

KEYWORD: Drugs

DIGEST: Applicant is a 40-year-old employee of a defense contractor who admitted occasional use of marijuana with decreasing frequency over a number of years. His most recent use was after submission of his security clearance application, while holding an interim clearance. Recently, he finds marijuana use distasteful, but used it anyway due to peer pressure. He could not rule out future use under foreseeable circumstances. Drug involvement security concerns raised by this inability or unwillingness to follow rules and regulations, and lack of trustworthiness and independent good judgment were not mitigated. Clearance is denied.

CASENO: 06-22660.h1

DATE: 07/31/2007

DATE: July 31, 2007

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In re:)	
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-----)	ISCR Case No. 06-22660
SSN: -----)	
)	
Applicant for Security Clearance)	
)	

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

APPEARANCES

FOR GOVERNMENT

Jennifer Goldstein, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 40-year-old employee of a defense contractor who admitted occasional use of marijuana with decreasing frequency over a number of years. His most recent use was after submission of his security clearance application, while holding an interim clearance. Recently, he finds marijuana use distasteful, but used it anyway due to peer pressure. He could not rule out future use under foreseeable circumstances. Drug involvement security concerns raised by this inability or unwillingness to follow rules and regulations, and lack of trustworthiness and independent good judgment were not mitigated. Clearance is denied.

STATEMENT OF THE CASE

_____ Applicant applied for a security clearance on November 17, 2003, in conjunction with his employment by a defense contractor as an electrician. On December 29, 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 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), 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 statement dated March 16, 2007, admitting the truth of the factual allegations, and elected to have a hearing before an administrative judge. On April 23, 2007, the case was assigned to another administrative judge. The case was reassigned to me on May 7, 2007. A notice of hearing was issued on June 1, 2007, and an amended notice of hearing, changing only the location, was issued on June 13, 2007.² The hearing was held as scheduled on June 28, 2007. The Government offered two exhibits that were marked as Government Exhibits (GE) 1 and 2, and admitted without objection. Applicant testified, and offered one exhibit that was marked Applicant Exhibit (AE) A, and admitted without objection. DOHA received the hearing transcript (Tr) on July 18, 2007.

FINDINGS OF FACT

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

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. A copy of the applicable AG was provided to Applicant with the SOR.

²A copy of this amended notice was served on Department Counsel and Applicant by email on June 13, 2007.

of fact. After 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 40-year-old employee of a defense contractor seeking a security clearance. He held an interim clearance during some of the time since he first applied in 2003, but is unsure of the exact dates involved.³ He admitted to using marijuana approximately once per year during the seven years preceding his security clearance application, and to one additional use in August 2005 while he held an interim clearance, as alleged in SOR ¶¶ 1.a and 1.b. He further admitted using marijuana with friends once or twice weekly while in high school, and once or twice monthly from 1985 to 1990. In 1990, his employer started a drug-prevention program, including urinalysis testing. His use declined to three or four times a year until 1993, then to about once a year until his last use in August 2005.⁴

Applicant stated that he has not enjoyed smoking marijuana for many years, and has turned it down on many occasions.⁵ He attributed his more recent uses to “curiosity” and, essentially, peer pressure. Each use was in a social setting, sharing marijuana provided by someone else. He equated its wrongfulness to running a red light – “I don’t see the harm in it.” He said future use was “unlikely,” and more unlikely if he was granted a clearance, but he could not rule it out.⁶ He could not explain why having a clearance made future use more unlikely when criminal laws and company policy against drug use did not deter him, and he used marijuana in the past while holding an interim clearance.⁷

There is no evidence of Applicant’s drug use except his candid admissions. All of his company-administered urinalysis test results have been negative.⁸ Being honest in connection with the security clearance process is more important to him than actually receiving a clearance.⁹ Applicant was entirely credible in his testimony during the hearing. He did not submit any testimony or documentary evidence from others concerning his character, reliability or trustworthiness.

POLICIES

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

³Tr at 6, 36-38.

⁴GE 1, Security Clearance Application (SF 86) dated Nov. 17, 2003, at 7-8; GE 2, Report of Interview conducted on Jan. 23, 2006, at 1; Tr at 32-33, 40-42, 44.

⁵Tr at 35, 40, 42, 45, 54.

⁶Tr at 41, 45-47, 55.

⁷Tr at 44, 48-51.

⁸AE A, Urinalysis results, at 1; Tr at 32-33.

⁹Tr at 16-17.

