

Date: January 28, 1997

In re:

SSN: -----

Applicant for Security Clearance

ISCR OSD Case No. 96-0556

**DECISION OF ADMINISTRATIVE JUDGE**

**KATHRYN MOEN BRAEMAN**

**APPEARANCES**

**FOR THE GOVERNMENT**

Matthew E. Malone, Esq.

Attorney-Advisor

**FOR THE APPLICANT**

*Pro Se*

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on August 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.<sup>(1)</sup> The SOR consists of allegations based on Criterion H (improper or illegal involvement with drugs) in paragraph 1, Criterion E (questionable judgment) in paragraph 2, and Criterion J (pattern of criminal activity) in paragraph 3. Applicant responded to the allegations set forth in the SOR in a written Answer dated August 23 1996, and chose not to have a hearing.

On October 11, 1996, Department Counsel prepared a File of Relevant Material (FORM) which was forwarded to Applicant which he received on October 21, 1996; he had 30 days after receipt of the FORM to object to any exhibits or to submit information on his own behalf. He did respond on November 15, 1996, which DOHA received on November 18, 1996.

Department Counsel filed a Reply to Applicant's Response where he did object to the attachments to Applicant's letter response, especially Exhibit B, as inadmissible hearsay under Federal Rules of Evidence 801(c): I have marked Applicant's response as Exhibit A and his six attachments as Exhibits B, C, D, E, F and G. While I have considered this objection, since the Federal Rules of Evidence are not rigidly adhered to in administrative adjudication and as these letters of reference go to his overall character and did not address any specific disputed issues, I overrule Government's objection and admit those exhibits into evidence as Exhibits A-G.

This matter was assigned to me on December 2, 1996, but I did not receive it until December 5, 1996. It is my role as

administrative judge to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

## **FINDINGS OF FACT**

Applicant admitted in his Answer (Item 3) all of the factual allegations contained in 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:

Applicant, a 25-year old employee of a defense contractor, seeks a secret security clearance. He began work there in July 1995. Item 4.

Applicant completed a National Agency Questionnaire (NAQ) on July 6, 1995, where he knowingly and willfully falsified his answers to questions 20.a. and 20. b. He knowingly and willfully falsified his answers to question 20.a. by answering "Yes" but understating substantially his drug use and by stating he had "no intention of further use/possession (*sic.*) of marijuana nor any illegal drug ever again in the future." He answered "No" to question 20.b. concerning his past purchases of drugs. He did so despite having signed a certification that the entries were "true, complete, and accurate" with an advisement that "a knowing and willful false statement on this form" would be subject to U.S. Code, Title 18, Section 1001 penalties. Item 4. Applicant did not disclose the accurate information as he feared he would not get his clearance. Item 3 (Applicant's Answer), Item 4, Item 6, and Exhibit A.

Subsequently, Applicant was interviewed by Defense Investigative Service (DIS) Agent #1 on April 10, 1996, but admitted only to minimal marijuana use from 1990 to 1995 and denied he had ever purchased marijuana. Item 5.

On June 6, 1996, Applicant was interviewed again but by Agent #2 and finally revealed more extensive marijuana use that began in fall 1989 and continued to Memorial Day weekend, 1996. For example, from 1995 to 1996 he used marijuana five to eight times in a social setting with friends. While he never bought marijuana himself, he "chipped in" to buy marijuana with others and spent \$25 once and overall about \$150 total. He has not used other drugs and has no future intent of using marijuana "if my clearance depends on my not using illegal drugs." Item 6.

The Applicant has the full confidence of the chief operating officer for his technical abilities. Exhibit B. His technical lead and project manager finds that he has produced consistently good software both in the office and under stress in the field. Exhibit C. His direct supervisor for the past six months finds him invaluable and productive; he has not been irresponsible or lax in his work ethic or personal conduct. Exhibit D. His co-worker and friend finds him a reliable and effective team member. Exhibit E. Another co-worker finds him dedicated to the company and as showing great pride in his work. Exhibit F. A college friend who has known him for four years found him a hard worker as a student and trustworthy and helpful to her personally. Exhibit G.

## **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 Adjudication 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

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);
- (2) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution;

**Conditions that could mitigate security concerns include:**

None

**Criterion E: Personal Conduct**

**Conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.**

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

- (2) the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;
- (3) deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination;

**Conditions that could mitigate security concerns include:**

None

**Criterion J: Criminal Conduct**

**A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.**

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

- (1) any criminal conduct, regardless of whether the person was formally charged;

**Conditions that could mitigate security concerns include:**

None

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue access to classified information. Then the Applicant presents evidence to refute, explain, extenuate, or mitigate to overcome the doubts raised by the Government, and to demonstrate persuasively 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 after 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**

### **Criterion H: Drug Involvement**

The Government established its case with regard to Drug Involvement (Criterion H) as Applicant continued his use of marijuana from 1989 through May 1996 even after he began work at a defense contractor. He continued even after he had promised in July 1995 that he had no intention of further use of marijuana ever again in the future. Further, he intermittently contributed money towards the purchase of marijuana. Clearly, he falls within the drug abuse conditions that could raise a security concern and may be disqualifying which include: (1) any drug abuse; and (2) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.

