

DATE: June 18, 1997

In re:

SSN:

Applicant for Security Clearance

ISCR OSD Case No. 97-0155

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR THE GOVERNMENT

Michael H. Leonard, 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 February 13, 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 March 3, 1997, Applicant responded to the allegations set forth in the SOR and requested a hearing. The case was assigned accordingly to this Administrative Judge on April 4, 1997, and on April 16, 1997, a hearing was scheduled for May 15, 1997. At the hearing held as scheduled, two Government exhibits were admitted. A Defense Investigative Service (DIS) Special Agent testified on behalf of the Government. Applicant proffered his testimony and that of his employer's security officer. A transcript of the hearing was received by this office on May 28, 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 31 year old ----- who has worked for his current employer (company A), a defense contractor, since April 1996. He seeks a Top Secret security clearance for his duties there.

During his last two years of high school (1982/83), Applicant smoked marijuana recreationally once every other month,

usually on a Friday night. In September 1983, Applicant matriculated in college in pursuit of his Bachelor and Masters degrees in electrical engineering. While in college, Applicant used marijuana in social settings approximately once every six months. During part of this period, in at least 1986, Applicant held a Secret security clearance in connection with his co-op student employment as a civilian with a branch of the United States military. Applicant purchased marijuana for his personal consumption on occasion until 1986. The marijuana smoked thereafter was obtained from others.

In May 1991, he started his own consulting business. In May 1992, he was awarded his B.S.E.E. and M.S.E.E degrees. He continued to use marijuana after college on average of once every six months. In January 1995, he went to work as an ----- for a large private company (company B) in addition to continuing to operate his own business. On at least one occasion in summer 1995, Applicant used marijuana.⁽¹⁾ After twelve months working for company B, Applicant accepted an offer of employment with company A. Prior to commencing work, he took a month long ski vacation with friends in March 1996. On at least one occasion during that ski trip, Applicant smoked marijuana which had been provided to him by one of his companions. Applicant was offered marijuana on other occasions during this trip but he declined to partake.

Applicant had his first experience with cocaine as a high school student. He has used cocaine ten times total, with his use since May 1986 being at the rate of once every two and a half years. Applicant last used cocaine in March 1996 at a private social gathering in his hometown shortly after he returned from his month long ski trip. Applicant purchased cocaine on a total of three occasions, once within the last ten years which was in about 1993. The cocaine used in arch 1996 was obtained from an associate.

Applicant used psilocybin mushrooms on four occasions between May 1986 and August 1993. He purchased the drug twice. As a college student, he also experimented with LSD three times (once prior to May 1986 and twice between May 1986 and June 1989), peyote once in April 1989 and Valium which had not been prescribed for him once in August 1988. He purchased LSD on one occasion.

On commencing his employ with company A, Applicant resolved to refrain from any illicit substance abuse in the future for reasons of health, his employer requires him to be drug-free, and because of the illegality of the drug involvement. Applicant has been offered marijuana since, the most recent occasion being in April 1997 when he met some skiers on the slope who were taking a "joint" break. Applicant refused their offer of marijuana. Applicant has not terminated his association with the individual who provided him marijuana on the ski trip in March 1996 as they share a common interest in skiing, but he does not see this person very often as the individual does not reside in Applicant's region of the country.

In conjunction with his employer's request that he be granted access to classified information up to the Top Secret level for his work at company A, Applicant executed on June 14, 1996, a Standard Form 86 (SF 86), Questionnaire for National Security Positions. On the advice of the facility security officer, Applicant went back ten years rather than the requested seven in responding to inquiry concerning illicit drug use or activity. Applicant listed thereon his involvement with marijuana, cocaine, psilocybin mushrooms, peyote, LSD and Valium.

On October 3, 1996, Applicant was interviewed by a Special Agent of the Defense Investigative Service (DIS) concerning his illicit drug involvement. Cooperative and candid during the interview, Applicant informed the Agent about the circumstances of his drug use in March 1996 while on the ski trip. He advised the Agent that he had no intent to use any illegal drug in the future. Applicant admitted he was acquainted with individuals from his hometown who continued to be involved with cocaine, but his everyday associates were more mature and regarded drugs as "more of a kid thing."

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:

- (1) the drug involvement was not recent
- (2) the drug involvement was an isolated or infrequent event
- (3) a demonstrated intent not to abuse any drugs in the future

* * *

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 those who testified, this Judge concludes that the Government has established its case with regard to Criterion H.

Applicant presents a history of occasional marijuana and cocaine abuse from high school (circa 1982) to March 1996 as well as experimental abuse of psilocybin mushrooms, peyote, LSD and Valium in the more distant past. Some of these drugs (marijuana, cocaine, psilocybin and LSD) Applicant purchased for his personal consumption, although those drugs used since 1993 were given to him by others. Illicit substance involvement is incompatible with retention of a security clearance because of the obvious potential for inadvertent disclosure of classified information when one is under the influence.

In assessing the current security significance of Applicant's drug abuse history, this Administrative Judge must consider the Adjudicative Guidelines pertaining to drug involvement set forth in Enclosure 2 to the Directive. Disqualifying conditions (DC) 1. (any drug abuse) and 2. (illegal drug possession, including purchase) are clearly both apposite.⁽²⁾ Of the corresponding mitigating conditions (MC), the remoteness and limited extent of Applicant's involvement with psilocybin, peyote, LSD and Valium warrant favorable consideration of MCs 1. (involvement not recent) and 2. (involvement infrequent) with respect to these substances. The evidence reflects that Applicant abused Valium on only one occasion in 1988, psilocybin on about four occasions over a seven year time frame to August 1993, LSD three times total with the last use in June 1989, and peyote once in April 1989. With the exception of psilocybin, Applicant's involvement with these dangerous substances ceased prior to or in 1989. Although his last ingestion of psilocybin in August 1993 was more recent, the drug no longer holds any appeal for him.

Applicant's abuses of cocaine and marijuana engender greater concern due to their fourteen year duration, their occasional nature (marijuana every other month in high school and once every six months thereafter; cocaine ten times), and the recency of latest involvement (March 1996). Such abuse is subject to mitigation under the Directive's adjudication policy guidance where there is a demonstrated intent not to abuse any drugs in the future (MC 3.) or satisfactory completion of a prescribed drug treatment program (MC 4.). Applicant has not completed any type of drug treatment program. However, Applicant has managed to refrain from any illicit substance involvement since he commenced his employ with the defense contractor just over a year ago. Notwithstanding, the Government contends that Applicant displays a casual attitude toward marijuana which is incompatible with retention of a security clearance, citing Applicant's response to the DIS Agent during the interview to the effect how can one go out on a ski trip to state C and not run across marijuana.⁽³⁾ Applicant obviously did not have a problem with using the marijuana when he was on the ski trip. To that extent, he may be said to have exhibited a casual attitude in that the illegality of the use or possible deleterious health effects proved no impediment. Applicant's attitude toward his personal use of marijuana (and of other drugs) has changed sufficiently in the last year to warrant favorable findings. Applicant testified credibly at the hearing that he has no intent to use any illegal drug in the future because of health concerns as well as the fact that his employment requires he remain drug-free. There is no evidence that in the last year he has sought out any illegal drug or deliberately placed himself in a situation where drugs would be available to him. Applicant has been offered marijuana since arch 1996, but it was during a casual encounter on the ski slope and he declined to partake.⁽⁴⁾ Furthermore, there is no evidence that he has endeavored to purchase any marijuana in the last ten years or cocaine since spring 1993.

Applicant does not currently reside in the same geographic locale as either the person with whom he used marijuana on the ski trip or the hometown friends with whom he used cocaine in March 1996. As corroborated by the testimony of the facility security officer/office manager, Applicant is a dedicated ----- professional who is committed to his work. His desire to continue his employment with company A is a deterrent to any drug abuse on his part. Where Applicant has been candid with the Government about his past drug abuse, and has demonstrated an ability to abstain for over twelve months, this Administrative Judge has no reason to doubt his desire or ability to refrain from all illegal drug abuse in the future. Accordingly, subparagraphs 1.a., 1.b., 1.c., 1.d., 1.e., 1.f., 1.g., 1.h., 1.i. and 1.j. are resolved in Applicant's favor.

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: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: For the Applicant

Subparagraph 1.e.: For the Applicant

Subparagraph 1.f.: For the Applicant

Subparagraph 1.g.: For the Applicant

Subparagraph 1.h.: For the Applicant

Subparagraph 1.i.: For the Applicant

Subparagraph 1.j.: 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.

Elizabeth M. Matchinski

Administrative Judge

1. Applicant testified that he does not recall using marijuana or cocaine while he was trying to run his own business from May 1991 to March 1996. When asked whether he had used marijuana while working at company B, Applicant responded, "I don't recall an exact incident, but, to be on the safe side, I'd have to say yes." (Transcript, pp. 54-55). He subsequently testified that his last use of marijuana prior to March 1996 had been "that previous summer, so a little more than six months." (Transcript, p. 63).

2. Whereas there is no indication that Applicant has ever been directed to attend a drug treatment program, his failure to enroll in, and successfully comply with, such a rehabilitation effort is not viewed as security disqualifying.

3. The DIS Agent testified at the hearing that Applicant displayed a casual attitude during the interview concerning the use of marijuana. (Transcript, p. 34). She later explained she was commenting about his demeanor at the hearing when discussing the marijuana. (Transcript, p. 36).

4. Applicant's admissions to being offered marijuana were in response to this Judge's inquiry. It is noted that the Government did not press Applicant as to any other occasions on which he may have been offered marijuana since March 1996.