

KEYWORD: Drugs; Personal Conduct

DIGEST: Applicant experimented twice with marijuana as a teenager and young adult. After a more than 14-year absence, he started smoking marijuana again in August 2004, following the breakup of his 10-year marriage. After occasional use for the next three months, he stopped smoking it and changed his lifestyle and friends, when he realized the negative effect his conduct was having on him. He has mitigated the government's concerns about his drug involvement. Clearance is granted.

CASENO: 06-18905.h1

DATE: 05/31/2007

DATE: May 31, 2007

In re:)	
)	
-----)	
SSN: -----)	ISCR Case No. 06-18905
)	
Applicant for Security Clearance)	

**DECISION OF ADMINISTRATIVE JUDGE
MARY E. HENRY**

APPEARANCES

FOR GOVERNMENT
Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT
Pro Se

SYNOPSIS

Applicant experimented twice with marijuana as a teenager and young adult. After a more than 14-year absence, he started smoking marijuana again in August 2004, following the breakup of his 10-year marriage. After occasional use for the next three months, he stopped smoking it and changed his lifestyle and friends, when he realized the negative effect his conduct was having on him. He has mitigated the government's concerns about his drug involvement. Clearance is granted.

STATEMENT OF THE CASE

On November 3, 2006, 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 modified, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. 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 Applicant. Specifically, the SOR sets forth security concerns arising under Guideline H (Drug Involvement) and Guideline E (Personal Conduct) of the revised Adjudicative Guidelines (AG) issued on December 29, 2005 and implemented by the Department of Defense, effective for any SOR issued after September 1, 2006. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. On December 1, 2006, Applicant submitted a notarized response to the allegations. He requested a hearing on January 27, 2007.

DOHA assigned this case to me on March 29, 2007, and issued a notice of hearing on April 16, 2007. I held a hearing on May 2, 2007. The government submitted five exhibits (GE), which were marked and admitted into evidence as GE1-5. I raised questions regarding the admissibility of GE 5, an unsigned and unsworn summary report, dated November 5, 2004. I admitted this document into evidence based on Applicant's statement that the information in this document reflected his basic statements to an investigator.¹ Applicant did not submit any documents into the record. Applicant and three witnesses testified. DOHA received the hearing transcript (Tr.) on May 10, 2007.

PROCEDURAL ISSUES

Initially, Applicant received the notice of hearing, which had been mailed on April 16, 2007, at work about two weeks before the hearing and at home the night before the hearing. At the hearing on May 2, 2007, Applicant waived his right to receive 15 days notice of the hearing. The hearing proceeded as scheduled.²

¹Tr. at 14-16.

²Tr. at 6. Applicant recently moved. The hearing notice had been sent to his previous address.

At the close of the testimony and immediately preceding closing argument, counsel for the government moved to amend the SOR to add an allegation of falsification of material facts during his interview with the National Security Agency (NSA) investigator on November 5, 2004.³ The government sought to allege that Applicant falsified facts related to his marijuana use in September and October 2004 based on the investigator's written statement that he denied further marijuana use after August 2004. The government submitted a copy of a November 5, 2004 report, which is a summary of relevant information provided by Applicant to the NSA polygraph examiner, which I admitted into evidence based on Applicant's statement that it generally reflected what he said to the polygraph examiner during his examination and considered it for its basic factual statements.⁴ The report is not signed; the author is not known; and the author did not testify to authentic the contents of the document. At the hearing, Applicant credibly testified that the information in the report summary is based on the dialogue developed during the course of his polygraph examination, not the result of an interview prior to the administration of the polygraph examination or discussions conducted separately from the polygraph examination as implied by the language of the report. His credible hearing testimony about the frequency of his use of marijuana in September and October 2004 is consistent with his statements to the polygraph examiner about the frequency of his marijuana use in this time period, and do not reflect intentional falsification. Although the government received this report approximately six weeks prior to the hearing, it did not seek to amend the SOR prior to the hearing, nor did it present or offer to present the preparer of the report as a witness. I denied the government's motion because its amendment raised a new issue based on the summary report, without presenting the polygraph operator to authenticate the contents of the report and clarify the context in which the statements were made - interview or examination. To have granted the motion at the conclusion of all testimony would have violated Applicant's due process rights of notice and opportunity to respond.⁵ In any event, I conclude the allegation of intentional falsification is not established.

