



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-04777
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: John Bayard Glendon, Esquire, Department Counsel
For Applicant: Applicant's Father,¹ Personal Representative

September 10, 2008

Decision

HARVEY, Mark W., Administrative Judge:

Applicant mitigated security concerns arising under Guideline H (drug involvement). Clearance is granted.

Statement of the Case

On May 27, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant,² 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 Personnel Security Clearance Review Program* (Directive), dated January 2,

¹ Some details have not been included in order to protect Applicant's right to personal privacy. Specific information is available in the cited exhibits.

²Government Exhibit (GE) 4 (Statement of Reasons (SOR), dated May 27, 2008). GE 4 is the source for the facts in the remainder of this paragraph unless stated otherwise.

1992, as amended, modified and revised.³ The SOR alleges security concerns under Guideline H (Drug Involvement). 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 his security clearance, 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 on June 16, 2008, and elected to have his case decided after a hearing. At the hearing held on August 25, 2008, Department Counsel offered two exhibits (GEs 1 and 2), and Applicant offered four exhibits (Applicant's Exhibits (AE) A-D). There were no objections, and I admitted GE 1, 2 and AE A-D (transcript (Tr.) 26, 30, 49). I approved a delay until September 5, 2008, to permit Applicant to submit additional documents (Tr. 85-86). On September 3, 2008, I received AE E. Department Counsel did not object, and I admitted AE E. I received the transcript on September 8, 2008.

Findings of Fact⁴

Applicant admitted in his response to the SOR all of the SOR's 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 became 23 years old in August 2008.⁵ He graduated from high school in June 2003 and from college in May 2007 with a bachelors degree. From December 2007 to present, a government contractor has employed him as an associate, while he learns the technical aspects of being an analyst. An analyst repeatedly runs computer programs, and records the results (Tr. 50). From September 2007 to December 2007, he was employed at a shop as an assistant manager. He has no military service. He has never married. He is currently enrolled in graduate school, and his first class begins in late August 2008 (Tr. 27, 62; AE A). Applicant was a varsity soccer player in college and continues to play soccer in a club (Tr. 62-63).

Drug Involvement (Guideline H)

On his December 19, 2007, security clearance application, Applicant estimated he used marijuana more than 300 times between December 2001 and August 2007, a

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.

⁴Ex. GE 2 (Responses to Interrogatories) and 5 (Response to SOR) are the sources for the facts in this section unless stated otherwise.

⁵GE 1 (Electronic Questionnaire for Investigations Processing (e-QIP), dated Dec. 19, 2007, will be referred to as a security clearance application in this decision) is the source for the facts in this paragraph, and the next paragraph unless otherwise stated.

six year period (SOR ¶ 1.a) (Tr. 75). He sometimes provided marijuana to others (Tr. 77). He also admitted using prescription drugs Aderol, Morphine and Vicodin seven times between August 2003 and August 2007 without having a prescription (SOR ¶ 1.c). He used cocaine ten times between December 2004 and June 2007 (SOR ¶ 1.d). He used psilocybin or psilocin (hallucinogenic mushrooms) four times between November 2006 and June 2007 (SOR ¶ 1.e) (Tr. 75-76). He used opium once between November 2005 and December 2005 (SOR ¶ 1.f).

When Applicant played soccer for his college during the fall season, he did not use drugs because of the NCAA drug testing program (Tr. 63-64). However, he used drugs during the off season mostly out of boredom and peer pressure (Tr. 65-66, 71-72). He also knew the NCAA did not test during the off season (Tr. 65-66). When he used illegal drugs, he did not believe he would be caught by law enforcement (Tr. 72). He is able to abstain from drug use while employed by the government contractor because he knows about the employer's random drug-testing policy (Tr. 64). He does not want to disappoint his parents (Tr. 73). He recognized that drug use was selfish and narcissistic (Tr. 74).

Applicant's interim security clearance was denied in December 2007 (Tr. 59). Applicant understands the responsibilities and commitment related to holding a clearance because his father has held a clearance for years (Tr. 60). He believes he is ready to hold a clearance (Tr. 60). Applicant does not physically associate with drug users, but he still has some internet communication with drug users that he met in college (Tr. 57-58). For example, he expects to receive some e-mail greetings from drug users that he associated with in college (Tr. 58). Although some of his associates visited for a reunion a few weeks before his hearing, drugs were not used at the reunion (Tr. 67). He used marijuana in high school, and now lives in the vicinity of his high school (Tr. 69). He rarely sees anyone he knows from high school (Tr. 69). Because he associates with numerous soccer players, it is likely that he associates with drug users (Tr. 70-71). If he observed drugs being used, he would just leave the area (Tr. 67-68). He was candid and honest about his past drug use (Tr. 61). His last drug use was in August 2007 (Tr. 68). He disclosed his drug abuse to his parents (Tr. 74).

