

DATE: \_September 5, 1997

---

In Re:

Applicant for Security Clearance

---

ISCR OSD Case No. 96-0662

## **DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

### **Appearances**

#### **FOR GOVERNMENT**

Barry Sax, Esq.

Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **STATEMENT OF THE CASE**

On October 4, 1996 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 October 16, 1996 and elected to have his case decided on the basis of the written record. Applicant was furnished copies of the File of Relevant Materials (FORM) on November 19, 1996 and is credited with receiving them on November 25, 1996. He provided no written response within the time (30 days) provided by the Directive. The case was assigned to another Administrative Judge on April 22, 1997 and reassigned to this Administrative Judge on April 23, 1997.

### **PROCEDURAL ISSUES**

Upon discovery of a missing page three in the SOR and Applicant's apparent non-receipt of the same page, the case file was returned on June 18, 1997 to Department Counsel for suggested resubmission of the complete SOR to Applicant for response. A new SOR was mailed to Applicant with the missing page included. And on August 18, 1997, a notarized supplementary answer (bearing an August 6, 1997 execution date) was received by DOHA and resubmitted to this Administrative Judge (on August 19, 1997) for disposition.

### **STATEMENT OF FACTS**

Applicant is 34 years of age and has been employed by his current defense contractor (Company A) since May 1994. He seeks a security clearance at the level of secret.

## Summary of Allegations and Responses

Applicant is alleged to have (1) used marijuana, with varying frequency, at times daily, from approximately 1981 to at least June 1996, (2) purchased marijuana, with varying frequency, from approximately 1981 to at least June 1996, (3) cultivated marijuana sometime between approximately 1978 and 1980, (4) used crack cocaine, on approximately 2 to 4 occasions, from approximately April 1992 and April 1994, (5) used amphetamines, dextroamphetamine, and/or methamphetamine (crank), on approximately 5 occasions, from approximately 1983 to 1984, and on approximately 5 occasions from approximately October 1995 to at least February 1996, (6) used marijuana and crack cocaine after being issued a security clearance on May 7, 1990 and (7) used marijuana, amphetamine, dextroamphetamine, and/or methamphetamine (crank) after being issued a security clearance on May 3, 1994.

Additionally, Applicant is alleged to have (a) falsified his National Agency Questionnaire ("NAQ") executed on October 9, 1993 by omitting his prior cultivation of marijuana between 1978 and 1980, his use and purchase of marijuana between 1981 and at least October 1993, his use of crack cocaine on two to three occasions between April 1992 and October 1993, and his use of amphetamines, dextroamphetamines, and/or methamphetamines (crank) on five occasions between 1983 and 1984 and (b) falsified his signed, sworn statement given to DIS on March 27, 1996 by omitting his (i) use of crack cocaine, amphetamines, dextroamphetamines, and/or methamphetamines (crank), and (ii) his use and purchases of marijuana.

And Applicant is alleged to have engaged in criminal conduct by dint of his arrest on October 3, 1995 in State A for aggravated battery/domestic violence (a felony), his later plea of guilty to simple assault, his ensuing sentence to serve 16 days in jail, and his award of probation for 12 months, conditioned on his attending anger control, receiving an alcohol evaluation, his performance of 50 hours of community service, and his payment of costs in the amount of \$100.00.

For his response to the SOR, Applicant admits most of the allegations, denying his ever cultivating marijuana, and adding several explanations: His use of marijuana for recreational purposes only (never to the point of addiction), his discontinuance of daily marijuana use since 1987, his assurances that he will never use crack cocaine again, and his lack of realization at the time of the impact or severity of his omissions.

## Relevant and Material Factual Findings

Applicant's pleading admissions are incorporated herein by reference as relevant and material findings of fact. Additional findings follow.

Applicant's first introduction to marijuana came in about 1978, when at the age of 15 he tried to grow a single marijuana plant. The plant had grown to be about a foot in height when his girlfriend's mother found it and flushed it down the toilet. Applicant made no further attempts to cultivate marijuana.

Applicant first used marijuana in 1981 at the age of 18. Starting slowly, he increased his rate of use to daily use, a frequency he maintained between 1983 and 1984. Moving to State A in 1985, he reduced his marijuana use to twice weekly and generally maintained this frequency of use until he commenced work with his current employer in April 1987. With the learning demands placed on him to master complex electrical systems for use in his work, he found it necessary to further limit his use of marijuana to around two to three times a month. Applicant continued his smoking of marijuana at the rate of twice to thrice monthly at least until June 1996. Use of the substance made him feel relaxed and lazy. To meet his personal needs, he purchased marijuana during the covered period of his use, with his purchases ranging from zero to \$30.00 per purchase.