FINDINGS OF FACT

Applicant admitted all the allegations under Guideline H and Guideline E of the SOR.⁶ Those admissions are incorporated as findings of fact. After a complete review of the evidence in the record and upon due consideration, I make the following findings of fact.

³Conduct not alleged in a SOR may be considered: (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for the whole person analysis un Directive Section 6.3." ISCR Case No. 03-20327 at 3 (App. Bd. Oct 26,2006) (citing ISCR Case No. 00-0633 at 3 (App. Bd. Oct.24, 2003)).

⁴At the hearing Applicant disagreed with certain facts in this report. Specifically, his disputed the factual statement that he smoked marijuana twice in high school, because he only smoked it once. He believes the report to be generally accurate, but could not say if it is completely accurate because he does not remember everything that was discussed or said. He adamantly stated during his testimony that the polygraph examination involved a dialogue between he and the examiner which lead to questions and responses. Tr. at 39, 45, 85.

⁵GE 5 (November 5, 2004 unsigned summary report); Tr. at 39, 45, 76-80.

⁶Applicant's response to the SOR, dated December 1, 2006, at 1-2.

Applicant, a 39-year-old man, works for a Department of Defense contractor. He graduated from high school in 1986. Following high school, he attended a technical school for two years and when he completed his program, he received a diploma. He began employment with his current employer over 19 years ago, while still a student at the technical school. He began working as a draftsman. His employer regularly promoted him, and he now works as a senior civil designer, with some managerial responsibilities.⁷

While a 17-year-old high school student, Applicant smoked marijuana one time at a party. In 1990, he smoked it once while on vacation. Applicant did not smoke marijuana for nearly 14 years thereafter.⁸

Applicant married in 1994. He has two sons who are ages 10 and 5. In 2000, he completed a security clearance application (SF-86). Based on the information in his application, he received a security clearance and access to classified information. In April 2004, he resubmitted his SF-86 application. At this time, he signed the Personnel Security Policy Advisor (Form G3149), which advises that the use of illegal drugs is prohibited. He acknowledged at the hearing that he knew illegal drug use was not permitted.⁹

Applicant's wife told him that she wanted a divorce in the summer of 2004. Although he did not want to end their marriage, in July 2004, he and his wife separated and he moved out of the marital home. He sought help through the Employer Assistance Program at work with his emotional issues triggered by his wife's decision. After a few sessions, which included his wife, the counseling ended without a need for a mental health referral or any diagnosis. After living with various family members, including his in-laws, Applicant moved in with his mother in August 2004.¹⁰

Shortly after he and his wife separated, Applicant started going out to bars in the evening to socialize and to make new friends. He describes his attitude at this time as "bad". He did not eat properly and had trouble sleeping. He considered quitting his job. Between August and October 2004, he regularly frequented local bars, and while socializing with his new friends at the bar, he occasionally smoked marijuana with one or two other individuals. He never purchased any marijuana during this time nor did he arrive at work under the influence of marijuana or spend time with his children after using it. After a few months, he realized his new life style was tiring. He started spending more time with family and at family activities. He received the emotional support he needed. He started eating and sleeping. He felt mentally stronger and physically healthier. He states he returned to his person.¹¹

⁷GE 1 (Applicant's application for a security clearance (SF-86), dated April 5, 2000 and resigned April 11, 2004) at 1-2; Tr. at 18, 28.

⁸GE 3 (NSA Clearance Decision Statement, dated March 2, 2005) at 1; Tr. at 28-30.