Applicant's sister is 25 (Tr. 33). She opined that Applicant has integrity, honor and displayed candor during the clearance process (Tr. 33). She concluded with respect to these attributes that he was exceptional for a 23-year-old (Tr. 33). Applicant has separated himself from his drug-using associates, who attended college with him hundreds of miles from where he currently lives (Tr. 36). She believed the last time he used illegal drugs was in August 2007, when friends from college visited him (Tr. 37).

Applicant's father did not dispute the SOR's allegations of drug use (Tr. 82-83). He emphasized that the only source of drug information was Applicant's disclosure, and that Applicant had shown candor and honesty (Tr. 82). Applicant was not caught using drugs. He emphasized Applicant's trustworthiness (Tr. 82). There was no diagnosis of drug use, or recommendation to attend a rehabilitation program (Tr. 83).

Since November 2007, Applicant's sponsor at the government contractor observes him at work on a daily basis (Tr. 39, 41). Applicant is hardworking, enthusiastic and learns quickly (AE B). Applicant shows attention to detail and is very conscientious (AE B). She believes Applicant is honest and trustworthy (Tr. 40). Applicant's drug use in college did not cause her to doubt his current reliability or trustworthiness (Tr. 44, 45). She wrote a letter of recommendation dated June 10, 2008, on his behalf (AE B; Tr. 42).

Applicant's supervisor at the government contractor, Mr. B, has supervised him since December 2007 (Tr. 47). Applicant does not currently have a security clearance (Tr. 56). Mr. B's office is adjacent to Applicant's office (Tr. 51). Mr. B has worked for the contractor more than 29 years, and has held a Top Secret clearance for most of those 29 years (Tr. 50, 52). Applicant exceeded nearly all of Mr. B's expectations (AE C). He learns quickly and is goal oriented (AE C). Applicant's drug use was a concern that warranted observation (Tr. 53). Mr. B believes Applicant had terminated his drug use (Tr. 55). Applicant's employer drug tests employees before they are hired, and thereafter they are randomly drug tested (Tr. 54). There is zero tolerance for drug use and the result of drug use is usually immediate dismissal (Tr. 54). Mr. B verified the accuracy of Applicant's performance appraisal (Tr. 48-49; AE C). Applicant is trustworthy (Tr. 51).

Department Counsel conceded that Applicant's statement concerning automatic revocation of his clearance if he used illegal drugs was adequate to meet the requirements of revised Adjudicative Guidelines (AG) ¶ 26(b)(4) (Tr. 78, 81; AE D), discussed *infra*.

On August 28, 2008, the President of Applicant's company, provided a letter stating at Applicant's request, the company would "facilitate random monthly drug testing for a period of twelve months" (AE E).

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines. 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,”⁶ 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).⁷

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* Executive Order 12968 (Aug. 2, 1995), Section 3.

⁶See 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).

⁷The 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).

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:

Drug Involvement (Guideline H)

AG ¶ 24 articulates the security concern concerning drug⁸ involvement:

[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.

Two drug involvement disqualifying conditions could raise a security concern and may be disqualifying in this case: "any drug abuse"⁹ and "illegal drug possession, including . . . purchase, sale or distribution [of illegal drugs]. . . ." AG ¶¶ 25(a) and 25(c). The other six disqualifying conditions listed in AG ¶ 25 are not applicable. These two disqualifying conditions apply because Applicant used and possessed marijuana, cocaine, psilocybin or psilocin (hallucinogenic mushrooms), and opium. He also used Aderol, Morphine and Vicodin without a prescription.

The Government produced substantial evidence of these two 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;

⁸AG ¶ 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. See Sch. I (c)(9). See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I). Mushrooms are the street name for psilocybin or psilocin, which is a Schedule (Sch.) I Controlled Substance. See *United States v. Hussein*, 351 F.3d 9, 16 (1st Cir. 2003) (mushrooms are a plant which may contain the Schedule I(c)(15) and I(c)(16) controlled substance psilocybin or psilocyn). Opium and cocaine are Schedule II Controlled Substances. See Sch. II(a)(3) (opium); and Sch. II(a)(4) (cocaine).

