

DATE: June 24, 2002

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 01-08717

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Henry Lazzaro, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant mitigates his several debt delinquencies with documented payment arrangements of his old federal and state tax debts and is credible in his explanations of his isolated positive drug test in 1998, which was preceded by sixteen unremarkable years of abstinence, followed by almost four years of abstinence, marked by a negative drug screen and endorsement by his company supervisor. On the basis of the evidence presented, Applicant also mitigates any security risks associated with his positive marijuana screen of almost four years ago. Clearance is granted.

STATEMENT OF CASE

On October 16, 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 2, 2001, and requested a hearing. The case was assigned to this Administrative Judge on April 24, 2002, and on April 25, 2002, was scheduled for hearing (amended on April 30, 2002 as to location). A hearing was convened on May 14, 2002, 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 eleven exhibits; Applicant relied one witness (himself) and no exhibits. The transcript (R.T.) of the proceedings was received on May 22, 2002.

PROCEDURAL ISSUES

Before the close of the hearing, Applicant requested leave to supplement the record with documentation of (a) excerpts of a study on the marijuana effects of passive inhalation in a urinalysis, (b) a passive inhalation report, (c) the laboratory

report confirming his 15ng/ML positive marijuana test in his random drug screen in August 1998, (d) a character reference from his most recent employer (Company B) confirming his good performance before his separation for failure to obtain a security clearance, (e) an updated account from the state taxing authority re: his current state tax balance, (f) his most recent IRS breakdown reflecting his current federal tax balance, (g) his latest negative drug test administered by Company B's testing service, and (h) another account from the state re: his current outstanding tax balance. With Government offering no objections to Applicant's offered exhibits C through H, and good cause being shown, exhibits C through H are admitted.

Government objects to the admission of exhibits A and B for assigned reasons of hearsay for (i) lack of authenticity the provided studies represent reliable scientific reports and (ii) their apparent junk science status based on the quality of the studies covered. While the reported studies do rely on hearsay tests under controlled circumstances not fully comparable with the claimed circumstances of Applicant's pre-test exposure, the controlled tests in the studies bear some similarities to the trace levels considered compatible with passive inhalation, which the Government's employer's disciplinary report (ex. 3) does not address. Juxtaposed against the Government's only documentation of Applicant's positive drug test (ex. 3), Applicant's proffered studies, considered in conjunction with his furnished laboratory report confirming a 15ng/ML THC trace, provide enough plausible corroboration of Applicant's passive inhalation claims to merit introduction of the studies for the weight they deserve. So, finding good cause for the admission of each of the documents for the weight they deserve under the Directive's more relaxed admission standards, exhibits A and B are admitted.

Before the close of the record, Government moved to amend the SOR to allege federal taxes owing for the tax years 1994 through 1999 in the amount of \$2,842.00 to conform to the evidence. Good cause being shown, Government's amendment request was granted. Applicant did not oppose the amendment, but claimed the net balance owed to the IRS has been further reduced below \$2,800.00 and wanted the opportunity to supplement the record to prove it. He was granted his request.

STATEMENT OF FACTS

Applicant is a 44-year old security guard recently employed by a defense contractor (Company B) who seeks a security clearance.

Summary of Allegations and Responses

Applicant is alleged to be indebted on delinquent debts attributable to two creditors, one being for back state taxes for the tax years of 1993 and 1999, respectively, and the other on a consumer debt, aggregating debts in excess of \$1,500.00 between them.

Additionally, Applicant is alleged to have used illegal drugs with varying frequency between 1967 and 1982, to have been fired from his defense contractor after failing a random administered drug test in August 1998, and is alleged to continue to associate with persons who use illegal drugs.

For his response to the SOR, Applicant admits incurring the three debts covered in the SOR, but to have discharged his accrued tax debts through payroll deductions. He admits being fired for testing positive on a random drug test administered by his former employer (Company A), and to associating with a person who uses illegal drugs. But he denies using marijuana with varying frequency between 1967 and 1982.

