



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-07235

Appearances

For Government: Benjamin R. Dorsey, Esq., Department Counsel
For Applicant: Stanley J. Mecinski, Jr., Esq.

10/18/2016

Decision

Harvey, Mark, Administrative Judge:

From May 2009 to January 2015, Applicant used marijuana about ten times while holding a security clearance. More time without illegal drug use is necessary to fully mitigate drug involvement security concerns. Personal conduct security concerns are mitigated as an unwarranted duplication of the concerns under the drug involvement guideline. Eligibility for access to classified information is denied.

Statement of the Case

On March 6, 2015, Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) version of a security clearance application (SF-86) (SCA). (GE 1) On April 12, 2016, 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 Guidelines H (drug involvement) and E (personal conduct). (Hearing Exhibit (HE) 2) 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 May 6, 2016, Applicant responded to the SOR and requested a hearing. (HE 3) On July 18, 2016, Department Counsel indicated he was ready to proceed on Applicant's case. On August 1, 2016, Applicant's case was assigned to me. On August 30, 2016, DOD issued a hearing notice, setting the hearing for September 21, 2016. (HE 1) Applicant's hearing was held as scheduled. Department Counsel offered two exhibits, and Applicant offered four exhibits. (Tr. 10-14; Government Exhibits (GE) 1-2; Applicant Exhibits (AE) A-D) There were no objections, and I admitted all proffered exhibits. (Tr. 11, 14; GE 1-2; AE A-D) Additionally, I admitted the hearing notice, SOR, and Applicant's response to the SOR. (HE 1-3) On September 29, 2016, I received the transcript.

Findings of Fact¹

Applicant admitted the conduct alleged in the SOR, and he provided 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 31-year-old employee of a defense contractor, who works as an engineer. (Tr. 15-16; GE 1; SOR response) In 2008, he received a bachelor's degree with a major in chemical engineering. (Tr. 15) He has worked for the same employer since July 2008. (Tr. 15) He has no prior military service. (Tr. 24) His employment requires a security clearance. (Tr. 16) In October 2008, he was granted a security clearance, and he has held a security clearance continuously to the present. (Tr. 17, 24-25)

Drug Involvement and Personal Conduct

When Applicant completed his March 6, 2015 SCA, he disclosed that he used marijuana from May 2009 to November 2014. (GE 1) He said his marijuana use was "[r]ecreational, only 1-3 times a year, 10 times or less in the last 7 years." (GE 1) He indicated he used marijuana while holding a security clearance, and he did not intend to use marijuana in the future. (GE 1)

On July 8, 2015, an Office of Personnel Management (OPM) investigator interviewed Applicant. (AE D) Applicant disclosed that his most recent date of marijuana use was January 2015, and he used marijuana one to three times a year since 2009. (AE D) He conceded he inadvertently erred when he completed his March 6, 2015 SCA and incorrectly stated his most recent marijuana use was in November 2014. (AE D)

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.

Applicant knew it was wrong to use marijuana while holding a security clearance, and he acknowledged using marijuana was a bad decision. (Tr. 27) His company has a policy prohibiting marijuana use, and he signed a document agreeing to comply with his company's drug policy. (Tr. 29) When he used marijuana, he also drank alcohol. (Tr. 27) He continues to drink alcohol. (Tr. 27) When he used marijuana, he did not disclose his marijuana use to his security officer. (Tr. 29)

At his hearing, Applicant said he used marijuana about 10 times, and he most recently used marijuana in January 2015. (Tr. 17, 22) He first used marijuana in 2005. (Tr. 25) His marijuana use occurred in the town where Applicant was raised. (Tr. 18) He received marijuana from a friend. (Tr. 18) He continues to associate with the friend that provided marijuana to him, and he sees the friend about once a year. (Tr. 26) His friend probably continues to use marijuana; however, he does not use marijuana in Applicant's presence. (Tr. 26-27)

In August 2016, Applicant enrolled in the employee assistance program (EAP), and he attended one session. (Tr. 19) After the single counseling or intake evaluation from his EAP, a licensed clinical professional counselor determined that EAP services were not recommended for Applicant. (Tr. 19; AE A) On August 11, 2016, and on September 15, 2016, Applicant was random drug tested, and the results were negative for use of illegal drugs. (Tr. 20-21) He has never tested positive on a drug test. (Tr. 29) He agreed to future periodic testing for illegal drug use. (Tr. 24) There is no evidence of drug-related arrests or convictions. (Tr. 22; GE 1)

