



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



In the matter of:)	
)	
)	ISCR Case No. 14-05932
)	
Applicant for Security Clearance)	

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: *Pro se*

04/13/2017

Decision

HEINY, Claude R., Administrative Judge:

Applicant contests the Department of Defense's (DoD) intent to deny his eligibility for a security clearance to work in the defense industry. From 1997 through 2010, Applicant used marijuana. In March 2005, he was granted a security clearance. He has mitigated the drug involvement and criminal conduct security concerns. Clearance is granted.

History of the Case

On November 30, 2015, acting under the relevant Executive Order and DoD Directive,¹ the DoD issued a Statement of Reasons (SOR) detailing drug involvement and criminal conduct security concerns. DoD adjudicators could not find that it was clearly consistent with the national interest to grant or continue Applicant's security clearance. On December 17, 2015, Applicant answered the SOR (Answer) and requested a hearing. On July 28, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing for a hearing to be convened on August 23, 2016.

¹ Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

At the hearing, Government's Exhibits (Ex.) 1 through 4 and Applicant's Ex. A and B were admitted without objection. Applicant and two of his coworkers testified at the hearing. The record was kept open to allow Applicant to present additional documents. On August 25, 2016, additional documents were received and admitted as Ex. C. On August 31, 2016, DOHA received the hearing transcript (Tr.).

Findings of Fact

In Applicant's answer to the SOR, he admitted using marijuana after having been granted a security clearance. I incorporate Applicant's admissions as facts. After a thorough review of the pleadings, exhibits, submissions, and transcript, I make the following additional findings of fact:

Applicant is a 33-year-old computer systems administrator who has worked for a defense contractor since July 2012, and he seeks to retain a security clearance. (Ex. 1, Answer, Tr. 34) He has had a security clearance since March 2005. (Tr. 13) From March 2001 through September 2010, he served in the U.S. Army National Guard. From June 2007 to September 2008, he was deployed to Iraq in support of Operation Iraqi Freedom. (Tr. 27)

In September 2010, then an E-5, Applicant smoked marijuana prior to a National Guard drill weekend. (Tr. 45) During the drill weekend, he had a random urinalysis and tested positive for tetrahydrocannabinol (THC) the psychoactive ingredient of marijuana. He received a general discharge under honorable conditions following his positive urinalysis. (Ex. 1) From the summer of 2011 to the summer of 2012, he was also deployed to Iraq as a contractor. (Tr. 27, 49)

The vice president of operations for the company employing Applicant stated he has known Applicant since 2010 and Applicant is an outstanding team member with great character, integrity, and professionalism. (Answer) Applicant is one of the company's most valued employees. Applicant is prompt, dependable, and carries out his duties in an exceptional manner. (Answer) The vice president of operations also stated Applicant is dependable and has become the number two for the senior lead. (Tr. 56, 57) Applicant mentors and trains new employees. The company's president stated Applicant is a dedicated, professional, outstanding individual, and a man of integrity. (Tr. 62- 66)

The site manager in Iraq stated Applicant demonstrates a strong work ethic and dedication to success whose coworkers value his advice and knowledge. (Answer) An information technology manager who has known Applicant for six years stated Applicant maintains the highest level of integrity, has great moral and ethical standards, and is a good family man. (Ex. B) Applicant's performance evaluations rate him as having outstanding skills and receiving numerous kudos for his professional and excellent work. (Answer) He has received a number of "coins" from Air Force commanders for his outstanding work. (Answer)

In 2005, Applicant met his wife and just before deploying to Iraq in 2007, they married. They married to ensure his wife would have healthcare and benefits while he was away. (Tr. 29) Applicant states, "in hindsight, that turned out to be a bad decision." (Tr. 29) His then-wife used marijuana. (Tr. 31) In 2012, when Applicant returned from his year in Iraq as a civilian, his then-wife told him she had cheated on him while he was deployed. (Tr. 31) She continued in the drug-user lifestyle, although she had stopped for a period of time when Applicant stopped using marijuana in May 2010, (Tr. 31 and 49) He immediately separated from her and stopped the progress on the plan to adopt her daughter. (Tr. 32) In July 2013, Applicant and his wife divorced and he has not seen her after their divorce was final. (Ex. 1, Tr. 32)