As his marijuana use continued to May, 1996, just six months ago, he does not fall within mitigating condition (1), that drug involvement not be recent. Applicant was not a regular user of drugs, but his use was more than "an isolated or infrequent event," so he does not fall within mitigating condition (2). While Applicant now promises that he will not use marijuana again, he merely says he would not do so only "if his clearance depends on my not using illegal drugs." (Emphasis added.) Indeed, he made another such promise in his NAQ in July 1995 and did not keep it as he used drugs several times subsequent to making that pledge. Consequently, with the recency and history of his drug abuse, it is too soon to find that he falls within mitigating condition (3) a demonstrated intent not to abuse any drugs in the future, as not enough time has passed for Applicant to have manifested his intent to remain drug-free. Thus, his renewed promise that he does not intend to use illegal drugs again may be genuine, but has to be tested by time. While I have also considered the Adjudicative Process factors, I nevertheless find against the Applicant under Paragraph 1 and subparagraphs 1.a. and 1.b.

### **Criterion E: Personal Conduct**

Notably, Applicant's drug use did not come to light voluntarily even though he signed a certificate that his National Agency Questionnaire (NAQ) answers were "true, complete, and accurate." Indeed, he willfully falsified answers to questions 20.a. and 20.b. on drug use and purchases. Applicant again minimized his past drug use and again denied ever making purchases to DIS Agent #1. It was not until his interview with DIS Agent #2 that he disclosed his drug usage in full. Thus, having considered the evidence of record in light of the appropriate legal precepts and facts, I conclude that the Government established its case with regard to personal conduct, Criterion E, as Applicant's conduct involved questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations which could indicate that he may not properly safeguard classified information.

By withholding relevant and material information about his drug use and purchases on his NAQ and in his initial interview with DIS Agent #1, his conduct falls within conditions that could raise a security concern and may be disqualifying. First, he deliberately omitted, concealed, or falsified relevant and material facts from his personnel security questionnaire when he had an obligation to be truthful. He continued his questionable personal conduct when he deliberately provided misleading information concerning relevant and material matters to DIS investigator #1.

While in his favor, he did finally reveal the entirety of his past drug use to DIS Agent #2, that favorable conduct came too late in the security process to supply a basis for mitigation. Thus, after also considering the Adjudicative Process factors, I find against the Applicant under Paragraph 2 and subparagraphs 2.a.(1), 2.b.(1), 2.c.(1) and (2), and 2.d.

### **Criterion J - Criminal Conduct**

The Government established its case with regard to criminal conduct, Criterion J, as Applicant's conduct involved a history or pattern of criminal activity which creates doubt about his judgment, reliability and trustworthiness. When he falsified his answers to the NAQ by minimizing his past drug use and denying any drug purchases, he made knowing and willful falsifications and violated United States Code Title 18, Section 1001. Notice of this statutory penalty for false answers is in the NAQ certification he signed. Thus, by this criminal action of knowing and willful falsification, he falls within a condition that could raise a security concern and may be disqualifying. In his case any criminal conduct, regardless of whether the person was formally charged, applies. His conduct does not yet fall within mitigation consideration (5), as there is not yet clear evidence of successful rehabilitation although he is now remorseful and also is

highly regarded at his company for his technical abilities. However, this favorable evidence from his work place is insufficient given the gravity of his repeated falsifications. Consequently, after also considering the Adjudicative Process factors, I find against the Applicant under Paragraph 3 and subparagraph 3.a.

### **FORMAL FINDINGS**

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1. Criterion H: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Paragraph 2. Criterion E: AGAINST APPLICANT

Subparagraph 2.a. Against Applicant

Subparagraph 2.a.(1) Against Applicant Subparagraph 2.b. Against Applicant

Subparagraph 2.b.(1) Against Applicant

Subparagraph 2.c. Against Applicant

Subparagraph 2.c.(1) Against Applicant

Subparagraph 2.c.(2) Against Applicant

Subparagraph 2.d. Against Applicant

Paragraph 3. Criterion J: AGAINST APPLICANT

Subparagraph 3.a. Against Applicant

### **DECISION**

In light of all 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 the Applicant.

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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.