⁹GE 1, *supra* note 7, at 3, 14; Tr. at 19, 28, 33, 35, 41-43.

¹⁰Tr. at 19-23, 28, 71-72.

¹¹*Id.* at 23-27, 31-32, 41-43, 49-50.

Because his employer performed work for the NSA, this agency required Applicant to undergo a polygraph examination, which he did on November 5, 2004. The polygraph examiner did not conduct a pre-examination interview. Rather, the examiner asked questions in the form of a dialogue with Applicant. Based on the questions presented in the early portion of the polygraph examination, Applicant provided information about his early use of marijuana. With the subsequent questions, he provided further information regarding his more recent use of marijuana between August 2004 and October 2004. He did not attempt to hide his marijuana use. He also told the polygraph examiner that he would use marijuana again, if offered. After discussing the NSA drug policy, Applicant told the polygraph examiner that he would abide by the policy and had no intent to use marijuana again. Applicant has not used other illegal drugs nor has he ever been arrested for any conduct related to illegal drug use.¹²

Based on the information obtained at his polygraph examination, NSA denied Applicant Access to Sensitive Compartmented Information (SCI) in a decision dated March 2, 2005. Without articulating any knowledge of the facts and circumstances surrounding Applicant's most recent decision to use marijuana and his years of work experience without incident, NSA concluded that he exercised extremely poor judgment in his use of "illegal drugs" and could not be trusted in the future. Applicant did not appeal this decision.¹³

Applicant has not used marijuana since October 2004. The polygraph examination caused him to realize that his decision to occasionally use marijuana was a poor decision sending him down the wrong path. Two and one-half years ago, he decided not to spend his evenings at a local bar and he ceased his association with individuals who smoke marijuana. He changed his attitude towards life and marijuana. He also accepted that his marital issues would not resolve. He spends his time with his sons and family, and at family events. He acknowledged at the hearing that he did not tell his employer about his marijuana use for fear of its impact on his job. He also has not told his family about his marijuana use.¹⁴

At the hearing, Applicant acknowledged that the overall information contained in the polygraph examiner's summary was as he remembered. He, however, disputed certain details of this report, including the statement that he used marijuana twice in high school, when he said once. He described the polygraph examination as a process involving a series of questions which developed through an ongoing dialogue and did not include a separate interview. The government did not provide any evidence in the form of a witness or documents, which contradicted Applicant's description of the process.¹⁵

Applicant's security officer and co-worker of 10 years testified. She described him as dependable, trustworthy, and loyal. He comes to work every day. She knew about the change in his marital situation, but saw no change in his work habits or abilities during this time of stress. She has

¹²*Id.* at 31-32, 39, 45-46.

¹³GE 2 (NSA Denial of access to Sensitive Compartmented Information, dated March 4, 2005); GE 3, *supra* note 8, at 2-3.

¹⁴Tr. at 25-27, 31-32, 40, 42, 44, 74.

¹⁵*Id.* at 44-45.

been the security officer since January 2004. She has no documentation which indicates that Applicant violated security procedures at any time, particularly during the period of July 2004 through October 31, 2004.¹⁶

Applicant's immediate supervisor testified. He first became acquainted with Applicant in 1989, and since 1998, has been Applicant's supervisor. Applicant is in his top 10% of performers. He rates Applicant's work as excellent. Applicant is very conscientious and reliable. He exercises sound judgment in performance of his work. Applicant has no disciplinary issues and no security violations. Applicant's supervisor knew about his marital status change in 2004 and stated that Applicant was pretty upset about his separation and was impacted by this change in his life. Applicant's work performance did not decrease at the time of his separation.¹⁷

POLICIES

The revised Adjudicative Guidelines set forth disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. An administrative judge need not view the revised adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, are intended to assist the administrative judge in reaching fair and impartial common sense decisions. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the revised AG should be followed whenever a case can be measured against this policy guidance. In addition, each security clearance decision must be based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in the Directive. Specifically, these are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other 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.¹⁸

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.¹⁹ The government has the burden of proving controverted facts.²⁰ The burden of proof is something less than a preponderance of the evidence.²¹ Once the government has met its burden, the burden shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against

¹⁶*Id.* at 53-59.

