

Date: April 30, 1997

In Re:  
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SSN: -----

Applicant for Security Clearance

ISCR OSD Case No. 97-0050

**DECISION OF ADMINISTRATIVE JUDGE**

**ROBERT R. GALES**

**APPEARANCES**

**FOR THE GOVERNMENT FOR THE APPLICANT**

Michael H. Leonard, Esquire

Department Counsel

*Pro se*

**STATEMENT OF CASE**

On January 24, 1997, 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 and modified, issued a Statement of Reasons (SOR) to -----  
-- (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 Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked.

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

In a sworn written statement, undated, but received on February 21, 1997, Applicant responded to the allegations set forth in the SOR, and requested a hearing. The case was initially assigned to Administrative Judge John R. Erck on February 28, 1997, but due to caseload considerations, was subsequently reassigned to, and received by, this Administrative Judge on March 17, 1997. A notice of hearing was issued on April 2, 1997, and the hearing was held before me on April 16, 1997. During the course of the hearing, two Government exhibits and one Applicant exhibit, and the testimony of four Applicant witnesses (including the Applicant), were received. The transcript was received on April 28, 1997.

**RULINGS ON PROCEDURE**

At the close of the evidentiary portion of the hearing, Department Counsel moved to amend the SOR to conform to the evidence in the record. The first motion was to amend subparagraph 1.b. of the SOR by deleting the number "1996," and

substituting therefor the words "September or October 1995." There being no objection, the motion was granted, and the subparagraph of the SOR was amended to read as follows: "b. You purchased marijuana from about 1986 to at least September or October 1995." The second motion was to amend subparagraph 1.d. of the SOR by deleting the words "with varying frequency," and substituting therefor the words "on two occasions," and by deleting the words "at least." There being no objection, the motion was granted, and the subparagraph of the SOR was amended to read as follows: "d. You used psilocybin 'mushrooms' on two occasions in 1986."

### FINDINGS OF FACT

Applicant has admitted nearly all of the factual allegations pertaining to drug involvement under Criterion H (subparagraphs 1.a., 1.c., and 1.d.). Those admissions are hereby incorporated herein as findings of fact. He denied subparagraph 1.b.

After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a twenty-seven year old male employed by a defense contractor, and he is seeking to obtain a security clearance, the level of which has not been specified.

Applicant has been a marijuana abuser for about ten years, commencing in about July 1986, when he was seventeen years old, and continuing until at least August 22, 1996. He started using marijuana in social situations, when marijuana *joints* or a marijuana-filled pipe were passed around among friends, because it was casually treated similar to the use of alcohol. He had concluded that marijuana was part of the culture in which he was growing up, and it did not seem harmful. The frequency of such abuse varied from about one or two times per week<sup>(1)</sup> to about one time per month. It started off more frequently, but eventually tapered off to abstinence.<sup>(2)</sup> At some point in early 1996, Applicant began to have doubts as to the wisdom of continuing to abuse marijuana. He attributed those feelings to post-abuse depression and an impact on his character.<sup>(3)</sup> In spite of those doubts, he continued to abuse marijuana on about four more occasions, with the last such occasion occurring during his twenty-seventh birthday on August 22, 1996.

Applicant commenced his position with his employer in April 1996. During the in-processing, Applicant was made aware of the anti-drug policy of the employer. Nevertheless, despite knowledge of the prohibitions, he continued to abuse marijuana. He attributed his continued substance abuse to an awareness that other employees were also doing so.

Eventually, after further consideration of his concerns, and with the added concern that continued substance abuse might impact his employment, he actually started to abstain. He vowed to never abuse marijuana in the future. Since the August 1996 decision, Applicant has turned down offers of marijuana from his friends. There is no evidence to rebut Applicant's contentions that he has abstained from further marijuana abuse since August 22, 1996.

Applicant also experimented with psilocybin mushrooms on two occasions in 1986. There is no evidence to rebut Applicant's contentions that he has abstained from further psilocybin mushroom abuse since 1986.

During the period of his substance abuse, commencing in 1986, and continuing until about September or October 1995, Applicant purchased marijuana, for his personal use and "sharing," on an unspecified number of occasions, thought to be on an average of one or two times per month, spending as much as forty-five dollars for a quarter of an ounce for his purchases.<sup>(4)</sup> There is no evidence to rebut Applicant's contentions that he has not made any such purchases since October 1995.

At some point during his period of substance abuse, Applicant's parents suspected his marijuana abuse, and even had him tested on several occasions. While the tests failed to reveal his substance abuse, they did uncover another malady unrelated to substance abuse. Applicant claimed that his parents were aware of his substance abuse and had asked him to stop,<sup>(5)</sup> but his mother denied ever asking in light of the test results.<sup>(6)</sup> Until he had decided to do so in August 1996, he refused to abstain.

Applicant was arrested on November 22, 1989, when he was twenty years old, and charged with possession of

controlled dangerous substance and possession of paraphernalia. He subsequently received probation before judgment, with the unsupervised probation lasting one year. Within two months of his arrest, Applicant resumed his abuse of marijuana, and continued to do so throughout the remainder of his period of probation. (7)

He has never undergone any drug treatment or rehabilitation as a result of his substance abuse.

In November 1996, Applicant moved to another town, and took up other interests and friends. Since that time, he has distanced himself from his substance abusing former friends.

Applicant's immediate supervisor supports his application, and has characterized his performance as excellent. Furthermore, he believes Applicant is a very responsible individual.

### POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Factors) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Factors).

