

DATE: April 24, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0009

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR GOVERNMENT

William S. Fields, Esquire, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On January 5, 1998, 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 5220.5, "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 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 security clearance should be granted.

Applicant answered the SOR on January 19, 1998, and asked that his case be decided without a hearing. Applicant received the Government's File of Relevant Material (FORM) consisting of five items on February 18, 1998; he did not submit a response. The case record was closed on March 20, 1998 and assigned to this DOHA Administrative Judge for decision on April 2, 1998.

FINDINGS OF FACT

In answer to the Statement of Reasons, Applicant admitted the factual allegations of drug involvement set forth in subparagraph 1.a., 1.b., 1.c., 1.d., 1.f., and 1.h. He denied allegations that he had purchased cocaine (subparagraph 1.e.), that he had purchased LSD (subparagraph 1.g.), that he had purchased amphetamine (subparagraph 1.i.) and that he may continue to use illegal drugs in the future (subparagraph 1.j.).

Applicant is a 30-year old employee of a defense contractor. He has worked for his current employer since July 1997 and is seeking a secret clearance. He has not previously held a security clearance.

The information in this case consists of a signed, sworn state which Applicant made to the Defense Security Service (DSS) in December 1996, an SF-86 (Questionnaire for National Security Positions) which he completed in September

1997, and his answer to the SOR on January 19, 1998.

In his signed, sworn statement dated December 1996, Applicant admitted that he had smoked marijuana "5000 times between 1983 and 1986," and had smoked it as recently as six months prior to signing his statement (Item #5). He also admitted that he had snorted cocaine 20 to 25 times between 1986 and 1995; that he had taken LSD in high school between 1983 and 1986; and that he had used amphetamines 50 times "during this same time period."⁽¹⁾ Although he denied that he had ever been involved with the sale, transfer of trafficking of drugs, he admitted that he had contributed to the purchase of small quantities of drugs. Applicant also admitted that he had grown a marijuana plant in his home in 1991 "just to see if (he) could do it" (Item # 5).⁽²⁾ And he admitted that he may use drugs in the future if he were in a situation where they were available--depending "on the mood (he) was in."

Applicant completed his SF-86 in September 1997. In response to question 24a which asked:

Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.) hallucinogenics (LSD, PCP, etc.) or prescription drugs?

Applicant answered "yes" and explained that he had used marijuana approximately 20 times between

October 1990 and October 1995. He did not mention his other drug use⁽³⁾ and did not indicate any marijuana use after October 1995.

When Applicant answered the Statement of Reasons in January 1998, he admitted that he had used marijuana between 1983 and May 1996, but denied that he had used it as often as 5000 times.

He admitted that he had attempted to cultivate marijuana in 1991, but denied that he intended to use illegal drugs in the future. He admitted that he had purchased marijuana, but denied that he had purchased cocaine, LSD, or amphetamines. He expressed his belief that his "drug involvements should not effect a decision for clearance" because his use of LSD, cocaine, and amphetamines was "a high school thing." Applicant indicated he would submit to a drug test "if need be" (Item # 3).

Applicant's statement to the DSS and his admissions concerning his use of marijuana, LSD, cocaine and amphetamines provide a sufficient basis for finding that he used marijuana regularly from 1983 to at least May 1996, and that he used LSD, cocaine, and amphetamines with at least the frequency stated in his December 1996 statement to the DSS. His statement to the DSS also provides a basis for finding that he regularly contributed money to the purchase of marijuana, and occasionally contributed money to the purchase of LSD, cocaine and amphetamines.⁽⁴⁾ And his statement to the DSS provides a basis for finding that Applicant was favorably disposed toward using illegal drugs in the future--until at least December 1996.

Because of previous inconsistent statements about his use of marijuana, there is reason to doubt Applicant's statement (in answer to the SOR) about recent marijuana use and about his future intentions concerning drugs. After admitting in December 1996 that he had used marijuana 5000 times, and used it as recently as May 1996, Applicant reported that he had used marijuana only 20 times--and had last used it in October 1995--when he completed his SF-86 in September 1997. On the same questionnaire, Applicant failed to acknowledge his use of LSD, cocaine and amphetamines in response to questions which specifically asked if he had used these substances.

POLICIES

The Adjudicative Guidelines of the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making decisions with reasonable consistency that are clearly consistent with the interests of national security. In making those overall common sense determinations, Administrative Judge must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines but in the context of the factors set forth in section F.3. of the Directive as well. In that vein, the Government not only has the burden of proving any controverted

fact(s) alleged in the SOR, it must also demonstrate that the facts proven have a nexus to Applicant's lack of security worthiness.

The following Adjudicative Guidelines are deemed applicable to the instant matter.

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;
- (2) Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution;
- (3) Failure to successfully complete a drug treatment program prescribed by a credentialed medical professional. Current drug involvement, especially following the granting of a security clearance, or an expressed intent not to discontinue use, will normally result in an unfavorable determination.

Conditions that could mitigate security concerns include:

- (1) The drug involvement was not recent.

