

Date: April 29, 1997

In re:

SSN: -----

Applicant for Security Clearance

ISCR OSD Case No. 96-0698

**DECISION OF ADMINISTRATIVE JUDGE**

**KATHRYN MOEN BRAEMAN**

**APPEARANCES**

**FOR THE GOVERNMENT**

Carla Conover, Esq.

Attorney-Advisor

**FOR THE APPLICANT**

William R. Brummett, Esq.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on September 23, 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 through counsel responded to the allegations set forth in the SOR in a written Answer dated October 17, 1996, and chose to have a hearing.

Initially, this matter was assigned to me on November 18, 1996, but then reassigned to another judge on November 21, 1996, and reassigned again to me on January 17, 1997. On January 23, 1997, I set this case for hearing on February 19, 1997, the date the hearing was held. At this hearing the Government called two witnesses and introduced five government exhibits (GE). Applicant's counsel called the Applicant as a witness but introduced no exhibits. The transcript (TR) was received on March 5, 1997.

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 none of the factual allegations contained in the SOR. After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following Findings of Fact:

Applicant, a 24-year old employee of a defense contractor, began work there in July 1995 as a -----; he -----  
----- for ----- . He seeks a secret security clearance. TR 70, 72.

Applicant completed and signed a National Agency Questionnaire (NAQ) on August 10, 1995, where he answered questions 20.a. about drug use by detailing his use of "pot" less than ten times (10/90, 11/90, 6/91, 7/91, 6/92, 7/93, and 9/94) and listed one time only use of LSD. He answered 20.b. about drug purchase, "No." He signed a certification that the entries were "true, complete, and accurate" over an advisement that "a knowing and willful false statement on this form" would be subject to U.S. Code, Title 18, Section 1001 penalties. GE 1; TR 85-87.

He subsequently was interviewed by DIS Special Agent #1 on December 29, 1995, who based his interview on an electronically submitted NAQ not in evidence but identified as GE 6. TR 40-41.

Without being confronted Applicant voluntarily detailed his drug use to Agent #1 which was more extensive than he had listed on his NAQ. His marijuana use began in high school in fall 1989; then he had used marijuana on approximately 24 occasions. He also admitted purchasing marijuana during his senior year once, but he would contribute to purchase on other occasions. However, he never purchased marijuana in college. During college he smoked marijuana approximately sixteen times and continued even after his December 1994 graduation when he used it three to four times when he worked at a restaurant. His last use of marijuana was at a concert in May 1995, but he stated he did not intend to use marijuana in the future. He used LSD on two occasions in college and purchased it both times for a total cost of \$25. He also tried psilocybin mushrooms on three occasions in college. Applicant maintained that the limited use he listed on his NAQ was "to the best of my recollection." He explained that on his NAQ he listed only the times he "really got high and left out the times I just took a puff." He forgot to list his use of mushrooms. He did not list his drug purchases because he was afraid he would not get a security clearance. GE 2; TR 21-24; 29-31; 41-43; 71.

Later Agent #1 conducted a second interview with Applicant again on January 5, 1996, after a former roommate had provided discrepant information regarding his later use of drugs. While Agent #1 confronted him, Applicant denied these allegations that he used marijuana three or four times from May to August 1995. GE 3; TR 24-28; 71.

When he was interviewed by Agent #2, a senior investigator/polygraph examiner, five months later on June 11, 1996, he stated he did not know when he used marijuana last as he had friends who use marijuana at parties including one he attended with his girlfriend on June 9, 1996. GE 4. He admitted using marijuana from 1989 to May 1995 from as much as three times a month to twice a year and to using LSD three or four times in 1990. While he initially still maintained that he had not used any illegal drugs after May 1995, he later said he was not able to say exactly when his last use occurred. GE 5; TR 45-57; 58-64; 64-65.

I accept his clarification at the hearing that his last use of marijuana was definitely May 1995 as I find credible his explanation that the reason he was unsure with Agent #2 over his last use was that he was very nervous and confused about her questions and the exact date of the concert. TR 72-73; 92-93, 94-96, 99-100. While the party on June 9, 1996, was for his girlfriend, I accept his explanation that he did not smoke marijuana that evening and has not used marijuana since he joined the defense contractor in July 1995, and he has no intent to use illegal drugs in the future. He has not used LSD since 1990. TR 74-77. I also find credible his explanation that with respect to purchases he forgot about the purchases or "misconstrued what purchase meant on the questionnaire" as he did not realize that contributing towards purchase was considered a purchase. TR 78-79; 87-89.

## 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:**

- (1) the drug involvement was not recent;
- (3) a demonstrated intent not to abuse any drugs in the future;

## **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;

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

- (2) the falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily;
- (3) the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts;

## **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:**

- (2) the crime was an isolated incident.

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 did use marijuana from 1989 through May 1995, LSD in 1990, and mushrooms in college. He at times had contributed to the purchase of marijuana and also purchased marijuana in high school and LSD in college. This drug use and purchases raise a serious security concern that may be disqualifying which include: (1) any drug abuse; and (2) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution. While Applicant was not a regular user of drugs, his use was more than experimental.

On the other hand in reviewing the evidence in mitigation I find credible his testimony that he did not continue to use drugs after he began work at a defense contractor in July 1995 and accordingly find that he does fall within mitigating condition (1), that his drug involvement was not recent and (2), that he has demonstrated an intent not to abuse any drugs in the future as at the time of the hearing he had been drug free for more than eighteen months.

While there were SOR allegations of drug use beyond May 1995, they were never established through his admissions or other evidence. Indeed, while he was ambiguous in his statements about his drug use to DIS Agent #2 when he stated he did not know when he used marijuana last and while his association with friends who use marijuana at parties is not to his credit, the only clear admission of additional drug use established by Agent #2 was his admission of an additional use of LSD in 1990, which is now dated. Given the extensive and complex nature of the interview of over four hours with Agent #2, I find credible Applicant's explanation that his statement to Agent #2 was incoherent because he was nervous and confused both by her questions and by not being able to remember then the exact date of the concert where he remembers he last used marijuana.

At the hearing, he was clear that he had not used any drugs after he had joined the staff of the defense contractor in July 1995. While his credibility is hurt by his having understated his drug use and omitted any purchases on his NAQ, his credibility is helped by the extensive details he provided voluntarily and without confrontation to Agent #1 in the initial interview. Thus, I find eighteen months is enough time to have passed for Applicant to have manifested his intent to remain drug-free. I have also considered the Adjudicative Process factors, and I find for the Applicant under Paragraph 1 and subparagraphs 1.a., 1.b, 1.c., 1.d, 1.e., 1.f., and 1.g.

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

Notably, Applicant's drug use was understated on his National Agency Questionnaire (NAQ) and he denied any drug purchases even though he signed a certificate that his answers were "true, complete, and accurate." By withholding relevant and material information about his drug use and purchases on his NAQ, his conduct falls within conditions that could raise a security concern and may be disqualifying as he deliberately omitted, concealed, or falsified relevant and material facts from his personnel security questionnaire when he had an obligation to be truthful.

On the other hand in considering factors that are mitigating, Applicant did not minimize his past drug use and drug purchases to DIS Agent #1. At this interview with DIS Agent #1 he disclosed almost all his drug usage (save one later additional use of LSD revealed to Agent #2), and he detailed his drug purchases in full. The only significant ambiguity that later developed in the security investigation concerned the date of his last use of drugs as there was an allegation that he continued to use marijuana beyond May 1995. However, he clearly denied this use to Agent #1 in this second

interview.

His interview with DIS agent #2 which took place several months later and took four and a half hours resulted in a confused Statement that could best be described as incoherent. I accept as credible his explanation that he was confused only about the date of the concert where he had last used marijuana and that he did not mean that his initial statement to Agent #1 was false. Even the Certified Result of Interview prepared by Agent #2 does not establish any significant recent drug use beyond his May 1995 marijuana use that he had freely admitted to Agent #1.

While ideally he should have revealed his drug use and purchases in full on his NAQ, I find credible his explanation that he did not understand fully what was meant by purchases. I do so based on the fact that in his initial interview he voluntarily detailed his high school purchases of marijuana and his minimal college purchases of LSD. Indeed Applicant made prompt, good-faith efforts to correct the NAQ omissions before being confronted with the facts. In Agent #1's testimony he did not reveal that he had any independent information with which to confront Applicant at the time of the initial interview. When Agent #1 did later develop some adverse allegations about Applicant's continuing use of marijuana, Applicant denied it and the Agent #1 had no further evidence to establish such use. (The Government did not call as a witness the individual who stated his use continued beyond May 1995.) While the Applicant did reveal one more use of LSD to Agent #2 than he had to Agent #1, I do not find that this limited factual development was sufficient to establish the government's case that he falls within Criterion E's disqualifying condition (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."

Thus, having considered the evidence of record in light of the appropriate legal precepts and facts, I conclude that while the Government established its case with regard to personal conduct, Criterion E, in part with respect to his NAQ, Applicant's conduct can be mitigated as he voluntarily revealed his drug use and purchases to Agent #1 in his initial interview and made a prompt, good-faith efforts to correct the falsification before being confronted with these facts in his initial interview. These factors together provide a basis for mitigation. Thus, after also considering the Adjudicative Process factors, I find for the Applicant under Paragraph 2 and subparagraphs 2.a., 2.a. (1), 2.a.(2), 2.b., 2.b.(1), 2.c, 2.c. (1), 2.d, and d.(1).

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

The Government established its case with regard to criminal conduct, Criterion J, as Applicant did misrepresent his answers to the NAQ by minimizing his past drug use and denying any drug purchases and consequently did mislead the Government on his NAQ. Thus, he falls within a condition that could raise a security concern and may be disqualifying over his incomplete answers to the NAQ. However, even concluding that his NAQ omissions constituted criminal conduct (regardless of whether the person was formally charged), his conduct can be mitigated if it is found to be of an isolated nature. Indeed, the only information in evidence about the Applicant's drug use and purchases came from the Applicant himself. While I do not fully accept Applicant's defense that he did not intend to falsify his NAQ, I do conclude that his initial omissions on the NAQ were not followed by repeated and willful falsifications at the interview stage.

Thus based on my credibility assessments, I do not find that the conduct will recur. Supporting my credibility assessment is that fact that he fully revealed all details of his drug use (save one 1990 LSD use) and purchases when these questions were clarified and asked again by DIS Agent #1 in his initial interview, as discussed above. DIS Agent #2 developed no significant inconsistent information from what he voluntarily revealed in this first interview. While his June 11, 1996, Statement to DIS Agent #2 suggests that his first statement was "false" because he knew that there was "a possibility of them not being true," at the hearing he said he could not explain what he meant by those words. While on that date he could not remember the date of his last use of marijuana, I found credible his explanation that his confusion was over the exact date of the concert where he last used. There is no evidence beyond this confusion on his part after a long interview, that he intended to falsify his most recent marijuana use to either DIS Agent #1 or #2. I accept as credible his testimony that his last use was in May 1995 as consistent with his initial interview with Agent #1; there is no other inconsistent evidence on his last use.

Consequently, after also considering the Adjudicative Process factors, I find for 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: 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

Paragraph 2. Criterion E: FOR APPLICANT

Subparagraph 2.a. For Applicant

Subparagraph 2.a.(1) For Applicant

Subparagraph 2.a.(2) For Applicant

Subparagraph 2.b. For Applicant

Subparagraph 2.b.(1) For Applicant

Subparagraph 2.c. For Applicant

Subparagraph 2.c.(1) For Applicant

Subparagraph 2.d. For Applicant

Subparagraph 2.d.(1) For Applicant

Paragraph 3. Criterion J: FOR APPLICANT

Subparagraph 3.a. For 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.

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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.