

DATE: June 29, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-19334

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Rita O'Brien, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant used illegal drugs between 1992 and May 1999 and for a three-year period spanning 1996 and 1999 stole controlled substances (anti-anxiety and pain killing drugs) from his employer, which he later swapped with a local drug dealer for marijuana and LSD, which he either used or distributed to acquaintances. Applicant later pled guilty to charges of possession of illegal drugs and drug paraphernalia and received withheld adjudication for the duration of his imposed three years of probation. Despite his satisfactory completion of his probation conditions (which included drug counseling), it is still too soon to credit Applicant with mitigation of security concerns associated with his past abuse of illegal drugs and exchanges and distributions with third parties. Clearance is denied.

STATEMENT OF THE CASE

On October 17, 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 November 12, 2003, and requested a hearing. The case was assigned to me on February 12, 2004, and was scheduled for hearing on April 28, 2004. A hearing was convened on April 28, 2004, 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 eight exhibits; Applicant relied on one witness (himself) and three exhibits. The transcript (R.T.) was received on May 13, 2004.

SUMMARY OF PLEADINGS

Under Guideline H, Applicant is alleged to have (a) started smoking marijuana when he was ten years old, and

continued to use marijuana with varying frequency to at least June 1999, (b) experimented with the use of illegal drugs, and controlled substances to include: LSD, Alparazolam, Diaezepam, Propoxiphene, Hydrocodone and Clonazenpan, (c) resigned from his job in May 1999 as a pharmacy technician at a local medical center from where he was stealing controlled substances for his personal use and for distribution to his friends, and (d) been arrested in May 1999 and charged with 10 counts of possession of controlled substances (LSD, Alparazolam, Diaezepam, Propoxiphene, Hydrocodone, Phenobaribital, Oxazepam, Clonazenpan, Carisoprodol, and marijuana) and possession of drug paraphernalia, to which he plead guilty and was placed on probation for three years with judgment withheld, which terminated favorably upon his completion of drug counseling in January 2001 (followed by court-ordered sealing of his criminal case record).

For his response to the SOR, Applicant denied smoking marijuana since the age of 10, while admitting to smoking marijuana in high school with varying frequency up to May 1999. Applicant admitted to each of the remaining allegations with added explanations. He claimed his experimentation with other illegal drugs and controlled substances was low frequency and often only when needed for anxiety or migraine headaches. He claimed he stole controlled substances for his personal use and occasionally for friends after observing others take a few here and there with no adverse consequences. Applicant claimed he has no intention of ever getting into legal trouble again. And he claimed his 1999 arrest and charge for possession of illegal substances was isolated and has been followed by excellent academic performance in a local college and admission to a four-year engineering college, where he is currently studying to become a software engineer.

FINDINGS OF FACT

Applicant is a 26-year-old engineering clerk for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

Applicant was introduced to marijuana in 1992 while a high school student and continued to use it periodically throughout the duration of high school tenure (to 1995). Most of the marijuana he used was obtained from fellow high school students.

While employed as a pharmacy technician for a local hospital center between February 1996 and May 1999, Applicant continued to use marijuana. He also experimented with other drugs: LSD, Alparazolam, Diaezepam, Propoxiphene, Hydrocodone and Clonazenpan. Beginning as a newly hired pharmacy technician (age 18 at the time). He observed other employees of the hospital take drugs and controlled substances from the pharmacy hospital for their own use. He never reported any of these employees he observed.

Having witnessed lax security conditions at the hospital center and other employees taking drugs, Applicant began stealing drugs and controlled substances himself, both for his own use and for distribution to friends and acquaintances. Over the course of his three-year stay with the hospital, he stole drugs and controlled substances from the hospital center on an intermittent basis.

While working at the hospital center, Applicant was enrolled at a local community college. The drugs he took from the hospital were comprised of anti-anxiety substances and pain killers that he took to relieve the anxiety from his studies. Later, he took other controlled substances he had misappropriated from the hospital's pharmacy for experimental use.

