

DATE: April 15, 1997

In Re:

SSN: -----

Applicant for Security Clearance

DOHA Case No. 96-0609

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR THE GOVERNMENT

Barry Sax, Esquire

Department Counsel

FOR THE APPLICANT

*Pro Se*

STATEMENT OF THE CASE

On August 30, 1996, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, "Safeguarding Classified Information Within Industry," dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6 "Defense Industrial Personnel Security Clearance Review Program" (Directive) dated January 2, 1992, as amended by Change 3, dated February 13, 1996, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make a preliminary determination that it was clearly consistent with the national interest to grant or continue a security clearance for him.

A copy of the SOR is attached to this Decision and included herein by reference.

The Applicant responded to the SOR in writing on October 2, 1996 and requested a hearing before a DOHA Administrative Judge. The case was reassigned to this Administrative Judge on January 15, 1997 after having been previously assigned to another Administrative Judge on November 4, 1996. On February 6, 1997, a hearing was convened for the purpose of considering whether it is clearly consistent with the national security to grant, continue, deny, or revoke Applicant's security clearance. The Government's case consisted of five exhibits; Applicant relied on four exhibits and his own testimony. A transcript of the proceedings was received on February 19, 1997.

FINDINGS OF FACT

Applicant has admitted, without explanation, the factual allegations pertaining to drug involvement (Criterion H) set forth under subparagraphs 1.d. through 1.m., the factual allegations pertaining to personal conduct (Criterion E) set forth under subparagraphs 2.a. through 2.d., and the factual allegation pertaining to criminal conduct (Criterion J) set forth under subparagraph 1.a.

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 is a 29 year old employee of a defense contractor. He has worked for his current employer since November 1994, and is currently applying for a secret clearance. A favorable preliminary determination could not be made on Applicant's suitability for a security clearance because of his drug involvement and falsification.

Applicant began using marijuana in 1980 when he was 12 years old. Since then, he has used it with varying frequency--at times as often as daily. From 1982 to 1984, he used marijuana two or three times weekly. From 1984 to September 1989, he used it from two to three times a week, to as often as daily. He received treatment for alcohol and marijuana abuse at Facility A in July 1989 and at Facility B in September 1989. He reduced his marijuana abuse after completing treatment; from 1990 to November 1994, he used it only two or three times per month. He reduced his marijuana abuse still further after his daughter was born in November 1994. He used marijuana the last time on June 21, 1996. In 1987, Applicant was cited and paid a fine as a result of possessing marijuana. In October 1993, he was arrested for possession of marijuana and was required to pay a fine--the amount of which has not been disclosed.

Applicant's involvement with illegal drugs has not been limited to his use and possession of marijuana. He purchased marijuana from 1986 to 1993; he sold marijuana to friends; he used cocaine on two or three occasions between 1986 and 1988; he purchased LSD and used it on six or eight occasions between 1986 and 1988; he purchased hashish and used it on at least six occasions between 1986 and 1990; and he used the drug Valium which had been prescribed for someone else.

When Applicant completed his National Agency Questionnaire (NAQ) on May 22, 1995, he certified that:

...the entries made by me are true, complete and accurate to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both.

In response to question 23 which asked if he had used or possessed any narcotic (to include heroin or cocaine),... hallucinogen (to include LSD or PCP), or cannabis (to include marijuana or hashish), Applicant answered "yes" and explained that he had used marijuana from June 1, 1986 to October 1, 1993. He added that: "I have finally grown up and ended my usage." In response to question 24 which asked if he had ever been involved in the illegal purchase or sale of marijuana or other illegal drugs, Applicant answered "yes." He explained that he had purchased marijuana occasionally between June 1, 1986 and October 1, 1993. Applicant answered "no" to question 25 which asked if he had ever misused a drug prescribed for himself or someone else.

Later, incident to his first interview with the Defense Investigative Service (DIS) in February 7, 1996, Applicant signed a statement in which he swore that he had last used marijuana in January 1994 (Gov Exh. 3). In the same statement he proclaimed: "I have no intention of using marijuana or any other illegal drugs in the future." He subsequently admitted in a second, signed sworn statement to the DIS on May 16, 1996, that he had used marijuana as recently as February 1996 (Gov. Exh. 2). Again in this statement, Applicant assured the DIS: "I can say without reservation, that I have no future intentions of ever again becoming involved with any type of illegal drugs, to include marijuana." However, at his administrative hearing, Applicant admitted that he had used marijuana yet again, on June 21, 1996 (Tr. 33), more than a month after his second DIS interview. Applicant later estimated that he has used marijuana as often as "dozen (or) two dozen times" since completing his NAQ on May 22, 1995 (Tr. 82-83).

Applicant has submitted letters of reference from supervisors attesting to his excellent duty performance, loyalty and trustworthiness. All have recommended that he be granted a security clearance. On his own behalf, Applicant testified that he not been truthful on his NAQ because he was ashamed of his drug use (Tr. 31). He has matured since becoming a father in November 1994 (Gov. Exh. 2) and getting married in May of 1995 (Tr. 73). His wife and daughter are very important to him and he would not do anything that would harm them (Tr. 32).

### **PROCEDURAL RULING**

Department Counsel moved to amend the SOR to allege that Applicant had abused marijuana until June 21, 1996, in conformance with Applicant's testimony about when he last used marijuana (Tr. 40 ). The motion was granted.

## POLICIES

The Adjudicative Guidelines of the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations with reasonable consistency that are clearly consistent with the interests of national security. In making those overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines but in the context of the factors set forth in section F.3. of the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate that the facts proven have a nexus to an applicant's lack of security worthiness.

