



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-03844

Appearances

For Government: Ray T. Blank, Esq., Department Counsel
For Applicant: *Pro se*

03/27/2017

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. Applicant used marijuana from 1991 through 2012. In November 2003, he had been granted a security clearance. He has failed to mitigate the drug involvement security concerns. Clearance is denied.

History of the Case

On January 12, 2016¹, acting under the relevant Executive Order and DoD Directive,² the DoD issued a Statement of Reasons (SOR) detailing drug involvement security concerns. DoD adjudicators could not find that it was clearly consistent with the national interest to continue Applicant's security clearance. On February 18, 2016, Applicant answered the SOR (Answer) and requested a hearing. On May 18, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing for a hearing to be convened on June 9, 2016.

¹ The SOR is incorrectly dated January 12, 2015.

² 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 3 and Applicant's Ex. A were admitted without objection. Applicant testified at the hearing. The record was kept open to allow Applicant to present additional documents. One additional character letter was submitted and admitted as Ex. B. On June 21, 2016, DOHA received the hearing transcript (Tr.).

Findings of Fact

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

Applicant is a 44-year-old engineer who has worked for a defense contractor since June 2001. He seeks to retain a security clearance granted in November 2005. (Ex. 1, Tr. 13) In September 2005, he divorced. He has a son, age 19, and a daughter, age 13. (Ex. 1, Tr. 13)

Applicant's manager states Applicant has established a positive record of accountability, reliability, team performance, and ethics. (Ex. A, Tr. 21) His manager has known Applicant for 15 years and has never known Applicant to improperly handle or misuse classified information. (Ex. A) Applicant's former manager stated Applicant informed him and the facility security officer (FSO) of his family situation. His former manager stated that throughout the situation Applicant maintained a great attitude and conducted himself professionally. (Ex. B)

In 2005, Applicant went through a "pretty nasty divorce" and custody battle and went "wild" for a bit of time following his divorce. (Tr. 22) He stated immediately following his divorce, he was "pretty hell-bent on destruction." (Tr. 27) He was drinking, chasing women, and engaging in self-destructive behavior. (Tr. 27) For a year or two, he was a pretty regular weekend marijuana user. (Tr. 27) He then cut back to special occasions such as fishing, camping, and the New Year's Eve party. (Tr. 27) In 2010, he purchased a home and started getting his life back in order.

On Applicant's March 2013 Electronic Questionnaires for Investigations Processing (e-QIP), he stated he had frequently used marijuana from 1991 through 2005 and occasionally used marijuana from 2005 through 2010. (Ex. 1) He used marijuana infrequently since 2010. (Ex. 1) He stated he did not intend to use it again for four reasons: first, he feared losing his job; second, he would be ashamed if his children found out; third, he no longer found it enjoyable; and, fourth it caused him severe paranoia. (Ex. 1, Tr. 18)

On April 20, 2013, Applicant had a personal subject interview (PSI) during which he provided an unsworn declaration. (Ex. 2) During his PSI, the only date he could specifically recall using marijuana was December 31, 2012. (Ex. 2) He was at a New Year's Eve party when he took two puffs of marijuana. (Ex. 2) This was the last time he used marijuana, and he intends not to use in the future. In December 2015, Applicant

responded to written interrogatories stating he had been completely drug free for three years and had only occasionally used marijuana for many years before stopping. (Ex. 2, Tr. 18) He again stated he had no intention of using illegal drugs in the future because his family and job were too important to him. (Ex. 2)

During Applicant's PSI, he stated from 1991 to 1998 he smoked marijuana daily. From 1998 through 2005, he decreased his use of marijuana to once a week, because he had children. (Ex. 2) He says this was only an estimate³ because there were periods of time when he abstained from all substance abuse. (Tr. 26) He also stated during his PSI that he had decrease his marijuana use from 2005 to December 2012. He stated his use decreased because he no longer enjoyed it and because he and his friends were getting older. (Ex. 2) However, he continued to use on a weekly basis. (Ex. 2)

Ten years earlier, in April 2003, Applicant provided a sworn statement in which his marijuana usage was discussed. (Ex. 3) In that statement, he stated he had first used marijuana after graduating from high school in 1991. He said he had last used it in March 1998.⁴ (Ex. 3) He estimated he had used marijuana approximately 200 times and would normally purchase a \$20 bag every two weeks. At that time, he stated he had stopped using illegal drugs before his son was born⁵ and he "knew it was time to grow up." (Ex. 3) He was thirty years old at the time of the statement. He stated his intent not to use illegal drugs in the future. (Ex. 3)