Besides marijuana, Applicant used other illegal substances. He tried amphetamines, dextroamphetamines, and/or methamphetamine (crank) on approximately five occasions between 1983 and 1984 while living in State B. After a considerable hiatus away from these drugs, he resumed his use of the same in 1995 after moving to State A (using it on approximately 5 occasions). He also tried crack cocaine on two to four occasions between April 1992 and April 1994. While this drug gave him a quick rush, he soon found that he didn't like it and ceased using it altogether.

Applicant's use and purchase of these illegal substances persisted even after he was given his security clearance (*i.e.*, on

May 7, 1990 and again on May 3, 1994).

When asked to complete his NAQ on October 9, 1993, Applicant responded in the negative to questions 20.a and 20.b, which inquired about his past use and purchases, respectively, of illegal substances. Applicant attributes his lying to his fear of jeopardizing his chances for holding a security clearance and his belief that his omissions were not that serious (*see* FORM, item 6). He was afforded an additional opportunity to respond to questions about his prior substance abuse in a scheduled interview of March 26, 1996, but declined again to acknowledge any of the details of his prior use of illegal substances. He could offer no explanation as to how anyone could claim he used illegal substances, insisting that such allegations, if made, were totally untrue. Inferences warrant that Applicant's omissions were made knowingly and wilfully.

Not until confronted by DIS Agent B with his prior omissions about his involvement with illegal drugs in a second DIS interview (*i.e.*, on July 10, 1996) did Applicant come forward with the full history of his prior use and purchase of illegal substances. Applicant's admissions were made free of any threats or promises from the interviewing DIS agent.

Applicant's aggravated battery/domestic violence arrest of October 3, 1995 was preceded by his grabbing his wife by the arms and pushing her to the floor following a heated argument. Getting on top of her, he pounded his fist in a threatening gesture and struck her in the mouth with the back of his hand. The blow itself packed enough force to loosen one of his wife's teeth and necessitated dental repairs. Despite Applicant's apologies, his wife filed a complaint with State A's local police, who in turn charged Applicant with aggravated battery/domestic violence (a felony). Following his accepted guilty plea for simple assault on or about November 14, 1995, Applicant was sentenced to serve 16 days in jail and awarded 12 months of unsupervised probation, conditioned on his (a) attending anger control counseling sessions, (b) receiving an alcohol evaluation, (c) performing 50 hours of community service, and (d) paying costs in the approximate amount of \$100.00. Available documentation is sufficient to credit Applicant with the payment of court costs, but not the remaining probation conditions. Applicant provides no probative written assurances of when he expects to complete the remaining conditions of his probation, and none can be inferred from the evidence of record.

### POLICIES

The Adjudication Guidelines of the Directive (Change 3) lists "binding" policy considerations to be made by Judges in the decision making process of most all 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. It does not require the Judge to assess these factors exclusively in arriving at a decision. In addition to the relevant adjudication guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in F.3 of Enclosure 2 of the Directive, as well as the Directive's preamble to Change 3, 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 (Criterion H)

##### Disqualifying Conditions:

1. Any drug abuse.
2. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution;
3. Failure to successfully complete a drug treatment program prescribed by a credentialed medical professional; current drug involvement, especially following the granting of a security clearance, or an expressed intent not to discontinue use, will normally result in an unfavorable determination.

Mitigating Conditions: None.

### Personal Conduct (Criterion E)

#### Disqualifying Conditions:

2. The deliberate omission, concealment, or falsification relevant and material facts from any personnel security questionnaire, personal history statement or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.
3. The deliberately providing false or misleading information concerning relevant and material matters listed above to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination.
5. A pattern of dishonesty or rule violations.

Mitigating Conditions: None.

### Criminal Conduct (Criterion J)

#### Disqualifying Conditions:

1. Any criminal conduct, regardless of whether the person was formally charged.
2. A single serious crime or multiple lesser offenses.

Mitigating Conditions: None.

### Burdens 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 suitability 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. Put another way, the Judge cannot draw inferences that are grounded on speculation or conjecture.

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

### CONCLUSION

Applicant's involvement with illegal substances is both varied and prolonged. He brings with him a 15-year history of marijuana involvement that includes an established regular rate of use between 1983 and at least June 1996 (at rates of use ranging between daily and twice weekly). His marijuana activity encompassed purchases as well to support his personal needs over the entire spectrum of his involvement with the substance. Only his brief experiment in cultivating a marijuana plant as a young teenager is sufficiently dated and isolated to be of no current security significance.

