DATE: _August 18, 1997

In Re:

Applicant for Security Clearance

ISCR OSD Case No. 97-0075

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

Appearances

FOR GOVERNMENT

Barry Sax, Esq.

Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On January 28, 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 on February 13, 1997 and elected to have his case determined on the basis of the written record. Applicant was furnished copies of the File of Relevant aterials (FORM) on March 19, 1997 and is credited with receiving them on April 1, 1997. He provided no written response within the time permitted (30 days) by the Directive. The case was assigned to this Administrative Judge on June 4, 1997.

STATEMENT OF FACTS

Applicant is 32 year of age and has been employed by his current defense contractor (Company A) since February 1995. He seeks a security clearance at the level of secret.

Summary of Allegations and Responses

Applicant is alleged to (1) have used and purchased marijuana from about 1982 to at least 1987; (2) exhibited signs of possible marijuana use in the future; and (3) have used cocaine, LSD and psilocybin mushrooms.

For his response, Applicant, admits, without explanation, each of the covered allegations, save for his denial of any future intention to use marijuana in the future.

Relevant and Material Factual Findings

Applicant first tried marijuana at a party in junior high school; he was only 13 at the time. He did not use marijuana again until 1982, but quickly established a pattern of weekly use of the substance between 1982 and 1987. His preference was to smoke it with a group of 5 to 6 friends in and about the vicinity of his college campus. He estimates to have regularly smoked the equivalent of 3 to 4 marijuana cigarettes a week during this 5-year time frame.

Applicant tapered his marijuana use considerably (*i.e.,* to monthly use) between 1987 and 1988 and reduced his use even more for the 7 years spanning 1988 and 1995. Between 1988 and December, 1995 he estimates to have used the substance some 30 times *en totale*, typically smoking 1/4 to 1/2 of a joint on each occasion when in the company of friends or at parties. Applicant admits to using marijuana because he enjoyed its affects. He assures in his October 21, 1996 signed, sworn statement to DIS that he will not seek out marijuana in the future and reiterates his disclaimers in his February 12, 1996 letter (attached to his response) . Still, he hedges some on his refusing offered marijuana at future parties. In his October 21 statement, he concludes that he cannot state with certainty that he won't try marijuana again should it be offered to him at a party in the future, a statement he makes no attempt to revise in his February 12 letter or correct in a FORM response. Though not an express indication of resumption intention, his reservations about the future do open possibilities for his returning to marijuana use.

To satisfy his personal marijuana needs in high school and his early college years, Applicant oft-purchased marijuana. His purchases were regular between 1982 and 1987, a period in which he typically contributed $25.00 to $30.00 a week towards the purchase of an ounce of marijuana, which he, in turn, divided among his use participants. Applicant never purchased marijuana again after 1987, always relying on others to give it to him in the ensuing years.

Besides marijuana, Applicant tried other drugs. He experimented with cocaine, LSD, and psilocybin (mushrooms) on a few occasions in the distant past (over 7 years ago) and assures he will not use or purchase any of these drugs again.

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:

1. The involvement was not recent.

2. The drug involvement was an isolated or infrequent event.

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 comes with a history of substance abuse that traces to 1978: A period of some 17 years. Over time, his use of marijuana has vacillated from isolated use, to a period of characterized regular use (*viz.,* a 5-year stretch spanning 1982 and 1987. During this concentrated period of marijuana use, Applicant regularly contributed to marijuana purchases to satisfy his personal needs. Thereafter, he cut back his marijuana use to monthly (to 1988), to once or twice a year between 1988 and 1995, and finally to sustained abstinence since December, 1995 (a period of some 18 months). Troubling still are Applicant's reservations about his accepting marijuana at future parties. Given the opportunity to respond to the Government's FORM, Applicant declined to redress the Government's active concerns about his unwillingness to disclaim any and all resumption intentions. Foreclosing any intentions of pursuing marijuana in the future represents good progress on the road to self-imposed abstinence, but it is not enough to absorb all of the Government's concerns about his returning to marijuana use. Applicant's qualified disclaimer (as written) is indicative of an expressed intention not to discontinue his marijuana use and warrants the invoking of DC 3 of the Adjudication Guidelines (for drug abuse).

Considered together, Applicant's record of marijuana use and purchases over a considerable time, coupled with his less than ringing demonstration of assured future discontinuance, is security significant. His brief history of experimental involvement with other illegal substances (*i.e.,* cocaine, LSD and mushrooms), while aged and infrequent, cannot be entirely discounted given Applicant's more recent involvement with marijuana and reservation on future activity. Government meets its initial proof burden.

To be sure, Applicant's marijuana activity in recent years has been on a steep decline and does not pose any cognizable security risks in the short term. But his hedges on future use are disquieting and preclude any safe predictions about his staying off drugs in the future. With barely 18 months of self-imposed discontinuance to his credit, reliable and trustworthy assurances against future resumption became critical determinants in the balancing of the Government's entitlement to safe risk assessments about Applicant's future away from drugs and Applicant's entitlement to being fairly credited with life-style changes in his involvement with illegal substances. While Applicant is entitled to the benefits of two of the mitigating conditions of the Adjudication Guidelines: MC 1 (non-recency) and MC 2 (infrequency in recent years), he may not take advantage of MC 3 (non-demonstrated intent to resume). In the end, too many doubts remain about Applicant's commitment to staying away from marijuana use to enable him to safely mitigate clearance concerns associated with his history of marijuana use and purchases. On the basis of this record, Applicant is unable to sustain his burden of proof, and unfavorable conclusions warrant on the covered allegations of marijuana use/purchases. Only with

respect to Applicant's aged and infrequent use of other illegal substances (*viz.,* cocaine, LSD and mushrooms) is he able to provide successful mitigation.

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 Change 3 Guidelines in the preamble.

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

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