



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



In the matter of:)
)
-----) ISCR Case No. 11-11638
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: *Pro se*

03/18/2013

Decision

Harvey, Mark, Administrative Judge:

From 1996 to 1999, and from 2003 to April or May 2011, Applicant used marijuana about once a week. On October 28, 1999, and in August 2003, Applicant promised in an official security context that he would not use illegal drugs in the future. More time without illegal drug use is necessary to fully mitigate drug involvement concerns. Eligibility for access to classified information is denied.

Statement of the Case

On May 18, 2011, Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) version of a security clearance application (SF-86). (GE 1) On September 5, 2012, the Department of Defense (DOD) issued a statement of reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) the President promulgated on December 29, 2005.

The SOR alleged security concerns under Guideline H (drug involvement). (Hearing Exhibit (HE) 3) The SOR detailed reasons why DOD was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance

for Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be granted or revoked.

On September 24, 2012, Applicant responded to the SOR and requested a hearing. (HE 3) On October 31, 2012, Department Counsel indicated he was ready to proceed on Applicant's case. On November 9, 2012, Applicant's case was assigned to another administrative judge. On January 28, 2013, the case was transferred to me for administrative reasons. On February 4, 2013, DOD issued a hearing notice, setting the hearing for February 25, 2013. (HE 1) Applicant's hearing was held as scheduled using video teleconference. Department Counsel offered seven exhibits, and Applicant did not offer any exhibits. (Tr. 14-15, 25-26; GE 1-7) There were no objections, and I admitted GE 1-7. (Tr. 26) Additionally, I admitted the hearing notice, SOR, and Applicant's response to the SOR. (HE 1-3) On March 5, 2013, I received the transcript.

Findings of Fact¹

Applicant admitted the conduct alleged in the SOR, and he provided an extensive discussion of the facts as well as some extenuating and mitigating information. (HE 3) His admissions are accepted as findings of fact. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant is a 63-year-old employee of a large defense contractor, who works as a systems analyst and provides primary information assurance for sophisticated computer systems. (Tr. 6, 22-23, 27) He has worked for the same employer since January 1994. (Tr. 22) He is responsible for security for 26 advanced computer systems, including data storage. (Tr. 22-23) None of the computer systems under Applicant's purview have ever been compromised or suffered a loss of data. (Tr. 28)

Applicant graduated from high school in 1967. (Tr. 6) He was awarded a bachelor's of arts degree in chemistry in 1975, a bachelor's of science degree in computer science in 1993, and a master's of science degree in computer science in 1996. (Tr. 7) He had outstanding grades in computer science especially in graduate school. (SOR response)

Applicant served in the Army from November 1969 to July 1971. (Tr. 7) He was a combat medic; he was awarded the Combat Medic Badge and an Army Commendation Medal; he left active duty as a Specialist (E-4); and he received an honorable discharge. (Tr. 8)

Applicant underwent National Agency Checks in 1999 and 2003, and he had clearance to work with sensitive but unclassified information. (Tr. 9) Applicant was never formally advised that he was granted access to sensitive information. (Tr. 9) Joint Personnel Adjudication System (JPAS) did not clearly indicate whether Applicant's

¹The facts in this decision do not specifically describe employment, names of witnesses or locations in order to protect Applicant and his family's privacy. The cited sources contain more specific information.

security clearance applications were fully adjudicated until the interim declination due to the issuance of the SOR in May 2011. (Tr. 10) Applicant is not married, and he does not have any children. (Tr. 22; GE 1)

Drug Involvement

In 1966 when he was 16, Applicant began using marijuana. (Tr. 33) He used marijuana and heroin in the early 1980s. Applicant was arrested for possession of heroin in about 1987.² (Tr. 31) In May 1988, he pleaded no contest to the drug offense. (Tr. 31) He served 42 days of his 60-day jail sentence, paid his \$1,878 fine, and received some drug treatment. (Tr. 31; SOR response) For six months, he was enrolled in an outpatient, methadone-treatment program after being released from jail, and he received counseling, and attended Narcotics Anonymous (NA) meetings. (Tr. 34-35) He stopped using marijuana in about 1987. He has not attended any drug counseling or treatment since 1988. (Tr. 35)

Applicant resumed his marijuana use in about 1996. (Tr. 32) Marijuana is the only illegal drug he used after 1995. (Tr. 36) His marijuana use from 1996 to 1999 was about once a week. (Tr. 37) On August 25, 1999, Applicant submitted a Public Trust Position Application. (GE 4) In response to a question about illegal drug use in the last year, he indicated that he occasionally used marijuana from August 19, 1998 to the present. (GE 4) He stopped using illegal drugs from 1999 to 2003 because of his application for a security clearance. (Tr. 37-38) On October 28, 1999, Applicant told a Defense Security Service special agent:

In my past, I have used heroin, LSD^[3] and marijuana. . . . I quit using [heroin from about 1971] until about 1982, when I was reintroduced to heroin by a new girlfriend. We used heroin on a weekly basis by injection, until the summer of 1987, when I was arrested for possession of heroin. . . . I was sentenced to 60 days in jail and a \$1,800 fine. I had to serve 1 year probation, which was no problem, because I quit using heroin. I will not

²His 1987 arrest was his only drug-related arrest. (Tr. 41)

³In Applicant's SOR response, he disclosed use of lysergic acid diethylamide (LSD), marijuana, peyote, cocaine, and methamphetamine in 1967 as well as Vicodin, Demerol, and Dilaudid (without a prescription) in the 1980's. The SOR did not include an allegation that Applicant used illegal drugs in addition to marijuana and heroin. 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 not considered the non-SOR allegations of other than marijuana and heroin illegal drug use for any purpose because it was not fully explored at his hearing.

use it in the future. During the 1960's I used LSD about 50 times. I do not [use] LSD now and will not use it in the future. . . . I quit using marijuana in Aug 99 when I realized the impact it could have upon my employment. . . . Since my current job has a zero tolerance position on drugs, I have decided to support the policy and disavow any future drug use. (Tr. 45-46; GE 5)

On February 13, 2003, Applicant completed a security clearance application, where he indicated that he occasionally used marijuana from February 1996 to August 1999. (GE 6) In 2003, Applicant resumed his marijuana use until 2011. (Tr. 32) In August 2003, Applicant made a statement to an Office of Personnel Management (OPM) investigator, in which he said, "I do not have any intentions in the future to use heroin or other drugs." (Tr. 46-48; GE 7) His marijuana use from 2003 to 2011 was about on a weekly basis. He used marijuana in his food, such as brownies and cookies, and occasionally by smoking it. (Tr. 38) He quit using marijuana shortly before submitting his May 18, 2011 SF-86. (Tr. 39) Applicant has resolved not to use marijuana in the future. (Tr. 32)

Applicant's secondary employer, a university, has a drug-free workplace policy, and he is subject to being required to submit to a drug test at any time. (Tr. 42) Applicant has never submitted to a drug test. (Tr. 42) He was not aware of his defense-contractor employer's drug use policy. (Tr. 43)

Applicant explained at his hearing:

. . . [a]fter having said that I would not use marijuana again I did so in 2003 and continuing on for about eight years. And it's hard for me to defend that. It certainly wasn't my plan. I resisted using, but I did use. And I—all I can say is I am very determined not to make that mistake again." (Tr. 49)

Applicant regretted resumption of his marijuana use in 2003, and he does not keep marijuana in his residence; however, he continues to associate with friends who sometimes use marijuana. (Tr. 44, 50, 55) His friends do not use marijuana in Applicant's residence or presence. (Tr. 44)

Applicant takes his employment very seriously, and he is a highly experienced professional. (Tr. 29-30) Applicant is an asset to his employer. (Tr. 29) His employer trusts Applicant and values his work. (Tr. 30)

Character Evidence

Applicant's supervisor has worked with him for 15 years, and he describes him as a very valuable employee with a superb work ethic.⁴ Applicant is professional, dependable, considerate, trustworthy, and protective of the information technology

⁴The source for the facts in this paragraph is the September 24, 2012 character statements Applicant provided from his supervisor. (SOR response)

system's integrity. Applicant has been the team captain in an important charitable event supported by colleagues and fellow employees for many years.

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 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. Nothing in this decision should be construed to suggest that I 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

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.

The disqualifying conditions in AG ¶¶ 25(a) and 25(c) could raise a security concern and may be disqualifying in this case: “any drug abuse,”⁵ and “illegal drug possession.” Applicant used and possessed marijuana and heroin.⁶ AG ¶¶ 25(a) and 25(c) apply.

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:

⁵AG ¶ 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.”

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 and heroin are Schedule (Sch.) I controlled substances. See Drug Enforcement Administration listing at http://www.dea/diversion.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).

