

DATE: 9 June 2003

---

In re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 02-03011

**DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

**APPEARANCES**

**FOR GOVERNMENT**

Marc Curry, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant presents with a history of illicit substance involvement that encompasses recurrent use over a 12-year period and occasional purchasing LSD for his own use. By failing to provide good, reliable and verifiable explanations of his historical involvement with marijuana, he is unable to successfully mitigate his history of marijuana activity to overcome raised doubts about his judgment and reliability sufficient to meet minimum security clearance eligibility requirements. Applicant is credited with mitigating his one alcohol-related incident by demonstrating his avoidance of any further abuses or problems with alcohol away from the work place. Clearance is denied.

**STATEMENT OF THE CASE**

On February 11, 2003, 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 February 19, 2003, and requested a hearing. The case was assigned to this Administrative Judge on March 18, 2003, and was scheduled for hearing on

April 22, 2003. A hearing was convened on April 22, 2003, 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 three exhibits; Applicant relied on one witness (himself) and one exhibit. The transcript (R.T.) of the proceedings was received on April 30, 2003.

**PROCEDURAL ISSUES**

Before the close of the hearing, the Government moved to amend the SOR to substitute the year 1988 for 1998 in subparagraph 1.c to conform to the evidence. There being no objection from Applicant, and good cause being demonstrated, the amendment request was granted. Applicant's answer remained unchanged.

### **STATEMENT OF FACTS**

Applicant is a 32-year old systems engineer for a defense contractor who seeks a security clearance.

#### **Summary of Allegations and Responses**

Applicant is alleged to have (a) used marijuana on numerous times from September 1988 through May 2000, (b) used LSD on numerous times from 1988 to 1992, spending \$40.00 a month in college to purchase drugs, (c) ingested hallucinogenic mushrooms numerous times between 1998 and 1996, and (d) used fantasy on three occasions between 1992 and 1993.

Additionally, Applicant is alleged to have experienced a DuI arrest in July 2001, to which he pleaded guilty to a reduced charge of reckless driving.

For his answer to the SOR, Applicant admitted most of the allegations. He denied only his alleged spending of \$40.00 a month on LSD purchases in college: He claimed his involvement with LSD was limited to experimental use.

#### **Relevant and Material Factual Findings**

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.

Applicant was introduced to marijuana as a 16-year old high school senior. During his senior year in high school, he smoked the substance usually with a pipe and did so regularly on weekends and at social events (*see ex. 2*). In the signed, sworn statement he provided DSS in August 2001, he described his frequency of use of marijuana as regular, beginning in high school and continuing on a regular basis until or about December 1999 (*ex. 2*).

Both in his answer to the SOR and at hearing, Applicant trimmed considerably on his previous version of his history of marijuana use. In these revised versions, he claimed the majority of his marijuana use occurred in high school and college (between 1988 and 1992) and only occasionally after college. Asked at hearing to pin down his marijuana use after college, he insisted he did not use marijuana at all in the three years preceding his use at a New Years' party in December 1999, and again six months later in May 2000 (*see R.T., at 27-29*). His revisions are difficult to reconcile with the regular monthly pattern he outlined in his earlier DSS statement. Not only was his earlier recounting of his involvement with marijuana clear and unambiguous in its charting of his marijuana use over a 12-year period spanning 1988 and August 2000, but it represented his first attempt to quantify the length and extent of his marijuana use, and at a time when his security clearance was not yet challenged by an SOR. This earlier version represents the the most credible version under the circumstances presented. With so much history of marijuana use covered in his DSS statement, the more plausible inference to draw is that he continued using marijuana at the regular level through December 1999 (*compare ex. 2 with R.T., at 27-30*).

Except for one recurrent instance of marijuana use in May 2000, Applicant essentially quit using marijuana in December 1999 (*ex. 2; R.T., at 27*). Applicant attributes his one-time return to marijuana smoking in May 2000 to his pending divorce at the time. He attributes his ensuing abatement of drug use to increased maturity, health concerns, and fear of getting into trouble with law enforcement authorities. His explanations are accepted.

Besides marijuana, Applicant also used LSD a couple of times a year between high school and May 1992, sometimes spending as much as \$40.00 a month on the drug (*see R.T., at 31*). Curiosity, he insists, was the principal motivator for attracting him to the drug and lack thereof as his reason for quitting his use of the drug. Between 1988 and 1992, he tried other drugs as well: hallucinogenic mushrooms, (alternating with LSD), cocaine twice in high school and college, and ecstasy three times (*i.e., twice in 1992 and once in 1993*) as the result of peer pressure and curiosity (before concluding the drug was highly overrated and dangerous to his health).

