

KEYWORD: Drugs; Personal Conduct; Criminal Conduct

DIGEST: Applicant is a 53-year-old employee of a defense contractor who has held a clearance for 25 years. He smoked marijuana, with varying frequency, between 1971 and January 1999, when he decided to quit. His teenage son was killed by a drunk driver in 2000, and he has since dedicated most of his free time to volunteering in crime, substance abuse and drunk-driving prevention programs. He falsely denied drug use in a 1992 security clearance application, but admitted it in a 1993 interview and has reported accurately on two subsequent applications. Applicant mitigated the security concerns raised by his drug involvement, personal conduct and criminal conduct. Clearance is granted.

CASENO: 06-26398.h1

DATE: 08/06/2007

DATE: August 6, 2007

_____)	
In re:)	
)	
-----)	ISCR Case No. 06-26398
SSN: -----)	
)	
Applicant for Security Clearance)	
_____)	

**DECISION OF ADMINISTRATIVE JUDGE
DAVID M. WHITE**

APPEARANCES

FOR GOVERNMENT

Jeff A. Nagel, Esq., Department Counsel

FOR APPLICANT

Barbara J. Fraser, Personal Representative

SYNOPSIS

Applicant is a 53-year-old employee of a defense contractor who has held a clearance for 25 years. He smoked marijuana, with varying frequency, between 1971 and January 1999, when he decided to quit. His teenage son was killed by a drunk driver in 2000, and he has since dedicated most of his free time to volunteering in crime, substance abuse and drunk-driving prevention programs. He falsely denied drug use in a 1992 security clearance application, but admitted it in a 1993 interview and has reported accurately on two subsequent applications. Applicant mitigated the security concerns raised by his drug involvement, personal conduct and criminal conduct. Clearance is granted.

STATEMENT OF THE CASE

_____ Applicant applied to renew his security clearance on September 28, 2005, in conjunction with his employment by a defense contractor as a government property manager. On March 30, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended. The SOR detailed reasons, under Guideline H (Drug Involvement), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of the revised Adjudicative Guidelines (AG),¹ why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant a security clearance for Applicant, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant responded to the SOR allegations in a notarized letter dated April 11, 2007, and a supplemental letter dated April 30, 2007, and elected to have a hearing before an administrative judge. The case was then assigned to me on June 15, 2007. A notice of hearing was issued on June 19, 2007, and the hearing was held as scheduled on July 13, 2007. The Government offered five exhibits that were marked as Government Exhibits (GE) 1 through 5, and admitted without objection. Applicant testified, and offered six exhibits that were marked Applicant Exhibits (AE) A through F, and admitted without objection. DOHA received the hearing transcript (Tr) on July 25, 2007.

FINDINGS OF FACT

Applicant admitted the truth of some factual allegations set forth in the SOR pertaining to drug involvement under AG H (¶¶ 1.a, 1.c, and 1.d). Those admissions are incorporated herein as

¹*Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (August 2006) as implemented by Under Secretary of Defense Memorandum of Aug. 30, 2006 for use in adjudication of all cases in which an SOR had not been issued by Sept 1, 2006. These revised AG replaced those found in enclosure 2 of the Directive, which is pending revision to incorporate them. Copies of the applicable AG were provided to Applicant with the SOR.

findings of fact. He denied the drug involvement allegation in ¶ 1.b, and the allegations concerning personal conduct under AG E (¶ 2.a), and criminal activity under AG J (¶ 3.a). After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following findings of fact:

Applicant is a 53-year-old government property manager for a defense contractor. He has worked for that firm for 27 years, the last 25 of which he held a security clearance required to perform his job. He honorably served one five-year enlistment in the Air Force right after high school. In 1975 he was a flying medic on board air-evacuation cargo planes during Operation Baby Lift, saving the lives of Amer-Asian babies and young children from orphanages in Saigon.

Applicant was married to his first wife from 1974 to 1994. His son was born in 1981, and his daughter was born in 1984. He and his wife went through difficult periods for almost ten years prior to their 1994 divorce, and he underwent counseling to try to save the marriage. Ultimately, his wife simply left him and the children, and he became their single parent. They formed “a team,” and he and his children became even closer and more interdependent. Applicant remarried for, as he testified, “11 months, 2 weeks, 3 days, and 6 hours,” to a woman who also had children. The marriage didn’t work from the start. He described it as, “difficult at best,” and after trying marriage counseling, they decided to divorce. He married his current wife, a very impressive lady who served as his personal representative, in May 2004.