Burden of Proof

The Government has the burden of proving any controverted facts alleged in the Statement of Reasons. If the Government establishes its case, the burden of persuasion shifts to the Applicant to establish his security suitability through evidence which refutes, mitigates, or extenuates the disqualifying conduct and demonstrates that 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 an Applicant.

CONCLUSIONS

Having considered the record evidence in accordance with the appropriate legal precepts and factors, this

Administrative Judge concludes that the Government has established its case with regard to Criterion H.

In reaching my decision, I have considered the evidence as a whole, including each of the factors, enumerated in Section F.3., as well as those referred to in the section dealing with the Adjudication process, both in the Directive.

Applicant's admitted, regular use of marijuana from 1983 up to, and including use as recently as, May 1996, together with his use of amphetamines, cocaine and LSD, is sufficient to establish the Government's case under Criterion H. Further substantiating the Government's case is Applicant's admission (in December 1996) that he may use drugs in the future. In his answer to the SOR, Applicant moved away from his statement--to the DSS--that he smoked marijuana 5000 times between 1983 and 1996 and from his statement that he "may use" marijuana in the future. However, even if he had smoked it only one-fourth the number of times he previously indicated, he would still have smoked marijuana at least weekly for more than 13 years--a history of significant marijuana abuse.

Applicant's drug involvement is a security concern because involvement with illegal 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.

The evidence in mitigation consists of Applicant's sworn statement--in answer to the SOR--that he does not currently use drugs and does not intend to use them in the future. He also volunteered that he would be willing to submit to drug tests. Although not directly pertinent to his marijuana use, Applicant is also credited with being honest and forthright in admitting that he drank more alcohol "than (he) should have" between 1994 and 1996.

Applicant's use of LSD and amphetamines has been mitigated by the fact that he has not used either of these substances since 1986 when he graduated from high school. His characterization of these drugs as "a high school thing" indicates that they have not been part of his life in the past ten years.

More difficult to mitigate is Applicant's use of marijuana and cocaine, especially in view of his accepting attitude toward future drug use--expressed as recently as December 1996. Although he has now changed his attitude toward future drug use, there is no evidence that this change occurred before Applicant received the SOR. This is a concern because the record is silent on Applicant's use of drugs between December 1996 and January 1998.

When he was interviewed by the DSS in December 1996, Applicant appeared to be very nonchalant in stating that he had used marijuana 5000 times (as recently as May 1996) and in indicating that he may use drugs in the future if the circumstances were right. He certainly left open the possibility of future drug use. Other than the receipt of the SOR in January 1998, there is no other intervening experience which would have caused him to change his attitude toward drug use.

On the one subsequent occasion when Applicant was questioned about his past drug use--i.e., the completion of his SF-86 in September 1997--Applicant provided information which was inconsistent with his earlier statement; he minimized his marijuana use (20 times) and pushed back in time the date (October 1995) when he had last used marijuana. Later when confronted with an allegation on his SOR--that he may use drugs in the future, Applicant responded that he no longer used drugs and does not intend to use them in the future--leaving open the possibility that he may have used them three, six, or nine months prior to answering the SOR.

In deciding on which of the occasions Applicant was telling the truth and honestly expressing his attitude about using drugs, the facts speak for themselves. Applicant clearly did not appreciate the consequences of drug use when he made his statement to the DSS in December 1996. Because he did not know that drug use could prevent him from getting a security clearance, he openly acknowledged his past drug use (marijuana 5000 times, LSD, cocaine and amphetamines) and admitted his intentions with respect to the future. When he began to realize, while filling out his SF-86 in September 1997, that drug use could interfere with his employment opportunities, he reduced by 4,980 the number of occasions he had used marijuana, and he pushed back--by eight months--the last occasion when he had last used marijuana. Later in response to an allegation on the SOR, Applicant revised his intentions about using drugs in the future. Applicant was not asked about drug use between December 1996 and January 1998, and has not voluntarily admitted or denied drug use during that time frame.

By the time Applicant answered the SOR, he had already demonstrated that he was willing and able to provide an account of his drug use that was in tune with what he believed the DoD needed to hear in order to grant him his security clearance. This Administrative Judge cannot ignore this fact in assessing the credibility of Applicant's current statement that he does not intend to use drugs in the future. Criterion H is concluded against Applicant.

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. For the Applicant

Subparagraph 1.c. For the Applicant

Subparagraph 1.d. Against 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. 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 Applicant's security clearance.

John R. Erck

Administrative Judge

1. It is not clear what "time period" Applicant is referring to; whether it was the period of time when he was in high school, or the period of time during which he had used marijuana between 1983 and 1996.
2. Judging from the information that has been included in his signed, sworn statement, the principal topic discussed during Applicant's DSS interview was alcohol consumption. Applicant had been arrested for battery after consuming 9-10 drinks in a bar in May 1996. This incident and Applicant's consumption of alcohol were not alleged in the Statement of Reasons. However, Applicant had admitted in this statement that he drank more alcohol "than he should have" between 1994 and 1996.
3. On this same SF-86, Applicant admitted that he had been arrested for battery in May 1996.
4. Because Applicant used marijuana **much more** frequently than he used LSD, cocaine, or amphetamines, it is logical that he would have contributed more regularly to the purchase of marijuana than to the purchase of these other substances.