¹⁷*Id.* at 62-68. He also testified that he does not give Applicant a written performance evaluation.

¹⁸Directive, revised Adjudicative Guidelines (AG) ¶ 2(a)(1)-(9).

¹⁹ISCR Case No. 96-0277 at 2 (App. Bd., July 11, 1997).

²⁰ISCR Case No. 97-0016 at 3 (App. Bd., Dec. 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.

²¹*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

him.²² Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²³

No one has a right to a security clearance,²⁴ and “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”²⁵ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.²⁶ Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” The decision to deny an individual a security clearance is not necessarily a determination as to the allegiance, loyalty, and patriotism of an applicant.²⁷ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to the allegations set forth in the SOR:

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.²⁸ (AG ¶ 24) Applicant used marijuana once as a high school student and once on vacation in 1990. Although he abstained from smoking marijuana for many years, in August 2004, he started smoking marijuana occasionally after being granted a security clearance. He never purchased it for use, but possessed it when smoking. He has never been arrested for this activity. Based on the evidence of record, DC ¶ 25(a) *any drug abuse*; DC ¶ 25(c) *illegal drug possession, including cultivation, processing, manufacture, purchase sale, or distribution*, and DC ¶ 25(g) *any illegal drug use after being granted a security clearance* apply.

²²ISCR Case No. 94-1075 at 3-4 (App. Bd., Aug. 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.

²³ISCR Case No. 93-1390 at 7-8 (App. Bd. Decision and Reversal Order, Jan. 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.

²⁴*Egan*, 484 U.S. at 531.

²⁵*Id.*

²⁶*Id.*; Directive, revised AG ¶ 2(b).

²⁷Executive Order No. 10865 § 7.

²⁸Drug abuse is defined in AG ¶ 24(a)-(b) to include drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970.

Security concerns can be mitigated under 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.* 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.* MC ¶ 26(a) has some applicability in this case. Applicant’s one time experimentation with marijuana as a high school student occurred more than 20 years ago and his one time experimentation with marijuana in 1990 happened 17 years ago. He last used marijuana two and one-half years ago during a period of extreme emotional distress created by his wife’s decision to end their marriage, which he did not want. While other emotional crises may possibly occur in the future, he is not likely to be involved in an emotionally devastating and unwanted divorce in the future. His past conduct does not cast doubt on his current reliability, trustworthiness or good judgment.

MC ¶ 26(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; and (3) and appropriate period of abstinence* applies. Applicant initially experimented with marijuana as a high school student and young man. His experimentation did not lead to further use. Rather, he abstained from using marijuana for 14 years. When his life changed from married to single without warning, a highly emotional time, he sought new single friends by hanging around bars. He found new friends who occasionally offered him a marijuana cigarette. For a few months, he continued to hang around these individuals. However, in a short time, he realized the negative effect his conduct had on him physically and emotionally. He began to change his attitude which lead to a change in his friends and places for social contacts. Applicant stopped going to bars for social contact in October 2004. Instead, he started spending more time with family and work friends after realizing that his recent conduct was leading him in the wrong direction. With this change in his social life, he associating with individuals who smoked marijuana. Furthermore, subsequent to his polygraph examination, he realized he needed to avoid any further contact with those who smoked marijuana, which he has done. He has mitigated the government’s concerns about his drug involvement.²⁹

Personal Conduct

Under Guideline E, 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. (AG ¶ 15) Applicant admitted to his one time use of marijuana as a teenager and as a young adult. He also admitted to occasionally using marijuana for three months in 2004, immediately after his wife requested a divorce. At this time, he held a security clearance and violated the rules against using an illegal substance. Applicant’s conduct raises the possible application of DC ¶ 16(d) *credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person*

²⁹MC ¶¶ 26(c) 26(d) are not relevant to this case.

assessment of a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: . . . (3) a pattern of dishonesty or rule violations.

