



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



In the matter of:

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ISCR Case No. 15-04242

Applicant for Security Clearance

Appearances

For Government: Douglas Velvel, Esq., Department Counsel

For Applicant: *Pro se*

11/09/2016

Decision

Tuider, Robert J., Administrative Judge:

Applicant's statement of reasons (SOR) alleges and the record establishes that Applicant used marijuana twice in the previous ten years with his most recent marijuana use in April 2014, and once each year from 1986 to 1989. He self-reported his marijuana use. He provided a signed statement of intent not to use illegal drugs with automatic revocation of clearance for any violation. Drug involvement and personal conduct security concerns are mitigated. Access to classified information is granted.

History of the Case

On November 5, 2014, Applicant completed and signed a Questionnaire for National Security Positions (SF-86). On March 8, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued an SOR to Applicant pursuant to Executive Order (Exec. Or.) 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 for Determining Eligibility for Access to Classified Information* (AG), which became effective on September 1, 2006.

The SOR detailed reasons why the DOD CAF could not make the affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or

revoked. Specifically, the SOR set forth security concerns arising under AGs H (drug involvement) and E (personal conduct).

On March 21, 2016, Applicant responded to the SOR and requested a hearing. On May 4, 2016, Department Counsel was ready to proceed. On May 9, 2016, the case was assigned to me. On May 19, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for June 9, 2016. (HE 1) His hearing was held as scheduled. During the hearing, Department Counsel offered 2 exhibits and Applicant offered 10 exhibits. (Transcript (Tr.) 11-13; Government Exhibits (GE) 1-2; Applicant Exhibits (AE) A-J) Applicant's Office of Personnel Management (OPM) personal subject interview was admitted with corrections and clarifications provided by Applicant. (Tr. 12; GE 2; AE D) There were no other objections, and all proffered exhibits were admitted into evidence. (Tr. 12-13; GE 1-2; AE A-J) On June 16, 2016, I received a transcript of the hearing. Applicant provided one post-hearing exhibit, which was admitted without objection. (AE K) The record closed on July 8, 2016. (Tr. 34)

Findings of Fact¹

In Applicant's SOR response, he admitted the allegation in SOR ¶ 1.a, and he denied the remaining allegations. He also provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is a 51-year-old mechanical design engineer, who is seeking a security clearance. (Tr. 11, 13-14; GE 1) The same defense contractor has employed him since June 2014. (Tr. 14) He previously worked for another defense contractor for 24 years at the same location where he currently works. (Tr. 14) In 1983, he graduated from high school, and in 1988, he received a bachelor of science degree in mechanical engineering. (Tr. 16-17) In 1996, he was awarded a master's of science degree in advanced solid mechanics. (Tr. 18) He has taken several courses towards an additional degree. (Tr. 18-19)

In 1989, Applicant married, and in 1991, he divorced. (Tr. 19) In 1998, he married, and in 2014, he divorced. (Tr. 19) His children are ages 8 and 10 years old. (Tr. 20) He did not serve in the U.S. military. (Tr. 21; GE 1) He has never held a security clearance. (Tr. 15)

Personal Conduct and Drug Involvement

In the previous 10 years, Applicant used marijuana once or twice. (Tr. 22-24; GE 1) His most recent marijuana use was in April 2014 at a festival. (Tr. 22, 38) He first used marijuana when he was in high school. (Tr. 24) He used marijuana in the 1986 to 1989 time period about once per year. (Tr. 23; GE 1) Applicant has many

¹Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

acquaintances that use marijuana, and he continues to associate with them. (Tr. 25, 37, 40) His company has a policy against illegal drug use, and his company provides rehabilitation for those who use illegal drugs. (Tr. 39) Applicant refused to provide the names of the person or persons with whom he used illegal drugs. (Tr. 40-42)²

When Applicant completed his November 5, 2014 SF-86, he was asked about illegal drug use in the previous seven years, and he said he used marijuana once or twice in the previous 10 years; his first marijuana use was in 1986; and his most recent marijuana use was in April 2014. (Section 23, GE 1)

Applicant provided a signed statement of intent not to use marijuana or any other illegal drug with automatic revocation of clearance for any violation. (Tr. 32-34; AE K) See AG ¶ 26(b)(4), *infra*.

Character Evidence

Applicant's manager, a colleague from work, and two friends provided character statements. (AE E-AE H) The general sense of the letters is that Applicant is enthusiastic, dedicated to his family and employer, diligent, professional, trustworthy, competent, and patriotic. (AE E-AE H) He received the highest possible rating for his 2015 performance review, and he makes important contributions to the accomplishment of his company's goals. (AE J)

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, "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 applicant's 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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are

²Department Counsel did not move to amend the SOR to allege a concern under AG ¶ 15(b), which provides that a personal conduct security concern is raised by a "refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination." Applicant was not advised that the names of witnesses who have knowledge of his illegal drug use are necessary information because it allows investigators to conduct follow-up interviews to verify the scope of an applicant's illegal drug use. Applicant was not warned of the potential applicability of AG ¶ 15(b). Applicant's failure to provide lawfully requested information will not be considered in this decision.

