

KEYWORD: Drugs; Personal Conduct

DIGEST: Applicant is a 45-year-old deputy program manager employed by a federal contractor. He smoked marijuana six times in 2001. After obtaining a security clearance, in 2004, he smoked marijuana once. The drug use is not recent, he no longer associates with other persons involved, and he signed a statement of intent not to use illegal drugs in the future. He successfully mitigated the security concerns about drug involvement. He also gave one false answer on a security clearance application in 2003. His actions were negligent, but not deliberate, and the government failed to make its case about personal conduct. Clearance is granted.

CASENO: 06-22755.h1

DATE: 07/20/2007

DATE: July 20, 2007

In re:)	
)	
)	
-----)	ISCR Case No. 06-22755
SSN: -----)	
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
CHRISTOPHER GRAHAM**

APPEARANCES

FOR GOVERNMENT

Francisco Mendez, Esq., Department Counsel

FOR APPLICANT

Robert R. Sparks, Esq.

SYNOPSIS

Applicant is a 45-year-old deputy program manager employed by a federal contractor. He smoked marijuana six times in 2001. After obtaining a security clearance, in 2004, he smoked marijuana once. The drug use is not recent, he no longer associates with other persons involved, and he signed a statement of intent not to use illegal drugs in the future. He successfully mitigated the security concerns about drug involvement. He also gave one false answer on a security clearance application in 2003. His actions were negligent, but not deliberate, and the government failed to make its case about personal conduct. Clearance is granted.

STATEMENT OF THE CASE

On April 12, 2005, Applicant submitted a Security Clearance Application (SF 86).¹ The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by 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, DOHA issued a Statement of Reasons (SOR) on December 22, 2006, detailing the basis for its decision – security concerns raised under Guideline H (Drug Involvement) and Guideline E (Personal Conduct) of the Directive. The President issued revised adjudicative guidelines (AG) on December 30, 2005. DoD implemented them on September 1, 2006. Pending official amendment/reissue of DoD Directive 5220.6, the AG are to be used in all cases when the SOR is dated on or after September 1, 2006. Because the SOR was issued after September 1, 2006, DoD policy requires that this case proceed under the revised guidelines.

Applicant answered the SOR in writing on January 12, 2007, and elected to have a hearing before an administrative judge. The case was assigned to me on February 27, 2007, and a Notice of Hearing was dated on March 14, 2007. I convened a hearing on April 4, 2007, to consider whether it is clearly consistent with the national interest to issue Applicant a security clearance. The government offered four exhibits, marked as Exhibits 1-4. Applicant offered fifteen exhibits, marked as Exhibits A-K and M-P. The government objected to Exhibit D, which was overruled. All other exhibits were admitted without objection. DOHA received the transcript (Tr.) on April 12, 2007.

FINDINGS OF FACT

Applicant admitted the allegations contained in the SOR. The admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 45-year-old deputy program manager employed by a federal contractor.² He is married and has three children.³ He has a masters in business administration (MBA) in management.⁴ He has no prior military service and was granted a security clearance in 2003.⁵

Applicant was employed in the financial industry for 19 years prior to the events of September 11, 2001. In November 2001, his employer laid off 400 people, including Applicant. The company's offices were destroyed in the World Trade Center collapse. He also lost a close friend, and his mother was hospitalized with a nervous breakdown. During this time, he used

¹Government Exhibit 1 (Security Clearance Application, dated April 12, 2005).

²Tr. at 13, 39.

³*Id.* at 15.

⁴*Id.* at 13.

marijuana approximately 6 times, due to the stress. There were other friends who had also lost jobs and lost friends in the tragic events. This group of friends would socialize and on occasion smoke marijuana. This lasted between one and two months. He moved when he found employment, and has not seen these people since 2001.⁶

He found work in October 2002, and his employer required a drug test. He passed the test. In March 2003, he accepted employment, with his current employer, and again passed a drug test, which was a condition of employment.⁷ He was granted a security clearance on July 18, 2003.