In December 2004, Applicant stated he had no intention of using illegal substances in the future. (Ex. 4) This statement was made before he met his now-ex-wife. He used marijuana with his then-wife once a month. (Tr. 41)

Applicant plans to marry his fiancée in the fall of 2017. In February 2016, he learned his fiancée was pregnant. (Ex. C, Tr. 32) They have a three-year-old daughter together. (Tr. 53) Becoming a parent and this investigation concerning his clearance has had a maturing effect on Applicant. (Tr. 33)

On Applicant's April 2014 Electronic Questionnaires for Investigations Processing (e-QIP) he listed his marijuana use that ended in 2010, his 2005 arrest for marijuana possession, and his discharge from the National Guard for marijuana use. He first used marijuana when he was 14 years old and a freshman in high school. (Tr.35) He used monthly in high school at parties and social events. During his one year in college, he used marijuana less frequently. (Tr. 36)

In December 2004, Applicant made a sworn statement in which he explained his April 2002 marijuana arrest. (Ex. 4) In April 2002, Applicant, then age 18 and a freshman university student, was arrested for smoking marijuana in a city park with his roommate. (Exs. 2, 3, 4) He received deferred adjudication. (Tr. 38) He was sentenced to one year probation, ordered to complete 60 hours of community service, complete a drug awareness class, and he paid a \$725 fine. (Ex. 2) His arrest had serious consequences on his life because he could no longer qualify for student loans or financial aid, which was one² of his reasons for leaving college. (Ex. 4, Tr. 24, 25) While on probation, he did not use marijuana. (Answer)

Applicant completed all the conditions of probation early which prompted his probation officer to recommend closing his case early. (Ex. 4) In January 2003, his case was closed, which allowed him to attend basic training and advanced individual training (AIT). In March 2003, Applicant entered the U.S. Army and during 2003 and 2004 he did not use marijuana while in basic training or during AIT. (Ex. 4, Answer, Tr. 40) He informed his unit's executive officer about his arrest and was told he would be informed if there was a problem with his clearance. (Ex. 4)

² Applicant's other reasons for leaving was that in March 2001, while a senior in high school, he had enlisted in the Army National Guard and was scheduled to go to basic training in the spring of 2003. (Tr. 25) The other reason was that he could not afford the cost of school. (Tr. 25)

In August 2005, Applicant, then age 22, was arrested and charged with possession of marijuana. (Ex. 3) He was returning home from a night class at the city college when he was pulled over for loud music and not wearing a seatbelt. (Tr. 30) He was a block from his house and when officers searched his house they found marijuana. Applicant asserted the marijuana belonged to his girlfriend who lived with him at the time and later became his wife. He was found guilty and sentenced to two years of probation, to pay an \$800 fine, and to pay an additional \$300 in costs. (Ex. 3, Tr. 42) He did not use marijuana for four years following his arrest. (Answer) From August 2005 through August 2007, while on probation, he did not use marijuana. (Answer) Nor did he use it while deployed to Iraq in 2006 and 2007. (Answer) While in Iraq he served as a security guard for a large outdoor detention facility. (Tr. 26) From 2007, when he returned from Iraq, to 2010, when he had a positive urinalysis; he estimated he used marijuana two or three times a year. (Tr. 44)

In early 2006, Applicant's National Guard unit was put on notice that it was being activated for deployment to Iraq. (Tr. 42) His commander, who had knowledge of the marijuana arrest, wrote a letter to the court asking that Applicant be allowed to deploy because Applicant was a critical member of his unit. (Answer, Tr. 43) Applicant was allowed to continue probation and his required reporting from Iraq. Applicant's probation officer recommended allowing the monthly reporting requirement to terminate early. (Answer) He received no punishment from the National Guard for his 2005 arrest. (Tr. 43)

After 2005, Applicant's marijuana use was sporadic. (Tr. 33) He did not describe the dates of those periods of abstinence. He asserts his use of marijuana never caused trouble in his personal life. (Tr. 35) He does not intend to use marijuana in the future and signed a statement of intent not to use illegal drugs with automatic revocation of clearance for any violation. (Ex. A, 2) He has not used marijuana since his positive urinalysis in May 2010. (Tr. 48) His discharge from the National Guard was the "last straw" for him and his marijuana use. (Tr. 48) He found the event to be a "wake-up call" and he did not want any more detrimental events in his life or career. (Tr. 48) In 2010, he dropped friends who were still using marijuana. (Tr. 50)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available,

reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination of the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to 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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying:

- (a) any drug abuse; and
- (b) testing positive for illegal drug use;

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

(g) any illegal drug use after being granted a security clearance.

