KEYWORD: Drugs

DIGEST: Applicant mitigates his recurrent marijuana use, purchases and his non-recent arrests for marijuana possession. His marijuana involvement was never more than occasional, and last occurred in September 2002. He is highly regarded by his superiors and colleagues for his good judgment, reliability and trustworthiness, and he credibly convinces that he will not return to marijuana use in the future. Clearance is granted.

CASENO: 03-09922.h1

DATE: 10/12/2004

DATE: October 12, 2004

In re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 03-09922

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Department Counsel

FOR APPLICANT

Kathleen E. Voelker, Esq.

SYNOPSIS

Applicant mitigates his recurrent marijuana use, purchases and his non-recent arrests for marijuana possession. His marijuana involvement was never more than occasional, and last occurred in September 2002. He is highly regarded by his superiors and colleagues for his good judgment, reliability and trustworthiness, and he credibly convinces that he will not return to marijuana use in the future. Clearance is granted.

STATEMENT OF THE CASE

On January 27, 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 14, 2004, and requested a hearing. The case was assigned to me on May 10, 2004, and was scheduled for hearing on June 3, 2004. A hearing was convened on June 3, 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 three exhibits; Applicant relied on two witnesses (including himself) and 14 exhibits. The transcript (R.T.) was received on June 15, 2004.

PROCEDURAL ISSUES

During the hearing, Applicant offered two affidavits (exhibits K and L), to the Government objected to by the Government as to portions addressing factual matters pertaining to the extent of Applicant's marijuana involvement. The objected to portions of the affidavits were stricken as to paragraphs 4 through 7(1) of exhibit K and paragraph 3 of exhibit L, without prejudice to Applicant to brief the raised hearsay issues during the allotted 14 days to supplement the record. The Government was afforded an additional 14 days to respond.

Within the time permitted, the parties addressed the hearsay issue associated with exhibits K and L. Historically, the Appeal Board has broadly construed the reach of hearsay exceptions to Rule 803 of the Federal Rules of Evidence. Police reports, medical records and business records that qualify as exceptions have been generally approved as admissible, even though the records include statements that might separately be considered hearsay declarations. *See* ISCR Case No. 98-0265 (March 1999) (business records represent recognized exception) to hearsay rule; ISCR Case No. 96-0575 (July 1997)(medical questionnaire admissible that is duplicative of admitted statements and does not involve controverted issue). These decisions follow the general guidance provided by the federal circuits when considering hearsay prohibitions in the context of making security clearance decisions. *Cf. Kewley v. Department of Health and Human Services,* 153 F.3d 1357, 1364 (Fed. Cir. 1998); *Hoska v. United States Dept. of the Army,* 677 F.2d 131, 138-39 (DC Cir. 1982). By contrast, the Appeal Board has been careful to limit the admissibility of third-party statements covering controverted fact issues that are not covered by any recognized hearsay exception. *See* ISCR Case No. 96-0277 (July 1997); ISCR Case No. 90-2069 (March 1992); DISCR Case No. 88-2173 (September 1990)

Both exhibits K and L contain hearsay accounts of a factual nature. While they corroborate Applicant's own accounts of the respective circumstances surrounding his May 1978 arrest and the source of his marijuana in 1999, they are a part of affidavits developed specifically for the hearing in the instant case. As such, they are not covered by any recognized hearsay exception and reflect statements generally barred by the hearsay rule in federal court and administrative proceedings alike. To accept these statements covering pivotal fact issues would weaken, if not eliminate, what is left of hearsay limits recognized in DOHA administrative proceedings. Nothing provided in the post-hearing submissions of the parties supports a construction of the hearsay rule in DOHA proceedings that permits the consideration of hearsay statements not colorably covered by a recognized hearsay exception. Accordingly, the factual portions of exhibits K and L that were stricken at hearing must remain so.

Before the close of the hearing, Applicant was afforded 14 days to provide Appeal Board guidance re: making risk of recurrence assessments based on past use of illegal substances and an applicant's likelihood of recurrence in the future based on a negative credibility assessment. The Government was afforded an additional 14 days to respond. With extensions granted Applicant to facilitate response to the trier's referenced Appeal Board decision at hearing, both parties responded with their timely briefing of the issue.

