



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
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----- ) ISCR Case No. 08-04629  
SSN: ----- )  
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Applicant for Security Clearance )

**Appearances**

For Government: Gina L. Marine, Department Counsel  
For Applicant: *Pro Se*

February 18, 2009

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**Decision**

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TESTAN, Joseph, Administrative Judge:

On May 22, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to applicant detailing the security concerns under Guideline H. The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on June 10, 2008, and requested an Administrative Determination by an Administrative Judge (AJ). Department Counsel issued a File of Relevant Material (FORM) on September 25, 2008. Applicant filed a response to the FORM on November 14, 2008. The case was assigned to me on December 12, 2008. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

## Findings of Fact

Applicant is a 54 year old employee of a defense contractor.

Applicant was interviewed by an OPM/DOD investigator in September 2007. During the same month, the investigator prepared a four page report based on that interview. DOHA sent interrogatories to applicant in February 2008, which he answered in March 2008. In addition to interrogatories requesting specific information about his drug use, one interrogatory specifically asked applicant if the four page report "reflect[s] accurately the information that you provided to the authorized investigator for the Department of Defense on the day you were interviewed." Applicant responded "yes" to this interrogatory. The four page report, interrogatories, and applicant's answers to the interrogatories, are all part of Exhibit 5.

As reflected in the September 2007 four page report, applicant told the investigator he (1) smoked marijuana and/or hashish from 1967 to the present,<sup>1</sup> (2) uses about one joint two to three times per month, (3) uses these drugs at home and at parties to relax from the pressures of the job, (4) feels "high" when he uses them, and (5) intends to use the same amount of these drugs in the future. Applicant confirmed some of this information in response to Interrogatory 1, where he stated he had used marijuana/hashish two/three times a month, last used one or both of these drugs in February 2008, and has not decided to stop using illegal substances.

In the 1970s, applicant was charged with Possession of Marijuana after a police officer searched applicant and found a "joint" on him. The case was dismissed because the search was ruled illegal.

In either the late 1980s or early 1990s, applicant was charged in a foreign country with Possession of Marijuana. He was convicted, fined, and placed on probation.

In SOR Paragraph 1.c., the Government alleges applicant purchased marijuana on multiple occasions. In his response to the SOR, applicant stated, "I DENY IT. I have never purchased marijuana, or hash. Some one else does this. This is so that I don't know who and where?" His denial conflicts with his response to one of the aforementioned interrogatories, where he stated he had purchased marijuana and hashish in February 2008.<sup>2</sup>

In SOR Paragraph 1.d., the Government alleges applicant intends to continue using marijuana. This allegation is certainly consistent with what applicant told the investigator in September 2007, and what he stated in response to the interrogatories in

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<sup>1</sup>Some of his drug use occurred while he was holding a security clearance.

<sup>2</sup> Interrogatory 5. In April 2008, applicant prepared a self-styled "amendment," presumably to his interrogatory responses, in which he stated: "This added amendment is to clear up any questions that I didn't finish correctly. On the question of ever used drugs: The statement I wrote was based on my Son. The last time that I remember smoking was on 1 January 2008. On the question of ever purchased, was by my son and that date is on the paper work." At the end of the "amendment," he reiterated that he smokes "maybe once every two or three months."

March 2008. However, in his response to the allegation he stated, "I DENY IT. This is a specific question. Right now, NO to the question."

In response to the FORM, applicant provided a long statement in which he stated, among other things, "Let me try to explain myself here. I really did not know what I need to do during this time frame, but I do know this much. I have not drunk or smoked any drugs for over 5 years now, must be getting older and that I have no interest in it." This denial of any drug use during the last five years contradicts every other statement he has provided on this issue.

## **Policies**

The President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position that will give that person access to such information." (*Department of the Navy v. Egan*, 484 U.S. 518,527 (1988).) In Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch. The President authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." (Exec. Ord. 10865, Section 2.)

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline.

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. (Directive, Paragraph E3.1.14.) Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. (Directive, Paragraph E3. 1.15.) An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." (ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).) "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." (Directive, Paragraph E2.2.2.)

A person granted access to classified information enters into a special relationship with the government. 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. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. (Exec. Ord. 10865, Section 7.) It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

## Analysis

### Guideline H, Drug Involvement

The security concern for drug involvement is set forth in Paragraph 24 of the AG, and is as follows:

Use of an illegal drug . . . can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

Paragraph 25 describes conditions that could raise a security concern and may be disqualifying: Under Paragraph 25.a., "any drug abuse" may be disqualifying. Under Paragraph 25.c., "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution . . ." may be disqualifying. Under Paragraph 25.h., an "expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use," may be disqualifying. Applicant's use and purchase of marijuana and hashish, and his March 2008 statement that he has no current plans to stop using marijuana, raise these three disqualifying conditions.

Paragraph 26 of the AG sets forth conditions that could mitigate security concerns. I considered each of them and conclude none apply.

In addition to the AG, current law specifically prohibits the granting of a security clearance to an "unlawful user of a controlled substance."<sup>3</sup> For purposes of this prohibition, an "unlawful user of a controlled substance" is a person who uses a controlled substance and has lost the power of self-control with reference to the use of the controlled substance, or is a person who is a current user of the controlled substance in a manner other than as prescribed by a licensed physician. Because the evidence does not support a finding that applicant has lost his self-control with respect to his drug use, or that he has used marijuana or hashish since February 2008, I conclude he does not meet the definition of "an unlawful user of a controlled substance."

### "Whole Person" Analysis

Under the whole person concept, the AJ must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the circumstances. An AJ should consider the nine adjudicative process factors listed at AG Paragraph 2(a): "(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) extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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." Under AG Paragraph 2.c, the ultimate determination of whether to grant a security clearance must be an overall common

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<sup>3</sup> 50 U.S.C. 435c.(b).

sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a middle aged man who has used marijuana and hashish for many years. As recently as March 2008, he indicated he will continue to use these drugs. Although he provided a carefully worded denial of an intent to continue using marijuana and hashish in response to the SOR, this denial is not credible in light of his many decades of drug use and the numerous inconsistent statements he provided regarding his drug use. Based on the foregoing, I conclude applicant failed to mitigate the security concerns arising from Guideline H.

### **Formal Findings**

Formal findings for or against applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H: AGAINST APPLICANT

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

JOSEPH TESTAN  
Administrative Judge