



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
-----) ISCR Case No. 06-22755
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Francisco Mendez, Esquire, Department Counsel
For Applicant: Robert R. Sparks, Esquire

January 31, 2008

Decision on Remand

HARVEY, Mark W., Administrative Judge:

Applicant mitigated security concerns regarding his marijuana use and failure to provide accurate information on his security clearance application. Clearance is granted.

Statement of the Case

On April 12, 2005, Applicant submitted a Security Clearance Application (SF 86).¹ On December 22, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him,² pursuant to Executive Order 10865,

¹Government Exhibit (GE) 1 (Security Clearance Application, dated April 12, 2005). For convenience, the security clearance application in this decision will be called an SF 86. There is no allegation of falsification of the 2005 SF 86.

²Exhibit I (Statement of Reasons (SOR), dated Dec. 22, 2006). Exhibit I is the source for the facts in the remainder of this paragraph unless stated otherwise.

Safeguarding Classified Information Within Industry, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified and revised.³ The SOR alleges security concerns under Guidelines H (Drug Involvement) and E (Personal Conduct). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In an answer dated January 12, 2007, and received at DOHA on January 22, 2007, Applicant responded to the SOR allegations, and elected to have his case decided at a hearing.⁴ The case was assigned to Judge Graham on February 27, 2007. A hearing was held on April 4, 2007. At the hearing, the Government offered four exhibits (GE 1-4), and Applicant offered 15 exhibits (AE A-K and M-P). The Government objected to consideration of AE D⁵ because OPM's opinion that there were no security issues is not relevant (R. 30). Judge Graham overruled the Government objection (R. 30).⁶ All other exhibits were admitted without objection. DOHA received the transcript (R.) on April 12, 2007. Judge Graham issued his decision granting a clearance on July 20, 2007.

Appellate Litigation

The Government appealed Judge Graham's decision.⁷ On December 17, 2007, the Appeal Board remanded the Applicant's case for a new decision. The Appeal Board's sustained Judge Graham's decision that Applicant had mitigated the security concerns pertaining to the allegation that he omitted information from his 2003 SF 86 stating:

The Judge's favorable conclusion under Guideline E is sustainable given the fact that the omission on his 2003 SF 86 was an isolated incident, it occurred at a time when Applicant was unfamiliar with the security clearance process, prior to being asked about the omission Applicant

³On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guideline to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006. The revised Adjudicative Guidelines are applicable to Applicant's case.

⁴Exhibit II (Applicant's response to SOR, dated Nov. 12, 2006).

⁵ AE D is an Office of Personnel Management (OPM) document indicating that as of August 31, 2005, there were no security issues concerning Applicant's background.

⁶I will consider the OPM document (AE D) for the limited purpose of showing that OPM did not find any security issues in addition to those currently discussed in this opinion.

⁷The briefs filed by the parties were not part of the file provided to me.

subsequently provided the correct information in response to the same question on his 2005 SF 86, and Applicant had otherwise favorable character recommendations. On this record, the Judge could plausibly conclude that Applicant's explanations were not unreasonable when viewed in their time sequence and context, and Applicant's initial lack of awareness of the seriousness of the issue. Therefore, the Judge's conclusion, although not the only reasonable interpretation in that regard, is not *per se* arbitrary, capricious, or contrary to law.

ISCR Case No. 06-22755 (App. Bd. Dec. 17, 2007) at 3-4.

In regard to the Guideline H security concerns, the Appeal Board noted that Applicant had provided evidence which might support application of several mitigating conditions; however, Judge Graham's opinion contained "problematic" language concerning Applicant's rationale for using marijuana. The Appeal Board stated:

(2) Guideline H. The Judge's analysis of Applicant's conduct under Guideline H is problematic. The record contains significant evidence which could arguably support a favorable application of Guideline H Mitigating Conditions 26 (a) and (b), including the fact that Applicant had used marijuana on only a few occasions, that his last use occurred in 2004, that his use had happened under unusual circumstances that were not likely to recur, that he had disassociated himself from drug using individuals and the environment where drugs were used, and that he had signed a statement of intent with automatic revocation of clearance for any future violations.

However, in his conclusions, the Judge used language which could be construed as not being consistent with DoD policy or prior Appeal Board decisions, in particular, describing illegal drug use in a way that suggested it was "reasonable" under certain circumstances. The objectionable nature of the language significantly detracts from the Judge's overall analysis of Applicant's circumstances and leaves the decision unsustainable as written.

Id. at 4 (footnotes omitted).

