

DATE: December 31, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0554

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Pamela C. Benson, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On August 10, 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 August 21, 1997, and elected to have his case decided on the basis of the written record. Applicant was furnished the File of Relevant Material (FORM) on October 27, 1997, and is credited with receiving it on November 12, 1997. He provided no written response within the time permitted (30 days) by the Directive and telephonically authorized DOHA to proceed on the basis of the compiled record. The case was assigned to this Administrative Judge on December 12, 1997.

STATEMENT OF FACTS

Applicant is 44 years of age and has been employed by his current defense contractor (Company A) since July 1980. He has held a security clearance at the level of confidential since July 21, 1980 and at the secret level since March 11, 1989. He seeks to retain his clearance at his current level.

Summary of Allegations and Responses

Applicant is alleged to have (a) used marijuana, with varying frequency and as often as three times weekly, from about 1971 to at least 1974 and from about 1989 to at least November 1996, (2) purchased marijuana from about 1971 to at least 1974 and from about 1989 to at least November 1996, (3) been arrested on May 18, 1973 in State A for possession of drug paraphernalia and disturbing the peace, pleading guilty to disturbing the peace, and having sentence imposed of

one year (suspended) and placed on one year's informal probation and assessed \$125.00 in fines and penalties (a marijuana cigarette and marijuana pipe had been found in his vehicle), (4) been reported by his employer (Company A) on December 4, 1996 that he tested positive in a random drug test, referred by his employer's employment assistance program for counseling to Drug Abuse Center X, where he attended meetings for about six weeks, and then referred back for personal performance counseling on a monthly basis for three months, and (5) used and purchased marijuana after being issued a secret security clearance on March 11, 1989.

For his answer to the SOR, Applicant admits each of the subject allegations without qualification or explanation.

Relevant and Material Factual Findings

Applicant's admissions to the allegations covered in the SOR are incorporated herein by reference and adopted as findings. Additional findings follow:

Applicant was introduced to marijuana in 1971 following his graduation from high school. Over a three-year period spanning 1971-1974, he smoked the substance socially on an average of once a week "because everyone else did it" (*see* item 5). He estimates to have made a few small purchases of marijuana to meet his personal needs, but never any large purchases.

After quitting his use and purchases of marijuana for some 15 years, Applicant resumed his use and purchases of the substance in 1989. He attributes his return to marijuana use to his working compressed shifts at work, which included nights and weekends, and spending correspondingly less time with his family. He became accustomed to smoking marijuana once or twice week, interspersed with weeks when he didn't smoke at all. He suspended his use of marijuana altogether for a two-year stretch between 1993 and 1994 following throat surgery. Returning to active marijuana smoking in 1994, Applicant reestablished his once to twice a week pattern of smoking the substance.

On a hunting trip in November 1996, Applicant estimates to have smoked marijuana daily for several days and failed an administered random drug test on his return to work. His company's employee assistance program referred him to substance abuse counseling. He was credited with completing his counseling regimen upon his successful attendance of six weeks of educational meetings and received a certificate of completion for his efforts.

Applicant assures he no longer associates with individuals who use drugs and will not use of drugs of any kind (marijuana included) in the future. Whether Applicant's received assurances are enough to absorb residual risks of his returning to illegal substance involvement in the future can only be resolved after consideration of the entire record and the relevant Adjudicative Guidelines and common sense considerations in the Directive.

POLICY

The Adjudicative Guidelines of the Directive (Change 3) lists "binding" policy considerations to be made by Judges in the decision making process covering 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. 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 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:

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

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. 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 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 (marijuana) has been considerable. Since 1971, he has used marijuana intermittently in social situations and has maintained frequency levels of twice monthly for several years before testing positive in a random drug test administered by his employer in November 1996. Granted a security clearance in 1989, Applicant continued to use and purchase marijuana for a number of years thereafter (*i.e.*, at least to November 1996). Such actions raise troubling concerns about his eligibility to hold a security clearance. Government may invoke Adjudicative Guidelines pertinent to his marijuana activities: DC 1 (any drug abuse) and DC 2 (illegal drug purchases). Applicant's drug activities in this case fit each of these cited to disqualifying conditions and are entitled to considerable weight, along with the more general and equally pertinent considerations covered by the common sense factors reserved in the Adjudicative Guidelines of the Change 3 Amendments (relative to seriousness, circumstances, maturity, frequency, recency, motivation, rehabilitation, exploitation, and likelihood of recurrence). Government carries its opening burden.

To his credit, Applicant has made some concerted attempts to educate himself on using illegal substances and avert recurrent use in the future. For his efforts he was credited with successful completion of his prescribed six-week education program. But with barely a year of sustained recovery to back his rehabilitation claims, it is still too early to make any firm predictions about the likelihood or not of his experiencing recurrent use. More time is needed before any definitive judgments can be made about Applicant's drug avoidance prospects.

Protecting the nation's secrets is an around-the-clock responsibly imposed on each and every person cleared to seek classified information. Government must be able to rely upon those it clears to see classified materials to safeguard them free of any risks of inadvertent mishandling, or worse yet disclosure. *See Snapp v. United States*, 444 U.S. 506, 511n.6 (1980). Off-duty conduct, such as drug abuse, can, in turn, have just as important a bearing on an appellant's presumed disposition for safeguarding classified information as adverse conduct exercised during employment hours. *See Coleman v. Young*, 351 U.S. 536, 550n.13 (1956). The key consideration still turns on an applicant's appraised trustworthiness in safeguarding classified materials owned by the Government. And from a trust standpoint, Applicant's

fails to extenuate or mitigate his longstanding abuse of marijuana (much of it coming after he had been granted a security clearance).

With the burden of demonstrating clearance suitability falling squarely on the person seeking a clearance, Applicant is reposed with the responsibility for making the convincing case in his behalf. And on the strength of this record, Appellant fails to carry his evidentiary burden. So, at this time, conclusions should be drawn unfavorably against Applicant with respect to raised security concerns about his abuse of illegal substances (covered by Criterion H).

In reaching my decision, I have considered the entire administrative record, including each of the factors considered 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: AGAINST APPLICANT

Sub-para. 1.d: AGAINST APPLICANT

Sub-para. 1.e: 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