Applicant was arrested for DuI in July 2001. He had consumed four beers at a local bar and was on his way home when he was stopped and administered a field sobriety test. He was then transferred to a local police station where he was asked to submit to a Breathalyzer. He refused and asked to speak an attorney. Later he pleaded guilty to a lesser offense of reckless driving and was sentenced to one day in jail with credit for time served. The court also placed him on probation for a year and ordered him to perform 50 hours of community service, pay court costs, attend a DuI counterattack school and participate in a victims' awareness program. Applicant satisfied the conditions set by the court and has had no further confrontations with law enforcement since his July 2001 DuI arrest. Since his 2001 incident he has curtailed his drinking: He estimates he drinks about once a week and no more than two to three drinks per sitting.

Applicant is well regarded by his employer and is credited with strong performance evaluations by his employer.

### **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**

*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 5 A pattern of dishonesty or rule violations.

##### **Mitigating conditions:**

MC 5 The individual has taken positive steps to reduce or eliminate vulnerability to coercion, exploitation, or duress.

#### **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 mere 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 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.

### CONCLUSION

Applicant is a praiseworthy engineer for his defense contractor who used marijuana and other illegal drugs in varying frequencies between 1988 and 2000 before ceasing all further drug use. Besides using illicit drugs, Applicant occasionally purchased illegal drugs (LSD) for his own use.

Although Applicant has discontinued his use of illicit drugs, his explanations of his post-college marijuana use too inconsistent to absolve him of lingering doubts about the full extent of his marijuana use over the period of his established use. These doubts fuel concerns about the strength of his commitments to avoid illicit drug use in the foreseeable future. On the strength of the presented evidence, the Government may invoke two disqualifying conditions (DC) of the Adjudication Guidelines for drugs: DC 1 (any drug use) and DC 2 (possession and purchases of drugs).

With such a long history of active drug use (over 10 years), infrequent breaks from drug abuse, and the absence of any reliable track history of suspended drug activity (considering the unambiguous and contradictory accounts he provided DSS and DOHA), too much doubt and uncertainty exist to enable safe predictive judgments about his ability to avoid recurrent drug involvement. For sure, he is to be encouraged in his ceasing of his illegal drug involvement. However, more time is needed to reliably season his commitment to discontinuance of all forms of illegal drugs. While Applicant may take some advantage of available mitigating conditions (*i.e.*, MC 1, drug involvement not recent and MC 3, demonstrated intent not to abuse any drugs in the future), safe assessments can not be made at this time about his likelihood to return to illicit drug activities in the future. Consequently, unfavorable conclusions warrant with respect to the allegations covered by sub-paragraph 1.a of Guideline H.

By contrast, Applicant is convincing in his assurances that he has not used or purchased any of the other drugs covered in the SOR within the past seven years (*i.e.*, LSD, cocaine, hallucinogenic mushrooms and Ecstasy). Applicant's past involvement with these illegal substances is sufficiently aged to absorb any recurrence risks associated with his past use and occasional purchase of these drugs. Favorable conclusions warrant with respect to subparagraphs 1.b through 1.e of Guideline H.

Applicant's 2001 DuI arrest qualifies as an alcohol-related incident, notwithstanding his accepted plea to a lesser offense of reckless driving, and, as such, reflects not only poor judgment but pattern rule violations when assessed in connection with his past drug abuse. DC 5 (pattern of dishonesty or rule violations) of the Adjudicative Guidelines for personal conduct may be invoked.

By his acceptance of his judgment lapses associated with his 2001 alcohol-related incident and avoidance of any further such incidents or other indicia of alcohol abuse, Applicant persuades his 2001 incident was an isolated judgment lapse, as it relates to alcohol, and one unlikely to be repeated in the foreseeable future. His mitigation efforts not only reflect noticeable reductions in the amount of alcohol he typically consumes (no more than once a week since his DuI arrest),

but sustaining positive steps to ensure against any future alcohol-related problems.

Because of his cumulative judgment lapses associated with his past drug and alcohol abuse, however, Applicant is not in a position at the present time to take full advantage of any of the mitigating conditions covered by the Adjudicative Guidelines for personal conduct. While he may claim some of the mitigation benefits associated with MC 5 (individual has taken positive steps to significantly reduce vulnerability to coercion), his actions and commitments to date are not sufficient to fully mitigate his past judgment lapses associated with his pattern of substance abuse.

Considering the record as a whole, Applicant's mitigation efforts, while encouraging, are not sufficient to warrant safe predictions he is no longer at risk to judgment impairment associated with such conduct. More seasoning is required before he can make the convincing case of his restoration of judgement in the wake of his judgment lapses associated with his past abuse of drugs. So, while favorable conclusions warrant with respect to the judgment impairment allegations covered by subparagraph 2.b of Guideline E, unfavorable conclusions warrant with respect to subparagraph 2.a.

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

Sub-para. 1.b: FOR APPLICANT

Sub-para. 1.c: FOR APPLICANT

Sub-para. 1.d: FOR APPLICANT

Sub-para. 1.e: FOR APPLICANT

GUIDELINE E: AGAINST APPLICANT

Sub-para. 2.a AGAINST APPLICANT

Sub-para. 2.b: 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