

DATE: February 5, 2002

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-08281

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Katherine D. MacKinnon, Department Counsel

Peregrine D. Russell-Hunter, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant with the commission of regular marijuana use in college, which ceased after graduation, with the exception of an isolated recurrent recreation use in ay 2000, convinces that he has no need for the substance or any intention to use it again and mitigates the conduct covered in the SOR. Clearance is granted.

STATEMENT OF THE CASE

On October 10, 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 November 26, 2001, and requested a hearing. The case was assigned to this Administrative Judge on December 7, 2001, and on December 13, 2001 was scheduled for hearing. A hearing was convened on December 28, 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 two exhibits; Applicant relied on one witness (himself) and no exhibits. The transcript (R.T.) of the proceedings was received on January 4, 2002.

PROCEDURAL ISSUES

During the hearing, procedural issues arose over Applicant's real and present need for a security clearance and whether Applicant held a security clearance previously approved by the Treasury Department that followed an investigation into

the same illegal drug- related issues as were raised in this clearance proceeding at DoD. Resolution of these issues are necessary before proceeding to the merits of the proceeding, since they raise preliminary jurisdictional questions.

Applicant satisfies by the letter supplied by his direct supervisor (*see ex. A*) that his employer has been the recipient of DoD contracts in the past covering network security vulnerability assessments (for which Applicant has been trained and promises to be a key player on future such projects), and by logical extension of its developed expertise and experience should be in line to receive future projects of a similar nature.

Enough is shown herein to conclude that Applicant has a sufficient need for a security clearance to proceed to resolving the second presented procedural issue herein: Whether the security clearance Applicant applied for with the Treasury Department in September 2000 and subsequently investigated involved the same or lesser scope of investigation as did his more recent application for a top secret clearance with DoD. If so, he would be entitled to reciprocity and clearance herein on his DoD application on the strength of the National Industrial Security Program Operating Manual (NISPOM), Section 2-203, since Applicant's same disclosed marijuana use was presumptively investigated by Treasury and mitigated when it granted him a clearance. Section 2-203's reciprocal recognition of other agencies' clearance grants based on a similar investigation is conditioned on a showing that the current investigation does not exceed the scope of the prior investigation that produced the earlier agency clearance grant. Because Applicant's top secret clearance application with DoD exceeds the scope of the clearance sought with his earlier Treasury application, Section 2-203 reciprocity requirements are neither triggered nor applicable here.

Applicant's supporting submission, which includes both his unsigned and signed January 11, 2002 letter from his superior, is admitted as exhibit A.

Jurisdiction established with the settling of preliminary issues covering Applicant's demonstrated need for a security clearance and potential reciprocal entitlement arising out of Applicant's previously approved Treasury clearance, this case will proceed to the merits of the illegal substance issues raised in the SOR and answer.

STATEMENT OF FACTS

Applicant is a 24-year old network security specialist for a major accounting firm with ongoing defense work with DoD that requires his holding a security clearance at the top secret level for the work responsibilities he will be tasked to do. He establishes a need for a clearance to work on contracts his employer either has with DoD or stands to obtain (*see ex. A*). He previously held a security clearance while working for his current defense contractor on a contract requiring a clearance with the Treasury Department, albeit not at the same scope (*see ex. A*).

Summary of Allegations and Responses

Applicant is alleged to have (a) smoked marijuana from September 1996 to May 2000 and (b) used marijuana in part during a period after he had completed his application for a security clearance.

For his response to the SOR, Applicant admitted smoking marijuana from September 1996 to May 2000, and doing so in part after he had completed a security clearance application.

Relevant and Material Factual Findings

The allegations covered in the SOR and admitted to by Appellant are incorporated herein by reference adopted as relevant and material findings. Additional findings follow.

During his sophomore and junior years in college, Applicant used marijuana infrequently: roughly every two to three months in social situations, fifteen times total. He has never sold or purchased the substance, or been involved in any confrontations with law enforcement over possession. He admits to knowing marijuana use was illegal when he used it.

