

DATE: February 26, 1998

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In Re:

SSN:

Applicant for Security Clearance

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ISCR Case No. 97-0544

**DECISION OF ADMINISTRATIVE JUDGE**

**WILFORD H. ROSS**

**APPEARANCES**

**FOR GOVERNMENT**

Martin H. Mogul, Esquire, Department Counsel

**FOR APPLICANT**

Derek A. Howard, Esquire

Joseph Schultz, Esquire

**STATEMENT OF THE CASE**

On September 8, 1997, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended), issued the attached 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 the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on October 3, 1997, and requested a hearing. The case was received by the undersigned on November 18, 1997, and a Notice of Hearing was issued on November 19, 1997.

A hearing was held on December 10, 1997, at which the Government presented four documentary exhibits, and called one witness. Testimony was taken from the Applicant, who also submitted one post-hearing exhibit.<sup>(1)</sup> The transcript was received on December 19, 1997.

**FINDINGS OF FACT**

The Applicant is 29, married and has a Master's Degree. He is employed by a defense contractor as a computer scientist, and he seeks to obtain a Secret-level DoD security clearance in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a security clearance, based upon the allegations set forth in the attached Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and criterion in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

Paragraph 1 (Criterion H - Drug abuse). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he abuses illegal drugs.

The Applicant has used marijuana during the following periods. From January 1988 to August of 1989 he used marijuana six to ten times, purchasing it once. The Applicant was in college at this time, and did not hold a security clearance. From July 1990 to July 1993, the Applicant worked for another defense contractor and held a security clearance. He did not use marijuana or any other illegal drug during this period. In July 1993, the Applicant left his employment and no longer had a security clearance. During the period when he no longer held a security clearance, he used marijuana once in August 1993 and once in June 1994. The Applicant has not used any marijuana or other illegal drug since June 1994 and he expresses a credible intent not to use marijuana or any other illegal drug in the future. (Transcript at 33-36.)

Mitigation. Applicant's Exhibit A consists of four letters of recommendation. Two are from fellow graduate students of the Applicant's. These people find him to be of high moral character, ethical and moral. The exhibit also contains letters from two academics at the university where the Applicant is a Ph.D. candidate. These people also find the Applicant to have a high moral character and a commitment to the country's values. All four of the correspondents recommend the Applicant for a security clearance.

## POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 and Section F.3. of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent criterion. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

### Criterion H (Drug involvement)

#### Condition that could raise a security concern:

- (1) any drug abuse;

#### Conditions that could mitigate security concerns:

- (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.

In addition, as set forth in Enclosure 2 of the Directive at page 2-1, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors (General Factors):

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes

- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence."

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in incidents of drug abuse that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

## CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the granting of a security clearance. If such a *prima facie* case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's *prima facie* case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by *prima facie* evidence that the Applicant has used marijuana on no more than twelve occasions from 1988 to 1994.

The Applicant, on the other hand, has successfully mitigated the Government's case. The bulk of the Applicant's drug use occurred during his college years, before he obtained a security clearance. His last two uses occurred after the Applicant no longer had a security clearance, and before he applied for a new one. He last used marijuana three and a half years ago. This use in 1993 and 1994 was an isolated and infrequent event. His long term abstinence, and testimony that he will not use marijuana in the future, show a demonstrated intent not to use drugs in the future. The Government was legitimately concerned about this intent, given the rather confusing statements of the Applicant in Government Exhibit 3. Based on the totality of the evidence, I am convinced that the Applicant understands the error of his ways and does not intend to use marijuana in the future.

In addition, application of the F.3. factors is appropriate and supports a decision in the Applicant's favor. The Applicant is motivated not to use drugs in the future (factor F.3.d.), he shows considerable evidence of rehabilitation (factor F.3.e.), and, under the circumstances of this case, the probability that the Applicant will return to using drugs are virtually nil (factor F.3.f.).

On balance, it is concluded that the Applicant has successfully overcome the Government's *prima facie* case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

## **FORMAL FINDINGS**

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

Paragraph 1: For the Applicant.

Subparagraphs 1.a. through 1.d.: 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 the Applicant.

Wilford H. Ross

Administrative Judge

1. Applicant's Exhibit A consists of four letters of recommendation. Applicant's counsel also submitted a written "Closing Statement," which was received by me.