Applicant testified that he thought he first obtained a security clearance in 1992. However, his 1992 Personnel Security Questionnaire stated that he had held a clearance since 1982.² When he filed that Questionnaire, he answered “No” to question 22.a, that inquired whether he had ever used narcotics or marijuana.³ He did so because he was a single parent by then, and was afraid that admitting drug use might cause him to lose his job.⁴ During the ensuing interview in March 1993, Applicant admitted to some casual, recreational use of marijuana, and experimentation with cocaine a few times, during 1983 and 1984. His clearance was continued, and he again applied for renewal in 1997.⁵ In response to question 27, inquiring about drug use during the last seven years, and question 28, inquiring about drug use while holding a clearance, he responded “Yes,” and reported using marijuana three times during January 1993.⁶ During the June 1998 follow-up interview, he explained that he was offered the marijuana by friends while at parties, was depressed by his pending divorce, and shared some with them. His clearance was again continued. When he submitted his currently pending Electronic Questionnaire for Investigations Processing (e-QIP), he reported marijuana use approximately 50 times from 1971 to 1999, including while he held a clearance.⁷

²GE 3 (Personnel Security Questionnaire (DD Form 398), dated July 1, 1992) at page 6 of 16.

³*Id.*

⁴Tr at 40-41.

⁵GE 2 (Security Clearance Application (SF 86), dated Sep. 25, 1997).

⁶*Id.*, at 7.

⁷GE 1 (e-QIP, dated Sep. 28, 2005) at 25-26.

Applicant explained his history of marijuana use at the hearing as being somewhat regular during high school, and decreasingly frequent, except for that period in 1983 to 1984, ever since. He never purchased marijuana, or used it by himself. His use was confined to smoking marijuana that was being passed around at parties, and he felt peer pressure to participate. He last used marijuana at a party in January 1999, and made the conscious decision never to do so again because of the risk to his children should something happen to him, and to avoid setting a bad example for them. His use of cocaine was limited to three occasions during the early 1980s. He no longer goes to any parties where drug use might occur, and would leave immediately if he accidentally did so.⁸

Applicant was a professional ski instructor, and his son was a world class snow boarder. The two of them spent all the time they could together in the mountains. After graduation from high school, his son took a year before starting college to work at an ice cream company and travel around the U.S. and Canada snow boarding during his time off work. One evening in 2000, his son went out in a friend's car and was killed by a drunk driver. The accident was so bad, he was not allowed to see his son's remains. This was such a severe mental and emotional trauma that he was relieved of many of his responsibilities at work for 18 months. He became severely depressed and almost suicidal.⁹

Five years ago, Applicant found an organization of victims of drunk drivers. He began volunteering three or more times a week to go to courts, prisons, police stations, and schools addressing people who had been caught driving under the influence and others about the dangers and impact of driving while impaired by alcohol or drugs. He and his main partner in this endeavor, herself a victim of a drunk driver, are well known, highly effective, and in high demand around the county and state for these services. These efforts, and his remarriage, have focused his life on helping others. While still grieving, he is no longer depressed and has returned to full duties at work. His declaration that he will never again use marijuana or any illegal drug was sincere, credible, and convincing.¹⁰

Applicant submitted the live testimony of his DUI Impact Panel partner and two letters of recommendation, attesting to his integrity, honesty, trustworthiness, and love for his country.¹¹ He also submitted a letter from one young man who had been greatly moved by his presentation.¹² Finally he submitted a copy of the security award he received from his company, recognizing his exceptional performance, diligence and awareness of security requirements.¹³

POLICIES

⁸Tr at 32-38, 42-46.

⁹Tr at 18-19, 23, 25, 31-32.

¹⁰AE C; AE D; Tr at 22-26, 34-36.

¹¹AE C; AE D; Tr at 24-26.

¹²AE E.

¹³AE F.

The revised AG that replaced Enclosure 2 of the Directive set forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into disqualifying conditions (DC) that may raise security concerns, and mitigating conditions (MC) that may reduce or negate security concerns. Applicable DCs and MCs must be considered in deciding whether to grant, continue, deny or revoke an individual's eligibility for access to classified information. Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, are set forth and discussed in the conclusions section below.

An administrative judge need not view the adjudicative guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are intended to be applied in conjunction with the factors set forth in the Adjudicative Process provision of the Directive,¹⁴ to assist the administrative judge in reaching fair and impartial, common sense decisions.

The entire decision-making process is a conscientious scrutiny of a number of variables known as the "whole person concept." All available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider, in addition to the applicable guidelines, are: (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) the 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.