An Administrative Judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision -- an expansion of the factors set forth in Section F.3. of the Directive, are intended to assist the Administrative Judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an Administrative Judge should consider are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of 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.**

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);
- (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;

Since the protection of the national security is the paramount determinant, the final decision in each case must be arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security,"<sup>(8)</sup> or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded that both standards are one and the same. In reaching this Decision, I have endeavored to draw only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have attempted to avoid drawing inferences that are grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the Government to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the Government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the Government's case, and to ultimately demonstrate that it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's loyalty and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides that industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than loyalty and patriotism. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied decision as to Applicant's loyalty or patriotism.

### **CONCLUSIONS**

Upon consideration of all the facts in evidence, an assessment of the witness testimony, demeanor, and credibility, and after application of all appropriate legal precepts and factors, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

With respect to Criterion H, the Government has established its case. Applicant's improper and illegal drug abuse, including the purchase, possession, and use of marijuana, and the use of psilocybin mushrooms, is of concern, especially in light of his desire to have access to the nation's secrets.

Motivated by social pleasures and the desire to fit in with his crowd, notwithstanding the legal status of his endeavor, Applicant exhibited a pattern of questionable judgment, irresponsibility, and immature behavior, and continued his substance abuse of marijuana for approximately ten years. He was given probation after his 1989 arrest, but Applicant apparently learned nothing from the experience, and resumed his substance abuse shortly after that arrest. Far from being an adolescent, he was, in fact, twenty-seven years old when he finally stopped abusing marijuana. Applicant placed his drug-induced social pleasures above his potential fiduciary responsibilities towards his employer, the Government, and the drug laws. As stated above, improper or illegal involvement with drugs raises questions regarding an individual's willingness or ability to protect classified information. Applicant's actions have seemingly answered those questions.

The presence or absence of rehabilitation and other pertinent behavioral changes are significant factors in the overall

adjudicative process. Despite a period of substance abuse which lasted for ten years, and a limited experimentation with another substance ten years ago, Applicant has not undergone any drug awareness, education, or treatment program, in order to achieve a better self-understanding of the behavioral and psychological effects of his actions and the motivation therefor. Likewise, simply superficially claiming that peer pressure and curiosity were initial motivators, and continued enjoyment and social pleasures were eventual motivators, does not demonstrate true insight into the actual motivation for following the ten year course of conduct which he had chosen. Furthermore, Applicant's period of abstinence has only continued for eight months to the close of the record. Without answers to these important questions, as well as the development of counter measures to the resumption of substance abuse -- relapse prevention, the likelihood of recurrence becomes greater. It is to his credit that Applicant has now chosen abstinence, and moved away from his old friends, to experience life without substance abuse.

It appears that neither punishment by the authorities, nor the threat of same, nor the interests of the employer, seem to have had any long-term success with marijuana's hold over Applicant. In this instance, especially in light of Applicant's continued violation of his probation, and the length of his period of substance abuse, I believe that both the successful completion of a drug treatment and rehabilitation program, as well as continued abstinence, for a period longer than the current eight months, should be required to demonstrate the truly successful transformation from substance abuser to an abstinent, drug-free person, and to provide the basis for a conclusion that such conduct will not continue or recur in the future. Under the evidence presented, I possess little confidence that Applicant's substance abuse is a thing of the past, or that it will not recur. This is not to infer that I do not believe Applicant's declared intention of continued abstinence, for he has exhibited a laudable candor. However, even with good intentions, more time is simply necessary.

I do not take this position lightly, but based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my evaluation of the evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under Enclosure 2 of the Directive, I believe that Applicant has failed to mitigate or overcome the Government's case. The evidence leaves me with grave questions and doubts as to Applicant's continued security eligibility and suitability. Accordingly, allegations 1.a. through 1.c. of the SOR are concluded against Applicant.

Applicant's experimentation with psilocybin mushrooms on two occasions in 1986 has not been repeated thereafter, and I consider such abuse to be stale, with little current security significance. Thus, I conclude that Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the Government's case. Accordingly, allegation 1.d. of the SOR is concluded in favor of Applicant.

For the reasons stated, I conclude Applicant is not suitable for access to classified information.

### **FORMAL FINDINGS**

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1. Criterion G: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: 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 grant or continue a security clearance for Applicant.

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Robert R. Gales

Chief Administrative Judge

1. *See*, Government Exhibit 1, at 8, wherein Applicant estimated his frequency during the period July 1986 until August 1995, to be one time per week. However, during the hearing, Applicant estimated the frequency during the period July 1986 until November 1989, to be "a couple times a week." *See*, Transcript (Tr.), at 30-31.
2. During late 1989, and continuing until about 1991, Applicant used marijuana approximately two times per month; commencing in 1991, and continuing until about 1994, he used it about one time per month; and in 1994, and continuing until about April 1996, he used it about one or two times per month. Between April and August 1996, Applicant used marijuana on about four occasions. *See*, Tr., at 30-32.
3. *See*, Tr., at 35.
4. It is interesting to note that in his Questionnaire for National Security Positions (QNSP), completed on April 12, 1996, when asked if, during the past seven years, he had ever been involved in the illegal purchase of cannabis (marijuana), Applicant answered "no." That response was untrue. *See*, Government Exhibit 1, at 8.
5. *See*, Tr., at 40.
6. *See*, Tr., at 55.
7. *See*, Tr., at 31.
8. *See*, Executive Order 12968, "*Access to Classified Information*;" as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995. However, the Directive uses both "clearly consistent with the national interest" (*see*, Sec. B.3; Sec. C.2.; and Sec. D.2.; Enclosure 3, Sec. 1.; and Sec. 25), and "clearly consistent with the interests of national security" (*see*, Enclosure 2 (Change 3), Adjudicative Guidelines, at 2-2).