

DATE: September 28, 2001

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-00278

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Marc Curry, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant who used illicit substances over recurrent periods spanning over twenty years (including some history of purchasing marijuana for his personal use) and who provides unreliable and untrustworthy corrections and ambiguities about the extent of his use and his purchases fails to mitigate his drug involvement. And by failing to provide good, reliable and verifiable explanations of his historical involvement in illicit drugs, he does not exhibit sufficient good judgment, reliability and trustworthiness to overcome raised judgment and reliability concerns arising under personal conduct guidelines to meet minimum security clearance eligibility requirements under the Adjudication Guidelines and the E.2.3 factors. Clearance is denied.

STATEMENT OF THE CASE

On April 12, 2001, 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, issued a 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 Applicant, and recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on July 2, 2001, and requested a hearing. The case was assigned to this Administrative Judge on August 2, 2001, and on August 3, 2001 was scheduled for hearing. A hearing was convened on August 21, 2001, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny or revoke Applicant's security clearance. At hearing, the Government's case consisted of five exhibits; Applicant relied on one witness (himself) and eleven exhibits. The transcript (R.T.) of the proceedings was received on September 5, 2001.

STATEMENT OF FACTS

Applicant is a 47-year old technical director for his defense contractor who seeks a security clearance at the level of secret.

Summary of Allegations and Responses

Applicant is alleged to have (1) used marijuana between 1973 and 1979, between 1985 and 1987, and again between January 1997 to January 1998, (2) received non-judicial punishment (Captain's Mast) under Article 15 for a violation of Article 92 of UCMJ, failure to obey an order or regulation, by possessing and using marijuana, in February 1979, and (3) used cocaine on or about May 24, 1998.

Additionally, Applicant is alleged to have (a) falsified his security clearance application ("SF-86") of September 24, 1999 by omitting his use of marijuana while holding a secret security clearance between 1973 and 1979, and using marijuana while aboard USS Navy ships in positions of trust, (b) falsified material facts in a signed, sworn DDS statement given to an agent of DSS on February 17, 2000, as follows: (i) understated his marijuana use by omitting his 1973 to 1979 use, (ii) understated his prior marijuana use of 2 to 3 times per week from 1973 to 1979 (denying "daily or even monthly use"), (iii) falsely denied his purchases of marijuana on a regular basis from 1973 to 1979, (iv) understated the number of periods of his marijuana use by omitting his 1973 use-start-up and 1985 to 1987 use and (v) falsely denied his use of marijuana while in a position of trust (*viz.*, 1973 to 1979 period when he held a secret clearance, and (c) falsified his SF-86 of May 13, 1987 by denying any involvement in the illegal purchase, possession, or sale of any illegal substances, and omitting his regular purchase of marijuana between 1973 and 1979.

And Applicant is alleged to have violated the criminal provisions of 18 U.S.C. Sec. 1001 (a felony statute) by knowingly and willingly falsifying his SF-86s of September 24, 1999 and May 13, 1987, respectively, and his signed, sworn DSS statement of February 17, 1987.

For his response to the SOR, Applicant admitted to receiving non-judicial punishment in 1979 while an enlistee of the US Navy and to using cocaine on one isolated occasion between 1997 and 1998 while in the pressures of a very difficult marriage. But he denied the balance of the allegations covering his alleged illegal marijuana involvement: Specifically, he denied using illegal drugs between 1973 and 1998, or using illegal drugs on more than two periods of time: *i.e.*, between 1978 and 1979 and between 1997 and 1998. Applicant denied falsifying any of the information concerning his illegal use called for in his SF-86 security clearance applications or in his signed, sworn DSS statement, respectively. He claimed to have either misread the questions covering his alleged omissions of illegal drug use while holding a secret Navy clearance between 1973 and 1979 or on board a US Navy ship between 1978 and 1979, or forgotten about what marijuana use he might have reported in an earlier SF-86. He denied any criminal wrongdoing associated with his completing his SF-86s and DSS statement and claimed the covered incidents were isolated and should not create any doubts about his reliability and trustworthiness to protect classified information when viewed in conjunction with his excellent employment evaluations.

Relevant and Material Factual Findings

Between 1973 and 1979 Applicant used marijuana in varying amounts while an enlistee of the US Navy. While he steadfastly denies ever using marijuana prior to 1978, he was never so clear about such time limits before. After he was charged with possession and use of marijuana in 1979 by his Navy superiors, he described his use in a signed, sworn statement to DSS as two to three times a week while in the Navy, which he time-defined as 1973 to 1979 (*see ex 5*; R.T., at 68). In the same DSS statement he also assured he had no intention of using marijuana or any illegal drugs in the future. While the 1973-1979 qualifier is susceptible to more than one reference (*viz.*, his time in service or the period of his use while in the Navy), Applicant never made any definitive attempts to qualify the actual time of his use while in the Navy until he was confronted with this episode of use by a DSS agent interviewing him in February 2000 (*compare* exs. 4 and 5 and B).

Considering Applicant's memory difficulties in recalling any of his other conceded periods of use and purchases of marijuana in prior DSS statements, it would be stretching reasonable credibility limits to accept his more precise estimates given over ten years later (*i.e.*, of a three-month period only between late December 1978 and February 1979 when he was apprehended by military authorities). On this covered 1973 to 1979 period of Applicant's marijuana use, inferences warrant that he used marijuana between 1973 and 1979 in varying amounts not detailed (with his exact start-

up and use frequencies left unclear), to include two to three times a week between December 1978 and February 1979.

Besides admitting to marijuana use during his Navy enlistment, Applicant also admitted to spending \$30.00 to \$40.00 a month on the marijuana he shared with his shipmates (*see ex. 5*). That Applicant could not recall his purchases of marijuana in either his February 2000 DSS interview at hearing does not deprive his earlier admissions of acceptance. Inferences warrant that Applicant contributed to the expenses of purchasing the marijuana he and his shipmates shared between 1973 and 1979.

Applicant was apprehended for marijuana use by military authorities in February 1979 and charged with possessing and using marijuana. For this offense he received non-judicial punishment (Captain's Mast) for a violation of Article 92, failure to obey an order or regulation, by possessing and using marijuana, in February 1979. His punishment consisted of forfeiture of \$150.00 a month in pay for two months, restriction to the ship for one month and a reduction in rank. All fines were paid and the ship's restriction were completed as required (*see exs. 4 and 6*).

By Applicant's own account given in a signed, sworn statement to DSS in 1987 in connection with an investigation into his using marijuana aboard a US Navy ship, he freely acknowledged using marijuana on several occasions between 1985 and 1987, with a last remembered usage in February 1986 (*see ex. 3*). In a subsequent signed, sworn statement given to DSS in February 2000 (*ex. 4*) he denied ever using marijuana, except for the two periods spanning 1978-1979 and 1997-1998. He reiterated his denials of any recollection of ever using marijuana on any other occasion but the two periods acknowledged at hearing (*see ex. A; R.T., at 68-71*). Applicant's memory is less than consistent, however, ranging from instant recall when it comes to limiting the periods of his use to denying any recollection of ever purchasing marijuana (*see ex. 4*), or acknowledging previously admitted years of use. Whether these manifest discrepancies are the result of denial or conscious minimizing, Applicant's SOR response and hearing accounts are not reconcilable and preclude him from any accepted corrections of prior admissions that contain the more expansive periods of marijuana use. Inferences warrant, accordingly, that Applicant used marijuana between 1985 and 1987 as previously acknowledged during a 1987 DSS investigation.

While married to his employer's superior at the time (between 1997 and 1998), Applicant resumed his use of illegal substances: marijuana on a number of occasions and cocaine on a single occasion. Applicant attributes the pressures of his marriage to his resumption. As he assured DSS in 1981 and 1987 (*see exs. 3 and 5*), he assured DSS once again (this time in his February 2000 DSS statement) that he had no intention of ever using marijuana or any other illicit substance in the future (*see ex. 4*). For lack of any reliable track record for keeping his prior promises to abstain from illegal drugs, Applicant's renewed promises cannot be fully accepted and relied on the strength of just his prior DSS statements and hearing testimony, reinforced by his performance evaluations.

Asked to complete an SF-86 in May 1987, Applicant omitted his prior purchases of marijuana during his years of sharing the substance with his Navy shipmates: between 1973 and 1979. When completing other SF-86s (these in September 1999, *exs. 1 and 2*), he followed the lead of his 1987 denial and denied again ever purchasing marijuana or any other illicit substance. He reiterated his denials of ever purchasing illicit substances when interviewed again by DSS in February 2000. Applicant could not recall either his previously admitted period of marijuana use between 1985 and 1987 or his pre-1978 marijuana use, either when interviewed by DSS in February 2000 or at hearing. But because he did provide admissions of both his marijuana purchases and more extensive use in prior certifications provided DSS, his more recent denials and revisions can be better attributed to memory lapse and denial than knowing and wilful omission. Government was not denied the investigatory benefits of the information, because it had already been provided the same by Applicant in prior SF-86s and signed, sworn statements given DSS. At the same time, Applicant's revisions do not permit any reliable gauges of the extent of his prior purchases and use of illicit drugs, and preclude him, accordingly, from requested drawn inferences of overall reliability and trustworthiness on the strength of his drug use acknowledgments and praiseworthy performance evaluations (*see exs. C through G*).