Protection of the national security is the paramount consideration, so the final decision in each case must be arrived at by applying the standard that issuance of a clearance must be clearly consistent with the interests of national security. Any doubt as to whether access to classified information is clearly consistent with national security must be resolved in favor of the national security.¹⁵ In reaching this decision, only those conclusions that are reasonable, logical and based on the evidence contained in the record were drawn, and no inferences were grounded on mere speculation or conjecture.

In the decision-making process, facts must be established by "substantial evidence."¹⁶ The burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. "Department Counsel is

¹⁴AG ¶ 2.

¹⁵*Id.*, at ¶¶ 2(b), 2(c).

¹⁶"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).

responsible for presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted.”¹⁷ “The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and [Applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision.”¹⁸ Once it has met its initial burden of production, the burden of persuasion (including any burden to disprove a mitigating condition) never shifts to the government.¹⁹

A person seeking access to classified information seeks to enter 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 that 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. Section 7 of Executive Order 10865 specifically provides that any adverse industrial security clearance decision shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned,” so the decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

As set forth in the Directive, every recommended personnel security decision must be a fair and impartial overall common sense decision based on all available evidence, both favorable and unfavorable. The decision must be arrived at by applying the standard that the grant or continuance of a security clearance or access to classified information is clearly consistent with the interests of national security.

Guideline H: Drug Involvement

“Use 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.”²⁰ Applicant admitted using cocaine three times during the early 1980s and marijuana while in high school, regularly for about six months around 1983, and once or twice a year thereafter until January

¹⁷Directive ¶ E3.1.14.

¹⁸Directive ¶ E3.1.15.

¹⁹ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005); “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).

²⁰AG ¶ 24.

1999, when he stopped for good. He never tested positive for any drug use, and the only reason it is known is because he honestly admitted it in connection with multiple security clearance renewal applications since 1993. He denied ever purchasing or owning marijuana or other drugs, and he merely shared in using them when being passed around at parties. There is no evidence to the contrary. He also admitted that some of his marijuana use occurred while he held a security clearance. The Government has established the truth of SOR ¶¶ 1.a, 1.c, and 1.d. The Government did not present any evidence to establish the truth of SOR ¶ 1.b, which Applicant denied.

Applicant's conduct raises security concerns under two drug involvement disqualifying conditions (DI DC). DI DC 25(a) ("any drug abuse")²¹ and DI DC 25(g) ("any illegal drug use after being granted a security clearance") apply to his admitted use of marijuana with varying frequency from 1971 to January 1999, and use of cocaine a few times during the early 1980s. Although Applicant did not remember having a clearance before 1992, he stated on the application he submitted that year that he had held a clearance since 1982. No other DI DC applies.

After considering all of the possible drug involvement mitigating conditions (DI MC), two of them squarely apply to Applicant's situation. DI MC 26(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") does apply to mitigate drug involvement security concerns. The last incident took place more than 8 years ago, and the last drug use of any frequency was some 24 years ago. He no longer attends parties where drugs might be present, and is fully engaged in law-enforcement programs to deter and prevent substance abuse after his son's tragic death. His prior drug use, even when holding a clearance, is highly unlikely to recur, and no longer casts doubt on his reliability, trustworthiness, or judgment under his present circumstances.

Applicant has disassociated himself from drug-using associates and contacts, now avoids the environment where drugs were used, has been abstinent for more than eight years, and compellingly demonstrated his intent not to abuse drugs in the future during his testimony, all of which further mitigate any security concerns under DI MC 26(b). DI MC 26(c) involving prescription drugs, and DI MC 26(d) concerning rehabilitation and treatment programs do not apply.

Guideline E: Personal Conduct

"Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process."²²

After considering all of the personal conduct disqualifying conditions (PC DC), only PC DC 16(a) ("deliberate omission, concealment or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations,

²¹Drug abuse is defined as the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction. Regulation, Appendix 8, Guideline H ¶ 24(b).

²²Regulation, Appendix 8, Guideline E ¶ 15.

determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities”) applies to Applicant’s conduct. He falsified his answer concerning prior drug use on his 1992 Personnel Security Questionnaire, and did so because he thought answering truthfully might endanger his job. He subsequently and honestly admitted his drug use in his 1993 and 1998 interviews, and on his 1997 and 2005 clearance applications. No other PC DC applies.