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, 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 about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. This decision is not based, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. Thus, any decision to deny a security clearance 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 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.

AG ¶ 25 describes two drug-involvement disqualifying conditions that could raise a security concern and may be disqualifying in this particular case: “(a) any drug abuse;”³ and “(c) illegal drug possession.” AG ¶¶ 25(a) and 25(c) apply because in the previous 10 years, Applicant used marijuana once or twice; his most recent marijuana use was in April 2014; and he used marijuana in the 1986 to 1989 time period about once per year.⁴ Consideration of mitigating conditions is required.

The Appeal Board concisely explained Applicant’s responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.” Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

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;

³AG ¶ 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.”

⁴AG ¶ 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 Sch. I(c)(9). See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

- (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.”⁵

⁵ 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.

Applicant used marijuana about once a year from 1986 to 1989, and twice from 2004 to April 2014. His most recent marijuana use in April 2014 was 25 months before his hearing. He recognizes the adverse impact on his life of drug abuse. These actions create some certitude that he will continue to abstain from drug use. AG ¶ 26(a) applies to his marijuana-related offenses.⁶

Applicant has completed a sustained period of abstinence, and he provided “a signed statement of intent [not to use illegal drugs] with automatic revocation of clearance for any violation.” AG ¶ 26(b) partially applies. AG ¶¶ 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. He did not provide proof of satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, and a favorable prognosis by a duly qualified medical professional.

In sum, the only evidence of Applicant’s marijuana use is his self-report during the security clearance process. He provided a signed statement of intent not to use illegal drugs with automatic revocation of clearance for any violation. He credibly described his marijuana use, and he sincerely promised not to use marijuana in the future. He has abstained from marijuana use for 25 months, demonstrating a sufficient track record of no drug abuse to mitigate drug involvement security concerns.

Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes three conditions that could raise a security concern and may be disqualifying in this case:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

⁶In 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.

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior . . . ; or (3) a pattern of dishonesty or rule violations; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Marijuana possession and use is thoroughly addressed under Guideline H, and accordingly, AG ¶ 16(c) does not apply. AG ¶ 16(e)(2) does not apply because the SOR does not allege Applicant's marijuana use in locations outside of the United States.

AG ¶¶ 16(d)(1), 16(d)(3), and 16(e)(1) apply because Applicant used marijuana which is a violation of federal law and his company's policy prohibiting illegal drug use. His marijuana use reflects adversely on his professionalism and creates a vulnerability to exploitation, manipulation, or duress. Marijuana use reflects "questionable judgment . . . or unwillingness to comply with rules and regulations [and raises] questions about [his] reliability, trustworthiness and ability to protect classified information." See AG ¶ 15.

AG ¶ 17 provides three potentially applicable personal conduct mitigating conditions in this case:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

AG ¶¶ 17(c), 17(d), and 17(e) apply. The disqualifying conduct alleged in the SOR under Guidelines H and E is identical. The mitigating facts discussed under Guideline H are applicable to mitigate personal conduct security concerns. His most recent marijuana use was in April 2014, and it happened under unique circumstances that are unlikely to recur and do not cast doubt on Applicant's continued reliability, trustworthiness, or good judgment. He disclosed his marijuana use to security officials, and he is not vulnerable to exploitation, manipulation, or duress. Personal conduct security concerns are mitigated.

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. I have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a 51-year-old mechanical design engineer, who is seeking a security clearance. The same defense contractor has employed him since June 2014. He previously worked for another defense contractor for 24 years at the same location where he currently works. In 1996, he was awarded a master's of science degree in advanced solid mechanics. He has taken several courses towards an additional degree. The general sense of statements from Applicant's manager, a colleague from work, and two friends is that Applicant is enthusiastic, dedicated to his family and employer, diligent, professional, trustworthy, and competent. He received the highest possible rating for his 2015 performance review, and he makes important contributions to the accomplishment of his company's goals.

Applicant used marijuana about four times from 1986 to 1989, and twice from 2004 to April 2014. He self-reported his marijuana use. He provided a signed statement of intent with automatic revocation of clearance for any violation. He ended his marijuana use in April 2014, and his marijuana use is not recent. He sincerely and credibly assures he will not use marijuana in the future, and he provided a signed

statement of intent not to use illegal drugs with automatic revocation of clearance for any violation.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Drug involvement and personal conduct security concerns are mitigated.

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: FOR APPLICANT

Subparagraphs 1.a and 1.b: For Applicant

Paragraph 2, Guideline E: 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 national security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Robert J. Tuider
Administrative Judge