



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



In the matter of:)
)
-----) ISCR Case No. 10-00380
)
Applicant for Security Clearance)

Appearances

For Government: Tovah A. Minster, Esquire, Department Counsel
For Applicant: *Pro se*

February 17, 2011

Decision

HARVEY, Mark, Administrative Judge:

Applicant’s extensive marijuana use started in 2007 and continued until about November 2009. He intentionally understated his marijuana use on his April 29, 2009 security clearance application. Personal conduct and drug involvement concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On April 29, 2009, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of security clearance application (SF 86) (Item 5). On July 21, 2010, the Defense Office of Hearings and Appeals (DOHA) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guidelines H (drug involvement) and E (personal conduct). (Item 1) 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 Applicant, and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked. (Item 1)

On September 10, 2010, Applicant responded to the SOR allegations and waived his right to a hearing. (Item 4) A complete copy of the file of relevant material (FORM), dated September 28, 2010, was provided to him on December 21, 2010. He was afforded an opportunity to file objections and to submit material in refutation, extenuation, or mitigation.¹ Applicant did not respond to the FORM. The case was assigned to me on February 8, 2011.

Findings of Fact²

In Applicant's response to the SOR, he admitted the allegations in SOR ¶¶ 1.a-1.c and 2.a.³ He acknowledged that he used marijuana approximately 20 times from 2007 to at least November 2009, and that he purchased "\$10.00 baggies" of marijuana approximately 20 times from a friend. (SOR ¶¶ 1.a and 1.b) He admitted that as of December 2009, he planned to continue to use marijuana in the future. (SOR ¶ 1.c) He also admitted that on his April 29, 2009 SF 86, he indicated his marijuana use was "once" from August 2007 to September 2007, and that he "deliberately failed to disclose" the more extensive marijuana use described previously in this paragraph. (SOR ¶ 2.a)

Applicant is a 22-year-old employee of a defense contractor.⁴ He graduated from high school in 2006. From October 2007 to present, he worked in the mailroom and performed maintenance services. He has never served in the military. He has never married and does not have any children.

Drug involvement⁵

On December 8, 2009, Applicant provided a written, sworn statement, describing his history of marijuana use. Since 2007, he has used marijuana approximately 20 times with friends and family members on weekends. He purchased marijuana about 20

¹The DOHA transmittal letter is dated September 29, 2010, and Applicant's receipt is dated December 21, 2010. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information.

²Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

³Applicant's SOR response is the basis for the facts in this paragraph. (Item 4)

⁴Applicant's April 29, 2009 SF 86 is the basis for the facts in this paragraph. (Item 5)

⁵Applicant's December 8, 2009 statement is the basis for the facts in this section. (Item 6)

times. He purchased \$10 baggies from a friend. He denied that he was dependent on marijuana. He has not had any drug-related counseling and does not believe he needs any counseling. He uses marijuana to relax even though he knows marijuana possession is illegal. His most recent marijuana use was in November 2009.

As of December 8, 2009, Applicant “planned on using marijuana on weekends for recreation in the future”; however, he is willing to stop using marijuana to retain his employment or receive a security clearance. He declined to provide the names of witnesses who would be aware of his marijuana use.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant

from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “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). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). 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). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concerns are under Guidelines H (drug involvement) and E (personal conduct).

Drug Involvement

AG ¶ 24 articulates the drug involvement security concern:

[u]se of an illegal drug^[6] 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 set forth in AG ¶¶ 25(a) and 25(c) could raise a security concern and may be disqualifying in this case: “any drug abuse,”⁷

⁶AG ¶ 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 (Sch.) 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).

⁷AG ¶ 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.”

and “illegal drug possession or sale or distribution.” These two disqualifying conditions apply because Applicant used and possessed marijuana. He fully disclosed his drug abuse in a sworn statement on December 8, 2009. He possessed marijuana on approximately 20 occasions before he used it. He did not describe any marijuana use after November 2009.

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.
- (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.