- (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.”⁷

⁷ISCR 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, affirmed the administrative judge’s decision to revoke an applicant’s security clearance after considering the recency analysis of an administrative judge stating:

Applicant stopped using marijuana in about 1987 or 1988. Applicant's drug use before 1988, more than 25 years ago, is of limited relevance because it was so long ago. The SOR allegations occurring more than 25 years ago, as alleged in SOR ¶¶ 1.a and 1.b, are mitigated. The allegation in SOR ¶ 1.d is essentially duplicated in SOR ¶ 1.e. Accordingly, SOR ¶ 1.d is mitigated.

In 1996, Applicant resumed marijuana use about once a week. He stopped using illegal drugs from 1999 to 2003 because of his application for a security clearance. On October 28, 1999, Applicant indicated in a statement to a Defense Security Service special agent, "I quit using marijuana in Aug 99 when I realized the impact it could have upon my employment. . . . Since my current job has a zero tolerance position on drugs, I have decided to support the policy and disavow any future drug use." (GE 5) In August 2003, Applicant made a statement to an OPM investigator, in which he said, "I do not have any intentions in the future to use heroin or other drug." (GE 7) In 2003, Applicant resumed his marijuana use on about a weekly basis until 2011. He quit using marijuana shortly before submitting his May 18, 2011 SF-86.

Applicant has resolved not to use marijuana in the future. He abstained from marijuana use for about two years. He recognized the adverse impact of drug abuse in connection with access to classified information. He also understands that possession of marijuana violates federal law. I accept Applicant's statement that he intends to continue to abstain from illegal drug possession and use. AG ¶ 26(a) partially applies to his marijuana-related conduct;⁸ however, more time without illegal drug use is necessary to fully apply AG ¶ 26(a) because he resumed illegal drug use after previous substantial periods of abstinence.

AG ¶¶ 26(b), 26(c), and 26(d) are not applicable because Applicant did not abuse drugs after being issued a prescription that is lawful under federal law. Marijuana was never lawfully prescribed for him under federal law. He did not provide proof of satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional. He continues to associate with marijuana users even though they do not use marijuana in his presence or at his residence.

In sum, Applicant ended his drug abuse in April or May 2011, about two years ago. The motivations to stop using illegal drugs are evident. He understands the

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.

⁸In 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.

adverse consequences from marijuana use;⁹ however, he has not shown or demonstrated a sufficient track record of abstention from illegal drug use to eliminate drug involvement as a bar to his access to classified information. Drug involvement concerns are not mitigated at this time.

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. My comments under Guideline H are incorporated into my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under Guideline H, but some warrant additional comment.

There is considerable evidence supporting approval of his clearance. Applicant is a 63-year-old systems analyst and the primary information assurance professional for sophisticated computer systems. He has successfully worked for a large defense contractor since January 1994. He is responsible for security for 26 advanced computer systems, including data storage. None of the computer systems under Applicant's purview have ever been compromised or suffered a loss of data. He was awarded a bachelor's of arts degree in chemistry in 1975, a bachelor's of science degree in computer science in 1993, and a master's of science degree in computer science in 1996. He served in the Army from November 1969 to July 1971 especially for his service in Vietnam as a combat medic. He was awarded the Combat Medic Badge and an Army Commendation Medal.

Applicant has avoided drug-related criminal arrests and convictions since 1988. He completed a drug counseling program in 1988. He has resolved not to use marijuana in the future, and he abstained from marijuana use for about two years. He recognized the adverse impact of his drug abuse in connection with access to classified

⁹Approval 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.

information and that possession of marijuana violates federal law. Applicant is a valued employee with a supportive supervisor. His supervisor lauds his work ethic, professionalism, dependability, trustworthiness, and his conscientious protection of his employer's information technology system. There is no evidence at his current employment of any disciplinary problems. His Army service and employment with a DOD contractor shows important rehabilitation and mitigation.

The evidence against approval of Applicant's clearance is more substantial. In 1996, Applicant resumed using marijuana about once a week. He stopped using illegal drugs from 1999 to 2003. On October 28, 1999, and in August 2003, Applicant stated in an official security context that he would not use illegal drugs in the future. In 2003, Applicant resumed his marijuana use on about a weekly basis until April or May 2011. His decision to return to marijuana use was knowledgeable, voluntary, and intentional. He was sufficiently mature to be fully responsible for his conduct. Illegal drug use shows a lack of judgment and/or impulse control. His problem with marijuana possession and use cannot be fully mitigated at this time. Such conduct raises a serious security concern, and a security clearance is not warranted.

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 Applicant has not fully mitigated the security concerns pertaining to drug involvement at this time.

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 and 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	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