Following Applicant's December 2012 New Year's Eve use, he regretted what he had done; he became fearful, and paranoid. (Tr. 28) He was ashamed of himself for "screwing up." (Tr. 28) After 2005, his use was not continuous but had periods of abstinence. (Tr. 33) He did not illuminate the dates of those periods of abstinence. He asserts his use of marijuana never caused trouble in his personal life. (Tr. 35) He says he will never use marijuana again.

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

³ Applicant stated, "The frequency, as I stated before was a little vague," it was "fair enough to say" from 1998 to 2005, he used marijuana weekly. (Tr. 31)

⁴ Applicant's statement concerning that he last used marijuana in March 2003 was untruthful because he was using marijuana weekly in 2003. (Tr. 31)

⁵ Applicant's son was born in March 1998. (Ex. 1)

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;
- (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 1991 to 1998, Applicant used marijuana daily. From 1998 through 2005, he used marijuana weekly. In November 2001, he was granted a security clearance. He continued using marijuana weekly until December 31, 2012, when he used at a New Year's Eve party. He asserts there would periods of abstinence, but gave no information as to when those periods occurred or how long the periods of abstinence lasted. AG ¶¶ 25 AG (a), (b), and (c) 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;

Applicant's period of abstinence is insufficient to demonstrate his intent not to use illegal drugs in the future. In 1991, Applicant started using marijuana after graduating from high school. He used marijuana for 21 years. During part of that time, he used marijuana daily and then weekly, although he claimed there were periods of abstinence. In his April 2003 sworn statement, he stated he had not used marijuana since March 1998. However, that statement was not true for he was using marijuana weekly at the time. In 2003, at the time of his sworn statement, he was 30 years old and gave as one reason for not using marijuana was that he knew it was time to grow up. However, he did not stop using marijuana and continued to use it until December 31, 2012.

Applicant continued to use marijuana for 11 years after he obtained his security clearance in November 2003. He asserts his most recent use is not recent and states he does not intend to use again, but he made a similar statement in 2003. Applicant's November 2005 divorce and custody battle were traumatic events, but the possibility of

encountering difficult circumstances is a part of life. Additionally, his use of marijuana was not confined to the few years following his divorce.

AG ¶ 24 (a) does not apply. Applicant's use was frequent and did not occur under circumstances that are unlikely to recur. There are no "bright line" rules for determining when 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 stated in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997) 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 has a lengthy history of marijuana use while holding a security clearance. He used marijuana frequently, claims to have abstained for some period of time, and returned to using. His current period of abstinence is insufficient to demonstrate his intent not to use illegal drugs in the future. AG ¶ 26 (a) and (b) do not apply. Although more than three and a half years have passed since his last usage, his many years of marijuana use cause me concern. But I have not discounted Applicant's statement that he will not use illegal drugs in the future. However, I have not given it great weight in light of his having made a similar statement in the past only to return to marijuana usage.

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.

⁶ ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has good work performance, is professional, and has a positive record for accountability and reliability. To his credit he acknowledged his marijuana usage on his March 2013 e-QIP. However, he used marijuana frequently over more than a 20-year period. His use between November 2003 and December 31, 2012 occurred when he had a security clearance. He claimed in his 2003 sworn statement that he had stopped smoking marijuana in March 1998, but he was using weekly at the time he made the statement. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance.

This decision should not be construed as a determination that Applicant cannot or will not attain the state of true reform and rehabilitation necessary to justify the award of a security clearance. The awarding of a security clearance is not a once-in-a-lifetime occurrence, but is based on applying the factors, both disqualifying and mitigating, to the evidence presented. Under Applicant's current circumstances it is simply too soon for a clearance to be granted, but should Applicant be afforded an opportunity to reapply for a security clearance in the future, with the passage of additional time, he may well demonstrate persuasive evidence of his security worthiness. However, a clearance at this time is not warranted.

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 E, Drug Involvement:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	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 a security clearance. Eligibility for access to classified information is denied.

CLAUDE R. HEINY II
Administrative Judge