Applicant came to recognize his use of marijuana was a mistake and quit using it his senior year in college, with his last college use coming in the Fall of his senior year to the best of his recollection (*i.e.*, in October 1998). He never felt any urge to get "high" on the substance, and usually used it in combination with alcohol, although his use was never

influenced by alcohol (*see* R.T., at 65-66). After a considerable hiatus from any marijuana use, he tried it once again while on vacation with old college friends in May 2000 (*compare ex. 2* with R.T., at 57-62). At the time of his slip, he had a security clearance application pending and was keenly aware that drug use of any kind was not only illegal, but against official DoD policy. When asked about his future intentions by an interviewing DSS agent in August 2000, he assured he had no intention of using marijuana in the future (*ex. 2*). He has kept to his word on this stated intention and averted any recurrent marijuana use since his last use in May 2000, even when he associates with old friends who still occasionally smoke the substance (*see* R.T., at 62).

To be sure, Applicant does not rule out the possibility of his trying marijuana at some time in the future, should he return to college for any reason, but believes he has learned his lesson and does not want to make another mistake by using marijuana again (R.T., at 65-70). Applicant's assurances of his having no intention to return to marijuana use in the future are backed by his avoidance of recurrent use since 1998, save for his one slip in May 2000, and by overall demonstrated maturity and responsibility with his current employer.

Applicant appears to be well regarded by his employer who has put him in for a security clearance and exhibits considerable candor and responsibility, both with his employer and with his personal affairs.

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.

Mitigating Conditions:

MC 1 The drug involvement was not recent.

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

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.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a nexus to the applicant's eligibility to obtain or maintain

a security clearance. The required showing of nexus however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of accessible risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation.

CONCLUSION

Applicant presents as a well regarded network security specialist, who over a two-year stretch during his sophomore and junior years in college used marijuana occasionally in social situations: some fifteen times altogether. Except for an isolated slip while on vacation with his old college friends in May 2000, he has never used marijuana, or any drug, since college. What adds to the security significance of his 2000 slip is his pending security clearance application and knowledge that drug use was not only illegal but against DoD policy.

Applicant's failure to fully abstain from marijuana use after accepting a new position with his current employer and initiating a security clearance application was not the result of any deliberate disregard on his part of existing DoD drug policy strictures, however, but rather the direct consequence of his being around individuals he generally doesn't associate with (*viz.*, his old college friends), while vacationing. The incident has matured him even more: to the point now (over eighteen months since his last slip) where he insists he will not use marijuana again, and potentially jeopardize his clearance and job.

Whether or not Applicant can consistently refrain from active marijuana involvement and/or use of other illegal substances in the foreseeable future remains the principal security concern. For Applicant to fully mitigate his occasionally revisited marijuana use, he necessarily needs to demonstrate a seasoned intention not to abuse marijuana in the future.

To help him make the convincing showing that he should be trusted on his hearing assurances that he will never use marijuana or other illegal substances as long as he holds a security clearance, Applicant places great stress on his highly valued work, his maturity and understanding of how marijuana use and clearance access do not mix. Applicant's management support for his role in network security projects that require a clearance is certainly a favorable consideration to factor into a whole person evaluation of his drug-free commitments. But it is not dispositive either. Our Appeal Board has consistently drawn bright distinctions between an applicant's value to his employer (as Applicant most certainly is considered by his supervisors and colleagues) and his eligibility to be cleared to access classified defense information. *Cf.* ISCR Case No. 98-0370 (January 28, 1999); ISCR Case No. 96-0710 (June 20, 1997). Predictability judgments about an applicant's likelihood to return to drugs are more heavily weighted by the applicant's prior substance abuse history and the amount of seasoning that has occurred since discontinued usage.

Both Applicant's history and his currently expressed intentions to avert marijuana in the future, when coupled with the trust he engenders in his professional efforts to date, are sufficient to absolve him under the facts of this evidentiary record of still active security concerns about his marijuana use. With almost eighteen months of sustained abstinence, he exhibits the seasoning to surmount any doubts about his ability to avoid recurrent use in the foreseeable future. Both his exhibited abstinence and his sustained commitments not to return to drug use since his first and only slip in May 2000 enable him to take full advantage of two of the mitigating conditions of the Adjudicative Guidelines for drugs: MC1 (non-recency) and MC 3 (demonstrated intent not to abuse drugs in the future) are all available to Applicant.

Considering Applicant's overall record, the circumstances of his use of marijuana in college, the seasoning that has occurred since his last slip in May 2000, and his convincing showing of his intention not to resort to illegal drugs in the future, Applicant is absolved of any risks of recurrent illegal drug involvement at this time. Favorable conclusions warrant, accordingly, with respect to sub-paragraphs 1.a and 1.b of Guideline H.

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: FOR APPLICANT

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR 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 Applicant's security clearance.

Roger C. Wesley

Administrative Judge