SUMMARY OF PLEADINGS

Under Guideline H, Applicant is alleged to have (a) used marijuana from 1978 to mid-2002, (b) purchased marijuana, (c) been arrested in March 1978 for possession of marijuana and drug paraphernalia (charges dismissed) and (d) been arrested in May 1978 for possession of marijuana (charge dismissed).

For his answer to the SOR, Applicant denied using marijuana for the dates and frequencies alleged, and denied possessing marijuana on either occasion he was arrested in 1978. He claimed more limited use dating to 1976, followed by more recent occasional use during a brief period in 1998 prior to his divorce being finalized. He claimed to have obtained the marijuana he used during this brief last period from his brother for no cost. Applicant claimed excellent career progress with his current employer and a loving, enduring relationship with his daughter and step-daughter from his last marriage.

FINDINGS OF FACT

Applicant is a 45-year-old senior systems engineer for a defense contractor who seeks a security clearance. He was introduced to marijuana in college and estimates to have used it about five times between 1976 and 1980 (influenced by peer pressure), again in1999 when he resumed use on an occasional basis following his separation from his spouse of 13 years, and one last time in 2002 following the breakup of a three-year relationship.

In March 1978, Applicant was a passenger in a vehicle driven by a friend who had marijuana in his car when the police pulled them over and arrested both of them for possession of marijuana and narcotic equipment. Applicant later pled no contest to the possession charge and received deferred adjudication on this charge; while the drug paraphernalia charge was dropped (ex. G). Applicant, in turn, was advised the remaining drug possession charges would be expunged from his police record. Applicant assures the marijuana was not his. His assurances are not controverted by the evidence in the record and are accepted, notwithstanding the absence of any documentation of expungement. .

Applicant was arrested again for marijuana possession in May 1978. This charge, too, was dismissed following applicant's not guilty plea (*see* ex. H). As with his earlier March 1978 arrest, he assures the marijuana found in the vehicle he was riding in was not his, and he had nothing to do with the arrest. His assurances are accepted.

During his 15-year marriage to his former spouse (spanning 1985 and 2000), Applicant avoided marijuana, as well as other illegal substances, save for his isolated use in 1999 (correcting his earlier 1998 estimate he provided in his answer). Random drug tests he submitted to during his eight year employment with a previous employer (1989 to 1997) consistently produced negative results (*see* ex. E). Applicant's former spouse corroborates Applicant's claims of isolated

marijuana use. She was always very much against the use of illegal drugs of any kind, and has a pretty good sense of smell for marijuana (R.T., at 21-22).

Marriage difficulties emerged between Applicant and his now former spouse in the late 1990s. Unable to keep their marriage on solid footing following months of marriage counseling (*see* ex. A), they separated in August 1999. Their marriage produced one daughter of their own, with whom they share custody (R.T., at 120), and a step-daughter from the spouse's previous marriage. Upon Applicant's petition for dissolution of their marriage, their divorce was finalized in arch 2000 (*see* exs. B and D).

Applicant's separation from his former spouse caused him considerable emotional stress. He became quite depressed after his wife asked him to move out of his house and away from his children and pets. With his sleep disrupted, he turned to marijuana to help him cope with the effects of losing his family. His use of marijuana over the ensuing year was sporadic: He used it infrequently, on occasional evenings at home to aid his sleep. Most of it he obtained from his brother, on no more than ten occasions. Applicant obtained it from both his brother and another in the surf shop where the former worked in return for repair work, never for cash or its equivalent (R.T., at 43-44). Applicant's exchanges, which collectively reflect small amounts, represent legally identifiable purchases for his personal use, which Applicant did not fully appreciate at the time to be the case.

Since his 1999 marital separation, Applicant continues to maintain a vigorous schedule of work (estimated to be 50 to 100 hours a week) and recreational pursuits (primarily coaching little league). This intense level of activity leaves him little time for socializing.