The Appeal Board remanded Applicant's case "for the issuance of a new decision which analyzes Applicant's conduct under Guideline H in a manner consistent with DoD policy, prior Appeal Board decisions, and the provisions of the Directive." *Id.* I will briefly state facts pertaining to the Guideline E allegation in the Findings of Fact, because they explain how the marijuana use was disclosed. These facts are also relevant to credibility and the "Whole Person Concept." However, I will not discuss the Guideline E allegation, or restate Judge Graham's findings or conclusions in the Analysis or the Formal Findings sections of this decision.

Findings of Fact

As to the SOR's factual allegations, Applicant admitted in his response to the SOR that he used marijuana in late 2001, and in the fall of 2004, while holding a security clearance. He also admitted that he failed to disclose the marijuana use in 2001 when he completed his 2003 SF 86. His response to the SOR also provided mitigating information concerning the SOR allegations. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 45 years old (R. 45). On March 17, 2003, he began his current employment and was granted a security clearance in July 2003 (R. 63). He is currently a deputy program manager employed by a federal contractor (R. 13, 39). Prior to the start of his government Applicant was employed on Wall Street for 19 years (R. 13), and as a cargo manager at a large airport (R. 18). He has been married for 18 years, and has three boys, ages 10, 12 and 14 (R. 15). He has a masters degree in business administration (R. 63). Applicant has no prior military service.

Marijuana Use

On September 12, 2001, the day after the World Trade Center collapse, Applicant's office building collapsed (R. 14). He lost a close friend in the attack (R. 15), and his mother was hospitalized with a nervous breakdown. In November 2001, Applicant's employer laid him off, along with about 400 other employees (R. 14). Applicant was socializing with other workers from the financial industry. Some of the workers had lost friends on 9/11, and/or were unemployed (R. 16-17). Marijuana use occurred in this group. Applicant used marijuana approximately six times, during an approximately 60-day period (R. 16-17, 51). He said the decision to use marijuana was due to stress (R. 16). He recognized that he was associating with the wrong type of people (R. 16). He moved when he found employment and has not associated with the marijuana users in New York since 2001 (R. 25).

In November 2004, Applicant and his wife were on an overnight camping/rafting trip with about 40 people from a church group that they had recently met (R. 21-23). One evening after the children were in bed, Applicant was sitting around the campfire talking with some of the men (R. 23). At some point, someone lit up a marijuana cigarette and started passing it around (R. 23). Without considering the ramifications of using marijuana, Applicant took a couple puffs and passed it on. At that point, his wife told him what he had just done (R. 24), and she gave him "hell for it" (R. 50). 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 (R. 24). After that trip, Applicant and his wife ended their association from the people who were on the camping trip (R. 25). He currently only sees them occasionally at school events (R. 25). He described his decision to use marijuana in 2004 as a "bad decision" and a "lapse in judgment" (R. 23-24, 38). He recognized almost immediately after using the marijuana that it was illegal, and during the confrontation with his wife, he

recognized his misconduct was aggravated by his holding a security clearance (R. 24, 49-50).⁸ He did not consider a single use of marijuana to be drug “abuse” because he equated drug abuse with drug addiction (R. 49).

Applicant took responsibility for his lapses in judgment concerning his marijuana use (R. 39, 60-61). He passed his employer’s drug test in 2002 (R. 18-19). In March 2003 Applicant accepted employment with his current employer and again passed a drug test, which was a condition of employment (R. 19-20; AE A). In 2005, he passed another employment-related drug test (R. 30-31; AE B, E). He said if he was exposed to drug use in the future, he would remove himself from the location (R. 38). He signed a statement of intent with automatic revocation of clearance for any future violation of Guideline H (Drug involvement) (R. 39). He denied that he would use drugs in the future, citing the importance of his security clearance and desire to be a role model for his children (R. 60).

2003 and 2005 Security Clearance Applications

On April 14, 2003, Applicant executed his 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, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.) or prescription drugs?”

Applicant described the completion of the 2003 SF 86 as “rushed” and contended he overlooked the requirement for seven years of information about marijuana use (R. 55-56). He did not leave out the drug information because he was worried about being hired, as a security clearance was not a prerequisite for the employment (R. 57). He denied that he deliberately omitted information about his 2001 marijuana use (R. 58).

In 2005, Applicant submitted an application with a federal government agency and took and passed a drug screening test (R. 26; AE B). He was also required to complete a SF 86. In filling out 2005 SF 86, he noticed for the first time that Question 27 asked about drug use for the last seven years (R. 28-29). 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 (R. 28-29, 56). In 2003, he had no knowledge of the security clearance process. In the 2005 application, he correctly listed his marijuana usage in 2001 and 2004 (R. 18, 28). On December 12, 2005, he provided a statement to an OPM investigator that was consistent with his description of his drug use at the hearing (R. 33; AE G).