Relevant and Material Factual Responses

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

Between 1967 and 1982, Applicant smoked marijuana two to three times a week on average, usually with a friend (*see* R.T., at 50-51). He customarily purchased enough marijuana a month (at a cost of \$5.00 to \$10.00 a bag) to satisfy his personal needs. During this period, he also tried cocaine several times. Between 1977 and 1978 Applicant was an enlistee in the Army and received a general discharge in September 1978 (*see* ex. 1). It is not clear why Applicant was discharged, but it did occur during the time frame he was actively using illegal drugs.

Claiming to have quit using illegal drugs altogether after 1982, he tested positive for tetrahydrocannabinol (THC) in a randomly administered test conducted by his employer (Company A) on August 27, 1998 (a Monday). Applicant insists his positive test screen was attributable to his being exposed to second hand smoke over the previous weekend while in the basement of a friend's house, and in the presence of friends smoking blunts (*see* R.T., at 23-24, 51-53). Not much is known about the timing and degree of exposure Applicant experienced on this previous weekend. He provides no corroborating details of the dimensions of the house he claims to have occupied, or of the amount of time that elapsed between his last such exposure and when he was administered his random test. Without such details it is virtually impossible to verify whether the traces detected in urine were the result of the normal dissipation of the substance over time following use, or as Applicant claims, the result of passive inhalation while associated with marijuana-using friends.

For documentation of his passive inhalation claims, Applicant cites secondary studies on the affects of passive inhalation and claims his detected traces of THC registered only about 15ng/mL (R.T., at 41). While Applicant's test results appear to be reliable and are accepted, the studies are less conclusive about how the marijuana traces were absorbed by Applicant. The admitted study itself cites test results based on submitted urine samples from non-smokers in concentrated areas over short periods in a controlled test environment, and then only with registered positive tests in a few of the tested samples, and at less than 20ng/mL. The study does not detail the type of testing equipment utilized to test the samples, or even the rate at which marijuana is generally recognized to dissipate in a person's urinary system. Without the additional test data, it becomes extremely difficult to compare Applicant's samples with those tested in the study. Applicant is correct, though, in his assessment of the THC level in his test: just 15ng/ML in a confirmatory test following an earlier 100ng/ML reported in the initial test run by the laboratory.

Still, too little details are known about the circumstances of Applicant's exposure to second hand smoke over the course of the previous weekend, the elapse time between exposure and testing, and the capacity of the testing system used by Applicant's employer to rule out passive inhalation as a contributing source of THC. The study itself, while admitted for the appropriate weight to be assigned, is a collection of excerpts from reported scientific studies and provides very controlled data used to develop reactions to second hand smoke and undetailed testing procedures used in the study.

To accept Applicant's unverified passive inhalation claims solely on the strength of his presented studies would require at the very minimal documentation of identical testing systems utilized and assessment of common data. Absent these identifiable common testing and data development features, any scientific comparison is necessarily flawed and insufficient to reach any fully reliable hypotheses about Applicant's passive inhalation claims. Whether Applicant's Company A supervisor was afforded access to the same test data and made his calculated termination decision on the basis of the recorded test results is unclear and cannot be presumed (*see ex. 3*). But the small traces of THC confirmed by the testing laboratory to be in Applicant's system (15ng/mL) are quite small and close enough to the 20ng/mL threshold used as a base point in the study to make Applicant's passive inhalation claims at least plausible, if not verifiable. His credibility is further enhanced by his pre-polygraph statements made to Agent B in a January 2001 pre-polygraph interview (*see* R.T., at 21-24). In this interview, Applicant repeated his claims of passive inhalation being the attributable source of his 1998 positive drug test: the same claims he asserted in an earlier DSS interview with Agent A (*see ex. 4*). Presumably, Agent B had no reason to doubt the sincerity Applicant's claims, for she did not polygraph Applicant (*compare* R.T. 21-24 with R.T., at 35-36). Because the record lacks corroborative testing data and details about the respective testing systems used, Applicant's passive inhalation claims cannot be verified as the only credible explanation of his testing positive for marijuana in August 1998. Just the same, the traces of THC found in Applicant's urine sample are inferentially small and consistent with the low levels associated with passive inhalation in the produced in studies and were not considered so inherently incompatible with Applicant's passive inhalation claims by Agent B as to prompt her to test the sincerity of his claims with a polygraph. The positive test results of August 1998 are themselves sufficiently aged as to make them only marginally material, absent evidence of more current use, and are not so incompatible with Applicant's passive inhalation claims as to render his claims insincere and wholly unsupported.

In his supplemented materials, Applicant provides documentation of negative results from a drug test administered in August 1999 by a testing service employed by his current employer (*see ex. E*; R.T., at 39-41). Based on the evidence presented, he is credited with avoiding any use of illegal drugs after August 1998). Put to his proof, he backs his marijuana use disclaimers with not only his sincerely proffered claims of passive inhalation associated with his August

1998 positive drug screen, but with both an ensuing negative test and the support of his supervisor with Company B, and overall showing that the positive test itself of almost four years ago, is of only marginal current security significance in light of the longevity of his latest demonstrated abstinence. Applicant's claims of general abstinence since 1982 are essentially accepted.

Applicant assures he has not associated with persons who use illegal drugs since his weekend involvement in August 1998 and has no intention of using illegal substances or associating with persons who do in the future. With almost four years of avoiding illegal substances and persons who use drugs (*see* R.T., at 53), Applicant's assurances are entitled to acceptance.

Between 1993 and 1999, Applicant fell behind in a number of his debts. His situation worsened considerably after his termination from Company A in August 1998 for failure of his drug test (*see* ex. 5): For almost a year he remained essentially unemployed. Finding work again in his field as a security guard with Company B in September 1999, he was forced to leave this job after he failed to obtain his security clearance (*see* ex. C; R.T., at 45-46).

Faced with mounting debts, especially with the IRS and his state's taxing agency, Applicant enlisted the aid of Consumer Credit Counseling (CCC) in May 2000. Through CCC he has been successful in resolving many of his old debts (after a number of months of unsuccessful job searches in the wake of his Company A termination. Three creditors were not included in his plan, however: both taxing agencies and a consumer creditor holding a past due debt in the amount of \$478.39. After referring the consumer account for collection with two collection agencies, the account was returned to the creditor who charged off the account. As of May 14, 2002, this account had not paid or otherwise resolved (*see* exs. 7 and 8; R.T., at 47).

Following the state's filing of a salary lien against Applicant for back taxes owed for tax years 1993 and 1999, Applicant entered into a payroll deduction plan calling for payroll deductions of \$25.00 a week until discharged. Applicant has continued to pay down this lien through payroll deductions. As the result of his efforts, the state's comptroller issued a lien modification to Applicant's employer in November 2001, reflecting a total balance due of \$1,145.45 (*see* ex. 9). Applicant's weekly payments towards satisfaction of the lien are current as of March 2002, and his latest furnished balance from the state's taxing agency reflects a current debt of just \$380.55: this attributable to a debt balance traceable to the 1993 tax year (*see* ex. F).

Applicant is also indebted to the IRS for taxes imposed between 1994 and 1999. As of March 2002, IRS tax records reflect a total balance in federal taxes of \$4,092.00 (*see* ex. 11). Applicant, who entered into a payroll reduction agreement with the IRS in June 2000 is credited at hearing with paying \$1,250.00 towards the balance due, leaving a current balance of approximately \$2,842.00 (*see* exs. 10 and 11; R.T., at 69). Afforded the opportunity to check with the IRS on the accuracy of this figure, Applicant provided an updated summary that credits him with additional payments, leaving a net current balance of approximately \$1,516.00 (*see* ex. D). By all accounts, Applicant is paying down his federal tax debt in accordance with his payroll agreement.

Applicant is well regarded by his latest employer (Company B) who was forced to terminate Applicant in March 2002 only after being advised his security clearance was revoked (ex. C).

