



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 10-01365

Appearances

For Government: David F. Hayes, Esquire, Department Counsel
For Applicant: *Pro se*

January 31, 2011

Decision

HARVEY, Mark, Administrative Judge:

Applicant's marijuana use from August 29, 2009 to December 4, 2009, in two foreign countries, while holding a security clearance, showed exceptionally poor judgment. Drug involvement concerns are mitigated; however, personal conduct concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On August 20, 2009, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of a security clearance application (SF-86). (GE 1) On October 20, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (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). (Hearing Exhibit (HE) 2) 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 continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether Applicant's clearance should be continued or revoked. (HE 2)

On November 8, 2010, Applicant responded to the SOR. (HE 3) On December 1, 2010, Department Counsel indicated he was ready to proceed on Applicant's case. On December 6, 2010, DOHA assigned Applicant's case to me. On December 7, 2010, DOHA issued a hearing notice, setting the hearing for December 22, 2010. (HE 1) On December 22, 2010, Applicant's hearing was held as scheduled.¹ At the hearing, Department Counsel offered two exhibits (GE 1-2) (Tr. 17), and Applicant offered three exhibits. (Tr. 18-19; AE A-C) There were no objections, and I admitted GE 1-2 and AE A-C. (Tr. 17-20) Additionally, I admitted the hearing notice, SOR, and Applicant's response to the SOR. (HE 1-3) On December 23, 2010, I received Applicant's performance evaluations for 2005 to 2009. (AE D) On January 3, 2011, I received the transcript. The record closed on January 3, 2011. (Tr. 20-21)

Findings of Fact²

Applicant's SOR response admitted all of the SOR allegations: (1) he used marijuana on several occasions from February 2007 to December 2009 (SOR ¶ 1.a); and (2) he used marijuana after being granted an interim Top Secret security clearance on August 24, 2009 (SOR ¶¶ 1.b; 2.a). (HE 3) His admissions are accepted as factual findings.

Applicant is a 27-year-old employee of a defense contractor. (Tr. 6) The same engineering firm has employed him in the area of materials for satellites for about 66 months. (Tr. 23, 25-26) In 2001, he graduated from high school. (Tr. 6) He was awarded a bachelor's degree in 2005 and a master's degree in applied mechanics for aerospace and mechanical engineering in 2008. (Tr. 7) He was employed in engineering either at the university he attended or at a private corporation from 2003 to 2005. (Tr. 24)

Applicant has never married, and he does not have any children. (Tr. 23) He has never served in the military. (Tr. 23)

Drug involvement

On August 20, 2009, Applicant signed his SF 86. (GE 1) On this SF 86, he responded, "Yes" to Section 23a, which asks about illegal drug use in the last seven years. (GE 1) He explained that he used marijuana "8 or 9 times over a two year

¹ Applicant waived his right to 15-days notice of the date of his hearing. (Tr. 15-16)

²Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

period,” and disclosed the time period as “02/2007 (Estimated)” to “06/2009 (Estimated.” (GE 1)

In 2006, Applicant received a Secret clearance. (Tr. 28) In August 2009, he received an interim Top Secret clearance. (Tr. 28) His clearances were subsequently suspended because of his marijuana use. (Tr. 28)

In February 2007, Applicant used marijuana at a party. (Tr. 30) At that time, Applicant was 24 or 25 years old and in a master’s degree program at a university. (Tr. 30) From February 2007 to December 2009, he used marijuana by smoking it a total of about nine times. (Tr. 30-31; GE 1) From August 29, 2009 to December 4, 2009, he used marijuana five or six times, while he was in two foreign countries. (Tr. 36-37; GE 2 at 15) He did not purchase the marijuana he used. (Tr. 31, 47) He has never purchased drug paraphernalia. (Tr. 47) He has never been tested using urinalysis for illegal drug use at his employment. (Tr. 38) The only illegal drug he used was marijuana. (Tr. 49-50)

Applicant was on a leave of absence from his employment when he used marijuana while outside the United States. (Tr. 39) He used marijuana overseas during the period from August 29, 2009 to December 4, 2009. (GE 2 at 15) The use of marijuana in country N was not illegal; however, marijuana use in country T was illegal. When he used marijuana, he understood that marijuana use could result in revocation of his security clearance. (Tr. 40) He acknowledged that his marijuana use while holding a security clearance showed poor judgment. (Tr. 41) On December 4, 2009, an Office of Personnel Management (OPM) investigator interviewed Applicant at an overseas location. (GE 2 at 13-17) The OPM investigator asked Applicant about his plans concerning future marijuana use and he stated, “[He] intends to stop using marijuana if he gets his Top Secret security clearance. Once [he] has access to classified information, he will definitely stop all marijuana use.” (Tr. 42, 52; GE 2 at 14) At his hearing, he explained that approval of a Top Secret clearance would be an additional reason, but not his exclusive motivation not to use marijuana in the future. (Tr. 53-54) He meant that even without the issue of his clearance, he would have stopped using marijuana. (Tr. 53-56)

From August 2009 to January 2010, Applicant traveled overseas. (Tr. 32) After January 2010, he lived in a different location in the United States than previously. (Tr. 32) He has changed his lifestyle, and no longer associates with marijuana users. (Tr. 22, 48) He gets lots of physical exercise. (Tr. 48) He is focused on his career, and recognizes that marijuana use is contrary to his career goals. (Tr. 62) He promised not to use marijuana in the future. (Tr. 47, 54-55; AE C) He has not received drug counseling or therapy. (Tr. 47-48) He was promoted at work to project manager. (Tr. 22) He signed a statement indicating that future illegal drug use “will result in revocation of any clearance currently held.” (AE C)

Character evidence

One character witness described Applicant as intelligent, compassionate, diligent, and very successful in academic and professional endeavors. (AE A) Another

described him as trustworthy, responsible, prudent, hardworking, and conscientious. Both recommended that Applicant's security clearance be approved; however, neither recommendation indicated an awareness of Applicant's marijuana use in a foreign country while holding a security clearance.

