

DATE: July 2, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 96-0906

DECISION OF ADMINISTRATIVE JUDGE

JOHN G. METZ, JR.

APPEARANCES

FOR THE GOVERNMENT

Carol A. Marchant, Esquire

Peregrine D. Russell-Hunter, Esquire

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF THE CASE

On 12 December 1996, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding⁽¹⁾ that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant answered the SOR--26 December 1996--and originally requested an administrative determination. However, on 28 March 1997 he requested a hearing. The case was originally assigned to another Administrative Judge on 22 April 1997, but was reassigned to me on 14 May 1997. I issued a Notice of Hearing on 15 May 1997--amended 21 May 1997--and held the hearing 17 June 1997.

At the hearing, the Government presented five exhibits--admitted without objection--and one witnesses, the Applicant; Applicant presented no exhibits and one witness. I received the transcript on 30 June 1997.

A copy of the SOR is attached to this Determination and incorporated by reference.

RULINGS ON PROCEDURE

Through an administrative oversight, I initially set this case for a date Applicant had indicated he was not available for hearing because his witness would not be available to testify. Applicant made a timely request for continuance, the Government posed no objection, and in a conference call on 21 May 1997 I rescheduled the hearing to 17 June 1997.

At the hearing on 17 June 1997, Government counsel objected to two character letters which Applicant had appended to his Answer to the SOR on the ground that the letters constituted inadmissible hearsay. I overruled the objection on the

ground that the rules of evidence apply only as a guide in these hearings, and the interposed objections went more to the weight to be given the documents and not their admissibility.

FINDINGS OF FACT

Applicant admitted the allegations of the SOR; accordingly, I incorporate the admissions as findings of fact.

Applicant--a 40-year old employee of a defense contractor--seeks a security clearance.

On 12 July 1996--while applying for his security clearance--Applicant answered "yes" on an OPM Security Clearance Application (SCA)(SF 86)(G.E. 1) when asked whether he used drugs --with or without a clearance--or had been arrested for any drug involvement.⁽²⁾ On a 29 October 1996 sworn statement to the Defense Investigative Service (G.E. 2), Applicant elaborated his drug abuse history.⁽³⁾ He also elaborated his drug arrest history: In July 1973, he was arrested on a group possession charge when some of Applicant's friends were smoking marijuana. Applicant was arrested for possession even though he was not smoking marijuana and did not have marijuana in his possession. He pleaded no contest and the charges were dismissed in juvenile court. In January 1985, he was charged with possession of marijuana and cocaine. Applicant was smoking marijuana with some friends in a parked car when a police patrol stopped and asked them to get out of the car. The police found cocaine in the car; however, Applicant did not know cocaine was in the car. Applicant received probation before judgment and the charge was eventually dismissed. In August 1992, Applicant was the subject of a random border search while returning by car from -----; the border guards found a roach clip in his possessions. Applicant was charged with possession of paraphernalia and paid fines and fees of \$1,000.

Applicant's January 1985 arrest was reported to the DIS by Applicant's employer. On 16 April 1985, Applicant executed a sworn statement (G.E. 3) describing the January 1985 arrest.⁽⁴⁾ As a result of the DIS investigation, Applicant stopped using marijuana and did not resume his marijuana use until he had his clearance terminated in 1991 when he left the employment that required the security clearance. He intends no drug use in the future.⁽⁵⁾

Applicant's supervisor for the last year is aware of Applicant's drug abuse history and will not tolerate any drug use. However, he has not noticed any indication of continued drug use in Applicant. Moreover, he considers Applicant very honest and unlikely to use drugs in his present living environment.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section F.3. and in Enclosure (2) of the Directive. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

Considering the evidence as a whole, the following adjudication policy factors are most pertinent to this case:

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.

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

- (1) any drug abuse;

(2) illegal drug possession, including. . . purchase

Conditions that could mitigate security concerns include:

(2) the drug involvement was an . . .infrequent event.

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

Burden of Proof

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where 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 or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the 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."

