

KEYWORD: Drugs; Personal Conduct

DIGEST: Applicant used marijuana from June 2001 through November 2006. He also purchased marijuana from June 2001 through June 2005. He used marijuana after submitting his security clearance application and during the background investigation for his security clearance. During that interview, he stated he had no plans to use marijuana in the future. He failed to mitigate security concerns relating to drug involvement and personal conduct. Clearance is denied.

CASENO: 06-26155.h1

DATE: 09/12/2007

DATE: September 12, 2007

In Re:)	
)	
-----)	
SSN: -----)	ISCR Case No. 06-26155
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
ROBERT J. TUIDER**

APPEARANCES

FOR GOVERNMENT

J. Theodore Hammer, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant used marijuana from June 2001 through November 2006. He also purchased marijuana from June 2001 through June 2005. He used marijuana after submitting his security clearance application and during the background investigation for his security clearance. During that interview, he stated he had no plans to use marijuana in the future. He failed to mitigate security concerns relating to drug involvement and personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On February 16, 2006, Applicant submitted a Security Clearance Application (SF 86).¹ On March 6, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified and revised.²

The SOR alleges security concerns under Guidelines H (Drug Involvement) and E (Personal Conduct). The SOR 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 him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In an answer dated and notarized on March 30, 2007, Applicant responded to the SOR allegations and requested a hearing. The case was assigned to me on April 18, 2007. On April 20, 2007, DOHA issued a notice of hearing scheduling the case to be heard on June 13, 2007. The hearing was held as scheduled. On June 26, 2007, DOHA received the transcript (Tr.). I left the record open until June 22, 2007 to afford the Applicant an opportunity to submit additional material. Tr. 17-18. He did not submit any additional material.

PROCEDURAL RULINGS

Amendment of Statement of Reasons

Department Counsel moved to amend SOR ¶ 1.b. to read, “During the period June 2001

¹Government Exhibit (GE) 1 (Standard Form (SF) 86, Security Clearance Application) is signed February 16, 2006.

²On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guideline to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006. The revised Adjudicative Guidelines are applicable to Applicant’s case.

through June 2005, you purchased marijuana.”

Department Counsel moved to amend SOR ¶ 1.c. to read, “In 2006, you used marijuana after submitting your security clearance application.”

Applicant did not object to the SOR amendments, and the motion was granted. Tr. 57.

FINDINGS OF FACT

As to the SOR’s factual allegations, Applicant submitted a mixed response of admissions and a denial regarding the SOR allegations of illegal drug use. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 24 years old.³ He received a bachelor of science degree in geographic science in May 2005. He has no military service, and he has never been married. Applicant has been employed by a government contractor as an assistant geographic information systems production manager since January 2006. Tr. 20, 49-50. His grade point average in college was 3.45. Tr. 49. He is a first-time applicant for a security clearance.

Applicant used marijuana with varying frequency between June 2001 and November 2006. Applicant began smoking marijuana at age 18 for the following reasons:

I mean I don’t know. I mean it was just kind of something I did when I was hanging out with friends, usually outside. It wasn’t, you know, it was something that a couple of my buddies did and I tried it a time or two and it didn’t seem completely harmful. It didn’t affect any sort of judgment of mine in situations and places. The setting and location of where I was doing it, you know, was completely, you know, safe environment for me and I felt – I never felt threatened, I never felt like it was something that I would endanger myself or anyone around me. (Describing the environment in which he smoked marijuana) Usually either on hiking trips or climbing trips, just kind of something you did at the end of the day and, you know, just kind of [a] way of calming down. Tr. 27.

Applicant stated his marijuana use declined in order to “focus more on school. My you know, overall drug use declined quite a bit my junior and senior year.” After college, his marijuana use declined even more when he began associating less with people who used marijuana. Tr 32. He stated “it was a liberating feeling, not feeling like I had to be dependent on getting high or, you know, getting marijuana or something like that.” Tr. 33-34. Also, he did not enjoy the physical affects of smoking marijuana and determined it was not in his best interests for employment. Tr. 47-48, 53-54. He has never participated in or attended any form of drug treatment or counseling program. Tr. 37.

³GE 1, *supra* n. 1. is the basis for the facts in this paragraph, unless otherwise stated.

The last time he smoked marijuana was in November 2006. This occurred after he began work in January 2006 for his defense contractor employer, after he submitted his SF 86 in February 2006, and after he was interviewed by a Special Agent of the Office of Personnel Management (OPM) in July 2006 where he stated he had no plans to use marijuana in the future. Tr. 39-44. He knew marijuana use was a concern to the government when he began his employment. Tr. 46.

Regarding the future non-use of marijuana, he stated at his hearing:

I mean I can give you my word, and I guess aside from doing some sort or rehabilitation program, that would kind of give some sort of credence to that, I could do something of that nature. I have no problem doing that. Tr. 55.

Applicant admitted purchasing marijuana during the period of June 2001 through June 2005, but denied purchasing marijuana from June 2001 through November 2006 as alleged in SOR ¶ 1.b. The government did not rebut Applicant's statement.

Applicant did not submit any character evidence or work-related performance evaluations.

POLICIES

In an evaluation of an applicant's security suitability, an administrative judge must consider the "Adjudicative Guideline for Determining Eligibility For Access to Classified Information" (Guideline[s]), which sets forth adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into Disqualifying Conditions (DC) and Mitigating Conditions (MC), which are used to determine an applicant's eligibility for access to classified information.

These Guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, an administrative judge should apply these guidelines in conjunction with the factors listed in the adjudicative process. Guideline ¶ 2. An administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," an administrative judge should consider all available, reliable information about the person, past and

Specifically, an administrative judge should consider the nine adjudicative process factors listed at Guideline ¶ 2(a): "(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence."

Since the protection of the national security is the paramount consideration, the final decision in each case is arrived at by applying the standard that "[a]ny doubt concerning personnel being

considered for access to classified information will be resolved in favor of national security.” Guideline ¶ 2(b). In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the Government has the initial burden of establishing controverted facts by “substantial evidence,”⁴ demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant’s access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence “to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).⁵

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

The scope of an administrative judge’s decision is limited. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. Executive Order 10865, § 7.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

⁴ “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge’s] finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620 (1966). “Substantial evidence” is “more than a scintilla but less than a preponderance.” *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

⁵ “The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant’s past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15.” ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

Drug Involvement

Guideline ¶ 24 articulates the Government’s concern concerning drug⁶ involvement stating, “[u]se of an illegal drug or misuse of a prescription drug can raise questions about an individual’s reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations.”

Two Drug Involvement Disqualifying Conditions could raise a security concern and may be disqualifying in this case: “any drug abuse,”⁷ and an “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.” Guideline ¶¶ 25(a) and 25(c). The other six disqualifying conditions listed in Guideline ¶ 25 are not applicable.

The two disqualifying conditions in Guideline ¶¶ 25(a) and 25(c) apply because Applicant used, possessed, and purchased marijuana.

The Government produced substantial evidence of these two disqualifying conditions, and the burden shifted to Applicant to produce evidence and prove mitigation. Guideline ¶ 26 provides for potentially applicable criminal conduct mitigating conditions:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment;
- (b) a demonstrated intent not to abuse any drugs in the future, such as:
 - (1) disassociation from drug-using associates and contacts;
 - (2) changing or avoiding the environment where drugs were used;
 - (3) an appropriate period of abstinence;

⁶Guideline ¶ 24(a) defines “drugs” as substances that alter mood and behavior, including:

- (1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances.

Schedule I is contained in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). The Controlled Substances Act, appears generally as 21 U.S.C. §§ 801 et seq. Marijuana (Sch. I (c)(10)) is a Schedule I controlled substance. *See United States v. Katz*, 445 F.3d 1023 (8th Cir. 2006).

⁷ Guideline ¶ 24(b) defines “drug abuse” as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.”

- (4) a signed statement of intent with automatic revocation of clearance for any violation;
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended;
- (d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Security concerns can be mitigated based on Guideline ¶ 26(a) by showing that the drug offenses happened so long ago, were so infrequent, or happened under such circumstances that they are unlikely to recur. There are no “bright line” rules for determining when conduct is “recent.” The determination must be based “on a careful evaluation of the totality of the record within the parameters set by the directive.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” *Id.* Guideline ¶ 26(a) does not fully apply because Applicant’s last marijuana use occurred as recently as November 2006 and after he expressed an intent not to use drugs again during his July 2006 interview with an OPM Special Agent.⁸ His overall drug abuse was varied and long lasting precluding the application of this mitigating condition. Based on all the facts and circumstances, he has not met his burden of establishing that his drug use will not recur.

Guideline ¶ 26(b) lists four ways Applicant can demonstrate his intent not to abuse illegal drugs in the future. His use of marijuana in November 2006 after he signed his SF 86 in February 2006 and stating to an OPM Special Agent he had no plans to use marijuana in the future in July 2006 precludes application of any of these mitigating conditions.