In November 2004, Applicant and his wife were on a camping trip with some couples that they recently met. One evening after the children were in bed, applicant was sitting around the campfire talking with some of the men. At some point, someone lit up a marijuana cigarette and started passing it around. Without thinking, Applicant took a couple puffs and passed it on. At that point, his wife told him what he had just done. He immediately left the area, and he and his wife retired for the evening. There was no evidence prior to that evening, nor did he expect, that this group would be smoking marijuana. After that trip, Applicant his wife disengaged from the people, and only see them sometimes at school events.

On April 14, 2003, applicant executed a security clearance application (SF 86), and he answered “No” to the following question: “**Question 27. Your Use of Illegal Drugs and Drug Activity - Illegal Use of Drugs** Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, domestic law alone, tranquilizers, etc.), hallucinogenic (LSD, PCP, etc.), or prescription drugs?” He failed to disclose his marijuana use in the late fall of 2001.

In 2005, Applicant submitted an application with a federal government agency, and took and passed a drug screen.⁸ He was required to complete a SF 86. In filling out the form, he noticed for the first time that question 27 asked about drug use for the last seven years. He realized he had misread the SF 86 he completed in 2003. Most employee applications in the financial community generally went back only for a 12 month period.⁹ He had no knowledge of the security clearance process. In the 2005 application, he correctly listed his marijuana usage in 2001 and 2004.¹⁰

Applicant took full responsibility for his mistakes. He signed a statement of intent with automatic revocation of clearance for any future violation of Guideline H (drug involvement.)¹¹ If

⁶*Id.* at 14-17.

⁷*Id.* at 18-20.

⁸*Id.* at 26.

⁹*Id.* at 56-58.

¹⁰*Id.* at 27-32.

¹¹ Applicant’s Exhibit I (Statement of Intent, dated January 12, 2007) at 1; Tr. at 38-39.

he were exposed to illegal drug use anywhere, he would remove himself from the situation.¹² When he received the SOR, he reported it to his employer's ethics committee, which referred him to the director of security. Applicant talked to the director of security and followed his advice regarding the process.¹³

The vice president and division manager of Applicant's employer testified that he was surprised when Applicant told him about the SOR. He said it was out of character, and he advised him to work through the system as hard as he could and be as straightforward and honest as he had been. He believed the incidents were lapses of judgment, he saw no change in character from the person that he hired, and felt that there was no discrepancy between the person he hired and in the person that had been working for him. Applicant's performance had significantly increased. He wanted Applicant to continue to work for him. The witness has held a security clearance since 1966, and he believed that Applicant should be granted a clearance.¹⁴

POLICIES

In an evaluation of an applicant's security suitability, an administrative judge must consider the "Adjudicative Guidelines for Determining Eligibility For Access to Classified Information" (Guidelines). In addition to brief introductory explanations for each guideline, the guidelines are divided into disqualifying conditions and mitigating conditions, 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. Guidelines ¶ 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 present, favorable and unfavorable, in making a decision.¹⁵

Specifically, an administrative judge should consider the nine adjudicative process factors listed at Guidelines ¶ 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."

¹²Tr. at 60-61.

¹³*Id.* at 35-37.

¹⁴*Id.* at 66-69.

¹⁵Guidelines ¶ 2(c).

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.”¹⁶ 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.”¹⁷ The Government initially has the burden of producing evidence to establish a case which demonstrates, 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 and prove a mitigating condition. Directive ¶ E3.1.15 provides, “The applicant is responsible for presenting witnesses and other 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.” The burden of disproving a mitigating condition never shifts to the government.¹⁸

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 and the guidelines include, by necessity, consideration of the possible risk that 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.¹⁹

¹⁶Guidelines ¶ 2(b).

¹⁷“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).

¹⁸*See* ISCR 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).

¹⁹Executive Order 10865, § 7.

CONCLUSIONS

Guideline H—Drug Involvement

Guidelines ¶ 24. The Concern. 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.

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

Guidelines ¶ 25. Conditions that could raise a security concern and may be disqualifying include:

- (a) any drug abuse (see above definition); and
- (g) any illegal drug use after being granted a security clearance.

Applicant admitted smoking marijuana six times in 2001, and one time in 2004. Applicant admitted that he smoked marijuana one time, while holding a security clearance.

