



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



In the matter of:)	
)	
SSN:)	ISCR Case No. 09-07877
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: *Pro se*

September 30, 2010

Decision

MASON, Paul J., Administrative Judge:

After illegally using marijuana periodically from 1984 to 1988, Applicant stopped using the drug from 1988 to 1998 because he was granted a security clearance to work on classified projects. After surrendering his security clearance and being read out of classified projects in 1998, he resumed periodic marijuana use at varying frequencies from 1998 to at least August 2009. From late 2005 or early 2006 to July 2009, Applicant combined his marijuana use with periodic use of ecstasy. Unlike his definitive intentions against future ecstasy use, Applicant has not convincingly demonstrated he will use no marijuana in the future under any circumstances. Combined with an insufficient period of abstinence from illegal drug use, Applicant has not provided sufficient evidence to overcome his illegal marijuana use. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted his most recent Security Clearance Application (SCA, GE 1) on May 9, 1993. He submitted a more recent SCA on August 25, 2009. He was interviewed by an investigator from the Office of Personnel Management (OPM) on

October 7, 2009. (GE 3) In his interrogatory answers submitted to the Government on December 29, 2009, Applicant agreed with the investigator's summary of his October 2009 interview, and that it could be used in a security clearance hearing to determine his security suitability. (Interrogatory answers, GE 4) In supplemental interrogatory answers dated December 29, 2009, Applicant provided additional information regarding the scope of his use of marijuana and ecstasy, and when he stopped using drugs. (GE 5)

On March 3, 2010, DOHA issued a Statement of Reasons (SOR) detailing security concerns under drug involvement (Guideline H), and personal conduct (Guideline E). The action was taken pursuant to 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 adjudicative guidelines (AG) implemented by the Department of Defense on September 1, 2006.

Applicant submitted his notarized answer to the SOR on March 16, 2010. DOHA issued a Notice of Hearing on June 21, 2010, for a hearing on July 13, 2010. The hearing was held as scheduled. At the hearing, five exhibits (GE 1 through 5) were admitted in evidence to support the Government's case. Applicant objected to GE 2 (SCA, August 25, 2009). While he was completing the SCA, he had problems with the software, resulting in an incorrect response to question 23(c)¹ of the security form. He indicated his "no" response should have been "yes." Department Counsel, and I agreed, that the inadvertent error was irrelevant to the allegations in the SOR. (Tr. 13-16)

The record remained open until July 27, 2010 (Tr. 65) to allow Applicant an opportunity to submit additional evidence. He submitted three exhibits (AE A through AE C) in a timely fashion. Those exhibits have been entered into the record. AE A contains a statement of position by Applicant indicating he has no future intention of using illegal drugs or misusing prescription drugs. Applicant offered to submit to random drug testing and/or drug counseling. He also listed four individuals whom he believed would submit character references by emails. (*Id.*) I have received no character statements from the last two individuals identified in AE A. AE B is a character statement from Ms. B, employed in management with Applicant's former employer and the first reference identified in AE A. AE C is a character reference from Mr. C, also employed in management by Applicant's former employer and the second reference in AE A.

DOHA received the transcript on July 20, 2010. The record closed on July 27, 2010.

¹ In the last 7 years, have you been involved in the illegal possession, purchase, manufacture, trafficking, production, transfer, shipping, receiving, handling, or sale of any controlled substance (see question above) including prescription drugs?

Findings of Fact

The first paragraph of the SOR alleges drug involvement. Applicant essentially admitted all the allegations under drug involvement, but disputed the time periods and the frequency of use. His disputes over the time periods of use initially appear in his interrogatory answers (GE 5, question 1.a drug used/last drug use/intentions for future drug use) that he submitted on December 29, 2009. His disputes about the time periods and frequency of his drug use continues in his response to the SOR and his testimony. He did not answer the personal conduct allegation, the second paragraph of the SOR. I will interpret the absence of an answer as a “denial” to the second allegation. On the second page of his answer, Applicant provided a general statement of his past drug use:

I do not find my past drug use at issue in this case. This activity is not one that defines me nor did it consume my life. I would define my usage somewhere between “privately and casually social” to “I’d rather eat a brownie than take the [prescribed medication] or a [prescribed medication].” When I went to work for [defense contractor] ([successor defense contractor]) in 1988, I stopped all drug use because it was required for me to do so - I resumed only after leaving in 1998. If it is required for me to stop again - I will do so. Frankly, in the last 19 years of my career, I’d rather be saving for my retirement than frivolously spending money. (Answer to SOR)

Applicant is 47 years old and single. Since March 2006, he has been employed as a consultant for two defense contractors, and a senior technical writer for a private company. He seeks a security clearance. Applicant has a Bachelor’s degree in mechanical engineering. He was completing the requirements for a Ph. D. when he moved to his current home in 1999. (Tr. 30; GE 2)

After discovering the pressure in his eyes was too high, he had laser surgery to relieve the pressure in 1985, and was treated with the prescribed drug marinol for three months. He discontinued the marinol because of the drug’s disabling side effects. The ophthalmologist noted that marijuana had fewer short-term side-effects, but expressed no recommendation for Applicant to use the drug. (Tr. 32)

SOR 1.a: In his October 2009 interview and his interrogatory answers in December 2009, Applicant indicated he used marijuana two to three times a month from 1985 to 1988 to cope with the eye pressure. (GE 3) In GE 5, Applicant stated he used marijuana about twice a month from 1986 to 1988. At the hearing, Applicant stressed that after the surgery in 1985, he used the drug “periodically,” “like very infrequently.” (Tr. 33)

SOR 1.b: In his October 7, 2009, interview, Applicant indicated that between 1988 and 1998, he did not use marijuana because he had a security clearance. (GE 3 at 1, 2; Tr. 36) From 1998 until a least September 2009, he smoked marijuana about

twice a month at home or at parties. (GE 3 at 2) At the hearing, Applicant testified he smoked marijuana until August 23, 2009 (Tr. 54), and not October 4, 2009, as indicated in his October 7, 2009, interview. (*Id.* at 3)

In 2002, Applicant began experiencing deep pains in his hands. His doctor considered that he was witnessing the early stages of rheumatoid arthritis, though Applicant was never officially diagnosed with the condition. With the objective of relieving the hand pain, Applicant took prescribed medication for about eight months. To relieve the sickening side effects of the medication, Applicant smoked marijuana daily for about eight months before discontinuing the prescribed medication altogether because it had no effect on the pain. (*Id.*) From 2002 to the present, Applicant continued to smoke marijuana, but decreased his use to twice a month for therapeutic purposes of dealing with his hand and knee pain. (*Id.*)

Applicant indicated in the October 2009 interview that he possessed an amount of marijuana in a container about the size of a cell phone, and that the amount might last him until June 2010. (*Id.* at 3) He repeatedly stated he would stop using marijuana if required to hold a security clearance. He indicated in GE 5 that he stopped using marijuana in July or August 2009. He testified his last marijuana use was on his birthday, August 23, 2009. (Tr. 46) Applicant provided no explanation for telling the investigator during the interview that his last use marijuana was on October 7, 2009. (GE 3 at 3)

SOR 1.c: In his October 2009 interview, Applicant discussed his use of ecstasy with a partner one or two times a month between November 2005 and July 2009. His partner always provided the marijuana and ecstasy. (GE 3 at 2, 3) In GE 5, Applicant described his ecstasy use from 2005 to August 2009, at a frequency of one to two times a month. In his answer to the SOR and at the hearing, Applicant claimed that he did not begin to use ecstasy until January 2006 rather than November 2005. Though Applicant did not want to use ecstasy, he or his partner made concessions to build their relationship. (Tr. 53, 26) Applicant denied he was ever dependent on ecstasy and declared he had no intention of using the drug in the future. (GE 3 at 3)

SOR 1.d: Applicant completed and certified his SCA on August 25, 2009. (GE 2) In his interview dated October 7, 2009, Applicant indicated that he used marijuana about twice a month from 2002 to the present. (GE 3) He also noted in his October 2009 interview that his last use of marijuana occurred on October 4, 2009, to facilitate sleep. (*Id.* at 3) I find Applicant used marijuana after he applied for a security clearance on August 25, 2009.

SOR 1.e: In 2005, Applicant purchased a small bag of marijuana. He could not recall how much he paid or the amount he purchased. (*Id.*) He also purchased a marijuana cigarette in February 2002 and again in October 2003. (*Id.*) Applicant never received a prescription for his marijuana use (Tr. 34, 43), but claimed he was trying to get a prescription on two occasions when he bought the drug. (Tr. 44) He has never received counseling or treatment for his drug use. (GE 3, GE 4, GE 5; Tr. 58)

When asked whether he intended to forego all future marijuana use, Applicant initially testified that if he received the security clearance, he would not use drugs. (Tr. 29) At a later point in his testimony, he testified other matters are more important in his life than using marijuana. (Tr. 48-49) Subsequently, Applicant testified that if the Government wanted him to make a "personal sacrifice," then he would stop using the drug because he did not want to do anything that is not permitted. (Tr. 57) AE A, as referenced in Statement of Case, contains Applicant's stated intention, dated July 22, 2010, not to use marijuana in the future, and submit to random drug testing.

Applicant no longer has contact with his former partner who provided him the ecstasy. (GE 3; Tr. 52) In addition, Applicant stopped traveling to the area where his former partner lived. (Tr. 62-63)

Character Evidence

On July 19, 2010, Ms. B, Vice President of Human Resources and Administration, wrote a character reference for Applicant. (AE B) She has known him professionally since 1996, and he is still a professional and personal friend. Her endorsement of him for a position of trust is based on his good judgment, trustworthiness, and belief in the national security. (*Id.*)

AE C is a character reference dated July 22, 2010, from Mr. C, Director of Strategic Development, the second person noted in AE A. Their relationship began professionally in the late 1980s. They have socialized together on many occasions. In Mr. C's view, Applicant should receive a security clearance because of his good judgment and security conscientiousness.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. Each guideline lists potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant's eligibility for access to classified information.

The administrative judge's ultimate goal is to reach a fair and impartial decision that is based on commonsense. The decision should also include a careful, thorough evaluation of a number of variables known as the "whole-person concept" that brings together all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture. 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 the potential, rather than actual, risk of compromise of classified information.

Under Directive ¶ E3.I.14., the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.I.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.

Analysis

Drug Involvement

Paragraph 24 of the AG sets forth the security concern attached to drug involvement:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules and regulations.

Applicant's admitted use of marijuana from about 1985 to 1988, after eye surgery, and from 1998 to at least August 23, 2009 invokes the disqualifying condition set forth in AG ¶ 25(a) (*any drug use*). In order to use an illegal drug, the user has to possess the illegal drug. AG ¶ 25(c) (*Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*) also applies. Applicant purchased marijuana on three occasions.

Applicant used marijuana at varying frequencies from 1984 to 1988. After returning his security clearance and being read out of classified programs in 1998, Applicant resumed marijuana use for approximately 11 years. Regardless of why he used the drug, Applicant repeatedly broke the law. His use of marijuana in the 1980s to thwart the disabling side effects of the prescribed eye medication does not excuse the fact that his use was illegal. His decision in 2002 to replace eight months of prescribed hand and knee medication with marijuana does not extenuate his illegal use of marijuana. Given Applicant's age and education, he should have returned to his physician to identify a legal course of action to treat his condition.

Applicant's drug use from 1998 to October 4, 2009 is disqualifying under the drug involvement guideline. His inconsistent and ambiguous statements about when he terminated his drug use and whether he would use drugs in the future are not credible. AG ¶ 25(h) (*expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use*) applies.

The two relevant mitigating conditions under ¶ 26 of the drug involvement guideline are: AG ¶ 26(a) (*the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment*); and, AG ¶ 26(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 are used, (3) an appropriate period of abstinence, and a signed statement of intent with automatic revocation of clearance for any violation).

Applicant's drug use did not end until October 2009, after 11 years of illegal marijuana use coupled with about three and a ½ years of ecstasy use. Even though there is no precise definition of the word "recent," Applicant's illegal drug use, which ended less than a year ago, is considered recent. Since Applicant admitted periodic marijuana and ecstasy use over several years, his use cannot be considered sporadic. The lack of substantial evidence showing a clear and convincing commitment to discontinue all drug use continues to cast doubt on Applicant's current reliability, trustworthiness, and good judgment. AG ¶ 26(a) does not apply.

Applicant resumed drug use in 1998 after relinquishing his security clearance. In his October 2009 interview (GE 3), he stated that he had no intention of using ecstasy in the future, but he did not provide the same unconditional language about future marijuana use. He conditioned his abstinence from marijuana use to being granted a security clearance. At the hearing, Applicant seemed to move toward an unconditional intent to forego all future marijuana use when he referred to his age and presence of more important matters in life. However, he did not provide an unconditional intention to forego future drug use until after the hearing. While Applicant may have disassociated himself from drug-using contacts, and changed his environment, insufficient time has passed under AG ¶ 26(b) to justify complete confidence in his stated intention to refrain from all future drug use. Applicant has not mitigated the security concerns associated with his drug involvement.

Personal Conduct

Paragraph 15 of the AG sets forth the security concern for personal conduct:

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.

The disqualifying condition under AG ¶ 16 of the personal conduct guideline is: AG ¶ 16(d) (*credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating the person may not properly safeguard protected information. This includes but is not limited to consideration of: (3) a pattern of dishonesty or rules violations...*)

Applicant's repeated illegal drug use from 2002 to at least August 23, 2009, demonstrates a willingness to disregard rules and regulations.

There are three mitigating conditions under AG ¶ 17 that are potentially applicable to the circumstances in this case. Those conditions are: AG ¶ 17(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*); AG ¶ 17(d) (*the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate stressors, circumstances, or factors that caused untrustworthy, unreliable or other inappropriate behavior, and such behavior is unlikely to recur*); and, AG ¶ 17(g) (*association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt on the individual's reliability, trustworthiness, judgment or willingness to comply with rules and regulations*). The mitigating conditions have been carefully considered but none apply due to the frequency and scope of Applicant's drug use, and the fact his drug use and disassociation with drug users did not end until July 2009. The personal conduct guideline has not been mitigated.

Whole-Person Concept

This recommended decision must be an overall commonsense judgment based upon careful consideration of the guidelines and the general factors of the whole-person concept. Those factors include:

- (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 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.

I have evaluated the facts of this case in conjunction with the disqualifying and mitigating conditions of the AG. I have found against Applicant under the drug involvement and the personal conduct guidelines. I have also assessed this case under the nine general factors of the whole-person concept.

Applicant began his illegal use of marijuana in about 1985. He exercised good judgment between 1988 and 1998 by not using drugs while holding a security clearance. However, in 1998, Applicant resumed using marijuana periodically, choosing to violate the law for the next 11 years. Beginning in late 2005 or early 2006, he combined his illegal marijuana use with ecstasy use at varying frequencies until July 2009. Applicant has provided different cessation dates for his marijuana use in place of the date of October 4, 2009 that he provided in his in October 7, 2009, interview.

While Applicant's character evidence provides a favorable picture of a person who generated a quality performance record during his employment with the defense contractor between 1988 and 1998, the evidence in mitigation does not overcome the duration and recency of his drug use. Moreover, his illegal drug use does not dispel the repeated rules violations under the personal conduct guideline.

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):	AGAINST APPLICANT
Subparagraph 1.a through 1.e	Against Applicant
Paragraph 2 (Guideline E):	AGAINST APPLICANT
Subparagraph 1.a	Against Applicant

Conclusion

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

Paul J. Mason
Administrative Judge