Raised security concerns extend also to Applicant's use of other illegal substances: Crack cocaine (on two to four occasions between April 1992 and at least April 1994) and amphetamine, dextroamphetamine, and/or methamphetamine (crank) on five occasions during the period of 1983 and 1984 and on some five additional occasions during an 8-month stretch between October 1995 and at least February 1996. Considered alone, his use of these drugs might be considered either experimental or occasional, but when appraised in connection with his contemporaneous use of marijuana, they become a part of a much more concentrated pattern of ongoing substance abuse. From a clearance standpoint, Applicant's use of these drugs should be cumulated along with his active use of marijuana during this same time period and considered regular on an overall basis. That Applicant continued to use these illegal substances after obtaining both his initial clearance (in ay 1990) and his updated clearance (in May 1994) only heightens the security concerns raised by his involvement with illegal substances.

On the strength of this record, several of the disqualifying conditions of the Adjudicative Guidelines are applicable: DC 1 (any drug use), DC 2 (illegal drug possession) and DC 3 (failure to complete a drug treatment program). Government carries its initial burden in establishing the security significance of Applicant's involvement with the subject illegal substances.

With acknowledged substance abuse still so recent (*i.e.*, June 1996) and no available documentation of any sustained discontinuance of illegal drugs, Applicant's mitigation showing is considerably weakened. He can realistically take advantage of none of the available mitigation conditions in either the Adjudicative Guidelines or the more general F.3 considerations. Risks persist that he might once again succumb to temptations to return to drug abuse in the foreseeable future, enough at this time to prevent his carrying his evidentiary burden. Sub-paragraphs 1.a and 1.b and 1.d through 1.g are concluded unfavorably to Applicant. By contrast, sub-paragraph 1.c (cultivation of marijuana), which is too aged and isolated to have any current security significance, is resolved favorably to Applicant.

Just as significant are the security concerns raised by Applicant's repeated failures to provide full and accurate details about his substance abuse history when afforded opportunities to do so in his NAQ and ensuing DIS interview. So much trust is imposed on those cleared to see classified information that accommodations for breaches are necessarily calibrated very narrowly. *See Snapp v. United States*, 444 U.S. 506, 511n.6 (1980). Applicant's earlier denials of any prior involvement with illegal substances were followed by repeated denials of involvement in a follow-up March 1996 DIS interview. Not until confronted by Agent B did Applicant choose to disclose the extent of his drug activities. His omissions are material and are covered by a host of Adjudicative Guidelines (for falsification): DC 2 (falsification of a security form), DC 3 (providing false information to an investigator) and DC 5 (pattern dishonesty). None of his omissions were corrected under circumstances consistent with recognized prompt, good faith disclosure guidelines. *See DISCR Case No. 93-1390* (January 27, 1995). Applicant's repeated omissions afford no room for extenuation or mitigation credit and preclude his taking advantage of either MC 3 (prompt, good faith disclosure) of the Adjudicative Guidelines (for falsification) or any of the broader tenets of F.3 of the Directive and the Change 3 amendments.

Conclusions warrant that under the circumstances presented by the record, Applicant's lapses in his responses to inquiries about his prior use and possession of illegal substances (marijuana included) do not comport with the high standards of trust imposed on persons granted security clearances. Applicant fails to carry his proof burden, and sub-paragraphs 2.a and 2.b are concluded unfavorably to him.

Both Applicant's assault conviction and ensuing omissions reflect pattern criminal conduct that are not probatively extenuated or mitigated by either the passage of time or his furnished explanations. While his assault conviction would appear to be of a misdemeanor nature only, his NAQ and later DIS omissions constitute felonious conduct under 18 U.S.C. Sec. 1001, which are more difficult to extenuate or mitigate. That he was never charged or convicted for falsification does not absolve him of imputed criminal conduct for purposes of assessing his clearance suitability. *See DOHA Case No. 94-0215* (April 13, 1995). In Applicant's case, his covered criminal actions are too recent and recurring to be extenuated or mitigated by either his furnished explanations or the passage of time. Sub-paragraphs 3.a and 3.b are concluded against him as well.

In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in F.3 of the Directive and the Directive's Guidelines enumerated in the preamble of the Change 3 Amendments to 5220.6 to the raised security concerns.

**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:

CRITERION H: AGAINST APPLICANT

Sub-para. 1.a: AGAINST APPLICANT

Sub-para. 1.b: AGAINST APPLICANT

Sub-para. 1.c: FOR APPLICANT

Sub-para. 1.d: AGAINST APPLICANT

Sub-para. 1.e: AGAINST APPLICANT

Sub-para. 1.f: AGAINST APPLICANT

Sub-para. 1.g: AGAINST APPLICANT

CRITERION E: AGAINST APPLICANT

Sub-para. 2.a: AGAINST APPLICANT

Sub-para. 2.b: AGAINST APPLICANT

CRITERION J: AGAINST APPLICANT

Sub-para. 3.a: AGAINST APPLICANT

Sub-para. 3.b: 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.

Roger C. Wesley

Administrative Judge