⁸ A contractor-managed training program informed Applicant that use of marijuana while holding a security clearance was forbidden (R. 48).

The vice president and division manager of Applicant's corporation has been employed by that corporation for 13 years, and he has held a security clearance since 1966 (R. 65, 69). He supervises approximately 100 personnel (R. 66). Applicant worked for him for about four years, and his office is three doors down from Applicant's office (R. 66-67). He was surprised when Applicant told him about marijuana use and the omission of his drug use from his 2003 SF 86 (R. 67). He believed it was out of character (R. 67). He advised Applicant to work through the system, and continue to be straightforward and honest (R. 67). He believed the incidents were lapses of judgment, he saw no change in character from the person that he hired, and he felt that there was no discrepancy between the person he hired and in the person that had been working for him (R. 68). Applicant's performance had significantly increased. He described Applicant's work as excellent, and he wanted Applicant to continue to work for him (R. 69). He recommended that Applicant be granted a clearance (R. 69).

Applicant's performance appraisals laud his hard work, dedication and initiative (AE O-P). His performance is described as outstanding and superb. He is an important asset to the corporation. He has strong leadership skills and is a role model for other employees.

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by “substantial evidence,”⁹ demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant’s access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence “to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).¹⁰

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the 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 provides that 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.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

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

⁹ See Directive ¶ E3.1.14. “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).

¹⁰ “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).

Guideline ¶ 24 articulates the Government's concern concerning drug¹¹ involvement stating, "[u]se of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations."

Three drug involvement disqualifying conditions could raise a security concern and may be disqualifying in this case: "any drug abuse,"¹² "illegal drug possession," and "any illegal drug use after being granted a security clearance." AG ¶¶ 25(a), 25(c), and 25(g). The other five disqualifying conditions listed in AG ¶ 25 are not applicable. These three disqualifying conditions apply because Applicant used marijuana in 2001 and 2004. His 2004 marijuana use occurred while he was holding a security clearance. His 2004 marijuana use breached the government's trust encompassed by holding a security clearance and raises especially serious security concerns.

The Government produced substantial evidence of these three disqualifying conditions, and the burden shifted to Applicant to produce evidence and prove mitigation. AG ¶ 26 provides for potentially applicable drug involvement mitigating conditions:

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

¹¹Guideline ¶ 24(a) defines "drugs" as substances that alter mood and behavior, including:

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

Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule I controlled substance. Sch. I (c)(10).

¹² Guideline ¶ 24(b) defines "drug abuse" as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction."

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended;

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Security concerns can be mitigated based on AG ¶ 26(a) by showing that the drug offenses happened so long ago, were so infrequent, or happened under such circumstances that they are unlikely to recur 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). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. 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."¹³

AG ¶ 26(a) does not fully apply because Applicant's last marijuana use was in November 2004, which is still relatively recent.¹⁴ His overall marijuana use included a

¹³ ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge's decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle changes and therapy. For the recency analysis the Appeal Board stated:

Compare ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the Administrative Judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) ("The Administrative Judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.") (citation format corrections added).

¹⁴ In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, considered the recency analysis of an Administrative Judge stating:

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

relapse from his previous marijuana abuse in 2001.¹⁵ This mitigating condition is not fully applicable. However, he receives some credit for only using marijuana once in November 2004, for not using any drugs thereafter, and based on his commitment not to use drugs in the future.¹⁶ Based on all the facts and circumstances, he has met his burden of establishing that his drug use will not recur, and because he will not use drugs his current reliability, trustworthiness and good judgment is not undermined.

AG ¶ 26(b) lists four ways Applicant can demonstrate his intent not to abuse illegal drugs in the future. He has “significantly” disassociated from drug-using associates and contacts; avoided the environment where drugs were used; abstained from drug abuse since November 2004; and signed a statement of intent with automatic revocation of clearance for any violation. He only used marijuana once in 2004, and did not use any other illegal drugs after completing his SF 86. Guideline ¶ 26(b) is applicable and significantly mitigates the security concerns involving his drug involvement.

AG ¶ 26(c) is not applicable because his abuse of marijuana did not follow an illness, and marijuana was never prescribed for him. AG ¶ 26(d) is not applicable because he has not completed a prescribed drug treatment program, and there has not been a favorable prognosis by a duly qualified medical professional.