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:

Financial Considerations

Concern: An individual who is financially overextended is at risk at having to engage in illegal acts to generate funds. Unexplained influence is often linked to proceeds from financially profitable criminal acts.

Disqualifying Conditions

DC 1. A history of not meeting financial obligations.

DC 3. Inability or unwillingness to satisfy debts.

Mitigating Conditions

MC 1. The behavior was not recent.

MC 3. The conditions that resulted in the behavior were largely beyond the person's control (*e.g.*, loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation).

MC 6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

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 2 The drug involvement was an isolated or aberrational event.

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

Personal Conduct

Basis: 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 1 Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances.

DC 6 Association with persons involved in criminal activity.

Mitigating conditions:

MC 1 The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability.

MC 7 Association with persons involved in criminal activity has ceased.

Burden of Proof

By virtue 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 the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable 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 persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSIONS

Applicant presents as an experienced and well regarded security guard with his most recent defense employer (Company B) who after a considerable period of active marijuana use, and relative long period of abstinence, tested positive for THC in a controlled random drug test conducted under the auspices of his Company A employer in August 1998. While his August 1998 positive result revealed a relatively small concentration of THC (*i.e.*, 15 ng/mLs), the test reflected marijuana traces in Applicant's system that are neither incompatible with dissipated traces associated with prior use, nor passive smoke inhalation during the weekend company of friends preceding the random test.

Once the Government met its initial burden with proof of Applicant's positive 1998 drug test, it became Applicant's burden to demonstrate by persuasive evidence of his own that the test results either bore a false positive or reflected marijuana traces attributable to a source other than use (attributable to passive inhalation according to Applicant). It is not necessary to doubt Applicant's sincerity to require of him evidence sufficient to discredit the test results by reliable scientific data. He has been granted every opportunity to supplement the record with testing studies and any other evidentiary materials sufficient to make passive inhalation of marijuana smoke an equally plausible cause of his positive test screen. In this endeavor, his efforts have produced mixed results. Because of the small size of the THC trace in his urine sample, neither use nor smoke inhalation can be ruled out as plausible sources. In the end, the credibility of Applicant's claims becomes the final determinant on which the question of Applicant's use or not of marijuana preceding his positive 1998 test must turn.

Even assigning full credibility to Applicant's testimony in this proceeding, and his unwavering testimony that he never smoked marijuana in the six years preceding his August 1998 test, his passive inhalation suggestions cannot be accurately verified from the furnished Company A report, the test results, and/or the produced studies. Applicant's passive inhalation claims, while sincere and plausible as possible explanations for the positive test, still find insufficient support in the evidentiary record to be considered wholly reliable. While it remains entirely plausible that Applicant could have inhaled enough passive smoke at his August 1998 weekend assembly to have tested positive for THC in small concentrations of ng/mLs the following day, the evidence provided is insufficient to make this explanation verifiable. Because of the considerable time elapse since the 1998 test, Applicant's ensuing negative test in 1999, and absence of any other drug use recurrence since his last admitted use in 1982, the materiality of the positive drug test is marginal at best, and of limited security concern. It becomes an issue only because of the trust issues a positive drug test must inevitably raise when considering an applicant's eligibility to hold a security clearance.

Making the case for accepting Applicant's claims of marijuana avoidance since 1982 are an array of considerations: Applicant's uncontroverted claims of avoidance between 1982 and August 1998 (a period of almost sixteen years), the relatively small traces (just 15ng/mL) of THC detected in his system when tested in August 1998, the plausibility of his

claims based on the studies considered, Agent B's accepting Applicant's reiterated passive inhalation claims in her pre-polygraph DSS interview and finding no apparent cause to polygraph him, a favorable negative drug screen administered by his more recent employer in September 1999 (presumed to be random as well), and the favorable impressions he draws from his Company B supervisor, who recites no known instances of Applicant's ever testing positive for drugs during his Company B employ.