During his employment at the hospital center, Applicant oft-obtained marijuana from a local marijuana dealer he knew in exchange for controlled substances he stole from the hospital's pharmacy. Some of this marijuana he obtained he used himself; some he distributed to friends and acquaintances. Applicant also obtained LSD from his dealer friend that he passed on to his other acquaintances. His assurance he made no profit from the drugs he received in exchange cannot be reconciled with his acknowledged stealing of the drugs he later swapped with the local drug dealer. Inferences he profited from his distributions of marijuana and other illegal substances to friends and acquaintances cannot be averted.

In May 1999, Applicant was a passenger in a vehicle that was stopped by local police and searched. Applicant (seated in the back seat of the vehicle) was confronted by the searching officer who wanted to examine the contents of his back pack. After initially trying to hide his back pack from the police, he relented to the search. Inside Applicant's back pack

the searching police officer found the following: Alparazolam (a prescription anti-anxiety drug), Diazepam (a prescription anti-anxiety drug), Propoxyphene (a prescription pain killer), Hydrocodone (a prescription pain killer), Phenobarbital (a prescription pain killer), Oxazepam, and Clonazepam (a prescription pain killer). Police also found 20 LSD tablets, rolling papers (drug paraphernalia) and about 27 to 28 grams of marijuana in Applicant's back pack.

After the police officer's search of Applicant's back pack and discovery of the illegal drugs and controlled substances, Applicant was arrested and charged with eight counts of felony possession of controlled substances, one count of felony possession of LSD, one count of felony possession of marijuana over 20 grams and four counts of misdemeanor possession of drug paraphernalia.

When Applicant appeared in court in July 1999 on his drug charges, he pleaded guilty as charged and received withheld adjudication of guilt. He was placed on drug offender probation for three years. Applicant's probation consisted of a drug evaluation program and random drug testing which he consistently passed. After completing his drug counseling probation requirements and over 50 per cent of his probation term (in January 2001), the supervising court terminated Applicant's probation and ordered his criminal case records sealed.

Acting on the advice of his attorney, Applicant resigned his pharmacy technician position in May 1999 (following reporting of his arrest). It is unclear whether Applicant was pressured in any way by his hospital employer to resign his job.

Since his arrest in May 1999, Applicant assures he has never used illegal drugs or controlled substances of any kind and has no intention of resuming use in the future. While credibility issues are raised as the result of his prior drug involvement and omissions of the same from his July 2001 SF-86, he appears to have cleared these issues up satisfactorily in a subsequent DSS interview. Applicant has since completed his community college course work with honors and is currently enrolled in a curriculum of computer science in a four-year university while working for his current defense contractor.

Applicant is highly regarded by his current supervisor and coworkers, who credit Applicant with honesty, reliability and trustworthiness in the performance of his duties (*see ex. A*). He is highly rated, too, by the director of student services for the community college he attended. Although any weight to assign the director's impressions must be discounted somewhat due to Applicant's apparent failure to acquaint the director with the circumstances surrounding his resignation from the hospital center. Applicant is favorably characterized by a family friend who as a therapist has worked with problem referrals from the local court system.

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These revised Guidelines require 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

The Concern: Improper or illegal involvement with drugs raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.

Disqualifying Conditions:

DC 1 Any drug use.

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

Mitigating Conditions:

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

MC 4 Satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a credentialed medical professional.

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 admission of criminal conduct.

DC 2 A single serious crime or multiple lesser offenses.

Mitigating Conditions:

MC 1 The criminal behavior was not recent.

MC 6 There is clear evidence of successful rehabilitation.

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's 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 material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, 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

case.

CONCLUSIONS

Applicant has a history of abusive use of illegal drugs (primarily marijuana), experimentation with other illegal controlled substances, and engagement in criminally-related misappropriation of controlled substances (*viz.*, anti-anxiety

drugs and pain killer medications) while employed at a hospital center between 1996 and 1999. These same stolen drugs he later swapped for marijuana and LSD, which he personally used and distributed to others. Applicant's actions raise serious security concerns over his judgment, reliability and trustworthiness required to access him to classified information.