Applicant has permanently committed to abstaining from illegal drug use. He has dissociated from those who abuse drugs. He did not disclose any internal motivation to refrain from drug abuse, but the motivations to stop using drugs are evident.¹⁷ He has shown or demonstrated a sufficient track record of no drug abuse.

¹⁵ In ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004), the Appeal Board reversed an unfavorable security clearance decision because the Administrative Judge failed to explain why drug use was not mitigated after the passage of more than six years from the previous drug abuse. In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board explained:

[W]here an applicant had extensive marijuana use and renewed marijuana use after periods of abstinence, a Judge may articulate a rational basis for doubts about whether the most recent period of abstinence was sufficient to conclude the applicant had put marijuana use behind them. See e.g. ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004).

¹⁶ See whole person analysis, *infra*. See ISCR Case No. 04-07360 at 2, 3 (App. Bd. Sep. 26, 2006) (indicating when a mitigating condition cannot be fully applied, “some credit” is still available under that same mitigating condition).

¹⁷ Retention of a security clearance, potential criminal liability for possession of drugs and adverse health, employment, and personal effects resulting from drug use are among the strong motivations for remaining drug free.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 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." Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

Applicant's marijuana abuse was knowledgeable and voluntary. He was 41 years old when he last used marijuana, and was sufficiently mature to be fully responsible for his conduct. Abuse of drugs is not prudent or responsible. Abuse of marijuana violates state criminal laws. Use of marijuana violates DoD policy. His marijuana use, while holding a security clearance, is particularly aggravating, and weighs heavily against granting or continuing his security clearance.

There is substantial evidence that mitigates his conduct. The likelihood of future drug abuse is minimal. Sufficient time has elapsed since his last marijuana use in November 2004 to provide some assurance that he will not use drugs again. He provided evidence of remorse, or regret concerning drug abuse. His record of good employment weighs in his favor. His wife is against drug abuse, and he does not associate with drug abusers. He provided a signed statement of intent with automatic revocation of clearance for any violation. His past abuse of illegal drugs does not create current doubt about his judgment, reliability, and trustworthiness, and it does not call into question his current ability or willingness to comply with laws, rules and regulations.

In ISCR Case No. 05-03941 at 2-3 (App. Bd. Aug. 2, 2007), the Appeal Board sustained the Administrative Judge's grant of that Applicant's clearance, and succinctly summarized the evidence regarding drug use and mitigating evidence under the previous guidelines:

The record indicates that Applicant used marijuana with varying frequency between 1991 and 2004. Applicant also used psilocybin mushrooms between 1993 and 2003, but testified that he used them only a few times. In a signed, sworn statement dated November 18, 2004, Applicant stated that he had last used marijuana in August 2004. He stated that he now understood the impact that drug use would have on his job and that he would no longer use marijuana or mushrooms.

The Appeal Board reasoned that Applicant's drug use was mitigated "due to the passage of time (DIMC 1) and Applicant's stated intention not to use illegal drugs in the future (DIMC 3)." *Id.* The Appeal Board cited the Judge's findings:

Applicant testified credibly that he had not used marijuana since he signed the affidavit in November 2004, over two years before the hearing. The Judge based his application of DIMC 3 in part on Applicant's statement that marijuana was not worth damaging his career and in part on changes in Applicant's life-the fact that Applicant had since married and was contemplating starting a family. (internal citations omitted).

Applicant presented sufficient mitigating evidence to counter the information about his marijuana abuse. He stopped using marijuana in November 2004 and desires to maintain his drug-free status in the future. He voluntarily and candidly disclosed his marijuana abuse on his 2005 SF 86. Applicant provided the only record evidence showing his marijuana abuse. The absence of evidence of any prior violation of his employer's rules or requirements, and his sincerity about making future progress weigh in his favor. Abstaining from drug abuse for about three years shows significant efforts to establish his responsibility and rehabilitation.

In sum, the likelihood of recurrence is low because there is evidence about improvement in his understanding of his situation. Although he did not receive counseling or therapy, he does have a clear perception of, or understanding about, how to avoid problematic situations and why he abused drugs. After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude he has mitigated the security concerns pertaining to drug involvement. The evidence leaves me without doubts as to Applicant's security eligibility and suitability.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"¹⁸ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guideline. Applicant has mitigated or overcome the government's case. For the reasons stated, I conclude he is eligible for access to classified information.

Formal Findings

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

Paragraph 1, Guideline H:	FOR APPLICANT
Subparagraphs 1.a to 1.b:	For Applicant

¹⁸See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

Conclusion

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 eligibility for a security clearance for Applicant. Clearance is granted.

Mark W. Harvey
Administrative Judge