



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



In the matter of:

)  
)  
) ISCR Case No. 09-00432  
)  
)  
)

Applicant for Security Clearance

**Appearances**

For Government: Alison O'Connell, Esq., Department Counsel

For Applicant: *Pro Se*

December 18, 2009

**Decision**

HEINY, Claude R., Administrative Judge:

Applicant used marijuana from 1980 to 1984, 1988 to 1990, and August 2007 to September 2008. In August 1996, Applicant had obtained a secret security clearance. In November 2005, he obtained a top secret security clearance. Applicant has failed to rebut or mitigate drug involvement and personal conduct security concerns. Clearance is denied.

**Statement of the Case**

Applicant contests the Defense Department's intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,<sup>1</sup> the Defense Office of Hearings and Appeals (DOHA) issued a

---

<sup>1</sup> Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative

Statement of Reasons (SOR) on July 9, 2009, detailing security concerns under drug involvement and personal conduct.

On August 7, 2009, Applicant answered the SOR and elected to have the matter decided without a hearing. Department Counsel submitted the government's case in a File of Relevant Material (FORM), dated September 9, 2009. The FORM contained nine attachments described as "Items." On September 23, 2009, Applicant received a copy of the FORM, along with notice of his opportunity to file objections and submit material to refute, extenuate, or mitigate the potentially disqualifying conditions.

Responses to the FORM are due 30 days after receipt of the FORM. Applicant's response was due on November 25, 2009. As of December 2, 2009, no response had been received. On December 7, 2009, I was assigned the case.

### **Findings of Fact**

In Applicant's Answer to the SOR, he admits the factual allegations in the SOR. Applicant's admissions to the SOR allegations are incorporated herein. After a thorough review of the record, pleadings, and exhibits, I make the following findings of fact:

Applicant is a 51-year-old software design engineer who has worked for a defense contractor since September 2001, and is seeking to maintain a secret security clearance. In August 1996, Applicant obtained a secret security clearance. (Item 5, page 6 of 10) In November 2005, he was granted a top secret security clearance. (Item 9)

In July 2005, Applicant was interviewed concerning his marijuana usage. (Item 6) Applicant used marijuana from 1980 to 1984 and 1988 to 1990. He used marijuana two or three times a week, spending \$50 per month for marijuana. (Item 6) In January 1983, Applicant was arrested and charged with possession of marijuana. He was fined. Applicant reported this offense on his Security Clearance Application, Standard Form (SF) 86. (Item 5) He did not use marijuana from 1984 to 1988 because it was not available. In 1990, he voluntarily attended counseling concerning his marijuana use. He attended counseling once a week for approximately a year and a half. As of July 2005, Applicant had no intention to use illegal drugs in the future.

Applicant suffered from anxiety and a lack of sleep. From 1999 to 2002, he was prescribed Prozac. In August 2007, when he thought his medication was not working as it should, he decided to "self-medicate" with marijuana. (Item 6) His medication was changed from Prozac to Paxil. Applicant used marijuana from August 2007 to September 2008. Applicant obtained marijuana from his nephew and used it twice a week. The marijuana helped him to sleep. In May 2008, he stopped smoking marijuana. (Item 6)

---

guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

In June 2008, Applicant self-reported his marijuana usage and sought help from his company's employee assistance program to refrain from using marijuana and to resolve his anxiety. (Item 6) From June 2008 through November 2008, he was treated by a licensed clinical social worker for a condition diagnosed, in part, as cannabis abuse. (Item 8) Applicant asserts he last used marijuana in September 2008, three months after he began counseling. (Item 4)

### **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 must be considered 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 overarching adjudicative goal is a fair, impartial and commonsense 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.

Under Directive ¶ E3.1.14, the government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, 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. . . ." The applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

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**

### **Drug Involvement**

Adjudicative Guideline (AG) ¶ 24 expresses the security concern pertaining to drug involvement in that the 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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying:

- (a) any drug abuse;
- (b) testing positive for illegal drug use;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;
- (d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;
- (e) evaluation of drug abuse or drug dependence by a licensed clinical social worker who, is a staff member of a recognized drug treatment program;
- (f) failure to successfully complete a drug treatment program prescribed by a duly qualified medical professional;
- (g) any illegal drug use after being granted a security clearance; and
- (h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

Applicant used marijuana from 1980 to 1984, 1988 to 1990, and August 2007 to September 2008. In 1983, he was arrested, charged, and fined for possession of marijuana. His arrest and fine did not stop his marijuana usage. It was not until 1984 that he first stopped using marijuana and that period of non-use lasted only four years. In 1996, Applicant had obtained a secret clearance, and in 2005, he obtained a top secret clearance. Even with a clearance, Applicant used marijuana. In June 2008, he was diagnosed with cannabis abuse. AG ¶ 25(a) drug abuse, AG ¶ 25(c) possessing and purchasing illegal drugs, AG ¶ 25(e) evaluation of drug abuse or drug dependence by a licensed clinical social worker, and AG ¶ 25(g) any illegal drug use after being granted a security clearance, apply.

In 1990, Applicant received counseling for his marijuana use and again from June 2008 through November 2008, Applicant received treatment. I do not find Applicant's seeking treatment to be a disqualifying condition. I find for him as to SOR ¶¶ 1(d) and 1(e).

AG ¶ 26 sets forth conditions that could mitigate security concerns:

(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;

(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.

None of the conditions that could mitigate security concerns apply. AG ¶ 26(a) does not apply because Applicant use was frequent and recent. AG ¶ 26(b) does not apply. Applicant asserts he will no longer use marijuana. Because Applicant chose to have this matter handled administratively, I am unable to: test the veracity of his assertions; to evaluate his demeanor, appearance, or to form a positive determination as to his truthfulness; to find Applicant was sincere, open, and honest. Applicant last used marijuana in September 2008, slightly more than one year ago. This period of abstinence is insufficient to insure Applicant will not return to using marijuana. Additionally, Applicant had abstained from marijuana usage for 17 years before using marijuana again. Applicant has not signed any statement of intent with automatic revocation of clearance for any violation.

AG ¶ 26(c) does not apply because prescription drugs were not abused. AG ¶ 26(d) does not apply because there is no favorable prognosis by a duly qualified medical professional.

### **Personal Conduct**

AG ¶ 15 explains why personal conduct is a security concern stating:

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.

With respect to the personal conduct concerns involving Applicant's marijuana use after being granted a clearance (SOR ¶ 2.b), the pertinent disqualifying condition is AG ¶ 16(d)(3), a pattern of rule violations. Marijuana use while holding a security clearance violated important civil and criminal rules in our society, and a history of such problems is conduct a person might wish to conceal, as it adversely affects a person's professional and community standing.

AG ¶ 17 provides seven conditions that could mitigate security concerns in this case:

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

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; 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.

None of the mitigating conditions apply. AG ¶ 17(a) does not apply because omission, concealment, or falsification was not alleged. AG ¶ 17(b) does not apply because there was no allegation of refusing or failing to cooperate with the security clearance process. AG ¶ 17(c) does not apply because Applicant used marijuana after having obtained a clearance and that use occurred slightly more than one year ago. Applicant used marijuana to self-medicate his problem with anxiety. His marijuana use was not infrequent nor did it happen under such unique circumstances that it is unlikely to recur or does not cast doubt on the his reliability, trustworthiness, or good judgment.

Applicant self-reported his marijuana usage and sought help from his company's employee assistance program to help him refrain from using marijuana and to resolve his anxiety. AG ¶ 17(d) partially applies. Applicant has expressed his desire to refrain from marijuana use and sought counseling. In 1990, Applicant received counseling and had no intention to use illegal drugs in the future. However, he returned to marijuana usage. He again received counseling and again intends to refrain from using marijuana.

In AG ¶ 17(e), "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress" does not apply to Applicant's marijuana use after being granted a clearance. There is no showing Applicant has taken positive steps to eliminating any vulnerability to exploitation, manipulation or duress. Any personal conduct security concerns pertaining to his marijuana use after being granted a clearance is dealt with more thoroughly under the specific, pertinent guidelines. For example, drug use is best addressed under the drug involvement guideline in this decision.

Because Applicant chose to have this matter handled administratively, I am unable to find Applicant has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress. AG ¶ 17(f) does not apply because the information was substantiated. AG ¶ 17(g) does not apply. There is no showing Applicant has ceased his involvement with persons involved in criminal activity. The only alleged person involved in criminal contact was Applicant's nephew from which Applicant purchased his marijuana. Applicant's current contact with is nephew is unknown.

## **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 relevant 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant used marijuana periodically. He used it after being arrested for possession and after periods where he abstained or refrained from using it for years. His use occurred over a 27-year period. From 1980 until 1994, Applicant used marijuana, then abstained from using it for four years before using again. He used marijuana again for two years before a 17-year period where he abstained or refrained from its use. In August 2007, he again started using marijuana. His only explanation for using marijuana was that he suffered from anxiety and his medication was not working.

Applicant's use of illegal drugs is serious and recent. He did not satisfactorily explain why he returned to marijuana use after such a long absence or why he used marijuana after having obtained his security clearance. I am unable to find that illegal drugs are no longer a part of his life. Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance.



For all these reasons, I conclude Applicant failed to mitigate the security concerns arising from his illegal drug usage and personal conduct.

### **Formal Findings**

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

Paragraph 1, Drug Involvement:	AGAINST APPLICANT
--------------------------------	-------------------

Subparagraphs 1.a – 1.c:	Against Applicant
--------------------------	-------------------

Subparagraphs 1.d and 1.e:	For Applicant
----------------------------	---------------

Subparagraph 1.f:	Against Applicant
-------------------	-------------------

Paragraph 2, Personal Conduct:	AGAINST APPLICANT
--------------------------------	-------------------

Subparagraph 2.a:	Against Applicant
-------------------	-------------------

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

---

CLAUDE R. HEINY II  
Administrative Judge