Applicant is periodically subjected to random drug tests at work, just as he was with a previous FAA contractor (albeit, never called for testing) between 1992 and 1997 (R.T., at 44-51). He has consistently tested negatively in these tests (*see* ex. F). He does admit to one recurrent use of marijuana since 1999. He smoked a single joint on about three occasions over the course of a week in September 2002 after learning that a woman he become involved with had serious undisclosed financial issues (R.T., at 58-59).

Other than his isolated recurrent use of marijuana in September in 2002 (which he promptly reported to his first line supervisor), Applicant has not used illegal drugs of any kind, expresses deep remorse for his mistakes of judgment in returning to marijuana, and assures he will not return to illegal substances in the future (*see* ex. M; R.T., at 118-19). Absent evidence of his further use before or after September 2002, no adverse inferences may be drawn of Applicant's likely return to marijuana use in the foreseeable future.

Applicant is highly regarded by his ex-spouse, members of his management team, and past and present colleagues who have worked closely with him. He is valued for his needed technical skills, experience, sound judgment, reliability, and trustworthiness (*see* exs. I, J and K; R.T., at 17-18).

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.

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 1 The drug involvement was not recent.

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

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

or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSIONS

Applicant brings a praiseworthy civilian work record to these proceedings, in addition to a history of recurrent marijuana use and isolated purchases. Applicant's recurrent involvement with marijuana over a twenty-five period raises

security significant issues his judgment, reliability and trustworthiness required for eligibility to access classified information.

Applicant's marijuana use, while recurrent, was never carried to addictive or abusive levels. Introduced to the substance in college (in 1976) he enjoyed a 19-year period of abstinence before returning to it again in 1999 for several weeks following his break-up with his spouse of many years, and one final time in September 2002.

Applicant's recurrent use of marijuana in college, in 1999, and again in 2002, along with his marijuana purchases and possession arrests in 1999, are sufficient to invoke two of the disqualifying conditions of the Adjudicative Guidelines for drugs, *i.e.,* DC 1 (any drug abuse) and DC 2 (illegal drug possession, including cultivation, processing, manufacture, purchase, sale or distribution). Because his 1978 possession arrests did not result in any cognizable adjudication of guilt, no inferences of abusive use of marijuana can be drawn from these arrests.

But misconduct predictions, generally, may not be based on supposition or suspicion. *See* ISCR Case No. 01-26893 (October 2002); ISCR Case No. 97-0356 (April1998). The Appeal Board has consistently held that an unfavorable credibility determination concerning an applicant is not a substitute for record evidence that the applicant used marijuana since his last recorded use, or based on his past use is likely to resume usage in the future. *See* ISCR Case No. 02-08032 (May 2004). Based on his own creditable testimony, the testimonials of his character references and his negative drug screens, over the past two years, Applicant may invoke MC 1 (non recency of the drug involvement) and MC 3 (demonstrated intent not to abuse any drugs in the future). While Applicant's recurrent marijuana use over 20 plus years raises some questions over the strength of his avoidance assurances, it is not enough to prevent Applicant's successful mitigation of the issue. Applicant's recurrent use of marijuana between 1976 and 2002, has been interrupted by long periods of non use, and most importantly has never been more than occasional.

Applicant's assurances that his marijuana involvement is a thing of the past are entitled to acceptance based on his limited periods of active marijuana use in the past, the absence of any drug activity attributed to him over the past 21 months and his very strong character references from his former spouse, employer, friends and former colleagues who have worked closely with him. Considering the all of the developed evidence of record, Applicant mitigates security concerns associated with his recurrent use and possession of marijuana. Favorable conclusions warrant with respect to sub-paragraphs 1.a through 1.d of Guideline H.

In reaching my decision, I have considered the evidence as a whole, including each of the E 2.2 factors enumerated in the Adjudicative Guidelines 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 (DRUGS): FOR APPLICANT

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR APPLICANT

Sub-para. 1.c: FOR APPLICANT

Sub-para. 1.d: 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. Clearance is granted.

Roger C. Wesley

Administrative Judge