The following Adjudicative Guidelines are deemed applicable to the instant matter.

### DRUG INVOLVEMENT

(Criterion H)

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
- (2) Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.

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

- (3) A demonstrated intent not to abuse any drugs in the future.

### PERSONAL CONDUCT

(Criterion E)

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

- (2) The deliberate omission, concealment, or falsification of relevant and material facts from any personal 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) Deliberate 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 personal security

trustworthiness determination.

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

None Applicable

**CRIMINAL CONDUCT**

(Criterion J)

**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 Applicable

**Burden of Proof**

The Government has the burden of proving any controverted facts alleged in the Statement of Reasons. If the Government establishes its case, the burden of persuasion shifts to the applicant to establish his security suitability through evidence which refutes, mitigates, or extenuates the disqualifying conduct and demonstrates that it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands that Court's rationale, doubts are to be resolved against an applicant.

**CONCLUSIONS**

Having considered the record evidence in accordance with the appropriate legal precepts and factors, this Administrative Judge concludes that the Government has established its case with regard to Criteria H, E, and J.

In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Section F.3, as well as those referred to in the section dealing with the Adjudicative Process, both in the Directive.

The Government has established its case with respect to Criterion H. Applicant has admitted that he used marijuana regularly--as often as daily--from 1980 until June 21, 1996. In addition to using marijuana, he used cocaine; he purchased marijuana; he purchased and used LSD and hashish; and he used Valium that had been prescribed for someone else. Applicant testified that he did not acknowledge the full extent of his marijuana abuse when he completed the NAQ in May 1995 because he was embarrassed<sup>(U)</sup> by his abuse of marijuana and afraid that he would lose his job if he told the truth.

Applicant's abuse of illegal drugs other than marijuana is mitigated by the passage of time and his stated intention not to use these substances in the future. Although favorable consideration has been given to his outstanding work record, this record and other favorable evidence is insufficient to overcome or mitigate the government's case with respect to his abuse of marijuana. Applicant abused marijuana as recently as June 1996, only seven months before his administrative hearing. And the credibility of his most recent statement that he does not intend to use marijuana in the future (Tr. 32) is significantly diminished by the fact that he has failed to abide by the assurances he has made on three previous occasions. (See Gov. Exhs.1, 2 and 3). While he claims that he would never do anything to hurt his wife, or his daughter

who was born in November 1994, he has obviously used marijuana on numerous occasions since they have been part of his life. If their welfare did not provide an incentive for him to abstain from marijuana in 1995 and 1996, there is little reason to believe that they will provide that incentive now and in the future. Criterion H is concluded against Applicant.

Criterion E applies to "the deliberate omission...of relevant and material facts from any personnel security questionnaire...or deliberately providing false and misleading information...to an investigator in connection with a personnel security...determination." Facts are considered relevant and material when they are capable of influencing a federal agency's decision, e.g., a decision to grant or deny a security clearance. In this instance, Applicant's regular abuse of marijuana up to the time he completed his NAQ in May 1995 falls well within the definition of materiality. Also falling within the definition of materiality, and also omitted from his NAQ, are Applicant's sale of marijuana, his purchase and abuse of LSD and hashish, his abuse of cocaine, and his abuse of a prescribed drug. Applicant provided false and misleading information again in February 1996 when he stated in his first signed, sworn statement to the DIS that he had not used marijuana since January 1994.

Because Applicant had provided misinformation on two occasions--in May 1995 and February 1996--his misconduct was neither an isolated incident, nor was it far removed from the

present. Although Applicant finally admitted the full extent of his marijuana and other drug abuse during the DIS interview in May 1996, he did not make these admissions under circumstances where he can be credited with making a prompt, good-faith effort to correct his prior falsification. Nor is Applicant's falsification mitigated by his explanation that he was not truthful--on his NAQ and on his first signed, sworn statement to DIS--because he was afraid he would lose his job, and because he was embarrassed about his marijuana abuse. This fear and embarrassment did not provide motivation for him to stop using marijuana, and they do not provide mitigation for the falsification which was made necessary by his continued marijuana use. Criterion E is concluded against Appellant.

The government has established its case under Criterion J. Applicant's willfully withholding information from the DoD on matters that are clearly relevant and material to his security clearance eligibility violates 18 U.S.C. 1001. The information withheld by Applicant had the potential to influence the course of his background investigation in areas of legitimate concern to the DoD. Criterion J. Is concluded against Applicant.

### **FORMAL FINDINGS**

Formal Findings as required by Section 3, Paragraph 7, of Enclosure 1 of the Directive are hereby rendered as follows:

#### Paragraph 1 (Criterion H) AGAINST THE APPLICANT

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. For the Applicant

Subparagraph 1.e. For the Applicant

Subparagraph 1.f. Against the Applicant

Subparagraph 1.g. Against the Applicant

Subparagraph 1.h. For the Applicant

Subparagraph 1.i. For the Applicant

Subparagraph 1.j. For the Applicant

Subparagraph 1.k. For the Applicant

Subparagraph 1.l. For the Applicant

Subparagraph 1.m. For the Applicant

Paragraph 2 (Criterion E) AGAINST THE APPLICANT

Subparagraph 2.a. Against the Applicant

Subparagraph 2.b. Against the Applicant

Subparagraph 2.c. Against the Applicant

Subparagraph 2.d. Against the Applicant

Paragraph 3 (Criterion J) AGAINST THE APPLICANT

Subparagraph 3.a. Against the 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 continue Applicant's security clearance.

**John R. Erck**

**Administrative Judge**

1. However, his embarrassment over past marijuana abuse did not deter him from abusing it another two dozen times in the following two years.