Date: May 28, 1997

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In re:

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SSN: ----------

Applicant for Security Clearance

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ISCR OSD Case No. 97-0042

**DECISION OF ADMINISTRATIVE JUDGE**

**JEROME H. SILBER**

## APPEARANCES

**FOR THE GOVERNMENT**

Barry Sax, Esq.

Department Counsel

**FOR THE APPLICANT**

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Personal Representative

## STATEMENT OF THE CASE

On January 16, 1997, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA 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, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked. In a sworn written statement, dated January 27, 1997, the Applicant responded to the allegations set forth in the SOR and requested a hearing. A copy of the SOR is attached to this Decision and incorporated herein by reference.

The case was assigned on February 19, 1997, to Administrative Judge Mason and reassigned on February 24, 1997, for reasons of caseload reallocations to the undersigned Administrative Judge. The undersigned held a hearing on March 26, 1997. The Department Counsel presented two exhibits ("Exhs") and the testimony of no witnesses. The Applicant's case consisted of the presentation of three exhibits and the testimony of a witness besides his own. The transcript ("Tr") of the hearing was received on April 7, 1997.

## RULINGS ON PROCEDURE

After receipt of the Applicant's response to the SOR, DOHA advised him by letter dated February 19, 1997, that the case had been referred to an Administrative Judge for the requested hearing. The letter stated:

You may represent yourself, retain an attorney, or obtain the help of anyone else such as a union representative or family adviser. In making the decision you should consider that the Government is represented by an attorney and that any adverse determination could affect your current employment and your future employ-ability. ***If you elect to be represented by an attorney, you must hire one promptly, for very shortly, your hearing will be scheduled by the Administrative Judge to commence generally within 30 days from this letter.*** A formal Notice of Hearing will be issued by the Administrative Judge setting forth the actual date, time, and location of the hearing.

***Once a Notice of Hearing is issued, a request to delay the hearing is generally NOT granted by the Administrative Judge without a showing of "good cause".***

(Emphasis in original.) The Notice of Hearing was issued on March 10, 1997, setting the hearing for March 26, 1997. On March 17, 1997, the Applicant retained Doris J. Dabrowski, Esq., as his attorney, and she mailed a notice of appearance the same day together with a request for a continuance to a date between April 11 and 30, 1997 to the undersigned with a copy to the Department Counsel. She was unable to reach either by telephone, however. The letter of s. Dabrowski was received by DOHA on March 24, 1997, but neither the undersigned nor the Department Counsel received it then because they were on official travel. The Applicant and his father appeared at the hearing without Ms. Dabrowski and informed both the undersigned and the Department Counsel of the retainer and her request for a continuance. However, the Applicant said he was prepared to go forward with the hearing as scheduled and requested that his father serve both as his personal representative and as a witness. Finding both competent to proceed without an attorney, the hearing was conducted and completed that day. Tr pages 5-22.

## FINDINGS OF FACT

The Statement of Reasons (SOR) consisted of allegations predicated on a single criterion: paragraph 1, Criterion H (drug involvement). The Applicant in his January 27, 1997 answer to the SOR admitted that he used marijuana, with varying frequency, from about October 1994 to at least June 1996 (SOR ¶1.a), but denied that he may use marijuana in the future (SOR ¶1.b). Except as noted herein, the Applicant's admission is hereby incorporated as a finding of fact.

The undersigned Administrative Judge completely and thoroughly reviewed the evidence in the record, and upon due consideration of the same, makes the following additional Findings of Fact:

The Applicant is a 22-year-old ---------- employed by a U.S. Government contractor since July 1996. The Applicant seeks to obtain a Secret personnel security clearance.

The Applicant graduated in May 1996 from the university. On July 8, 1996, he was offered a job with his employer, contingent upon successful completion of a substance abuse screening test, with a report-to-work date of July 15, 1996. The offer stated:

Your continued employment with [corporate employer's name] is contingent on successfully obtaining a security clearance.

