



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



In the matter of:)
)
-----) ISCR Case No. 10-09071
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esquire, Department Counsel
For Applicant: *Pro se*

October 6, 2011

Decision

HARVEY, Mark, Administrative Judge:

Applicant's extensive marijuana use showed poor judgment and raised security concerns. He stopped using marijuana in February 2010. More time is needed without illegal drug use to mitigate security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On June 28, 2010, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (Item 4). On April 15, 2011, 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 Guideline H (drug involvement). (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.

On May 31, 2011, Applicant responded to the SOR allegations and requested a decision without a hearing. (Item 3) A complete copy of the file of relevant material (FORM), dated June 8, 2011, was provided to him on June 21, 2011. 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 September 15, 2011.

Findings of Fact²

Applicant's SOR response admitted all of the SOR allegations: (1) the police arrested him for marijuana possession in September 1995 (SOR ¶ 1.a); (2) he was arrested for prohibited possession of a controlled drug in 1997 (SOR ¶ 1.b); and (3) he used marijuana about once each year from June 2000 to February 2010 (SOR ¶ 1.c). (Item 3) His admissions are accepted as factual findings.

Applicant is a 33-year-old employee of a defense contractor. (Item 4) In May 2000, he was awarded a bachelor's degree. (Item 4 at 15) He began working for his current employer in April 2010 as a general manager. (Item 4 at 17) From December 2003 to March 2010, he was employed as a senior account manager in a private company not under contract to the Department of Defense. (Item 4 at 18) He does not have any prior military service. (Item 4 at 29-30) He married in October 2006. (Item 4 at 33) He has one child who is less than one year old. (Item 4 at 34-38; Item 5 at 14)

Drug involvement

On June 28, 2010, Applicant signed his security clearance application. (Item 4) On this security clearance application, he responded, "Yes" to Section 22e, which asks whether he has ever been charged with any offenses related to alcohol or drugs. (Item 4 at 46) He disclosed that in September 1995, he was charged with possession of marijuana, and he said the offense was subsequently expunged. (Item 4 at 47) On August 5, 2010, he told an investigator from the Office of Personnel Management (OPM) that he never went to court for this offense, and in response to DOHA interrogatories, he said the charged was "dropped." (Item 5 at 10, 15) In January 1997,

¹ The DOHA transmittal letter is dated June 15, 2011, and Applicant's receipt is dated June 21, 2011. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information.

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

he pleaded no contest to simple possession of marijuana, and the court imposed a fine. (Item 4 at 46-47)

Applicant's August 5, 2010 OPM interview indicates he used marijuana about ten times from June 2000 to February 2010 at the rate of about once per year.³ He used marijuana at barbecues, concerts, or when traveling for sports. He received the marijuana from friends; however, he was unable to recall the names of the friends who provided the marijuana. Applicant has not received any diagnosis or treatment for marijuana use. He stopped using marijuana at the beginning of 2010 because of his commitment to his family (especially his seven-month-old son) and his desire to improve his career opportunities.

In his response to DOHA interrogatories, Applicant described his history of marijuana use as follows:

I smoked marijuana my senior year in high school and my first year and a half of college in 1995-1997 about 20 times, after that period of time I have very rarely smoked over the past 10 years, maybe once a year. I haven't smoked marijuana since February of last year when I was making a career change and when we started trying for a family.

Item 5 at 18.

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

³ The sources of the information in this paragraph are Applicant's August 5, 2010 OPM personal subject interview (PSI) (Item 5 at 11) and his response to DOHA interrogatories. (Item 5 at 15-16) On December 20, 2010, Applicant verified the accuracy of the summary of the OPM interview, except he clarified that he knew the friends who were with him when he used marijuana. (Item 5 at 15-19) He explained that he did not know the source of the marijuana that he used. *Id.*

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 concern is under Guideline H (drug involvement).

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.

Two drug involvement disqualifying conditions in AG ¶¶ 25(a) and 25(c) could raise a security concern and may be disqualifying in this case: "any drug abuse"⁴ and "illegal drug possession." These two disqualifying conditions apply because Applicant possessed and used marijuana.⁵ He admitted his marijuana use on his security clearance application, to an OPM investigator, and in his SOR response. He possessed marijuana before he used it. He was convicted of simple marijuana possession in 1997. Applicant's arrest for marijuana possession in 1995 does not establish a security concern because he did not indicate that he committed an offense, and the offense was not prosecuted. Accordingly, SOR ¶ 1.a is not substantiated.

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.

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."

⁵ 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.

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 Drug Enforcement Administration listing at http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308_11.htm. See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

(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.”⁶

Applicant’s involvement with marijuana extended over about a 15-year period beginning with his marijuana use in high school, his arrest in 1995, his conviction in

⁶ 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.

1997, and ended in February 2010, when he stopped using marijuana.⁷ He recognizes the adverse impact on his life of drug abuse in connection with access to classified information as well as the impact on his family and career. Marijuana possession violates federal law. He did not indicate that he has ended any association with known drug users. AG ¶¶ 26(a) partially applies to his marijuana-related offenses.⁸

Applicant demonstrated his intent not to abuse illegal drugs in the future. 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 about 20 months. AG ¶¶ 26(b) partially 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.

In conclusion, Applicant ended his drug abuse in February 2010, about 20 months ago. The motivations to stop using illegal drugs are evident.⁹ He has shown or demonstrated a sufficient track record of no drug abuse to reduce, but not completely eliminate drug involvement as a bar to his access to classified information. Drug involvement concerns remain and will not be mitigated until more time elapses with no marijuana possession or use.

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

⁷The SOR did not allege that Applicant used marijuana about 20 times during high school and college. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

(citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). I have considered the non-SOR misconduct for the five above purposes, and not for any other purpose.

⁸ In 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.

⁹ Approval 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.

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 Guideline H 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. He stopped using marijuana in February 2010. 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. 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. 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 33 years old, and he was sufficiently mature to be fully responsible for his conduct. His marijuana use on approximately 30 occasions over a 15-year period shows lack of judgment. He risked arrest and prosecution each time he possessed and used marijuana. Such judgment lapses raise questions about Applicant's reliability, trustworthiness, and ability to protect classified information. His marijuana use under all of the 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 not fully mitigated. 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:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraphs 1.b and 1.c:	Against Applicant

Conclusion

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

Mark Harvey
Administrative Judge