Guidelines ¶ 26. Conditions that could mitigate security concerns include:

(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 and him) changing or avoiding the environment where drugs were used;

(3) an appropriate period of abstinence; and

(4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant's marijuana use in 2001 is understandable considering the circumstances of dealing with the collapse of the World Trade Center, the loss of his job, the loss of his best friend, and the hospitalization of his mother. Several other acquaintances had similar problems. It's plausible to see Applicant sitting around with these persons, consoling each other by sharing alcohol and an occasional joint. He no longer associates with these people. It occurred five years ago and is not recent. The other use in 2004 was an aberrational event. Applicant got caught up in the moment around the campfire when someone passed a joint. He took two puffs, passed it along, and at that point, his wife interrupted him and asked him what he was thinking about. He realized his mistake, withdrew, and they have had no further social contact with these people. Applicant stated his intent not to use drugs in the future, and signed a statement of intent that provides automatic revocation of

his clearance for any drug violation. I find that Guidelines ¶ 26 (a), (b) (1,3,and 4) apply and I conclude guideline H for Applicant.

Guideline E—Personal Conduct

Guidelines ¶ 15. The Concern. 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.

Guidelines ¶ 16. Conditions that could raise a security concern and may be disqualifying include:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant admitted that he answered Question 27. incorrectly on the 2003 security clearance application. He explained that in his 19 year history with financial industry, it's a question about drugs appeared on an employment application, it normally only ask for drug use in the past 12 months. He admitted he did not read the form carefully, and he was commuting several hundred miles between his old and new jobs. I characterize his conduct as negligent, but not deliberate, and therefore the government has failed to make its case under guideline E.

If, assuming *arguendo*, that the government did make its case, then the following mitigating conditions apply to mitigate the security concerns:

Guidelines ¶ 17. Conditions that could mitigate security concerns include:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(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;

(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; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant corrected his mistake regarding question 27 on his 2005 security clearance application. He answered questions truthfully to DSS investigators, he self-reported to his company's ethics committee. Based on the testimony of his division manager, his employer believes

that the offenses did not cast doubt on Applicant's reliability, trustworthiness, or good judgment. He has acknowledged the behavior and the stressors and circumstances of the 2001 marijuana use no longer exist. He no longer associates with the persons that provided the marijuana in 2004. Such behavior is unlikely to recur.

Whole Person Analysis

“The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance.”²⁰ “Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.”²¹ In evaluating Applicant's case, in addition to the disqualifying and mitigating conditions, I also considered the “whole person” concept in evaluating Applicant's risk and vulnerability in protecting our national interests.²² I considered his age (45), his education which includes a MBA, his employment, and what might motivate him to be less than truthful. Applicant supplied a false answer on a security clearance application. This is problematic because candor with the government about a person's negatives is the crux of a trustworthiness determination. If a person discloses the adverse information about himself, then he may be trusted with confidential or classified information. Applicant was unfamiliar with the security clearance process. He had spent 19 years in the financial industry where the only questions about drug use asked for the prior 12 month period. It is reasonable to believe that given the impact of 9/11 and the loss of one's job, a group might join together to drown their sorrows with beer and a few joints get passed around.

Likewise, he's sitting around the campfire on a camping trip, engrossed in discussion, and someone passes a joint. Without thinking, he takes two puffs, passes it on, and then his wife brings him back to reality. He no longer associates with these people, and he signed a statement of intent not to use drugs in the future. I am confident this aberrational behavior will not happen again. He has become a vital part of his company's team as demonstrated by his division program manager's testimony. The totality of the record raises no reasonable and persistent doubts about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. I conclude it is clearly consistent with the national interest to grant or continue Applicant's security clearance.

FORMAL FINDINGS

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

Paragraph 1. Guideline H: FOR APPLICANT

Subparagraph 1.a: For Applicant

²⁰Directive ¶ E.2.2.1.

²¹*Id.*

²²*Id.*

Subparagraph 1.b: For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.a: For Applicant

DECISION

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

Christopher Graham
Administrative Judge