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) list "binding" policy considerations to be made by Judges in the decision making process covering DOHA cases. The term "binding," as interpreted by the DOHA Appeal Board, requires the Judge to consider all of the "Conditions that could raise a security concern and may be disqualifying"

(Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the Judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Drug Involvement

Disqualifying Conditions:

DC 1 Any drug use.

DC 2 Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.

Mitigating Conditions:

MC 1 The drug involvement was not recent.

MC 3 A demonstrated intent not to abuse any drugs in the future.

Personal Conduct

The Concern: conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Disqualifying Conditions:

DC 2 The deliberate omission, concealment, falsification or misrepresentation of relevant and material facts from any personnel security questionnaire, personal history statement or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

DC 3 Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination.

Mitigating Conditions: none

Criminal Conduct

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Disqualifying Conditions:

DC 1: Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.

DC 2: A single serious crime or multiple lesser offenses.

Mitigating Conditions:

MC 4: The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur.

Burden of Proof

By dint of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

CONCLUSION

Applicant presents as a highly regarded technical director for his defense contractor who used marijuana in varying frequencies over three different periods of time between 1973 and 1998. His illicit drug use also included an isolated use of cocaine during the last period of his involvement with illegal drugs. Besides using illicit drugs, Applicant also purchased marijuana at various times for his personal use during the first period of his marijuana use: between 1973 and 1979.

Although Applicant has expressed his strong intentions not to use illicit drugs in the future, this is not the first time he has expressed such intentions. He made similar assurances in 1981 and again in 1987, only to resume his use in 1997 and 1998 under marital pressure at the time. With so many returns to drug use after commitments to abstain, and lacking in any reliable track history of illicit drug activity (considering the ambiguous and contradictory accounts he has provided DSS over a series of investigations), too much doubt and uncertainty exist to make safe predictable judgments about his ability to avoid recurrent drug involvement. More seasoning of his most recent commitments to abstain from illicit drug use are needed before necessary safe assessments can be made about his unlikely return to illicit drug abuse in the future. Unfavorable conclusions warrant with respect to the allegations covered by Guideline H.

With respect to the covered omissions in Applicant's respective SF-86s and February 2000 DSS statement, Applicant is credited with successfully refuting the Government's claims that he knowingly and wilfully omitted and/or understated his more extensive periods of marijuana use, and prior purchases. Because of the existence of at least some ambiguity in his 1981 DSS account of his marijuana use, the considerable time lapses between his respective DSS investigations (*i.e.*, 1981, 1987 and 1999), and the accepted information he provided DSS in his previous accounts, Applicant's subsequent revisions, though not fully accepted, are attributed more to a combination of denial, memory lapse and confusion than to deliberate falsification. Nonetheless, his omissions and corrections do not reflect good judgment, reliability and trustworthiness (the core predicate of Guideline E), and they do not satisfy the minimum personal conduct requirements of security clearance worthiness sufficiently, using the E.2.2 factors of the Directive, to enable Applicant to refute, extenuate or mitigate his omissions and misstatements.

Turning to whole person analysis, Applicant pitches his strongest case in the excellent performance evaluations he has accumulated. Work history does certainly have a role in making clearance eligibility determination, but it is not dispositive. Our Appeal Board has repeatedly emphasized that the negative security significance of an applicant's actions is not negated by an applicant's job performance in making a whole person evaluation. *See* ISCR Case No. 00-0622 (August 28, 2001).

Taking into account Applicant's SF-86 omissions, his unreliable and untrustworthy corrections of his drug use/purchase history, and his solid performance evaluations in making an overall person assessment of Applicant's judgment, reliability and trustworthiness under Guideline E, Applicant's presented explanations, buttressed by his solid job performance evaluations, are insufficient, considered in their entirety, to enable him to overcome doubts raised about the level of his judgment, reliability and trustworthiness compatible with security clearance eligibility. Unfavorable conclusions warrant with respect to the allegations covered by Guideline E. By contrast, since Applicant's omissions and misstatements are not considered to have been made knowingly and willfully, favorable conclusions warrant with respect to the allegations covered by Guideline J.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the factors set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR and ensuing conclusions in the context of the FINDINGS OF FACT, CONCLUSIONS and the FACTORS listed above, this Administrative Judge makes the following FORMAL FINDINGS:

GUIDELINE H: AGAINST APPLICANT

Sub-para. 1.a: AGAINST APPLICANT

GUIDELINE E: AGAINST APPLICANT

Sub-para. 2.a: AGAINST APPLICANT

Sub-para. 2.b: AGAINST APPLICANT

Sub-para. 2.c: AGAINST APPLICANT

GUIDELINE J: FOR APPLICANT

Sub-para. 3.a: FOR 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 or continue Applicant's security clearance.

Roger C. Wesley

Administrative Judge