Having considered all of the personal conduct mitigating conditions (PC MC), several apply. PC MC 17(a) (“the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts”) does not apply. His 1993 admission to the drug use came during an interview when, although not confronted with any known facts, he was being questioned about the truthfulness of his denial. This does not rise to the level of voluntary correction and disclosure required by Appeal Board precedent under the former adjudicative guidelines which, though not necessarily binding for interpretation of the reworded PC MC, guides this decision. Applicant never asserted that concealment of his drug use was caused by improper advice or legal counsel, so PC MC 17(b), addressing such situations, is inapplicable.

PC MC 17(c) (“the offense was so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment”) does apply to mitigate Applicant’s conduct. This falsification was more than 15 years ago, and he has fully and freely disclosed the omitted information on two subsequent clearance applications, during two security interviews, and at the hearing itself. Taken together, this history establishes that recurrence is unlikely, and the conduct casts no doubt on his present judgment, trustworthiness and reliability. The falsification was known 24 years ago. He has maintained a clearance ever since, has had no security violations, and in fact received formal recognition for his security performance.

PC MC 17(d) (“the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur”) also applies in partial mitigation. Applicant first admitted the falsification back in 1993, and continues to do so. He has taken positive steps to eliminate his drug involvement that put his job or security clearance at risk and caused him to answer falsely in the first place. He has fully revealed his past involvement, and has an extended period of demonstrated integrity.

PC MC 17(e) (“the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress”) also mitigates the security concerns here. He has been abstinent for more than eight years. He fully intends to continue this lifestyle, which reduces or eliminates his vulnerability. He did not eliminate drug involvement in response to any threat to his job or clearance, but for family and personal reasons that have been heavily reinforced by events since then.

PC MC 17(f) (“the information was unsubstantiated or from a source of questionable reliability”) does not apply, since Applicant admitted the falsification. PC MC 17(g) (“association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt on the individual’s reliability, trustworthiness, judgment, or willingness to comply with rules and regulations”) would apply to mitigate any security concerns under PC DC 16(g), which were not alleged in this case, but has no mitigating effect on concerns raised under PC DC 16(a).

Guideline J: Criminal Conduct

“Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules and regulations.”²³ The only crime alleged in the SOR was the falsification of the 1992 Personnel Security Questionnaire discussed above under AG E. His drug use, while admittedly illegal, was not alleged as a security concern. For the reasons discussed above under AG H, the drug use does not raise any independent security concerns under AG J.

Criminal conduct disqualifying condition (CC DC) 31(a) (“a single serious crime or multiple lesser offenses”) and CC DC 31 (c) (“allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted”) both apply to raise potential security concerns about Applicant’s falsification as alleged in SOR ¶ 3.a. Although known for 24 years and never pursued as a crime, falsification on a clearance application can be prosecuted as a felony and is especially significant in determining worthiness to hold a clearance. No other CC DC applies.

Criminal conduct mitigating condition (CC MC) 32(a) (“so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness or good judgment”) does apply to mitigate this falsification for the same reasons discussed above concerning PC MC 17(c). Applicant also established CC MC 32(d) (“there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement”). He has not falsified his subsequent security clearance submissions for 15 years, and has an excellent employment record, particularly in the area of security. He has engaged in highly constructive community involvement for more than five years, directly supporting law enforcement efforts and combating substance abuse. Applicant did not assert, and the record would not support any other CC MC.

Whole Person Analysis

I have considered the “whole person” concept in evaluating Applicant’s risk and vulnerability in protecting our national interests. His drug involvement consisted of three experimental uses of cocaine, and marijuana use, primarily during and before the early 1980s. Between 1984 and January 1999, he used marijuana once or twice a year, on average, when it was being passed around at a party and he felt peer pressure to participate. He knew what he was doing was wrong, and decided to abstain from any drug use in January 1999 out of concern for his then 18 and 15-year-old children. He was devastated when his son was killed in 2000 by a drunk driver. He has volunteered extensively for the past five years with law enforcement and other crime prevention programs against substance abuse and drunk driving. He is now in a happy, healthy and stable marriage. He has admitted his conduct in connection with security clearance renewals since 1993. His 1992 falsification was a long ago, has not been repeated, and is unlikely to recur. Accordingly, Applicant

²³AG ¶ 30.

has mitigated the security concerns raised by his drug involvement, personal conduct, and criminal conduct. It is clearly in the interest of national security to continue his access to classified material.

FORMAL FINDINGS

Formal Findings For or Against Applicant on the allegations set forth in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1, Guideline H:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline J:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

David M. White
Administrative Judge