From 1997 to 2010, Applicant periodically used marijuana. In March 2005, he was granted a security clearance. He continued using marijuana until May 2010, then a member of the National Guard, when he tested positive for marijuana during a random urinalysis. AG ¶¶ 25 AG (a), (b), (c), and (g) apply.

AG ¶ 26 provides two conditions that could potentially mitigate security concerns:

(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; and

(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.

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). 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.”³

³ 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

Applicant stopped using marijuana in May 2010, and he has resolved not to use marijuana in the future. His use was not frequent and the circumstances of use are unlikely to recur. He used with his ex-wife. Her continuing with the drug-using lifestyle after he had stopped using was one of the reasons for their divorce. After May 2010, he stopped associating with individuals who used marijuana. His fiancée does not use marijuana and Applicant is concentrating on his family. He recognized the adverse impact of drug abuse in connection with access to classified information, and he expressed remorse about using marijuana while employed by a defense contractor. 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 as truthful. AG ¶ 26(a) applies to his possession and use of illegal drugs.⁴

From 2007 through May 2010, Applicant used marijuana two or three times a year. His current period of abstinence of more than six years is sufficient to demonstrate his intent not to use illegal drugs in the future. His use of marijuana after obtaining a security clearance is a concern, but changes in lifestyle and family life, and his realization of what is important in his life, counter that concern. Additionally, he asserts he will not use illegal drugs in the future and signed a statement of intent not to use illegal drugs with automatic revocation of clearance for any violation.

Guideline J, Criminal Conduct

Adjudicative Guideline (AG) ¶ 30 expresses the security concern pertaining to criminal conduct:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. Potentially disqualifying conditions in this case are:

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:

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.

⁴ 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.

(a) a single serious crime or multiple lesser offenses; and

(c) allegations or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

In 2002, Applicant, then 18 years old and a college freshman, was arrested for smoking marijuana in a city park. Adjudication was deferred. In 2005, he was arrested for possession of marijuana. Adjudication was again deferred. He was allowed to continue his probation while in Iraq. He finished the terms of his probation early. AG ¶¶ 31(a) and 31(c) apply.

AG ¶ 32 provides two conditions that could mitigate security concerns. Those that are potentially mitigating are:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Applicant's last arrest occurred in 2005, more than 11 years ago. His first arrest occurred when he was 18 years old. He no longer uses marijuana or associates with those that do. AG ¶ 32(a) applies. Neither his actions of 11 years ago, nor the other arrest, cast doubt on his current reliability, trustworthiness or good judgment. AG ¶ 32(d) applies because of the passage of time without involvement of law enforcement and his good employment record.

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.

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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have considered Applicant twice went to Iraq, a qualified hazardous duty area entitling him to receive hostile fire pay or imminent danger pay. From June 2007 to September 2008, he was deployed to Iraq with his Army National Guard unit in support of Operation Iraqi Freedom. From the summer of 2011 to the summer of 2012, he returned to Iraq as a contractor in direct support of military operations. Applicant receives significant whole-person mitigating credit for going in harm's way in support of the United States.

Applicant has outstanding work performance, is professional, and has a positive record for accountability and reliability. He is highly thought of by the president and vice president of his company, co-workers, and associates. Applicant has a strong work ethic, dedication, maintains the highest level of integrity, is a good family man, and has great moral and ethical standards.

Applicant has made positive changes to his lifestyle and family life, and has realized that he must reject illegal drug use to achieve what is important in his life. He no longer associates with those who use marijuana. Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance.

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., Drug Involvement:	FOR APPLICANT
--	---------------

Subparagraphs 1.a –1.f:	For Applicant
-------------------------	---------------

Paragraph 2, Guideline J., Criminal Conduct:	FOR APPLICANT
--	---------------

Subparagraph 2.a:	For Applicant
-------------------	---------------

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's security clearance. Eligibility for access to classified information is granted.

CLAUDE R. HEINY II
Administrative Judge