Applicant offered no evidence other than his statements at his hearing that he intended to refrain from future drug use. He offered no corroborating evidence

⁸ In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, considered the recency analysis of an Administrative Judge, who held a hearing on July 31, 2006, stating:

The Administrative Judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

Although Applicant did not abuse drugs while holding a security clearance, Applicant’s illegal drug use was extensive, and his abstention from drug use was relatively brief.

suggesting he was drug free or was refraining from the use of drugs.⁹ He has not described or demonstrated he has a source for support and guidance, or other positive changes. He has not shown or demonstrated a sufficient track record of no drug abuse. Moreover, his failure to present readily available corroboration about his non-drug use or life altering behavior from co-workers, neighbors, family and friends is another factor in this decision weighing against mitigation of his drug involvement.¹⁰

Personal Conduct

Guideline ¶ articulates the Government’s concern concerning personal conduct stating, “[c]onduct involving questionable judgment, . . . or unwillingness to comply with rules regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information.”

One Personal Conduct Disqualifying Condition that could raise a security concern and may be disqualifying in this case, “personal conduct, . . . or information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person’s personal, professional, or community standing” Guideline ¶ 16(e).

Applicant’s use of marijuana in November 2006 after he stated to an OPM Special Agent he had no plans to use marijuana in the future gives rise to questionable judgment and an unwillingness to follow rules. Given this behavior on the heels of his OPM interview precludes the application of any Mitigating Conditions under this Guideline.

⁹Retention of a security clearance is probably insufficient to ensure Applicant’s abstinence from drug abuse under these circumstances. Potential criminal liability for possession of drugs and adverse health, employment, and personal effects resulting from drug use are among the strong motivations for remaining drug free. Nevertheless, Applicant was repeatedly involved with illegal drugs from 2001 to late 2006.

¹⁰Administrative judges “must look at the record for corroboration of Applicant’s testimony.” ISCR Case 02-03186 at 3 (App. Bd. Feb. 16, 2006). Moreover, a judge may consider “Applicant’s failure to present documentary evidence in corroboration of his denials and explanations.” ISCR Case 01-20579 at 5 (App. Bd. Apr. 14, 2004) (holding Applicant’s failure to provide reasonably available corroborative evidence may be used in common sense evaluation to determine whether Applicant’s claims are established). In ISCR Case 01-02677 at 7 (App. Bd. Oct. 17, 2002), the Appeal Board explained:

While lack of corroboration can be a factor in evaluating the reliability or weight of evidence, lack of corroboration does not automatically render a piece of evidence suspect, unreliable, or incredible. . . . Evidence that lacks corroboration must be evaluated in terms of its intrinsic believability and in light of all the other evidence of record, including evidence that tends to support it as well as evidence that tends to detract from it.

“Whole Person” Analysis

In addition to the enumerated disqualifying and mitigating conditions, I have considered the general adjudicative Guideline related to the whole person concept under Guideline ¶ 2(a). As noted above, Applicant’s history of drug abuse, and his actions concerning illegal drug use were knowledgeable and voluntary. Although he is 24 years old, he was sufficiently mature to be fully responsible for his conduct, especially for his drug use in November 2006. The likelihood of future drug abuse remains substantial because insufficient time has elapsed since his last marijuana use, and Applicant has not provided sufficient corroborative evidence of a change in his lifestyle. Nor does the record contain evidence of a good employment record, or constructive community involvement. Applicant’s use of drugs raises the possibility of compromise of sensitive or classified information. Use of illegal drugs creates doubt about his judgment, reliability, and trustworthiness, and it calls into question his ability or willingness to comply with laws, rules and regulations. Abuse of drugs is not prudent or responsible.

Applicant presented little or no extenuating and mitigating evidence to counter the information about his drug abuse. He offered little other than his assertions that he has changed his behavior and desire to maintain drug-free status in the future. On the other hand, he voluntarily and candidly disclosed his history of drug abuse on his February 2006 SF 86 and in his July 2006 OPM interview. Applicant provided the only record evidence showing his drug abuse. The absence of evidence of any prior violation of his employer’s rules or requirements, and his sincerity about making future progress weigh in his favor.

In sum, Applicant did not demonstrate that he will remain drug free. There is insufficient evidence about improvement regarding his understanding of his situation. He did not receive counseling or therapy, and he may not have a clear perception of, or understanding about, how to avoid problematic situations or why he abused drugs. The recency of his drug abuse, especially his marijuana use after applying for a security clearance weighed most heavily against him. The evidence of his rehabilitative efforts is insufficient to resolve my doubts about his reliability, trustworthiness, and good judgment. After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the security concerns pertaining to drug involvement. The evidence leaves me with doubts as to Applicant’s security eligibility and suitability.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my “careful consideration of the whole person factors”¹¹ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guideline. Applicant has not mitigated or overcome the government’s case. For the reasons stated, I conclude he is not eligible for access to classified information.

¹¹See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H: AGAINST APPLICANT

Subparagraphs 1.a to 1.c.: Against Applicant

Paragraph 2, Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: 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 eligibility for a security clearance for Applicant. Clearance is denied.

Robert J. Tuidier
Administrative Judge