Applicant expressed his remorse for his use of marijuana. (Tr. 30) He promised that he would not use illegal drugs in the future. (Tr. 23)

Character Evidence

Applicant's chief executive officer (CEO) wrote that Applicant is an "upstanding employee" with high performance ratings. He is responsible, professionally competent, knowledgeable, and he provides valuable expertise to customers. He has volunteered for drug testing. (SOR response)

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), 25(c), and 25(g) could raise a security concern and may be disqualifying in this case: "any drug abuse";² "illegal drug possession"; and "any illegal drug use after being granted a security clearance." Applicant used and possessed marijuana on about 10 occasions while holding a security clearance.³ AG ¶¶ 25(a), 25(c), and 25(g) 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:
 - (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.

²AG ¶ 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."

³AG ¶ 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 substances. See Drug Enforcement Administration listing at http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308_11.htm. See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

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(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."⁴

⁴ISCR 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).

Applicant stopped using marijuana in January 2015, shortly before submitting his March 6, 2015 SCA. Applicant resolved not to use marijuana in the future. He abstained from marijuana use for about 22 months. He recognized the adverse impact of drug abuse in connection with access to classified information, and he expressed remorse about using marijuana. 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) partially applies to his marijuana-related conduct;⁵ however, more time without illegal drug use is necessary to fully apply AG ¶ 26(a) because he used marijuana while holding a security clearance.

AG ¶¶ 26(b), 26(c), and 26(d) are not fully applicable. 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 received one counseling or intake evaluation from his EAP, and a licensed clinical professional counselor determined that EAP services were not recommended for him. There is no evidence that he is addicted to marijuana; however, more than one intake session is necessary to fully apply AG ¶ 26(d). He continues to associate with the marijuana user who repeatedly provided marijuana to him from 2009 to 2015.

In sum, Applicant used marijuana from 2005 to 2015, and he used marijuana about 10 times while holding a security clearance. Each time he possessed and used marijuana he violated federal criminal law. He violated security rules and his employer's policy against illegal drug use. He ended his marijuana use in January 2015, about 22 months ago. He understands the adverse consequences from marijuana use;⁶ 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.

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.

⁵In 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.

⁶Approval 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.

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 two 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; and

(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 to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources.

The SOR cross-alleges under the personal conduct guideline the same conduct alleged under the drug involvement guideline. His marijuana use while holding a security clearance under Guideline H is sufficient to warrant revocation of his security clearance without incorporating or applying Guideline E. The concerns under Guidelines H and E address identical issues involving judgment, trustworthiness, and reliability. All

personal conduct security concerns described in the SOR are directly related to his drug involvement under Guideline H. Personal conduct security concerns as alleged in the SOR constitute an unwarranted duplication of the concerns under Guideline H, and accordingly 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. My comments under Guidelines H and E are incorporated into my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under Guidelines H and E, but some warrant additional comment.

Applicant is a 31-year-old employee of a defense contractor, who works as an engineer. In 2008, he received a bachelor's degree with a major in chemical engineering. He has worked for the same employer since July 2008. His employment requires a security clearance. In October 2008, he was granted a security clearance, and he has held a security clearance continuously to the present. He expressed remorse for his marijuana use, and he promised not to use marijuana in the future. Applicant's CEO lauded Applicant's high performance ratings, responsibility, professionalism, competence, knowledge, and expertise. Applicant volunteered for drug testing. His CEO's statement supports continuation of Applicant's security clearance. There is no evidence of drug-related arrests or convictions or security violations.

The evidence against continuation of Applicant's clearance is more substantial. Applicant used marijuana from 2005 to January 2015, and he used marijuana about 10 times while holding a security clearance. Each time he possessed and used marijuana he violated federal criminal law. He violated security rules and his employer's policy against illegal drug use. His decisions to repeatedly use marijuana were knowing, voluntary, and intentional. He was sufficiently mature to be fully responsible for his conduct. Illegal drug use shows a lack of judgment and impulse control. He ended his marijuana use in January 2015, about 22 months ago, which is still relatively recent. He

understands the adverse consequences from marijuana use; 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.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont*, 913 F. 2d at 1401. Unmitigated drug involvement concerns lead me to conclude that continuation of a security clearance to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With more time without abuse of illegal drugs, he may well be able to demonstrate persuasive evidence of his security clearance worthiness.

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 mitigated personal conduct security concerns as an unwarranted duplication of drug involvement concerns; however, he 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:	Against 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 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