Exh. A. He passed the substance abuse screening test and began work.[(1)] On August 20, 1996, the Applicant filled out a Form 86 Security Clearance Application (SCA) to initiate the security clearance process. Question 27 of the SCA asked whether he had since the age of 16 illegally used any con-trolled substance. The Applicant's handwritten response to this question was:

Yes from 10/94 - 6/96**:** marijuana 5 or 6 times (total)

Exh. 1, page 6; tr pages 69-74. On November 1, 1996, the Applicant was interviewed by a Defense Investigative Service (DIS) agent as part of the security clearance investigation. On that date the Applicant gave a signed, sworn statement to the DIS agent that elaborated on the drug involvement of the Applicant. The statement read in part (exh. 2, page 2.):

I can't guarantee that I won't use marijuana in the future. Every time I used marijuana was due to peer pressure, to fit in. There currently isn't much peer pressure but I can foresee a rare instance where there might be that pressure. In a situation where I was feeling left out and smoking marijuana might help me fit in I might smoke marijuana again.

The Applicant had first used marijuana in the fall of 1994 while a junior in college. He used it about five times that school year in dorm rooms. He did not use marijuana again until the winter of his senior year when he did so once or twice. He did not use marijuana again until early June 1996 when at a party after he had been graduated about two weeks. Tr pages 77-78. That was the last time he used marijuana, although there have been three or four times since June 1996 where his friends had used marijuana in his presence, including October 31, 1996. Tr pages 81-88. There have therefore been seven or eight times in all that he smoked marijuana; each time it was given free to him. Tr pages 40, 43, 48. He has never used any other illegal drug. Moreover, he has never purchased, sold, manufactured, transported, or otherwise trafficked in any illegal drug, including marijuana. The Applicant has never been arrested or medically treated as a result of his marijuana use. Exh. 2, pages 1-3.

In answering the SOR on January 27, 1997, the Applicant declared that he will not use marijuana in the future and stated:

I obviously wasn't clear enough on the second issue [SOR ¶1.b] when I had my interview. During that interview, I did say that the one situation where I could possibly imagine smoking it again was if all my best friends were pressuring me to smoke it. I was foolish to bring this up as none of my good friends do smoke it; but even *if* they did, and *if* they attempted to pressure me, I am totally confident in my will to resist. Maybe I had some doubts at the time of the interview, but there is no doubt within me now on this subject.

For the last seven months, I have not smoked or had any desire to smoke marijuana. Nor will it happen at any point in the future. I value my job and the kind of life it provides for me too much to jeopardize it with something that pointless. I don't know how else to put it, so I hope I have said enough to straighten things out.

(Emphasis in original.)

The "main" reason the Applicant claims for his change of mind about the possibility of future mari-juana use between November 1996 and January 1997 was "as [he] heard that [his] clearance might be revoked, [he] just began to think about this, that this was something that could cost [him his] job possibly." Tr pages 51-52.

On March 17, 1997, the Applicant took a drug screen urinalysis at Ms. ---------'s suggestion. Tr pages 78-80. The test proved negative when the results were received on March 20, 1997. Exh. B. The Applicant has not smoked marijuana since early June 1996, 9+ months prior to the close of the record.

## POLICIES

Enclosure 2 of the Directive (32 C.F.R. part 154 appendix H) sets forth adjudicative guidelines which must be considered in evaluation of an individual's security eligibility. The guidelines are divided into those that may be considered in determining whether to deny or revoke a clearance (Disqualifying Conditions or DC) and those that may be considered in determining whether to grant or continue an individual's access to classified information (Mitigating Conditions or MC). In evaluating this case, relevant adjudicative guidelines as set forth below have been carefully considered as the most pertinent to the facts of this particular case.

The criteria, disqualifying conditions, and mitigating conditions most pertinent to an evaluation of the facts of this case are:

### 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

(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 (see above definition);

(3) . . . . Current drug involvement, especially following the granting of a security clearance, or an expressed intent not to discontinue use, will normally result in an unfavorable determination.

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

(2) the drug involvement was an isolated or infrequent event;

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

The Directive also requires the undersigned to consider, as appropriate, the factors enumerated in Section F.3:

a. Nature and seriousness of the conduct and surrounding circumstances.

b. Frequency and recency of the conduct.

c. Age of the applicant.

d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved.

e. Absence or presence of rehabilitation.

f. Probability that the circumstances or conduct will continue or recur in the future.

Enclosure 2 to the Directive provides that 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

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 upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative

Judge may only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. Determinations under the Directive include consideration of the risk that an applicant may deliberately or inadvertently fail to safeguard properly classified information as that term is defined and established under Executive Order 12958, effective on October 14, 1995.

Initially, the Government has the burden of proving controverted facts alleged in the Statement of Reasons. The United States Supreme Court has said:

It is difficult to see how the Board would be able to review security-clearance determinations under a preponderance of the evidence standard without departing from the 'clearly consistent with the interests of the national security' test. The clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials. Placing the burden on the Government to support the denial [of a security clearance] by a preponderance of the evidence would inevitably shift the emphasis and involve the Board in second-guessing the agency's national security determinations.

*Dept. of the Navy v. Egan*, 484 U.S. 518, 531 (1988). This Administrative Judge understands that Supreme Court guidance in its context to go to the minimum ***quantum*** of the admissible evidence that must be adduced by the Government in these proceedings to make its case, that is, substantial evidence but something less than a preponderance of the evidence -- rather than as an indication of the Court's tolerance for error below.[(2)]

The burden of going forward with the evidence then shifts to the applicant for the purpose of establishing his or her security eligibility through evidence of refutation, extenuation or mitigation of the Government's case or through evidence of affirmative defenses. Assuming the Government's case is not refuted, and further assuming it can reasonably be inferred from the facts proven that an applicant might deliberately or inadvertently fail to safeguard properly classified information, the applicant has a heavy burden of persuasion to demonstrate he or she is nonetheless eligible to hold a security clearance.[(3)]

## CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility and demeanor of those who testified, the undersigned concludes that the Government established its case with regard to Criterion H.

The Applicant experimented with puffs on marijuana cigarettes (without buying marijuana) some seven or eight times over about a 20-month period, an average of about once every three months, while in college. MC #2 identified on page 6 ***supra***, is applicable where the drug involvement was "infrequent." Due to the passage of 9+ months of cannabis abstinence since his last use, considering his marked immaturity during college, and in light of his professed change of mind, the Applicant's trivial use of marijuana is sufficiently mitigated so that SOR ¶1.a is concluded favorably to him.

The allegation in SOR ¶1.b[(4)] is another matter. On its face the allegation is no longer true although it was true on November 1, 1996. The Applicant has now ceased marijuana use so, while such use may "recur," is cannot be literally said that it may "continue." More fundamentally, the allegation suggests a ridiculously low standard for denying or revoking a personnel security clear-ance.[(5)] Any disqualifying conduct or condition whatever "may" occur in the future. That is, of course, immaterial[(6)] to the determination of an applicant's ***present*** eligibility for a personnel security clearance. What is material is the applicant's past and/or current conduct or condition, including his past and/or current intentions, and extrapolating by reasonable and logical inference from that to the applicant's future. While the extrapolation need not be, and rarely is able to be, scientifically demonstrable, it must not be propelled simply by cynicism, prejudice, or punitive motivations. A common sense meaning of SOR ¶1.b (one that put this Applicant on notice of the Government's concern) is that the Government believes that there is a reasonable probability that the Applicant will continue or resume the use of marijuana one or more times in the foreseeable future based on his future access to a supply of marijuana and (1) his present intentions, (2) diagnosed addiction, or (3) how he has behaved under circumstances likely to be replicated in the future.

In this case, the Applicant has never been diagnosed with marijuana dependence or abuse, nor does he have the "desire" to smoke marijuana. We have evidence that the evening before his DIS interview, the Applicant declined to smoke marijuana with two acquaintances when offered it as he had done on a few earlier occasions. Yet he was willing the next day to sign a sworn statement that the Government had requested, admitting that he could foresee himself succumbing to peer pressure in the future and using marijuana to "help [him] fit in." Only when he received a formal SOR putting his request for a clearance in jeopardy did he begin to think about the adverse personal consequences. Tr pages 45-46, 57. At the hearing he testified that he has no intention of ever using marijuana again, repeating the substance of his January 27, 1997 SOR answer. When asked for examples in which he had demonstrated maturity to resist something personally advantageous or pleasurable to comply with rules, the Applicant explained that when he accompanies his friends out drinking, he is usually the "designated driver" for them. He testified that in such cases, "if" he took a drink himself, he would "take efforts to drink water for the rest of the night, or make sure that it was at least an hour or two or three after the drink had taken place so [he] felt confident enough." Tr pages 91-94, 102-103. The Applicant knew while in college that smoking marijuana was something illegal, something that "isn't quite right," something against university policy. Tr pages 58, 60, 62.

The Applicant argues that his present intention is never to use marijuana in the future, that he "was never addicted to the substance, or that [he] ever even enjoyed it in the first place," and that because of his job he will resist any peer pressures to smoke it in the future. Tr pages 58-59. His testimony at the hearing was credible only in the sense that he clearly believed his own conclusions, ***i.e.***, sincere, but it is insufficient to warrant reliance. His case as a whole did not carry his "heavy burden of persuasion." Compliance with rules for the sake of the rules themselves appears to be an expression, a conceptual thing, rather than a matter of conviction. He correctly acknowledged that he did not know if he had matured to any great extent between November 1, 1996, and January 27, 1997. Tr page 57. Even in his SOR answer, the Applicant wrote:

I don't know how else to put it, so I hope I have said enough to straighten things out.

Page 4 ***supra***. This suggests a verbal correction to a verbal mistake. DC #3 identified on pages 5-6 ***supra***, is not directly applicable to the facts of this case because there is no current illegal drug involvement and no refusal to discontinue illegal drug use. On the other hand, MC #3 identified on page 6 ***supra***, is not sufficiently satisfied because his intent not to abuse any drugs in the future has not been "demonstrated" but merely expressed. SOR ¶1.b is concluded unfavorably to the Applicant.

The Directive requires that the factors listed in Section F.3 and enclosure 2 to the Directive, identified on page 6 ***supra***, be considered, as appropriate, in making this decision. The nature, seriousness, and frequency of the Applicant's use of marijuana all weigh substantially in the Ap-plicant's favor as does his age and current immaturity. That he is honest and has resisted the use of marijuana for the last 9+ months is also encouraging, but not dispositive of the concern that the use will recur. That he voluntarily participated in the illegal drug activity--knowing it to be illegal--is adverse to him. The relative absence of evidence of significant behavioral changes since his college days in acceding to "peer pressure" is also adverse to him. On balance, this Administrative Judge concludes that the Applicant is not now eligible for a personnel security clearance on this record.

## FORMAL FINDINGS

Formal findings as required by Enclosure 1 of the Directive (see paragraph (7) of section 3 of Executive Order 10865, as amended) and the additional procedural guidance contained in item 25 of Enclosure 3 of the Directive are:

Paragraph 1. Criterion H: AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: Against Applicant

## DECISION

In light of all the circumstances presented by the record in this case, it is the determination of the undersigned that it is

not clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

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Jerome H. Silber

Administrative Judge

1. Tr pages 75-76. His job performance through the end of 1996 was satisfactory, having met all or most of the performance expectations for his position. Exh. C; tr page 106.

2. The rule has been restated as requiring "that security clearances should be revoked [***sic***] if doing so is consistent with the national interest;" *Doe v. Schachter*, 804 F. Supp. 53, 62 (N.D.Cal. 1992). ***Cf.*** with regard to the ***quantum*** of evidence the DISCR Appeal Board analysis in DISCR OSD Case No. 90-1054 (July 20, 1992) at pages 3-5, and DOHA Case No. 94-0966 (July 21, 1995) at pages 3-4. The Directive establishes the following standard of review:

[Whether the] Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the [DISCR] Appeal Board shall give deference to the credibility determinations of the Administrative Judge.

Item 32.a. of the Additional Procedural Guidance (Enclosure 3 to the Directive). See also 5 U.S.C. §556(d).

3. While the Government has the burden of proving controverted facts, the Applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Items 14 and 15 of the Additional Procedural Guidance (Enclosure 3 to the Directive).

4. "b. You may continue to use marijuana in the future."

5. ISCR Case No. 94-1038 (July 14, 1995), concurring opinion.

6. As a matter of the law of evidence, that which is immaterial to an issue may be said to prompt the response, "even if true, so what?" *See* McCormick on Evidence (practitioner treatise series, 4th ed. 1992), pages 773-76. Cf. the analysis of what difference evidence makes if it is "material" in *U.S. v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989).