DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 10-06512
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Philip J. Katauskas, Esq., Department Counsel
For Applicant: Sheldon I. Cohen, Esq.

October 12, 2011

Decision

RIVERA, Juan J., Administrative Judge:

Applicant purchased and used hashish (marijuana) in April 2010, while working for a Government contractor in a foreign country, and after he was granted a top secret security clearance in 2007. His behavior is recent and it continues to cast doubt on his reliability, judgment, and ability and willingness to comply with the law and follow rules. Clearance is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on September 4, 2007. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding[1] that it is clearly consistent with the national interest to grant Applicant's request for a security clearance.

[1] Required by Executive Order 10865, *Safeguarding Classified Information Within Industry,* dated February 20, 1960, as amended; and Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as revised.

On March 16, 2011, DOHA issued Applicant a statement of reasons (SOR) alleging security concerns under Guidelines H (Drug Involvement) and E (Personal Conduct) of the adjudicative guidelines (AG).[2] Applicant responded to the SOR allegations on March 22, 2011, and requested a hearing before an administrative judge. The case was assigned to me on April 29, 2011. Applicant's counsel requested a postponement until mid-July 2011. DOHA issued a notice of hearing on May 25, 2011, convening a hearing on July 19, 2011. At the hearing, the Government offered four exhibits (GE 1 through 4). Applicant objected to GE 3, and the Government withdrew it before a ruling. Applicant testified, presented the testimony of an expert witness, and introduced one exhibit (AE 1) with 21 tabs marked A through U. DOHA received the transcript of the hearing (Tr.) on July 27, 2011.

Procedural Issues

On June 17, 2011, Applicant moved for leave to present an expert witness' testimony by telephone. The Government opposed on June 22, 2011, and Applicant replied to the Government's objection on June 22, 2011. I granted Applicant's motion on June 22, 2011. The documents concerning this motion were marked together as Hearing Exhibit (HE) 1.

On July 14 and 17, 2011, Applicant submitted a Memorandum, and an Amended Memorandum (respectively) Regarding His Intent to Raise the Defense of Necessity at hearing. Both documents were marked together as HE 2.

Findings of Fact

Applicant admitted the factual allegations under SOR ¶¶ 1.a, 1.b, 2.a, and 2.b, with explanations. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, his answers to the SOR, DOHA interrogatories, and having observed his demeanor while testifying, I make the following additional findings of fact.

Applicant is a 61-year-old linguist/translator working for a Government contractor. Applicant was born, raised, and educated in Afghanistan. He received his bachelor's degree in literature from an Afghani university in 1975, and worked as a language high school teacher. In 1980, his father (a high ranking military officer), uncle, and brother were imprisoned by the invading Russian Army. Fearing for his life, Applicant escaped through Pakistan into Germany. In 1982, he received asylum in the United States, and became a naturalized U.S. citizen in October 1991.

Applicant married his wife in March 1973, and they have four grown sons. His two oldest sons were born in Afghanistan. His oldest son is working as an interpreter for

[2] Adjudication of this case is controlled by the AGs, implemented by the DoD on September 1, 2006.

a Government contractor servicing U.S. troops deployed to Afghanistan. His two youngest sons are attending college in the United States.

From 1990 until 1999, Applicant worked as a state court translator and for Immigration and Naturalization Service. He also attended a U.S. university from 1995 until 1999, and received a bachelor's degree in psychology. He is currently working on his master's degree in psychology. After graduating in 1999, Applicant moved to his current state of residency and worked for some time as a mental health and behavior counselor. He then moved to another job seeking a higher salary.

From March 2004 until around April 2009, Applicant worked as a quality assurance translator/linguist for two Government contractors. He reviewed other translators' work for accuracy and content. During this period, he was granted an interim top secret clearance. There is no evidence to show that Applicant compromised or caused others to compromise classified information. During this period, Applicant received numerous certificates of appreciation for his outstanding performance and meritorious service in support of critical and highly sensitive missions in the war against global terrorism. He was commended for his foreign language capabilities (Pashtu, Dari, and Farsi), his professionalism, positive attitude, and hard work. He was considered an invaluable asset by his employers and customers. (AE 1, Tabs B-I)

From April 2009 until September 2009, Applicant worked as an interpreter for another Government contractor (R). He was deployed to Afghanistan in support of U.S. military operations in that country. He also performed duties vetting local employees and issuing security identification cards. In September 2009, Applicant was terminated from his employment because he complained about the installation security guards being abusive to the local employees, he allegedly stated that they should kill the security guards, and he attempted to obtain for a local employee a higher access level than the person was qualified. (GE 2)

Applicant admitted he filed a complaint against the installation security guards, but repeatedly denied stating that the guards should be killed, or that he attempted to obtain higher access level for an unqualified person. He credibly testified that he was fired because he filed a complaint against his supervisor for unprofessional behavior and violation of rules.

