

DATE: March 18, 1998

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 97-0803

**DECISION OF ADMINISTRATIVE JUDGE**

**ELIZABETH M. MATCHINSKI**

**APPEARANCES**

**FOR GOVERNMENT**

Michael H. Leonard, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 3), issued a Statement of Reasons (SOR), dated December 4, 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. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. The SOR was based on Applicant's use and purchase of illegal drugs (criterion H).

On December 16, 1997, Applicant responded to the SOR, admitting all the allegations set forth and requesting a hearing. The case was assigned accordingly to this Administrative Judge on January 22, 1998, and on January 29, 1998, a hearing was scheduled for February 25, 1998. At the hearing held as scheduled, four Government exhibits and six Applicant exhibits were admitted into evidence. Testimony was taken from the Applicant. A transcript of the hearing was received by DOHA on March 10, 1998.

**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 41 year old senior engineering technician who has worked for his current employer (company A), a defense contractor, since the end of June 1997. He seeks to retain a secret security clearance which was originally granted to him in May 1989, by the Defense Security Service Operations Center--Columbus (formerly designated the Defense Industrial Security Clearance Office) for his defense-related duties for a prior employer (company B). The Secret clearance was transferred in July 1997 for his work in his present job.

Applicant started using marijuana as a student in a vocational technical high school. Between 1973 and 1975, he smoked marijuana in cigarettes and pipes with friends at weekend social gatherings one to three times per month. He purchased small amounts of the drug for personal consumption. Following his graduation, Applicant entered the United States military in October 1975. Abstinent from illegal drugs until August 1976, Applicant was then transferred to an overseas duty location where he began to use hashish one to three times per month at weekend social gatherings. He continued to use hashish at this rate until February 1979 when he was assigned for duty stateside. Applicant purchased hashish for his own consumption at a cost of \$20.00 per month between August 1976 and February 1979. Once back in the continental United States, Applicant resumed use of marijuana with friends two to three times a month. Applicant was tested three times for drugs while in the military with negative results. In October 1979, Applicant was granted an honorable discharge from the military at the rank of E-4 specialist after serving four years in wheel and track vehicle repair.

Applicant worked thereafter in the civilian sector as a bus and then truck repairman until 1985 when he enrolled in technical school. After an eight month course of study, he earned in November 1985 a certificate in computer repair electronics. During the period from October 1979 to November 1985, he smoked marijuana with friends on average two to three times a month, purchasing small amounts for his personal consumption. Applicant's marijuana use was at its peak during the late 1970's and early 1980's where on occasion he smoked on both Friday and Saturday evenings two or three weekends a month.

In December 1985, Applicant went to work as a test technician for a defense contractor (company B). Granted a Secret security clearance in May 1989, he knew continued use of marijuana was inconsistent with holding that security clearance. Also aware that this employer had a policy against drug use at the workplace and that he was subject to random drug testing, Applicant continued his use of marijuana during his tenure at the company, but limited it to vacations and social functions such as rock concerts. He did not feel his employer's requirement of a drug-free atmosphere pertained to these times or that he would be compromising classified information by limiting his drug use to these social occasions. From 1990 through 1996, Applicant estimates he used marijuana maybe about five times a year; definitely less than ten times. He did not purchase the marijuana but used it only when provided the drug by others (usually a friend from town who he used to work with at company B). Applicant was never tested under company B's random drug testing program.

Applicant used marijuana once in 1997 when during Memorial Day weekend, he smoked marijuana on a camping trip with his brother when the drug was passed to him by someone also sitting around the campfire.

At the end of June 1997, Applicant went to work for his current employer. His second day on the job, Applicant submitted to a urinalysis which tested positive for marijuana. As a result, Applicant's continued employment was formally conditioned on a follow-up urinalysis test, compliance with random drug testing for a year, and an evaluation by the Employee Assistance Program (EAP). Applicant agreed in writing to abide by these conditions. After signing this agreement, Applicant informed those with whom he used marijuana in the past (his brother, brother-in-law and former co-worker) that he was no longer using drugs.

Applicant met with a licensed clinical social worker in the EAP on one occasion in July 1997. In the social worker's assessment, Applicant was a social user of marijuana whose problem was resolved and no further counseling was needed. A follow-up drug screen conducted in August 1997 was negative for all substances tested, including marijuana.

Abstinent from marijuana since that May 1997 camping trip, Applicant no longer intends to use any illegal drug as it is inconsistent with his defense-related employment.

Applicant's current supervisor at company A also worked with Applicant at company B. This supervisor hired Applicant for company A because of Applicant's professional experience as a test technician in the microwave field, the quality of his work and good attendance. This supervisor has detected no problems with Applicant's work performance at company A. At the end of his first ninety days, Applicant was doing a very good job of meeting requirements. Evaluated by his fellow team members in October 1997, Applicant was given an overall rating of 4.25 on a scale of 1 (low) to 5 (high).

## **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

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Under the provisions of Executive Order 10865 as amended 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 of the Applicant, this Judge concludes the following with respect to criterion H:

Applicant presents a twenty-four year history of cannabis use, primarily marijuana. Although his illegal drug involvement after commencing defense-related employ in December 1985 was limited to marijuana on average five times a year, it engenders significant security concerns because of the longstanding nature of his abuse and the fact it continued while he held a Secret security clearance in known contravention of pertinent laws and company B and Department of Defense policies. Illicit substance abuse is incompatible with retention of a security clearance due to the obvious potential for impairment when one is under the influence.

Disqualifying conditions 1. and 2. of the Directive's adjudicative guidelines pertaining to drug involvement are both applicable as Applicant used and purchased marijuana from 1973 to October 1975, smoked and bought hashish while stationed abroad from August 1976 to February 1979, used and purchased marijuana from February 1979 to November 1985, and accepted offers of marijuana from others thereafter until the end of May 1997. Although Applicant has not used cannabis in the form of hashish in nineteen years, his continued use of marijuana precludes favorable consideration of MC 1. (drug involvement not recent) or MC 2. (drug involvement isolated or infrequent). Nor has Applicant completed a drug treatment program required under MC 4. The security concerns raised by Applicant's longstanding drug involvement may still be overcome if there is demonstrated intent not to abuse any drugs in the future (MC 3.).

Applicant's involvement with marijuana significantly declined after he commenced his defense-related employ in December 1985. In 1997, his use was limited to one occasion and that was in the context of a casual encounter around a campfire in late May. There is no evidence that he sought out the marijuana on that occasion or that he has purchased any illegal drug since November 1985. Although his marijuana use during the 1990's can be termed as no more than occasional, illegal drug use to any extent is not condoned. The Government, moreover, has a legitimate concern in what it regards as the "nonchalant" attitude exhibited by Applicant in the past toward illegal drugs. Applicant obviously did not have a problem with using marijuana in contravention of known company B and Department of Defense policies against drug use, rationalizing that the drug-free workplace rules did not apply to him off the job. The illegality of marijuana use proved no impediment. However, once his continued employment with company A was rendered contingent on abstinence, Applicant made the choice to remain drug-free and he has advised those with whom he used drugs in the past that he has ceased his drug involvement. As corroborated by his current supervisor, Applicant is committed to his work. His desire to continue his employment with company A serves as a deterrent to any future drug abuse on his part. Given the limited nature of his involvement in 1997, this Administrative Judge furthermore finds little risk, if any, Applicant will return to drug use once he is no longer under the close scrutiny of his employer in July 1998. Whereas Applicant has been candid with the Government about his past drug use and has demonstrated an ability to abstain for nine months, this Administrative Judge has no reason to doubt the sincerity of his commitment to remain drug free. Accordingly, subparagraphs 1.a., 1.b., 1.c., 1.d., 1.e., and 1.f. 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

**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**