While not established to be abusive to the point of addiction, inferences were drawn that Applicant used marijuana and experimented with other drugs (including LSD). Most of these other drugs were controlled substances he obtained from the hospital center he worked for between 1996 and 1999. Some of the marijuana and LSD he obtained from the drug dealer he used himself; some he distributed to friends and acquaintances. When he was arrested in May 1999 the back pack he had with him in the vehicle he was riding in was searched by police and found to contain various controlled substances, along with considerable quantities of LSD and marijuana. Based on their findings police arrested Applicant and charged him with possession of controlled substances and drug paraphernalia.

Because it was Applicant's first drug-related offense, he received withheld adjudication of guilt and placement in a drug offender probation program for three years. Applicant is credited with completing his drug offender program in January 2001, after which the court terminated his probation and ordered his criminal case record sealed.

Applicant's abusive use of marijuana and experimentation with other drugs (including LSD and controlled anti-anxiety and pain killer medications), exchange of these controlled substances he stole from his hospital employer during the 1996-1999 time frame, and ensuing distribution of exchanged for marijuana and LSD are sufficient to invoke three of the disqualifying conditions of the Adjudicative Guidelines for drugs (*i.e.*, DC 1 (any drug abuse), DC 2 (illegal drug possession, including cultivation, processing, manufacture, purchase, sale or distribution). Both his history of illegal drug use and the serious circumstances associated with his swapping stolen prescription drugs for marijuana and LSD for both his personal use and distribution make his association with illegal and controlled drugs a serious security concern from the standpoint of both prolonged drug abuse and criminal misbehavior.

Applicant's drug-related arrest and charges arising out of his May 1999 incident in which multiple illegal and controlled substances were seized from him adds additional criminal conduct to the Government's drug-related security concerns. Although the court withheld adjudication of guilt after receiving Applicant's guilty plea, a criminal conviction is not prerequisite to concluding criminal conduct under the Directive's Adjudicative Guidelines. Our Appeal Board has repeatedly stated that the Government can prove applicant engagement in criminal conduct, even in the absence of a criminal conviction. *Cf.* ISCR Case No. 94-1213 (June 7, 1996). Accordingly, two of the disqualifying conditions of the Adjudication Guidelines for criminal conduct may be invoked: DC 1 (criminal conduct regardless of whether the person was formally charged) and DC 2 (a single serious crime or multiple lesser offenses).

Based on his own testimony and the received probation reports, Applicant may invoke MC 3 (demonstrated intent not to abuse any drugs in the future and MC 4 (satisfactory completion of a drug treatment program). Mitigation of the more serious concerns associated with his exchange of controlled substances he stole from his hospital employer and ensuing distributions to friends and acquaintances is more difficult to reconcile with tenets of judgment, reliability and trustworthiness required for security clearance eligibility. He is entitled to some benefit from MC 1 (not recent) of the Guidelines for criminal conduct, but not enough to mitigate the conduct.

Fro Applicant to mitigate the Government's concerns associated with his distribution of illegal substances, more time is needed. Five years of demonstrated rehabilitative behavior manifest in his work and schooling is very encouraging and places Applicant on a positive trajectory of trust restoration. Not enough time has passed, however, to enable safe predictive judgments he will not repeat his mistakes of the past.

Considering all of the developed evidence of record, Applicant fails to mitigate security concerns associated with both his abuse of illegal substances and his engagement in criminal behavior incompatible with holding a security clearance. Unfavorable conclusions warrant with respect to sub-paragraphs 1.a through 1.d of Guideline H and the same incorporated sub-paragraphs of 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 reached in the context of the FINDINGS OF FACT, CONCLUSIONS, CONDITIONS, and the factors listed above, this Administrative Judge makes the following FORMAL FINDINGS:

GUIDELINE H (DRUG INVOLVEMENT): AGAINST APPLICANT

Sub-para. 1.a: AGAINST APPLICANT

Sub-para. 1.b AGAINST APPLICANT

Sub-para. 1.c: AGAINST APPLICANT

Sub-para. 1.d: AGAINST APPLICANT

GUIDELINE J (CRIMINAL CONDUCT): AGAINST APPLICANT

Sub-para. 2.a: AGAINST 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. Clearance is denied.

Roger C. Wesley

Administrative Judge