Around October 2009, Applicant was hired by another Government contractor (M) to work as a linguist, media analyst, and to prepare security reports on local national employees in Afghanistan. During a health and welfare inspection conducted with the assistance of a working dog, the military police discovered Applicant had hashish (marijuana) in his belongings (a piece of approximately the size of a garbanzo bean). Applicant was terminated from his employment because of his possession of an illegal substance, in violation of General Order 1B (published by the Commander, U.S. Central Command) (GE 4), and he was returned to the United States.

At his hearing, Applicant admitted that the hashish belonged to him, that he used it twice, and that he knew that his possession and use of marijuana was illegal and in violation of General Order Number 1B. (GE 4) Before using hashish, Applicant did not tell any of his supervisors that he intended to use hashish to resolve his gastrointestinal illness. When he was terminated, Applicant provided no explanation for his possession of the hashish to the military police or to his supervisors. (Tr. 151-153)

In June 2010, Applicant provided a statement to a Government investigator in which he explained that during April 2010, he became violently ill with a gastrointestinal illness. He suffered from diarrhea, vomiting, nausea, pain, weakness, could not sleep, and lost ten pounds in ten days. Applicant stated that he visited the military base hospital twice. He claimed the first time he was turned away because the military hospital only treated military personnel.

Applicant's supervisor advised him to fly to Dubai to receive medical treatment. Applicant declined because it was too expensive and he could not afford the $2,000 plane ticket, the $150 a day hotel expenses, and the medical treatment fee. At the time, Applicant was earning $150,000 a year. He claimed, however, that all of his earnings were being sent directly to his wife in the United States, and that he did not have the money. Applicant went back to the military hospital and begged to be seen. The military doctor found him to be dehydrated and gave him "a shot in the arm," which Applicant claimed did not make him feel any better.

Applicant then went to the Green Zone market searching for a herbal remedy and was advised by "several market place people" that the best medicine for his condition was hashish. He claimed he initially declined, but after performing an Internet research, decided to purchase the hashish. During the June 2010 interview, Applicant told the investigator that he went to the Green Zone and purchased the marijuana in paste form (hashish) for $2, from a stranger in the street. He used the hashish twice and felt better. The next week, the military police discovered the hashish and he was terminated.

At his hearing, Applicant reiterated his June 2010 statement, and provided some additional facts. He testified that there were two fairly large military retail stores in the base he was stationed, and he had access to both. He claimed the British store did not sell any medicine, but the U.S. store sold over the counter medicines. He claimed he did not see any medicine for gastrointestinal illness in the store, except Pepto Bismol. (Tr. 161-164) One of Applicant's friends purchased Pepto Bismol for him. He tried the Pepto Bismol, but Applicant did not like it because it was too sweet, and it provided no relief. He claimed the military store had nothing else to cure him. (Tr. 15-16) The second time that Applicant visited the military hospital he was treated for dehydration with an intravenous serum, but he was not provided any medication.

Applicant then went to the Green Zone seeking a herbal remedy and an old man recommended he used hashish. After doing research on the Internet, Applicant asked a

truck driver to buy hashish for him.[3] The truck driver bought the hashish and gave it to Applicant. Applicant paid $2 for it.

Applicant was born in Kandahar, the second largest city in Afghanistan. The military base to which he was stationed is located next to Kandahar. He lived in Kandahar after he graduated from college and was married there. He is familiar with Kandahar and the languages spoken in that region. His wife's cousins and some of Applicant's cousins live in that area. He resided on the military base for six months before he got sick. There are two large hospitals and approximately 20 pharmacies in Kandahar. Applicant claimed he was not allowed to go to the Afghan hospitals or pharmacies because of security concerns. He claimed he discussed the possibility of him going to Kandahar for treatment with his supervisor, but he was told that would be the last option to be considered because of the possible danger involved. (Tr. 138-141) His supervisor suggested Applicant fly to another country for his medical treatment.

Applicant had ten Afghanis working for him as informants. Most of the informants would report information to Applicant using cell phones. Twice a week the informants were required to come in to the military base to submit their written reports. Applicant did not ask any of his informants to buy any medicine for him because he wanted to maintain a professional relationship with them. Additionally, he distrusted the medicine sold in the local pharmacies because they were imported from either Pakistan or China. Applicant testified he experimented with marijuana once when he was in high school. He claimed he never used it again until April 2010. He stated that he and his wife are against the use of drugs and alcohol. They counsel their sons to stay away from illegal drugs. Applicant does not intend to use any illegal drugs ever again.

Since May 2010, Applicant has been working for another Government contractor (C), who is sponsoring his security clearance. He is teaching deploying soldiers to speak Pashtu, Dari, and Farsi, and to understand the culture and customs of Afghanistan. He also was offered employment by two other Government contractors. His job offers are contingent on his ability to hold a security clearance.

Applicant's supervisors and coworkers consider him to be reliable, trustworthy, and a good employee. His supervisors are impressed with Applicant's language skills and the quality of his work. He is considered to be an asset to his company.

Applicant testified that he is deeply sorry, remorseful, and regretful about his lapse of judgment. He understands that the use of illegal drugs is a serious offense. He testified he is committed to never using any illegal drugs again. He averred he only used marijuana because he was seriously ill, feared for his life, and there was no other medical treatment available.

[3] During the later part of his testimony, Applicant claimed the Afghani offered to bring the hashish without Applicant asking for it. (Tr. 142)

Applicant presented the testimony of an expert witness in the medical uses of marijuana. He established that historically, medical marijuana has been proven useful in the treatment of inflammatory bowel disease, nausea, vomiting, insomnia, pain, and other disorders. Applicant presented no evidence to show he was legally authorized to use marijuana.

Policies

The President of the United States 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." *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense 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. 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).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs 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 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 to reach his decision.

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 that 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. 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), 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 that 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

Guideline H, Drug Involvement

AG ¶ 24 articulates the security concern about 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 experimented with marijuana once as a high school student in Afghanistan. In April 2010, he purchased and used marijuana twice. At the time, he was 60 years old, and held a top secret security clearance. He was deployed to Afghanistan with a Government contractor as a linguist and cultural advisor in support of U.S. troops. He knew that the possession and use of marijuana was prohibited. He claimed he used marijuana only because he was seriously ill, feared for his life, and there was no other medical treatment available.

AG ¶ 25 describes eight conditions related to drug involvement that could raise a security concern and may be disqualifying. Three drug involvement disqualifying conditions raise a security concern and are disqualifying in this particular case: AG ¶ 25(a) "any drug abuse,"[4] AG ¶ 25(c) "illegal drug possession . . . purchase, sale, or

[4] AG ¶ 24(b) defines "drug abuse" as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction."

AG ¶ 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.

distribution," and AG ¶ 25(g) "any illegal drug use after being granted a security clearance."

AG ¶ 26 provides four potentially applicable drug involvement mitigating conditions. Considering the evidence as a whole, I find that none of the mitigating conditions fully apply. Applicant used hashish/marijuana in April 2010. As such, his use is recent.

Applicant claimed he used hashish under extraordinary circumstances that are unlikely to recur - he was seriously ill, feared for his life, and there was no other medical treatment available. I disagree. Suffering from a gastrointestinal illness is a fairly common occurrence of deployed personnel. Applicant had a number of viable alternatives to obtain a legal medication or to seek medical treatment for his gastrointestinal illness. I am not convinced that Applicant was under such extraordinary circumstances that it justified his use of an illegal drug.

Although Applicant was not entitled to full medical treatment at a military hospital, he was screened and treated at the hospital. Probably, if the military doctor had determined Applicant's condition was serious and he needed emergency treatment, Applicant would have been treated at the military hospital, or evacuated to a medical treatment facility.

Applicant had access to two military stores, one of which dispensed over the counter medications suitable for his illness, including Pepto Bismol, a well known remedy for gastrointestinal problems. That Applicant disliked Pepto Bismol's taste did not entitle him to use an illegal drug. Likely, the military exchange stores also sold other over the counter gastrointestinal medicines such as Kaopectate or Imodium.

