

November 7, 1996

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In Re:

SSN:

Applicant for Security Clearance

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ISCR OSD Case No. 96-0443

**DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL KIRKPATRICK**

Appearances

FOR THE GOVERNMENT

Melvin A. Howry, Esq.

Department Counsel

FOR THE APPLICANT

*Pro Se*

**STATEMENT OF THE CASE**

On June 19, 1996, 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.

The Applicant responded to the SOR in writing on July 10, 1996. This case was assigned to the undersigned on August 19, 1996, and a Notice of Hearing was issued on August 29, 1996.

A hearing was held on October 10, 1996. During that hearing, the Government called one witness, and presented five documentary exhibits. The Applicant testified on his own behalf, and presented three documentary exhibits. Official notice was taken of the Directive and of Title 21, U.S. Code, Sections 802 and 812.

The transcript was received on October 15, 1996.

**FINDINGS OF FACT**

In his Answer to the SOR, Applicant admitted the material facts alleged in every subparagraph of the SOR, 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 39 years old. He is married. He is a college graduate, having earned a bachelors degree in electrical engineering. He is employed by a defense contractor in the job of -----. He seeks to

retain his secret security clearance in connection with his employment. The Government opposes the Applicant's request for a continued security clearance, on the basis of allegations set forth in the attached Statement of Reasons (SOR).

Paragraph 1 (Criterion H- Drug involvement). The Government alleges that the Applicant is ineligible for clearance because he has had improper or illegal involvement with drugs, thereby raising questions regarding his willingness or his ability to protect classified information, and thereby increasing the risk of unauthorized disclosure of classified information.

Appellant began smoking marijuana when he was in college, from 1975 until 1980. During those years, his frequency of usage was once or twice per month. After he graduated from college, he continued to smoke marijuana once or twice per month until April of 1981, when he was arrested. During that time, he purchased small amounts of marijuana for his personal use. (Govt.Exs. 2 and 3; Tr., p. 18.)

On April 20, 1981, when Appellant was 24 years old, as he went through the boarding procedures for a commercial airline flight, the airport's automatic metal detection equipment was not working, and he was therefore "hand searched." During that search, a small amount of marijuana was found in his possession. He was arrested by the state police, and charged with the misdemeanor offense of possession of a controlled dangerous substance (marijuana). Because Applicant had no previous arrests, and because the amount of marijuana was small, the prosecuting attorney elected not to pursue the charge. The state court records reflect a disposition of "nolle prosequi." (Govt.Exs. 1-4; Tr., pp. 20, 31-32.) He has no other arrests. (Tr, pp. 19 and 33.)

From 1980 until January of 1991 Applicant had a secret-level Department of Defense security clearance. (Answer to SOR; Tr., pp. 20-21, and 25.)

From 1981 to 1984, Applicant smoked marijuana from "once every two months to once yearly." From 1985 to 1991, he smoked marijuana only one or two times. (Govt.Ex. 2; App.Ex. A; Tr., pp. 21, 30.)

From 1992 to February of 1996, Applicant smoked marijuana approximately once per year. (Govt.Ex. 2; App.Ex. A; Tr., p. 21.) The last two times that he smoked marijuana were on June 21, 1995, at his wife's birthday party, and in February of 1996. (Govt.Ex. 2; Tr., p. 29.) The incident in February of 1996, occurred when a friend came to Applicant's home, and offered Applicant a "hit." Applicant did in fact "take a single hit" on that occasion. (Govt.Ex. 2; Tr., pp. 22 and 29.) His use of marijuana in recent years was only on those occasions when it was offered to him at parties. (Tr., p. 18.) Applicant has not used marijuana since February of 1996, and he testified credibly that he does not intend to ever do so again. (Govt.Exs. 1 and 2; App.Exs. A and B; Tr., pp. 22-24, 26-27, and 29.)

In his present employment with a defense contractor, Applicant is subject to random drug testing for marijuana. (App.Exs. B and C; Tr., pp. 23, 26.) As a result of this security clearance proceeding, Applicant has learned that he cannot use marijuana and retain a security clearance or his employment. (App.Ex. B.)

Applicant no longer associates with people who use marijuana. (Tr., p. 22.) He recently moved to ----- from -----, and he now has an entirely new set of business and social acquaintances. These new friends and acquaintances neither use drugs nor condone its use. (Tr., p. 24.) His wife does not smoke marijuana, and she does not condone its usage by Applicant. (Tr., pp. 23 and 28.)

### Mitigation.

All of the information pertaining to Applicant's past use of marijuana was fully and frankly provided by the Applicant himself. He held a security clearance in the past, and has taken his security responsibilities seriously. (Tr., pp. 25-26.) He does not intend to ever use marijuana again, and he now fully understands the consequences of marijuana usage. (Tr., pp. 27 and 29.) He is doing very well at work, and his attendance and work performance are "acceptable, if not excellent." (Tr., p. 28.) He receives high marks on his performance evaluations, and he recently received a raise. (Tr., p. 28.) He has informed both his supervisor and his security officer of this security clearance hearing and its subject matter. (Tr., pp. 28-29.)

### POLICIES

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

#### Criterion H (Drug Involvement)

Conditions which could raise a security concern:

1. Any drug abuse;
2. Illegal drug possession, including ... purchase.

Conditions which could mitigate security concerns:

2. The drug involvement was an isolated or infrequent event;
3. A demonstrated intent not to use abuse any drugs in the future.

In addition, the general adjudication policies expressed at Paragraph F.3. of the Directive and in Enclosure 2 of the Directive have been considered as to each criterion in this case. Enclosure 2 provides, in pertinent part, as follows: "The adjudication process is the careful weighing of a number of variables known as the whole person concept. All available information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. In evaluating the relevance of an individual's conduct, the adjudicator should consider the following factors:

"The nature, extent, and seriousness of the conduct.

"The circumstances surrounding the conduct, to include knowledgeable participation.

"The frequency and recency of the conduct.

"The individual's age and maturity at the time of the conduct.

"The voluntariness of participation.

"The presence or absence of rehabilitation and other pertinent behavioral changes.

"The motivation for the conduct.

"The potential for pressure, coercion, exploitation, or duress.

"The likelihood of continuation or recurrence."

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 a security clearance

#### **CONCLUSIONS**

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 instances of off-duty drug abuse, conduct which may demonstrate poor judgment or unreliability.

The Directive's definition of drug abuse includes the "illegal use of a drug." The Directive defines "drugs" to include those mood and behavior altering drugs identified and listed in the Controlled Substances Act of 1970, as amended, and marijuana is identified and listed both in that statute and in the Directive itself. Applicant's past use of marijuana therefore falls within the Directive's definition of drug abuse, and raises a security concern. In this case the Government has therefore met its initial burden of proving under Criterion H that the Applicant has used and purchased marijuana in the past, as alleged in the SOR, and that such drug involvement raises a security concern. Applicant's past use of marijuana was clearly incompatible with security responsibilities. This is so because it reflects poor judgment, and because of the obvious potential for an unauthorized disclosure of defense secrets resulting from neglect or misadventure when a person is intoxicated as a result of the use of marijuana. A security clearance will normally be denied or revoked if the evidence reflects use of marijuana on a frequent or a sustained basis. However, the Directive also provides that a security clearance may be granted if the Applicant presents strong and convincing evidence of reform and rehabilitation consistent with the Directive's policies and guidelines.

In this case, the Applicant has introduced evidence in rebuttal, explanation or mitigation which is sufficiently persuasive to overcome the Government's case against him. His use of marijuana in recent years was very infrequent. He used marijuana only one or two times during the entire period from 1985 to 1991, only once per year from 1992 to 1994, once in June of 1995, and once in February of 1996. His use of marijuana in February of 1996 consisted of only one "hit" of a marijuana cigarette. He testified credibly that he now recognizes the adverse employment and security clearance implications of marijuana usage, and that he will never use marijuana again. He recently moved to ----- from another state, and his new work associates and friends neither condone nor use marijuana. He no longer associates with people who use marijuana. In his new job, he is subject to random drug testing. The weight of the evidence is that Applicant's use of marijuana is a thing of the past, and not likely to be resumed.

On balance, it is concluded that the Government's evidence opposing Applicant's request for a continued security clearance has been overcome by his mitigating evidence, and by the application of the Directive's pertinent Criterion H mitigating concerns and the Directive's Enclosure 2 general adjudicative guidelines and policies. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in SOR Paragraph 1 and each of its subparagraphs.

## **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 (Criterion H): 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.

## **DECISION**

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

Michael Kirkpatrick

Administrative Judge