(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. AG H is the applicable guideline in this case. 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,¹⁰ 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.¹¹ 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, facts must be established by “substantial evidence.”¹² 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 responsible for presenting witnesses and other evidence to establish facts alleged in the SOR that

¹⁰AG ¶ 2.

¹¹*Id.*, at ¶¶ 2(b), 2(c).

¹²“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).

have been controverted.”¹³ “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.”¹⁴ 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.¹⁵

A person who seeks 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 Regulation, 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.”¹⁶ The SOR alleges, and Applicant admits to, use of marijuana on multiple occasions between 1996 and August 2005, including while he held an interim clearance after submission of his security clearance application.

¹³Directive ¶ E3.1.14.

¹⁴Directive ¶ E3.1.15.

¹⁵ISCR 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).

¹⁶Regulation, Appendix 8, Guideline H ¶ 24.

Applicant's conduct raises security concerns under two drug involvement disqualifying conditions (DI DC). DI DC 25(a) ("any drug abuse")¹⁷ applies because Applicant admittedly used marijuana approximately once a year during the period alleged. DI DC 25(g) ("any illegal drug use after being granted a security clearance") also applies. Applicant admittedly used marijuana while holding an interim security clearance. The security concerns from this casual and infrequent social marijuana use are not so much with respect to Applicant's temporarily impaired judgment, but bear directly on his ability or willingness to comply with laws, rules and regulations. No other DI DC applies in this case.

I have considered all of the possible drug involvement mitigating conditions (DIMC). DIMC 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 not apply. Applicant's behavior occurred over a long period of time, including about 15 years during which his company had an active drug prevention program. His most recent use was less than two years ago, and occurred while his current clearance application was pending and he held an interim clearance. Applicant himself would not expressly rule out future use. No prediction can yet be made that recurrence is unlikely. Applicant's history of casual drug use when peer pressure overcomes his minimal self-control and stated distaste for the results, casts ongoing doubt on Applicant's trustworthiness and good judgment.

Applicant said he "wouldn't mind signing the statement of intent with automatic revocation of clearance for any violation,"¹⁸ has largely disassociated himself from drug-using associates and contacts, and has changed the environment where drugs were used, all of which may mitigate security concerns under DI MC 26(b) by demonstrating intent not to abuse drugs in the future. The remaining such possible indicator listed under DI MC 26(b) is an appropriate period of abstinence. Applicant's abstinence period has been only 23 months, and while he said he had no plans to use marijuana in the future, he candidly refused to rule it out. The possibility of losing his security clearance and job did not deter him from regular drug use between 1990 and 2005. He has not shown sufficient rehabilitation that signing a statement of intent would now be sufficient to demonstrate intent not to abuse drugs in the future, when company policy and criminal prohibitions were insufficient to prevent past drug abuse.

DI MC 26(c) involves abuse of prescription drugs, so it does not apply. DI MC 26(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")¹⁹ does not apply. Applicant offered no evidence of having entered or completed any rehabilitation program, and no duly qualified medical professional prognosis was provided.

¹⁷Drug 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).

¹⁸Tr. at 55.

¹⁹"Duly qualified medical professional" means a physician, clinical psychologist, or psychiatrist. Regulation, Appendix 8, Guideline H ¶ 25(d).

Whole Person Analysis

I have considered the “whole person” concept in evaluating Applicant’s risk and vulnerability in protecting our national interests. He has regularly, albeit with decreasing frequency, used marijuana on social occasions for about 25 years. He was not deterred by the fact such use is illegal, or by the potential adverse impact on his employment or security clearance. He engaged in each of the admitted offenses voluntarily. He is mature and fully accountable for his choices. The only factor he cited to make recurrence less likely was that he would not want to use drugs if he held a clearance, but admitted his last use occurred while he held an interim clearance.

Applicant has been forthright and honest about his actions, without which they would probably be unknown. However, his more recent history of drug abuse is an ongoing security concern in large part because it occurred due to peer pressure, and even though he did not enjoy the experience. This indicates that he is easily persuaded to commit an illegal and distasteful act to please others, at least in the perceived absence of swift and sure sanctions, and reflects poorly on his self-control, trustworthiness, and ability or willingness to abide by rules and regulations. Accordingly, Applicant has not mitigated the security concerns raised by his drug involvement. It is not clearly in the interest of national security to grant him 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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	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 a security clearance for Applicant. Clearance is denied.

David M. White
Administrative Judge