

DATE: May 9, 1997

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In Re:)

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-----) ISCR OSD Case No. 97-0019

SSN: -----)

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Applicant for Security Clearance)

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DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

Appearances

FOR GOVERNMENT FOR APPLICANT

Michael S. Leonard, Esq. *Pro Se*

Department Counsel

STATEMENT OF THE CASE

On January 27, 1997 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 (undated but received by DOHA on February 18, 1997) and elected to have his case determined on the basis of the written record. Applicant was furnished copies of the File of Relevant Materials (FORM) on March 3, 1997 and is credited with receiving them on March 12, 1997. He provided no written response within the time (30 days) provided by the Directive. The case was assigned to this Administrative Judge on April 22, 1997.

STATEMENT OF FACTS

Applicant is 40 years of age and has been employed by his current defense contractor (Company A) since 1984. 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, from approximately 1973 to at least June 1996 and (2) been arrested on May 21, 1993 in State A for violation of State's Controlled Substance Act and possession of marijuana; he pleaded *nolo contendere* to the marijuana possession charge and was sentenced to 12 months of

confinement (suspended upon payment of \$600.00 fine).

Additionally, Applicant is alleged to have (a) falsified his Questionnaire for National Security ("QNS") of June 3, 1996 by omitting his prior use of marijuana, (b) falsely denied any prior use of illegal drugs in a August 12, 1996 DIS interview, (c) falsified his signed, sworn DIS statement of August 13, 1996 by denying any prior use of illegal drugs, (d) understated his use of marijuana in his October 17, 1996 DIS interview by limiting his actual use of marijuana to one-time use in 1973 or 1974 and (e) further understated his use/possession of marijuana in his October 17, 1996 DIS interview by denying any use or possession of illegal drugs since 1975.

And Applicant is alleged to have engaged in a history or pattern of criminal conduct by virtue of his alleged repeated instances of falsification and single instance of marijuana possession for which he was convicted in State A.

For his response to the SOR, Applicant admitted each of the specific allegations, with the exception of his alleged sentencing of 12 months of confinement, for which he received a suspended sentence.

Relevant and Material Findings

The pertinent allegations of the SOR, save for Applicant's alleged sentencing of 12 months in confinement, are admitted by Applicant and are incorporated herein by reference. Additional findings follow.

Applicant was introduced to marijuana in high school in 1973. Between 1973 and 1990, he smoked it occasionally when it was offered to him by friends. There were periods during this time span when he didn't smoke it at all. While married to his third spouse (*i.e.*, between October 5, 1990 and September 21, 1995), he estimates to have smoked marijuana approximately 12 times. After their break-up, he continued seeing her periodically and smoked it with her from time to time. He last used the substance in June 1996 while on a recreational retreat with her at the lake. He since broke off with his ex-spouse and no longer sees her.

Applicant claims the roach found in his truck preceding his 1993 arrest was not his, and he cannot confirm whose it was or how it came to be placed in his truck. He is of record in entering a *nolo* plea on his possession charge, and without any further explanation from Applicant as to the source of the located marijuana, he must be imputed to have been in constructive possession of the covered substance at the time of his State A arrest. By contrast, the charged controlled substance alleged to have been found in his truck at the time of his arrest turned out to be pain pills belonging to his spouse, and the charges on this count were subsequently dropped by the State's Attorney.

Applicant was asked to execute a QNS in June 1996. In his executed QNS (Standard Form 86), dated June 3, 1996, he answered in the negative to the inquiry (question 24.a) about his use of any controlled substance, including marijuana, since he turned 16, or within the previous 7 years, whichever period was shorter.

When interviewed by DIS Agent A on August 12, 1996, Applicant reiterated his denial of his ever using illegal substances. He committed his denial to writing in a subsequent signed, sworn statement which he executed and gave to Agent A on August 13, 1996.

During a second DIS interview on October 17, 1996 (this one with Agent B), Applicant initially acknowledged brief prior use of marijuana (*viz.*, on a single occasion in 1973 or 1974) and lone possession of marijuana (*i.e.*, on May 21, 1993), while denying any use or possession of marijuana since 1975. Not until he was confronted by Agent B, did he fully disclose the extent of his prior use of marijuana. He attributes his previous omissions and use minimization to his (a) belief that he was not a "drug user" and (b) desire to avoid talking about his use of illegal drugs and his 1993 marijuana possession arrest. Applicant's claims are insufficient to avoid drawn inferences that his omissions and understatements were knowingly and willfully made.

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.

Mitigating Conditions: **None.**

Personal Conduct (Criterion E)

Disqualifying Conditions:

2. The deliberate omission, concealment, or falsification of relevant and material facts from any Personnel Security Questionnaire, Personal History Statement or similar form used by any Federal agency to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.
3. Deliberately providing false or misleading information concerning any of the 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 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 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 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 any manifest risks that the 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 comes to these proceedings with a considerable history of marijuana use: Over 20 years of intermittent use at characterized occasional frequency levels. Buffeted by a misdemeanor conviction for marijuana possession in 1993, Applicant's marijuana involvement retains its security concern, despite Applicant's apparent break-away from the substance in June 1996. Both DC 1 (any drug use) and DC 2 (illegal drug possession) of the Adjudicative Guidelines (for drug involvement) are applicable to the instant facts, and Government satisfies its initial proof burden.

With less than 10 months since Applicant's last reported marijuana use in June 1996, Applicant cannot make the convincing case that he is no longer at risk to returning to illegal substances (particularly marijuana). He claims no rehabilitation program or close family support system to assist him in remaining drug free. Risks remain that he might still be lured into returning to marijuana use in the foreseeable future, enough at this time to prevent his carrying his evidentiary burden. Sub-paragraphs 1.a and 1.b are concluded unfavorably to Applicant.

More pressing even 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 QNS and ensuing DIS interviews. 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 marijuana use/possession within the previous seven years were followed by very limited admissions of prior marijuana use and possession in his initial interview with Agent B. Not until confronted by Agent B did Applicant choose to be up-front about the extent of his marijuana involvement. His omissions 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 failure to voluntarily correct his original QNS omissions when provided a second opportunity to do so by Agent A and reserving on his accurate accounting of his substance abuse history until later confronted by Agent B precludes 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.

Applicant's exhibited extenuation and mitigation efforts are insufficient to absolve him of security concerns about his overall candor. Such conclusions, however, should not be construed to impugn his loyalty to the United States. Security clearance decisions are not loyalty determinations, and the present case is no exception. *See Executive Order 10865*, Section 7. But conclusions do warrant that under the circumstances presented by the record, Applicant's candor lapses in his responding to material 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 through 2.e are concluded unfavorably to him.

Both Applicant's marijuana possession 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 marijuana possession conviction would appear to be of a misdemeanor nature only, his QNS 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 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

CRITERION E: AGAINST APPLICANT

Sub-para. 2.a: AGAINST APPLICANT

Sub-para. 2.b: AGAINST APPLICANT

Sub-para. 2.c: AGAINST APPLICANT

Sub-para. 2.d: AGAINST APPLICANT

Sub-para. 2.e: 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