CONCLUSIONS

The Government has established its case under criterion H; however, I find the conduct to be mitigated. Applicant's recreational use of marijuana from 1977 to 1985 and from 1991 to 1996 raises legitimate security concerns. He used marijuana without apparent regard for its illegality; from October 1990 to sometime in 1985, he used marijuana without apparent regard for either its illegality or the Government's security concerns. However, when Applicant's marijuana use put his clearance at risk in 1985, Applicant stopped using marijuana. Although he resumed marijuana use when he had no clearance, he stopped using when he obtained a job which required a clearance. Applicant realizes that drug use is incompatible with access to classified information. While his drug use was recent, and certainly not isolated, the frequency of his drug use was fairly low--from 1991 to 1996 less than monthly⁽⁶⁾; I find no suggestion of physical or psychological dependence. The Government correctly argues that the issue in this case is whether Applicant's stated intent to refrain from drug use is credible. Although Applicant did use drugs while having a clearance from October 1981 to 1985, he did not use drugs from 1985 to 1991 while he had a clearance--conforming to DoD policy. In 1996--before applying for a new clearance, if only shortly before--Applicant again brought himself into compliance with Government policy. Under the circumstances, I think it unlikely that Applicant will abuse drugs in the future. He has demonstrated his intent not to abuse drugs in the future. I find criterion H. for the Applicant.

FORMAL FINDINGS

Paragraph 1. Criterion H: FOR THE APPLICANT

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: For the Applicant

Subparagraph e: For the Applicant

Subparagraph f: 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 grant or continue a security clearance for Applicant.

John G. Metz, Jr.

Administrative Judge

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6, dated January 2, 1992--and amended by Change 3 dated 16 February 1996 (Directive).
2. He amplified those answers by reporting that he had been charged with marijuana possession in July 1973, charged with marijuana and cocaine possession in May 1985, and charged with marijuana possession in August 1992. Applicant reported using marijuana forty times from February 1992 to April 1996. He truthfully reported that he had used marijuana while possessing a security clearance, but incorrectly reported those dates as February 1992-April 1996. In fact, Applicant used marijuana while he had a clearance from October 1980 to 1985.
3. "I began to use marijuana in about 1977 or 1978 while a sophomore in college. From then until I graduated in 1980 I smoked marijuana infrequently, possibly once a month on a social basis. From 1980 to 1982, I probably only used marijuana one or two times because I had moved away from home and only had the occasion to use it when visiting back home with friends. From 1982 to 1985 I smoked marijuana about once every month or once every two months while socializing with friends at parties. From 1985 to 1991 I did not use any marijuana because of holding a security clearance at the time. From October 1991 to July 1992 I smoked marijuana approximately once monthly while socializing with others. It was during this period of time that I made my only purchase of marijuana. I bought a half ounce of marijuana for \$200 through a friend of mine. I did not buy from a dealer as I knew no dealers. My marijuana purchase was shared with others at social functions. I never used marijuana alone or for other than socializing. In July 1992 I moved back [home] and from July 1992 to May 1996 I may have used marijuana a total of 40 times while socializing with friends. In May 1996 I learned that I was getting my new job with my current company so I decided I would not use any more marijuana. . . . As for the future, I would like to get this clearance and I really do not want drugs to jeopardize my future career. Marijuana is not important enough to me to jeopardize my future. . . . I have not and would not ever use any other type of illegal drugs and I expect to use no marijuana in the future." Applicant's testimony at the hearing (Tr. 31-43) is consistent with this reported drug use.
4. This statement inaccurately asserted that the police initially found no evidence of drug use before conducting a more extensive search of the car; Applicant's October 1996 statement acknowledges that he was smoking marijuana at the time of the arrest. Because the Government did not allege falsification on this issue, I have not considered this discrepancy as evidence of falsification, but I have considered it on the issue of Applicant's credibility.
5. I considered very carefully the Government's argument that this stated intention should be given little weight because Applicant had made the same promise to the DIS at the time of the April 1985 interview and then resumed marijuana use. However, the record reflects that Applicant stopped using marijuana in 1985--at approximately the time of his DIS inquiry--and did not resume marijuana use until his clearance was terminated in 1991--when he left employment requiring a clearance. I have also considered the Government's suggestion that Applicant's credibility is suspect because of the circumstances of his obtaining his initial clearance in 1980. However, the record contains no firm evidence supporting this inference. The Government has not alleged falsification of the 1980 clearance application, nor has it otherwise demonstrated that Applicant falsified that application or was asked about his drug abuse and provided untruthful answers. Even had the Government produced such evidence--and thus arguably putting Applicant's credibility at issue based on those falsifications--I would consider this evidence overcome by Applicant's truthful completion of the 1996 clearance application and his extensive disclosures to the DIS in the October 1996 sworn statement.
6. Applicant testified (Tr. 42-3) that he reached the estimated forty uses of marijuana between 1992 and 1996 by estimating monthly use of marijuana for four years, and rounding down because he did not actually use monthly.