⁹ AG ¶ 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."

- (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.
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and
- (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."¹⁰

¹⁰ 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

Although Applicant's last drug use was slightly more than a year ago, AG ¶ 26(a) fully applies despite Applicant's last illegal drug use being relatively recent. His overall illegal drug use lasted approximately six years, and involved numerous uses of marijuana, and other illegal drugs.¹¹ AG ¶ 26(a) applies because his drug use does not cast doubt on his current reliability, trustworthiness, or good judgment. I am confident because of his previous demonstration that he could abstain from drug use and his company's random drug testing policy that his illegal drug possession and use will not recur. Because he will not use illegal drugs in the future, his current reliability, trustworthiness and good judgment is restored.

AG ¶ 26(b) lists four ways Applicant can demonstrate his intent not to abuse illegal drugs in the future. He has essentially disassociated from drug-using associates and contacts. He moved hundreds of miles from the location where he routinely abused illegal drugs, changing or avoiding the environment where drugs were used. He abstained from drug abuse for slightly more than one year. He provided "a signed statement of intent with automatic revocation of clearance for any violation." AG ¶ 26(b) applies.

AG ¶ 26(c) is not applicable because his drug abuse did not follow an illness, and these illegal drugs were 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.

In conclusion, Applicant ended his drug abuse in August 2007. The motivations to stop using drugs are evident.¹² He understands he will be terminated from his employment if he abuses drugs, and his company is going to randomly test him on a monthly basis for a year. He has shown or demonstrated a sufficient track record of no drug abuse to warrant access to classified information.

rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.") (citation format corrections added).

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.

¹¹In 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.

¹²Retention 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) 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.

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.¹³

The evidence against approval of Applicant's clearance is significant. Applicant estimated his marijuana use at more than 300 times between December 2001 and August 2007, a six year period. Sometimes he provided marijuana to others. He used Aderol, Morphine and Vicodin seven times between August 2003 and August 2007 without a prescription. He used cocaine ten times between December 2004 and June 2007. He used psilocybin or psilocin (hallucinogenic mushrooms) four times between November 2006 and June 2007. He used opium once between November 2005 and December 2005. He has not completely cut off his contacts with individuals who use illegal drugs. His drug uses were knowledgeable, voluntary, and not isolated. He is sufficiently mature to be fully responsible for his conduct. Drug use is not prudent or responsible. He did not receive counseling or therapy, and may not have a clear understanding about how to avoid problematic situations and why he engaged in the misconduct.

The evidence supporting approval of his clearance is more substantial. Applicant revealed his drug abuse on his security clearance application. The only evidence of his drug problem came from his admissions. I specifically find his statements about his drug use and his changes in his drug-abusing behavior are credible. Applicant was young when he used illegal drugs, and was not yet 23 at the time of his hearing. He used drugs because of boredom and peer pressure. He no longer has direct physical association with his drug-abusing peers, and if someone starts to use drugs in his presence he will leave the area. He was a student when he used drugs. Now he is in the workforce where the consequences of drug abuse will be much more severe. He

¹³ Although I find Applicant's drug abuse mitigated under AG ¶¶ 26(a) and 26(b), even if neither of these mitigating conditions fully applied, I would still mitigate the security concerns under the whole person concept.

stopped using illegal drugs slightly more than a year ago. He knows if he uses drugs he will be terminated from his employment and lose his security clearance. Especially important is the employer's promise to randomly test him on a monthly basis for a year to verify his abstinence. Future drug use, especially after his clearance is approved, will severely damage his career. Applicant has begun graduate school, and is a valued employee with excellent potential. There is no evidence at work of any disciplinary problems. There is no evidence of disloyalty or that he would intentionally violate national security. His law-abiding character and good work performance shows some responsibility, rehabilitation and mitigation. His family, a co-worker, and his supervisor supported approval of his clearance. I am satisfied that his current judgment, reliability, trustworthiness, and his current ability or willingness to comply with laws, rules and regulations warrant a security clearance. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has mitigated the security concerns pertaining to drug involvement.

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"¹⁴ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. 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.f:	For Applicant

Conclusion

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

Mark W. Harvey
Administrative Judge

¹⁴See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).