but had no intent to purchase in the future. GE 1.

On December 27, 1995, he provided a Statement to a DIS agent and stated that he had forgotten to list on his NAQ his one time use of methamphetamine in high school but that he would not use methamphetamine, cocaine, LSD or hashish in the future. Applicant last used marijuana in October 1995 on a camping trip and declared that he had "used marijuana responsibly in the past and will continue to use it responsibly in the future." He explained that since he had used marijuana since he completed the NAQ, it was "more truthful to state that I will use marijuana in the future." GE 2. In 1995 he used marijuana once a month. TR 72. But, after he realized the security significance, he decided not to use marijuana in the future. Answer; TR 64-65. He has no intention of smoking marijuana or taking any other illegal drugs in the future. TR 55. He has been offered marijuana from friends and has declined it since October 1995 on ten to fifteen occasions. TR 57. He interpreted the company drug policy to prohibit drug use at the work place, but not to regulate use in social settings. TR 58-59.

Applicant's karate teacher who has known him for two years and also knows him socially recommended him for a position of trust. This teacher finds him to be a dedicated student who works hard and is a role model for the younger students. He works in a volunteer program to promote women's self-defense. TR 20-24. He did not know about Applicant's drug use until he asked the teacher to testify, but he has never seen him use any drugs. TR 25-26.

A co-worker who became his supervisor three months ago and has known him for a year recommends him for a position of trust. This supervisor described Applicant's work as accurate, timely and of the highest caliber. He described Applicant as someone who seeks challenging work. TR 28-31. He explained that the company does not do drug testing but does not permit use of marijuana. He was not aware that Applicant had use marijuana four times since joining the company. TR 31-33.

A friend and co-worker who has known him two years has never seen Applicant use drugs and recommended him for a position of trust. TR 34-36.

The company security manager (FSO) has only known Applicant through work, but is impressed with his work ethic which he finds extraordinary as Applicant is always on time and always works late. The FSO recommends him for a position of trust. TR 37-39. The company has a policy that there will be no drug-related activity in the facility; if he had known about Applicant's past drug use, he would not have recommended him for employment. TR 40-41.

The company vice-president who is a retired foreign service officer and supervises Applicant's manager recommends Applicant for a position of trust. He sees Applicant on a daily basis and interacts with him frequently. This vice-president finds Applicant dependable as he is at work on time every day and his work products are outstanding; he works on jobs beyond the normal operating hours to meet schedules to make delivery to the government agency for whom they contract. He has included Applicant in the corporate "-----" just released as a token of his appreciation for Applicant being one of the company's better employees. He did not know of Applicant's past drug use until one week before the hearing; also, he did not know about the extent of Applicant's drug use. Any drug use would be against company policy. TR 42-53; AE A at 3..

Applicant's Reports of Investigation (only submitted in part) revealed favorable references from former employers and friends as well as a favorable FBI check. AE B.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. But the mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole in evaluating this case, I weighed relevant Adjudicative Guidelines as set forth below :

Criterion H: Drug Involvement

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.

Drugs are defined as mood and behavior altering:

- (a) drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens) and
- (b) inhalants and other similar substances.

Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

Conditions that could raise a security concern and may be disqualifying include:

- (1) any drug abuse (see above definition);

Conditions that could mitigate security concerns include:

- (1) the drug involvement was not recent;
- (2) the drug involvement was an isolated or infrequent event;
- (3) a demonstrated intent not to abuse any drugs in the future.

The burden of producing evidence initially falls on the Government to establish a case which demonstrates that it is not clearly consistent with the national interest to grant or continue access to classified information. If the Government meets its burden, the heavy burden of persuasion then falls to 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 that it is clearly consistent with the national interest to grant or continue the clearance. Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In

reaching the fair and impartial overall common sense determination, the Administrative Judge may only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and facts, and having assessed the credibility and demeanor of those who testified, I conclude that the Government established its case with regard to Criterion H. Applicant did use and purchase drugs: methamphetamine once in high school; cocaine in May 1986, once; LSD in 1987-88, three times; hashish in 1985 to 1988, ten times; and marijuana from 1985 to October 1995. It is not to his credit that his marijuana use continued for four months after he began work for a defense contractor when he should have understood the security significance of any drug use. He was clearly on notice by his NAQ that the government considered drug use a security-related concern. Also troubling is Applicant's initial stated intent not to use drugs again, coupled with his later admission to DIS that he did use again until October, 1995, along with his defense to DIS that he would "continue to use it responsibly in the future." He further explained that since he had used marijuana since he completed the NAQ, it was "more truthful to state that I will use marijuana in the future." This drug history and his statement of intent to use in the future caused legitimate concern over his eligibility for a security clearance. Applicant clearly falls within Criterion H: Drug Involvement, as detailed in the Adjudicative Guidelines in Enclosure 2 to the Directive, within Disqualifying Condition (DC)(1) as "any drug abuse" creates a security concern.

On the other hand, the security policy also allows for Mitigating Conditions (MC), considerations that could allay a security concern. To mitigate under the Directive as amended by Change 3, three conditions are delineated: (1) the drug involvement was not recent; (2) the drug involvement was an isolated or infrequent event; (3) a demonstrated intent not to abuse any drugs in the future. While the previous Drug Abuse adjudication policy guidance was extremely detailed as to time frames and applied different standards as to whether cannabis was used alone or in combination with other drugs and whether the abuse was experimental, occasional, frequent, regular, or compulsive, Change 3 guidance gives no such detailed requirements. Thus Change 3 gives the adjudicator general guidance without requiring mathematical precision as to number of drugs used and frequency.

Indeed, at the time he applied for a security clearance, Applicant's use of cocaine, LSD and hashish was dated, and his use of marijuana had declined, but not ceased. While I am concerned that after he joined a defense contractor on July 31, 1995, Applicant used marijuana on four occasions, I accept his explanation that he thought the drug policy only prohibited use in the work setting. Significantly, during this 1995 period he did not have a security clearance but was seeking a clearance. Applicant explained that he initially understood the drug policy to be that there will be no drug-related activity in the facility, which conforms with the FSO's explanation of the company drug policy. But the FSO made clear that had he known about Applicant's past drug use, he would not have recommended him for employment. However, Applicant did not conceal this past use of drugs either on his NAQ or to a DIS agent. On the other hand Applicant has a duty to the government to fully revealed his drug use, so that factor cannot be a basis for mitigation. While initially to DIS he even claimed that he could use marijuana "responsibly" in the future, the record evidence establishes that even when he made that statement at that time he had in fact already stopped using marijuana. In 1995 he reduced his marijuana use to once a month and stopped altogether in October 1995, significantly, seven months before he received his SOR and ten months prior to the hearing.

The Board has made clear in its remand order that the "whole person" test is to be applied and that it is impermissible to look at drug use piecemeal. In evaluating the "whole person" I find it significant that his use of drugs, other than marijuana, was as a teenager, between 16 and 18, and was limited to one time use of cocaine, three-time use of LSD, one-time use of methamphetamine, and ten-time use of hashish, which ceased altogether in 1988, eight years prior to the hearing. Equally significant, his marijuana use continued for ten years, but even that use declined as he matured from daily use as a teenager, to weekly use in his early twenties, to use once a month in 1995 until he stopped all use of marijuana in October 1995. Once Applicant fully understood the security significance of his marijuana use, he reconsidered his actions, and he stopped his drug use totally in October 1995 even before he received his SOR issued on May 8, 1996. Thus, in his favor, at the time of the August 1996 hearing, Applicant had remained drug free for ten months as his last use was in October, 1995, so I conclude that this ten months meets the standards of MC (1) that the drug involvement was not recent. Even under the old mechanical guidelines, occasional abuse could be mitigated after twelve months, and while they no longer apply, they suggest a historical context for a definition of "recent." Clearly, the

intent of the Change 3 guidelines was to give the adjudicator more discretion based on credibility assessments. Here, while it might be a close call based on his shifting responses between his NAQ and his DIS Statement, once he understood the breadth of the drug policy, he stopped using any drugs.

Given his naive honesty to the agent regarding possible future use, I carefully evaluated his new position -- in his answer to the SOR and at the hearing -- that after he realized the security significance, he decided not to use marijuana in the future. Consequently, after weighing all the evidence, I find he has also met C (3) and has demonstrated his intent not to abuse drugs in the future as I find credible his statement that he has no intention of smoking marijuana or taking any other illegal drugs in the future. He testified convincingly that he has been offered marijuana from friends and has declined it since October 1995 on ten to fifteen occasions. Further, five witnesses, both personal and professional, highly praised his character, work ethic, and endorsed him for a position of trust. His karate teacher who has known him for two years socially has never seen Applicant use drugs and endorsed him for a position of trust. Similarly, a co-worker and friend who has known him for two years has not seen Applicant use drugs and recommend him for a position of trust. Further a co-worker who became his supervisor described Applicant's work as of the highest caliber and endorsed him as someone who seeks challenging work. Similarly, impressed with his extraordinary work ethic, the FSO endorsed him for a position of trust. Finally, the company vice-president who sees Applicant on a daily basis was so impressed with the quality of his work and his commitment to work beyond normal operating hours to meet schedules to make delivery of products to the government agency customer, that he featured Applicant in the corporate "-----" to signify his regard for Applicant. He recommended Applicant for a position of trust. While work ethic alone is insufficient to mitigate, I find his favorable work references need careful consideration under the mandated "whole person" analysis and contribute to my overall favorable credibility assessment.

In sum, it has been almost a decade since his teenage experimental use of methamphetamine, cocaine, LSD, and hashish. His use of marijuana dramatically decreased and then totally ceased: he has abstained from any marijuana use for ten months at the time of the hearing. Thus I find his drug use overall was not recent and he falls within MC (1). Even if one should find ten months of abstinence an insufficient time frame, I conclude he falls within MC (2) as his teenage drug use is now dated and his 1995 marijuana use was infrequent. Finally, I find credible his promise that he will not use any drugs in the future and conclude Applicant meets MC (3) as he has now demonstrated his intent not to abuse drugs in the future. I find it improbable that he might continue this use or his use might recur in the future given his stable lifestyle and outstanding employment record and job performance, especially given the high regard with which he is uniformly held by his co-workers and management. Thus applying the "whole person" analysis, I find Applicant is now worthy of the trust and confidence that granting a security clearance requires as I conclude Applicant falls within MC (1), (2), and (3), detailed above.

Consequently, considering all of these factors, and after also considering the factors enumerated in the Adjudicative Process section in Enclosure 2 and in section F.3, and after applying the "whole person" test, I find for the Applicant under paragraph 1 and subparagraphs 1.a. through 1.i.

FORMAL FINDINGS

In reviewing the allegations of the SOR in the context of the Adjudication Policy and the factors set forth under Section F.3. of the Directive, I make the following formal findings:

Paragraph 1. Criterion H: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For Applicant

Subparagraph 1.g.: For Applicant

Subparagraph 1.h.: For Applicant

Subparagraph 1.i.: For Applicant

DETERMINATION

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.

Kathryn Moen Braeman

Administrative Judge

1. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), and as amended by Change 3 dated February 16, 1996.