Applicant could have used the services of one of the ten local employees under his supervision to purchase a legal medicine for him in the city of Kandahar. After all, according to one of Applicant's versions of his purchase of the hashish, he asked a truck driver to purchase the hashish for him. The same truck driver could have visited a local pharmacy and purchased a legal medicine for him. Applicant claimed he was discouraged from visiting the two local hospitals for security reasons. If he was indeed concerned about his health, he should have followed the recommendation of his supervisor and paid for a trip to a friendly country to receive medical treatment. He was earning $150,000 a year under his employment contract. He knew when he entered into his employment contract that it did not provide for medical treatment. Thus, he should have planned for the contingency of getting sick. I find that Applicant's illegal use of marijuana occurred under normal circumstances. Under the totality of the circumstances, I do not find Applicant's use of marijuana legally justified. AG ¶ 26(a) does not apply.

Applicant is well-educated and has at least six years of experience working for Government contractors and dealing with the security clearance process. He was granted a security clearance at the top secret level in 2007. He was 60 years old when

he used marijuana in April 2010. He was well aware that using illegal drugs is a criminal offense and knew of the adverse job-related consequences of illegal drug use. Notwithstanding, he elected to use marijuana.

Applicant promised not to use any illegal drugs in the future, and he is no longer in the environment where he obtained the hashish. AG ¶ 26(b) partially applies, but does not fully mitigate the security concerns. Not enough time has transpired since his use of marijuana to establish an appropriate period of abstinence or for him to demonstrate his intent not to use illegal drugs in the future. AG ¶¶ 26(c) and (d) are not reasonably raised by the facts in this case and are not applicable. Applicant's past questionable behavior still casts serious doubts on his reliability, judgment, and his ability and willingness to comply with the law. Applicant's favorable evidence, at this time, is not sufficient to mitigate the Guideline H security concerns.

Guideline E, Personal Conduct

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

> 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.

Applicant illegally used marijuana (as described under the Guideline H discussion, incorporated herein) after he was granted access to classified information at the top secret level in 2007. He knew that the illegal use of drugs constitutes a serious offense, and that his employer and the Government had a policy against the use of any illegal drugs. His behavior triggered the applicability of disqualifying condition: AG ¶ 16(e): personal 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.

After considering the seven mitigating conditions set out in AG ¶ 17, I find that, for the same reasons discussed under Guideline H (incorporated herein), none fully apply to the facts of this case. In April 2010, Applicant was involved in serious misconduct while holding a security clearance, thus, his behavior is recent. His evidence failed to establish that his behavior happened under such unique circumstances that it is unlikely to recur, and it still casts doubt on Applicant's reliability, trustworthiness, and judgment. AG ¶ 17(c) does not apply.

Applicant acknowledged his misconduct and has taken some steps to avoid the circumstances that led to his illegal drug use. Notwithstanding, at this time, it is too soon for him to establish that his questionable behavior is unlikely to recur, and that he has

the ability and willingness to comply with the law, rules, and regulations. The remaining mitigating conditions are not reasonably raised by the evidence in this case.

Concerning SOR ¶ 2.b, Applicant admitted he was terminated from his employment with a Government contractor in September 2009. He denied that he was involved in any misconduct. He complained about the installation security guards being abusive to the local nationals, and filed a complaint against his supervisor for unprofessional behavior and his failure to follow rules. He credibly denied stating that the abusing security guards should be killed, or attempting to obtain for a local national higher security access than the person was qualified for. After considering the evidence as a whole, I find for Applicant on SOR ¶ 2.b. It appears he had a personality conflict with his supervisor and filed a complaint against him. It is possible that his supervisor, in turn, retaliated and filed his own complaint against Applicant.

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.

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. AG ¶ 2(c). I have incorporated in my whole-person analysis my comments on the analysis of Guidelines H and E.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a well-educated and valuable employee. He receives credit for his many years of outstanding service as a linguist working for Government contractors. He expressed remorse, regret, and embarrassment for his questionable behavior, and promised to remain abstinent. This conduct shows responsibility, good judgment, and some mitigation.

Notwithstanding, the factors against granting his access to classified information are more compelling. Applicant was 60 years old at the time he illegally used marijuana. He used marijuana after he was granted a security clearance. He broke the trust placed in him. At this time, his evidence is insufficient to show that the factors that triggered his

illegal drug use are no longer present. He failed to establish his ability and willingness to comply with the law, rules, and regulations. On balance, the record evidence fails to convince me of Applicant's eligibility and suitability for a security clearance.

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 1a – 1b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 1a:	Against Applicant
Subparagraph 1b:	For Applicant

Conclusion

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

_____
JUAN J. RIVERA
Administrative Judge