AG ¶ 26(a) can mitigate security concerns when drug offenses are not recent. There are no “bright line” rules for determining when such 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.”⁸

⁸ISCR 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

Applicant's extensive marijuana use lasted about two years. He continued using marijuana after completing his April 29, 2009 SF 86. In his December 8, 2009 sworn statement he said he planned to continue to use marijuana; however, he is willing to stop using marijuana to hold a security clearance. It is unclear whether he used marijuana after making his December 8, 2009 sworn statement. There is insufficient evidence to support a conclusion that he will not use illegal drugs in the future. AG ¶ 26(a) does not apply to his marijuana-related offenses.⁹

Applicant has not demonstrated his intent not to abuse illegal drugs in the future. He has not disassociated from his drug-using associates and contacts. He has not provided sufficient evidence that he has broken his patterns of drug abuse and changed his life with respect to illegal drug use. He has not provided "a signed statement of intent with automatic revocation of clearance for any violation." AG ¶ 26(b) does not apply.

AG ¶¶ 26(c) and 26(d) are not applicable because Applicant did not abuse prescription drugs. Marijuana was never prescribed for him. He has not received a prognosis of low probability of recurrence of drug abuse.

In conclusion, there is no evidence whether Applicant continued to use marijuana after November 2009. The motivations to stop using illegal drugs are evident. He

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).

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.

⁹In 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.

understands the adverse results from marijuana use.¹⁰ He has not shown or demonstrated a sufficient track record of no drug abuse to eliminate drug involvement as a bar to his access to classified information.

Personal Conduct

AG ¶ 15 expresses the security concern pertaining to 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.

AG ¶ 16 describes two conditions that could raise a security concern and may be disqualifying with respect to the alleged falsifications of documents¹¹ used to process the adjudication of Applicant's security clearance in this case:

- (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and
- (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

Applicant intentionally provided false information on his April 29, 2009 SF 86 when he understated his marijuana use. When he completed his SF 86, he stated in the

¹⁰Approval 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.

¹¹The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

- (a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

comments section that he used marijuana once in 2007. He did not disclose his marijuana use on approximately 20 occasions continuing into 2009. (SOR ¶ 2.a) AG ¶¶ 16(a) and 16(b) apply and further inquiry about the possible application of mitigating conditions is necessary.

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.

Applicant deserves substantial credit in the whole-person analysis for candidly admitting he deliberately falsified the April 29, 2009 SF 86. However, the personal conduct concerns pertaining to Applicant's falsification of his 2009 SF 86 about the duration and extent of his marijuana use cannot be mitigated at this time because it is too serious and too recent. His failure to be fully candid and forthright on his 2009 SF 86 shows poor judgment and militates against approval of a security clearance. More progress is necessary to assure Applicant has the reliability, trustworthiness, and good judgment necessary to safeguard classified information.

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. I have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

There is some evidence supporting approval of Applicant's clearance. Applicant was relatively young and immature when he began using marijuana. He served his country as an employee of a Government contractor. In his December 8, 2009 sworn statement, and in his September 10, 2010 SOR response, he candidly admitted his extensive history of marijuana use. He did not receive any drug counseling or therapy. He knows the consequences of marijuana use. He contributes to his company and the Department of Defense. There is no evidence of disloyalty or that he would intentionally violate national security. His supervisors evidently support him, or he would not have been able to retain his employment after his security clearance was called into question.

The evidence against approval of Applicant's clearance is more substantial. On December 8, 2009, he disclosed his extensive marijuana use; however, on April 29, 2009, he deliberately understated his marijuana use on his SF 86. He was sufficiently mature to be fully responsible for his conduct. His marijuana use after completing his SF 86 and his failure to be candid about his marijuana abuse on his SF 86 show a lack of judgment and a failure to abide by the law. Such lapses in judgment are especially relevant because they were made in the context of security requirements. His falsification of his 2009 SF 86s raises a particularly serious security concern.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude drug involvement and personal conduct concerns are not mitigated. For the reasons stated, I conclude he is not 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:	AGAINST APPLICANT
Subparagraphs 1.a to 1.c:	Against Applicant
Paragraph 2, Guideline E:	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 national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge