

DATE: March 19, 1998

Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0663

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

William S. Fields, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On October 3, 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 November 1, 1997 and elected to have his case assigned for hearing. The case was assigned to this Administrative Judge on December 8, 1997. Applicant was furnished copies of the Government's intended exhibits prior to hearing. A hearing was convened on January 21, 1998 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 four exhibits and no witnesses; Applicant relied on one exhibit and two witnesses (including himself). A transcript of the proceedings was received on January 30, 1998.

PROCEDURAL ISSUES

Prior to the close of the hearing, Applicant requested leave to keep the record open to enable to supplement the record with character references. Good cause being shown, Applicant was afforded an additional 15 days to augment the record.

STATEMENT OF FACTS

Applicant is 27 years of age and has been employed by his current defense contractor (Company A) since September 1992. He seeks a security clearance.

Summary of Allegations and Responses

Applicant is alleged to have (a) used marijuana from about 1986 to at least late 1995, (b) purchased marijuana from about 1986 to at least late 1995, (c) been arrested on May 26, 1994 in State A for contributing to the delinquency of a minor and possession of marijuana, found guilty of (i) contributing to the delinquency of a minor and sentenced to 30 days in jail (20 days suspended) and (ii) marijuana possession and fined \$250.00 plus \$46.00 in costs, appealed and was acquitted on the contributing to the delinquency count and resentenced on the marijuana possession count to 30 days in jail (10 days suspended), a fine of \$250.00 plus costs of \$275.00, both conditioned on six months' good behavior and suspension of his driver's license for six months, (d) been arrested on December 22, 1996 in State A for possession of marijuana, disregarding a red light and driving on a suspended license, and with respect to the marijuana possession count, sentenced to serve 60 days in jail (suspended), fined \$200.00 plus \$172.00 in costs and suffered the suspension of his driver's license for six months, (e) used cocaine, with varying frequency and as often as almost daily, from Summer of 1991 to at least June 1994 and on two occasions in February 1995 and January 1996, (f) purchased cocaine from the Summer of 1991 to at least January 1996, (g) experienced work-related performance problems as the result of his near daily cocaine use in 1994 and been suspended from work at his Company A employer for three months beginning in May 1994, (g) received counseling from June 22, 1994 to September 1, 1994 at a State A counseling center for cocaine dependency and discharged with the recommendation to participate in an aftercare program and attend Narcotics Anonymous ("NA") meetings, and (h) subsequently used cocaine on at least two occasions in February 1995 and January 1996, notwithstanding his treatment for cocaine dependency.

For his response to the SOR, applicant admitted most of the covered allegations without and qualification or explanations. The others he admits save for the 10 day suspension pertaining to his 1994 arrest and alleged purchases of cocaine after 1994. He offers additional explanations on the admitted allegations: He claims (a) the "marijuana pipe" found in his car preceding his 1994 arrest belonged to his girlfriend; (b) his cocaine use began with weekly, even bi-weekly use, and progressed to almost daily use the last few months; (c) his three-month work suspension in 1994 was in-house only; and his relapse into cocaine use was but a natural part of his overall successful recovery process.

Relevant and Material Findings

The allegations in the SOR that were admitted by applicant are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

Applicant was introduced to marijuana in 1970 at the age of 16. He estimates to have smoked the substance weekly for the first four years, with friends, buying an eighth of an ounce twice a month at a price of \$20.00 an ounce. He increased his use frequency to three to four times a week between 1991 and May 1994, spending approximately \$100.00 a month on purchases from friends and acquaintances to supply his personal needs. Between May 1994 and December 1995 applicant used marijuana on a few occasions, purchasing the same for his personal use, but ceased all marijuana use and purchases thereafter.

Applicant experienced two drug-related arrests: One in May 1994 and the other in December 1996. Preceding his 1994 arrest, applicant shared an evening at home with a friend, drinking beer. He could hear his next door neighbors embroiled in a domestic quarrel, which drew the police to investigate. In the meantime, a young 15-year old neighbor (accompanied by three others) knocked and asked to use his telephone, which applicant agreed to. Shortly thereafter, the police arrived and asked to search applicant's apartment. In their search, the police found a pipe for using marijuana, but no illegal drugs. On the charges of contributing to the delinquency of a minor and possession of marijuana, applicant was initially found guilty. He appealed and won dismissal of the contributing charge. For the standing conviction on marijuana possession, applicant was fined \$250.00 and assessed \$275.00 in costs, and was sentenced to 30 days in jail (20 days suspended). Considered eligible for the work release program, applicant served his jail time by working weekends (two in all).

More recently (in December 1996), applicant was arrested for marijuana possession, disregarding a red light and driving on a suspended license. Marijuana was found in his girlfriend's car, which applicant was driving. No issue is made in the SOR or at hearing of applicant's using marijuana contemporaneously with his arrest, and no applicant use or ownership of the discovered marijuana should be inferred. But applicant was convicted of the marijuana possession charge (which would include constructive possession of the substance found in the car he was driving) and sentenced to 60 days in jail (suspended), fined \$200.00 plus costs of \$172.00 and suffered the suspension of his driving privileges for six months,

all of which applicant admits to.

Besides marijuana, applicant tried cocaine as well. Beginning with weekly cocaine use in the Summer of 1991, applicant increased his use to bi-weekly use and maintained this frequency of use until approximately December 1992. He estimates to have spent approximately \$25.00 a month on his cocaine purchases for his personal use. After a brief respite for much of 1993, applicant resumed his use of cocaine in late 1993. Between late 1993 and June 1994, he used cocaine almost daily, spending \$25.00 to \$50.00 a purchase "each time I had a hit" (*see ex. 2*).

Applicant's near daily use of cocaine caused him work-related problems with his company A employer in the early months of 1994. He was placed on "in-house" suspension for three months (beginning in May 1994) and counseled that his failure to correct his poor work performance could result in more serious consequences for him (*ex. 2*).

Applicant entered counseling on June 22, 1994 and participated in the program's group counseling sessions, along with NA meetings, over the ensuing nine weeks. The focus of his program was counseling, not teaching, and he was never diagnosed for cocaine dependence by a credentialed treatment provider. Nonetheless, applicant considered himself cocaine dependent at the time, and committed to further NA participation following his successful completion of his counseling program. He continued his NA participation for several months thereafter before quitting altogether, citing the following: His settled belief that drugs were no longer a problem for him and he could learn nothing new, in any case, from the meetings.

Following his emergence from counseling, applicant resumed his use of marijuana (using it on a few occasions before his last use in December 1995) and experienced two cocaine relapses (in February 1995 and January 1996) before relinquishing any further involvement in illegal substances. Applicant assures he has no intention to use illegal substances of any kind in the future. He impresses as being candid and credible about his intentions, and his assurances are accepted. Whether he can be safely trusted to avert any drug relapses in the future, though, must await assessment of all the evidence in conjunction with the governing Adjudicative Guidelines.

Characterizing applicant with "having his ups and downs with life in general," his supervisor describes applicant as a person he currently can trust to accomplish his assigned tasks (*see ex. A*). He credits applicant with doing a good job for his company and being free of security risks at the present time. His supervisor's reflections are entitled to weight, using the whole person approach, but not dispositive weight in evaluating the overall weight of the evidence pertaining to applicant's clearance suitability.

POLICIES

The Adjudicative Guidelines outlined in the Change 3 amendments to the Directive list policy considerations to be made by judges in the decision making process. These considerations include Disqualifying Conditions and Mitigating Conditions, which should be assessed before deciding whether or not a security clearance should be granted, continued or denied. The Directive does not require the assessment of 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 the Directive, which are intended to assist judges in reaching a fair and impartial common sense decision for recommendation.

Viewing the issues raised and evidence as a whole, the following Adjudicative Guidelines 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.

Mitigating Conditions:

1. The drug involvement was not recent.
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. 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 to these proceedings with a considerable history of illegal substance abuse. His drug abuse history presents troubling concerns about his eligibility to hold a security clearance despite a credible employment record with his defense contractor employer. His frequency rate of marijuana use between 1986 and 1994 can most appropriately be characterized as regular (*i.e.*, weekly, escalating to three to four times a week). Trimming his use considerably following his marijuana possession arrest in May 1994, applicant continued using marijuana on an occasional basis to December 1995 before discontinuing all use of the substance. During this resumption period, applicant further compounded concerns over his relapse with another marijuana possession arrest (this latest one in December 1996), even if his personal use was not at issue in the arrest.

Applicant's involvement with illegal substances was not limited to marijuana. Over a six-year period spanning Summer 1991 and Summer 1994, applicant went heavy into cocaine use. For a brief period between December 1993 and June 1994, he abused the substance almost daily, purchasing enough of the substance to satisfy his personal needs. At the height of his cocaine problem (in March-June 1994), applicant experienced cocaine-related work problems and was awarded a three-month in-house suspension by his employer. Enjoying a brief respite from cocaine use following his turn to drug counseling in May 1994, applicant suffered a couple of relapses (in February 1995 and again in January 1996). Applicant's problems with cocaine use compound his marijuana difficulties and make safe judgments about his reliability and trustworthiness at the present time difficult to estimate.

On this record, Government is entitled to the application of several disqualifying conditions of the Adjudicative Guidelines (for drug involvement): DF 1 (any drug abuse), DC 2 (illegal drug possession) and DC 3 (failure to successfully complete a drug rehabilitation program).

To his credit, applicant forswears against using any types of illegal substances in the future and provides some time in abstinence to give his claims seasoning: Some two years. Applicant does appear to be sincere in his assurances that he has turned irrevocably away from drugs since his last relapse into cocaine use in January 1996 (a period of two years). His assurances draw sustenance from the increased responsibility and maturity he has manifested in his work and

personal life. Strengthening his mitigation efforts, too, is his successful completion of his drug counseling program in September 1994. But with barely two years of sustained abstinence from illegal substance abuse (including both marijuana and cocaine), and no successful treatment program or active NA program to support and guide him through still uncertain territory, it is premature to absolve applicant of all foreseeable risks of relapse. To make safe judgments about applicant's ability to withstand temptations to return to drug activity, more time is necessary. While commendable, his abstinence efforts still leave him short of the minimum safe requisites for satisfying any of the available mitigation conditions covered in the Adjudication Guidelines for attributed regular and compulsive abuse of illegal drugs.

Both the duration of applicant's involvement in illegal substances and the relatively short time he is able to document to being drug-free make difficult safe predictions that he is currently fully absolved of recurrence risks at this point in his recovery journey. For making this kind of assessment, more time is required. Applicant's decision to seek counseling help, turn away from drugs and acquit himself in a more responsible way with his employer speaks well of him and is worthy of commendation. But his efforts require additional seasoning before he can be credited with doubt-free recovery. Applicant's presented evidence in his behalf is insufficient to avert overall unfavorable conclusions with respect to Criterion H.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the factors enumerated in the preamble of the Change 3 amendments to the Directive.

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

Sub-para. 1.f: AGAINST APPLICANT

Sub-para. 1.g: AGAINST APPLICANT

Sub-para. 1.h: FOR APPLICANT

Sub-para. 1.i: 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