Applicant's performance evaluations from 2005 to 2009 describe his excellent growth, initiative, diligence, intelligence, talent, and professionalism. (AE D) His evaluations' descriptions of his performance tend to support approval of his access to classified information. (AE D)

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 that, "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 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 and modified.

Eligibility for a security clearance is predicated upon meeting the criteria contained in the adjudicative guidelines (AG). 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 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. Adverse clearance decisions are made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the [a]pplicant concerned." See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. 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 as to 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 or her] 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) with respect to the allegations set forth in the SOR.

Drug Involvement

AG ¶ 24 articulates the security concern concerning drug 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.

Three drug involvement disqualifying conditions in AG ¶¶ 25(a), 25(c), and 25(g) could raise a security concern and may be disqualifying in this case: “any drug abuse,”³ “illegal drug possession or sale or distribution,” and “any illegal drug use after being granted a security clearance.” These three disqualifying conditions apply because Applicant used and possessed marijuana.⁴ He admitted his marijuana use on his SF 86,

³AG ¶ 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.”

⁴AG ¶ 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,

to an OPM investigator, and at his hearing. He possessed marijuana before he used it. Applicant's Secret security clearance was approved in 2006, and his interim Top Secret clearance was approved in August 2009. He used marijuana on five or six times from August 29, 2009 to December 4, 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

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).

must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.”⁵

Applicant’s marijuana use lasted from February 2007 to December 4, 2009. When he completed his SF 86 on August 24, 2009, he said he used marijuana eight or nine times. At his hearing, he stated he used marijuana five or six times in 2009 while in two foreign countries after completing his SF 86. He stopped using marijuana about 14 months ago. He recognizes the adverse impact on his life of drug abuse. He no longer associates with known drug users. He believes his life circumstances and career goals have changed sufficiently to create some certitude that he will continue to abstain from drug use. AG ¶ 26(a) partially applies to his marijuana-related offenses.⁶

Applicant demonstrated his intent not to abuse illegal drugs in the future. He has disassociated from his drug-using associates and contacts. He has broken his patterns of drug abuse, and he has changed his life with respect to illegal drug use. He has abstained from drug abuse for fourteen months. He provided “a signed statement of intent with automatic revocation of clearance for any violation.” AG ¶ 26(b) applies.

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

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

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

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.

⁶In ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004), the Appeal Board reversed an unfavorable security clearance decision because the administrative judge failed to explain why drug use was not mitigated after the passage of more than six years from the previous drug abuse.

In conclusion, Applicant ended his drug abuse in December 2009, about fourteen months ago. The motivations to stop using illegal drugs are evident. He understands the adverse results from marijuana use.⁷ He has 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 in this case:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Applicant used marijuana five or six times while holding an interim Top Secret clearance and while in two foreign countries. In one of the foreign countries, his marijuana use was illegal. His marijuana use under such circumstances shows questionable judgment and adversely affects his professional standing. AG ¶¶ 16(c) and 16(e) apply.

⁷Approval 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.

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 his marijuana use. Applicant's disclosure of his marijuana use is an important positive step "to reduce or eliminate vulnerability to exploitation, manipulation, or duress." AG ¶ 17(e) mitigates security concerns raised under AG ¶ 16(e). However, the personal conduct concerns pertaining to Applicant's marijuana use while holding an interim Top Secret clearance and while overseas in country T on more than one occasion from about August 29, 2009, to December 4, 2009, shows such poor judgment that none of the mitigating conditions fully apply. Personal conduct concerns cannot be mitigated at this time because they are too serious and too recent.

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 in 2007. He served his country as an employee of a Government contractor. He stopped using marijuana in December 2009. I am confident that he has the ability to abstain from marijuana use. In his SOR response and at his hearing, he admitted his history of marijuana use. He knows the consequences of marijuana use. He provided "a signed statement of intent with automatic revocation of clearance for any violation." Applicant contributes to his company and the Department of Defense. There is no evidence of disloyalty or that he would intentionally violate national security. His character and good work performance show some responsibility, rehabilitation and mitigation. His supervisors evidently support him or he would not have been able to retain his employment after his security clearance was called into question. His evaluations and character statements laud his hard work, trustworthiness, and dedication. I am satisfied that if he continues to abstain from marijuana use, and avoids future offenses he will eventually have future potential for access to classified information.

The evidence against approval of Applicant's clearance is more substantial at this time. Applicant is 27 years old, and he was sufficiently mature to be fully responsible for his conduct. His marijuana use five or six times between August 29, 2009, and December 4, 2009, while holding an interim Top Secret clearance and while in country T shows an exceptional lack of judgment. He risked his security clearance and detention in a foreign country each time he possessed and used marijuana. Such judgment lapses "raise questions about [Applicant's] reliability, trustworthiness and ability to protect classified information." See AG ¶ 15. His marijuana use under such

circumstances raises a serious security concern, and a security clearance is not warranted at this time.

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 concerns are fully mitigated; however, personal conduct concerns are not mitigated at this time. For the reasons stated, I conclude he is not currently 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 and 1.b:	For 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 interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge