

DATE: June 26, 1997

In re:

SSN:

Applicant for Security Clearance

ISCR OSD Case No. 97-0041

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR THE GOVERNMENT

Matthew E. Malone, Esq.

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended by Change 3, issued a Statement of Reasons (SOR) dated January 27, 1997, to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive 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 conduct proceedings and determine whether clearance should be granted, continued, denied or revoked.

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

On February 18, 1997, Applicant responded to the allegations set forth in the SOR and requested a hearing. The case was assigned to Administrative Judge Jerome H. Silber on February 25, 1997, and on April 16, 1997, it was transferred to the undersigned due to workload considerations. On April 17, 1997, the hearing was scheduled for May 22, 1997. At the hearing held as scheduled, two Government and four Applicant exhibits were admitted into evidence. Testimony was taken from the Applicant. Also at the hearing, the Government moved to amend subparagraph 3.a. of the Statement of Reasons to allege that the conduct set forth in subparagraph 2.a. only was a violation of Title 18, Section 1001 of the United States Code and as such cognizable as a security concern under Criterion J (criminal conduct). Applicant had no objection thereto, and the amendment was granted. A transcript of the proceedings was received by this office on June 16, 1997.

FINDINGS OF FACT

After a thorough review of the evidence in the record, and upon due consideration of same, this Administrative Judge renders the following findings of fact:

Applicant is a 42 year old ----- who has worked for his current employer (company A), a defense contractor, since April 1996. He seeks a Secret security clearance for his duties there.

Applicant smoked about a quarter ounce of marijuana per week from age fifteen (circa 1970) to mid March 1996. He used the marijuana mostly at home but also on occasion when partying with friends with whom he went out motorcycle riding. ⁽¹⁾ Applicant purchased marijuana during the period 1970 to March 1996 for his personal consumption.

In mid March 1996, Applicant went to work for company B as a ----- and he resolved to forego the use of any illegal drugs. He first day on the job, he underwent a drug test. Allowed to work while awaiting the results of the test, Applicant was terminated from his employ with company B on March 27, 1996, when the test came back positive for marijuana. ⁽²⁾

In April 1996, Applicant commenced his employ as a ----- for company A. In connection with his employer's request that Applicant be granted a Secret security clearance for his duties, Applicant executed on June 18, 1996, a Questionnaire for National Security Positions (SF 86). In response to inquiry thereon (question 22.) concerning his employment record, Applicant reported that he was fired from his job with company B in March 1996 for testing positive for marijuana. With respect to question 24.a. regarding any illicit drug abuse within the last seven years, Applicant responded in the affirmative and listed his use of marijuana, but falsely indicated that he had used it only twice, both times in March 1996. He did not reveal the extent of his marijuana use because he feared denial of the security clearance requested. Applicant answered "no" to question 24.c. ("In the last 7 years, have you ever been involved in the illegal purchase, manufacture, trafficking, production, transfer, shipping, receiving, or sale of any narcotic, depressant, stimulant, hallucinogen, or cannabis for your intended profit or that of another?"). Applicant responded negatively to question 24.c. because his purchases of marijuana were in small quantities for his personal use and that he had never purchased marijuana for profit. ⁽³⁾

On October 14, 1996, Applicant underwent a drug test which was negative for all drugs tested (amphetamines, cannabinoids, cocaine, PCP, opiates).

On October 31, 1996, Applicant was interviewed by a Special Agent of the Defense Investigative Service (DIS). Applicant was forthcoming with the Agent about the extent of his past marijuana abuse and purchase. He admitted that he had not listed his past use of marijuana on his security form, stating, in a signed, sworn statement executed during that interview: "I have quit and I didn't feel like I should incriminate myself on something that I had quit doing." Applicant indicated he would be willing to undergo a polygraph.

Applicant has no intent to use any illegal drug, to include marijuana, in the future. Applicant has made an effort to dissociate himself from those friends with whom he used marijuana in the past, with the exception of one individual who he grew up with. Applicant has advised this friend that he is no longer using marijuana. On about a dozen occasions over the past year (March 1996 to March 1997), this person has used marijuana in Applicant's presence.

Applicant has proven to be a reliable and conscientious security guard for company A. His supervisors (onsite and shift) confirm Applicant takes his duties seriously.

POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the seriousness, recency, frequency and motivation for an applicant's conduct; the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the circumstances or consequences involved; the age of the applicant; the absence or presence of rehabilitation, the potential for coercion or duress, and the probability that the conduct will or will not recur in the future. *See* Directive 5220.6, Section F.3. and Enclosure 2. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although

adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

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
- (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

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:

- (3) the individual made prompt, good faith efforts to correct the falsification before being confronted with the facts.

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

(2) a single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

(2) the crime was an isolated incident.

(5) there is clear evidence of successful rehabilitation.

* * *

Under the provisions of Executive Order 10865 and the Directive, a decision to grant or continue an applicant's 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 can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets its burden and establishes conduct cognizable as a security concern under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of criterion conduct, 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 the Court's rationale, doubts are to be resolved against the Applicant.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility and demeanor of the Applicant, this Judge concludes that the Government has established its case with regard to criteria H, E and J.

The evidence establishes that Applicant used marijuana in quantity of a quarter ounce weekly from about 1970 to mid March 1996. His regular use of marijuana and repeated purchase over the course of some twenty-six years is clearly incompatible with possession of a security clearance. In addition to the unacceptable risk of potential disclosure of classified information when one is under the influence of a mood-altering drug, the demonstrated disregard for applicable laws proscribing illicit drug abuse cast doubt as to whether one can be entrusted to abide by the policies and regulations promulgated for the handling and safeguarding of classified information.

In assessing the current security significance of Applicant's involvement with marijuana, this Administrative Judge must consider the adjudicative guidelines set forth in Enclosure 2 to the Directive. Under the pertinent policy pertaining to drug involvement, disqualifying conditions (DC) 1. and 2. are apposite. While there is no evidence of any physical dependence on the drug, the regularity of the abuse for some twenty six years manifests the extent to which marijuana was part of his recreational lifestyle. Applicant bears a particularly heavy, although not insurmountable, burden to demonstrate reform.

Of the corresponding mitigating conditions (MC), the quarter ounce per week nature of the abuse and its recency to mid

March 1996 preclude any consideration of MCs 1. (not recent) and 2. (isolated or infrequent event). Nor has Applicant participated in any type of drug treatment program. Only MC 3. (demonstrated intent not to use any drug in the future) has any potential applicability. Applicant resolved to maintain abstinence from marijuana on entering the ----- field and by all accounts of record, he has managed to do so. The positive urinalysis test in March 1996, which led to his termination after only one week at company B, is not evidence that he used marijuana on that date, but it does reflect that he stopped marijuana use only shortly before going to work for company B. His maintenance of a drug-free lifestyle since for some fourteen months is demonstrative of a sincere commitment to abstain, but doubts persist as to whether his drug use is safely behind him. His present abstinence is very brief when compared to his twenty-six years of involvement. It is reasonable to infer from his abuse on at least a weekly basis for such a long period that Applicant enjoyed the use of marijuana. While Applicant has made some effort to dissociate himself from those with whom he used marijuana in the past, he continues to socialize with a longtime friend in the context of motorcycle riding. On a dozen occasions between March 1996 and March 1997, Applicant met at this friend's house where this individual and others would smoke marijuana in his presence and then Applicant would accompany them riding. There is no evidence that the others placed pressure on Applicant to use any marijuana on those occasions, but the risk of relapse cannot be discounted where he knowingly continues to place himself in situations where marijuana is being used. Applicant's positive work record at company A is assessed as favorable, but even his desire to retain his defense-related employment has not been enough for him to divorce himself from circumstances historically associated with his own marijuana use. Accordingly, subparagraphs 1.a., 1.b. and 1.c. are resolved against him.

The concerns engendered by his longstanding marijuana use and purchase are compounded by his failure to be forthright on his June 18, 1996, Questionnaire for National Security Positions (SF 86). Applicant responded in the affirmative to question 24.a., admitting thereby to the Department of Defense that he had used illegal drugs in the past, but he reported use of marijuana only twice in March 1996. Applicant concealed his extensive use of marijuana because he feared denial of the clearance requested should he incriminate himself. In contrast, Applicant denied question 24.c. as he regarded the question as pertinent to drug involvement for profit. His interpretation was not unreasonable given the nature of the question and therefore he is found not to have deliberately omitted or concealed his marijuana purchases. Thus, a favorable finding is returned with respect to subparagraph 2.b.

DC 2. under the adjudicative guidelines pertaining to personal conduct must be considered because of Applicant's deliberate concealment of material facts concerning his marijuana use from his personnel security questionnaire. Of the seven listed mitigating conditions under the personal conduct guidelines, the first four have potential application in cases of intentional misrepresentation. Marijuana abuse at the rate of a quarter ounce weekly from 1970 to mid March 1996 has the potential for influencing an agency's investigative and adjudicative decisions and is pertinent to a determination of Applicant's judgment, trustworthiness and reliability so MC 1. on its face does not apply. The falsification of question 24.a. on the SF 86 was an isolated incident, but occurred in June 1996, which is less than one year ago and thus too recent to apply MC 2. in his favor. There is no evidence that Applicant to his detriment relied on the improper advice of an authorized person which is required for consideration of MC 4. With respect to MC 3., Applicant submits that he made amends by being candid about his drug use during his subject interview of October 31, 1996. The Government does not contest Applicant made voluntary disclosures to the DIS Agent, but takes the position that it was not an independent effort to correct the prior misrepresentation as it came in the context of a DIS interview. MC 3. requires that the correction be prompt, in good-faith, and before being confronted. The fact that the disclosures were made during a DIS interview does not in and of itself preclude consideration of MC 3. There is no evidence that Applicant had to be confronted with the truth about his marijuana use by the DIS Agent. Applicant admits he did nothing to correct the record between the time he executed the SF 86 and his DIS interview. Unquestionably, Applicant would have even a better case in mitigation had he taken some steps of his own in the interim four months to correct the record, such as inquiring from his employer's security office or other authorized person as to possible rectification. The fact that he set the record straight during his first official opportunity to do so still weighs considerably in his favor, however. After consideration of the isolated nature of the falsification, the voluntariness of his admissions during the DIS interview, and his frankness at the hearing regarding his past marijuana abuse and his continued association with at least one friend who uses marijuana in his presence, this Administrative Judge finds it unlikely that Applicant will engage in similar criterion E conduct in the future. Subparagraph 2.a. is therefore also concluded in his favor.

Inasmuch as Applicant's deliberate misrepresentation of his marijuana abuse on his SF 86 constitutes a felony violation of federal law pursuant to Title 18, Section 1001 of the United States Code,⁽⁴⁾ the adjudicative guidelines DC 1. (any

criminal conduct) and DC 2. (single serious crime) pertaining to criminal conduct must likewise be taken into account when evaluating his current security worthiness. The Government can ill afford individuals dictating for themselves the timing and extent of disclosure. Applicant's recent, knowing and willful misrepresentation of his marijuana abuse is viewed as especially egregious. In mitigation, it was isolated in nature and there is evidence of rehabilitation in his candor during his DIS interview and at his hearing. The concerns caused by his criterion J conduct are sufficiently overcome to find for him with respect to subparagraph 3.a. of the SOR.

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

Paragraph 2. Criterion E: FOR THE APPLICANT

Subparagraph 2.a.: For the Applicant

Subparagraph 2.b.: For the Applicant

Paragraph 3. Criterion J: FOR THE APPLICANT

Subparagraph 3.a.: For 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 grant or continue a security clearance for Applicant.

Elizabeth M. Matchinski

Administrative Judge

1. At his hearing, Applicant testified that he used marijuana in the context of socializing with individuals with whom he went out motorcycle riding. In response to this Judge's inquiry as to whether he had ever used marijuana in a context other than riding a motorcycle with this group of friends, Applicant testified, "No, ma'am. Well, we would sit around. Like at night when most people would drink, we would smoke marijuana." (Transcript, pp. 34-35). He indicated he used marijuana "just for partying." However, in his signed, sworn statement dated October 16, 1996, Applicant disclosed that he used marijuana mostly at home, sometimes at parties with friends. (Government Exhibit 2, p. 1). Given the regularity of his use, a quarter ounce per week over approximately twenty-six years, it is clear marijuana was part of his lifestyle.

2. There is no evidence that Applicant used marijuana since entering the ----- field, his positive urinalysis test notwithstanding. The Government presented no evidence controverting Applicant's testimony that he took the drug test on the first day of his employ and that it took a week for company B to learn of the test results.

3. As evidence of deliberate falsification of question 24.c. on the SF 86, the Government relied solely on Applicant's Answer to the SOR, specifically on Applicant's admission to subparagraph 2.b. In his Answer, Applicant, however, went on to clarify his admission to subparagraph 2.b., indicating that he considers his response of "no" to question 24.c. on the SF 86 to be accurate because he has never been involved in anything other than the purchase of small quantities for his personal use and he never once purchased, manufactured, trafficked, produced, transferred, shipped, received or sold anything for profit. The parties were notified at the hearing that this Administrative Judge considered Applicant to

have therefore denied any intentional falsification as it pertains to question 24.c. Even in the absence of any independent evidence offered by the Government, this Administrative Judge may reject statements by an applicant which are implausible or contrary to reason. However, it was reasonable for Applicant to read question 24.c. as pertaining only to drug activity where profit was intended. As question 24.c. is presently drafted, the phrase "for your intended profit or that of another" modifies not only sale, but all the conduct listed (illegal purchase, manufacture, trafficking, production, transfer, shipping, and receiving). In light of subparagraph 2.b. of the SOR, the Government's position is that question 24.c. covers small purchases for personal consumption. It is noted that while Department Counsel did not withdraw allegation 2.b., he moved to amend the allegation of criminal conduct by limiting it to the falsification only of question 24.a. on the SF 86, which reflects the lack of Government confidence in its position, at least in this case.

4. 18 U.S.C. §1001 provides in pertinent part: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up a . . .material fact. . .shall be fined not more than \$10,000 or imprisoned not more than five years, or both."