Considering the isolated nature of Applicant's August 1998 test and otherwise clean record concerning marijuana and other controlled substances since his last admitted use in 1982 (an elapsed time of almost twenty years now), Applicant is entitled to invoke several of the mitigating conditions (MC) of the Adjudicative Guidelines for drugs: MC 1 (lack of recency), MC 2 (isolated use) and MC 3 (demonstrated intent not to abuse drugs in the future). While his reported association with known marijuana users preceding his positive screen in 1998 is troubling, his accepted claims of shedding these friends following the positive test (almost four years ago) are sufficiently reassuring to mitigate his former associations.

Taking into account all of the evidence presented in the record, conclusions warrant that Applicant carries his evidentiary burden sufficiently to refute and mitigate his last attributed use of illegal substances within the past twenty years, and demonstrate convincingly he has shed his ties with persons who use illegal drugs. With no exhibited disposition to return to illegal substances in the future, conclusions warrant, accordingly that the allegations covered by Guidelines E and H are resolved favorable to Applicant.

Financial concerns associated with Applicant's past tax debt delinquencies and a charged off consumer debt are raised as well. Of security concern to the Government is Applicant's reliability and trustworthiness in light of his history of ongoing carried over tax imbalances with both the IRS and his State's taxing authority. Security determinations have never confined risk considerations to debt profiles that include any outstanding debts, no matter how few or payment status, but rather they have looked to the applicant's overall financial history to shed light on his most recent conduct as an indicator of his recurrence risks. This the Government has done in its underscoring of Applicant's still ongoing financial difficulties associated with his outstanding consumer debt charged and continuing tax obligations attributed to back years with both the IRS and the state taxing agency.

While Applicant cannot be faulted for incurring debts while conflicted with other mature obligations and unemployed, his judgement may be questioned for his not making more concerted efforts to obtain part time employment and work out payment arrangements earlier with his still outstanding creditors, just as he has been able to successfully conclude with some of his other creditors through consolidated work-out efforts with CCC.

Appraising the security significance of Applicant's financial deficiencies, a number of Disqualifying Conditions (DC) of the Adjudicative Guidelines (for financial) are applicable. With respect to his covered debts, DC 1 (history of not meeting financial obligations) and DC 2 (inability or unwillingness to satisfy debts) apply.

To his credit, Applicant has worked out payment arrangements with his two public creditors and has been steadily working down his past due tax debts with both the IRS and his State's taxing agency. He has made progress in working these accrued tax debts and can be expected to complete his payment arrangements with both taxing agencies within the next year. Based on his repayment efforts to date, he may fairly claim some mitigation benefits under the Adjudicative Guidelines. Each of the listed debts have been partially absorbed of security concerns by application of MC 3 (circumstances beyond Applicant's control, such as unemployment and medical emergency) and MC

6 (good-faith effort to repay creditors).

Overall assessment of Applicant's finances remains a work in progress, but with solid evidence of his addressing his outstanding tax debts and improving prospects about his ability to stabilize his finances in the foreseeable future. Applicant convinces he is fully capable of keeping his finances current and stable in the face of his spotty employment history and associated difficulties in taking care of some of his outstanding debts.

Applicant carries his extenuation/mitigation burden and in doing so surmounts Government's concerns about his judgment and reliability in managing his finances so as to avoid exposure to security risks of pressure and coercion to generate funds. Favorable conclusions warrant with respect the allegations covered by sub-paragraphs 1.a through 1.c of

Guideline F.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the factors enumerated in the preamble of Appendix I of Regulation 5200.2-R.

FORMAL FINDINGS

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

GUIDELINE F (FINANCIAL CONSIDERATIONS): FOR APPLICANT

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR APPLICANT

Sub-para. 1.c: FOR APPLICANT

GUIDELINE H (DRUG INVOLVEMENT): FOR APPLICANT

Sub-para. 2.a: FOR APPLICANT

Sub-para. 2.b FOR APPLICANT

GUIDELINE E (PERSONAL CONDUCT): FOR APPLICANT

Sub-para. 3.a: FOR APPLICANT

Sub-para. 3.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