MC ¶ 17(c) *the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;* 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;* MC ¶ 17(e) *the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;* and MC ¶ 17(g) *association with persons involved in criminal activity has ceased ...* may apply. Resolution of the issues raised in this guideline will be discussed in the whole person analysis, *infra*.

Whole Person Analysis

Protection of our national security is of paramount concern. Security clearance decisions are not intended to assign guilt or to impose further punishment for past transgressions. Rather, the objective of the adjudicative process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Thus, in reaching this decision, I have considered the whole person concept in evaluating Appellant's risk and vulnerability in protecting our national interests.

Applicant's experimental use of marijuana as a teenager and young man occurred many years ago. His decision, however, to occasionally smoke marijuana in 2004 while holding a security clearance is serious misconduct. He made this decision at a time when his life, as he had known it for 10 years, fell apart without warning. His wife's request to end their marriage took him by surprise and at the same time, devastated him emotionally. For a few months, he attempted to develop a new social network by going to bars and drinking with the people he met at the bars. On a few occasions, he smoked marijuana with one or two others when offered. He never purchased it. By the end of October 2004, he got tired of this new life and began spending more time with family and at family activities. When he took the polygraph examination, he realized that he had made a bad decision about smoking marijuana and about the direction of his personal life. He decided he needed to change his habits and life style, and he did. He stopped going to bars. He no longer associates with the individuals he met there. He told the polygraph operator that he could abide by the policy against drug use and has because he changed his social patterns. He learned that his family provided the support he needed to progress with his new life.

During this time of emotional crisis, Applicant continued to perform his work duties at his usual high level of performance. For this part of his life, he continued to make appropriate decisions and exercised good judgment. He never mishandled classified information and continued to work on a regular basis.

The polygraph examiner focused the questions on Applicant's use of drugs. He answered the questions truthfully. The examiner did not address the reasons surrounding his decision to smoke

marijuana in 2004. NSA based its decision to deny Applicant SCI access on the polygraph examiner's limited findings. In reaching my conclusion, I considered NSA's decision and its underlying basis. Although the decision purports to consider the whole person, the decision does not reflect other facts outside of Applicant's use of marijuana. It loosely characterized Applicant's use of marijuana as multiple drugs (the decision referenced the use of "illegal drugs"), which is inaccurate and not supported by the evidence. Thus, NSA's decision is entitled to limited weight. Because this decision was rendered more than two years ago and much closer to the time when Applicant actually smoked marijuana, I also considered Applicant's acknowledgment he could abide by the no drug policy and his compliance with this acknowledgment for the last two years and one half years.

Applicant broke the rule against use of an illegal substance when he decided to smoke marijuana. He recognized the error of his ways and corrected both his attitude and his conduct. I have carefully weighed the mitigating factors, the totality of the circumstances surrounding his decision to smoke marijuana in 2004, his honesty in revealing this information, his work ethic, his recent conduct, and his change in attitude against the seriousness of his misconduct. I have concluded that he would not act in a manner which would harm the government. There is little likelihood he could be pressured, coerced, exploited, or subjected to duress for his past conduct. He learned that his family was important to him. He has also accepted that his marriage has ended. There is little likelihood that his use of marijuana would occur in the future. Applicant has mitigated the government's concerns pertaining to his drug involvement and his personal conduct.

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:

SOR ¶ 1-Guideline H : Subparagraphs a-e:	FOR APPLICANT For Applicant
SOR ¶ 2-Guideline E: Subparagraph a:	FOR APPLICANT For Applicant

DECISION

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

Mary E. Henry
Administrative Judge