



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 16-02446
)	
Applicant for Security Clearance)	

Appearances

For Government: Erin P. Thompson, Esq., Department Counsel
For Applicant: Gregory F. Greiner, Esq.

01/09/2018

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant did not present sufficient evidence to mitigate security concerns raised by his drug use while holding a security clearance and after submitting his most recent security clearance application. Clearance is denied.

Statement of the Case

On October 7, 2016, the Department of Defense (DoD) sent Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement and substance misuse) and Guideline E (personal conduct). Applicant answered the SOR and initially requested a decision on the written record. He subsequently requested a hearing.

Applicant's request for a hearing was granted. On November 16, 2017, a date mutually agreed to by the parties, a hearing was held. Applicant testified at the hearing and the exhibits offered by both parties were admitted into the administrative record without objection. (Government Exhibits 1 – 5; Applicant's Exhibits A – D.) The transcript of the hearing (Tr.) was received on December 1, 2017.¹

¹ Correspondence, the notice of hearing, the case management order, and other administrative documents, if any, were marked and are attached to the record as App. Exh. I.

Findings of Fact

Applicant, 31, is employed as a mechanical engineer by Contractor A, a major defense contractor. He holds undergraduate and graduate degrees in engineering. He graduated with top honors from top-flight schools. While attending graduate school, Applicant volunteered his time mentoring undergraduate engineering students, mostly those from groups who are underrepresented in the science, technology, engineering, and math fields. He is not married and has no children, but is in a serious relationship that he hopes will lead to marriage.²

Applicant used marijuana from 2005 to 2015. He began using marijuana as a freshman in college. He used it in social settings, in part, to help cope with social anxiety issues. He stopped using marijuana in 2008, upon graduating from college and getting his first job with Contractor A. He submitted a security clearance application in connection with this job and reported his marijuana use while in college.³

Applicant also discussed his past marijuana use during his initial security clearance interview, which took place in October 2008. He told a security clearance investigator that “he really did not like the feeling [marijuana] gave him and he stopped using marijuana . . . in September 2007.” He then told the investigator that “he has no intention of using any [illegal] drugs in the future.”⁴ He was subsequently granted a security clearance.

Applicant worked for Contractor A from 2008 to 2012, when he was laid off due to economic conditions. He was under the impression that he no longer held a security clearance after he was laid off. At the time, Applicant was 26 years old and did not consider the possibility that he would one day work in the defense industry again.⁵

Applicant was able to obtain a job with a private U.S. firm after being laid off by Contractor A. The toxic work environment at the firm and high pressure demands of the new job exacerbated Applicant’s underlying anxiety issues. He began using marijuana to cope with the stress. Applicant worked for the private firm from February 2012 to May 2015. During this period, he used marijuana intermittently to deal with the stress of his job. In June 2015, Applicant was rehired by Contractor A.⁶

In October 2015, Applicant submitted a security clearance application in connection with his new position with Contractor A. He reported on the application using marijuana between 2005 and 2014. In response to a question on the application, Applicant promised not to use marijuana in the future.⁷ About two months later, he used

² Tr. 12-13; Exhibit 1; Exhibit A at 5; Exhibit D.

³ Tr. 14-25; Answer; Exhibit 1; Exhibit 2 at 29; Exhibit A at 2.

⁴ Exhibit 5 at 1.

⁵ Tr. 14-25, 32, 38-39.

⁶ Tr. 14-25; Exhibit 1; Exhibit A at 5; Exhibit D.

⁷ Exhibit 1 at 36.

marijuana with his former roommate.⁸ The following month, Applicant sat down for a security clearance interview and revealed his marijuana use, including his most recent use a month earlier.⁹

Applicant has not used marijuana since November 2015. Since then, he moved to and lives in a different state. He also obtained professional help to deal with his underlying issues and made a number of positive lifestyle changes to manage his anxiety and stress. He does not associate with those he used marijuana with in the past. His girlfriend and current friends do not use marijuana or other illegal drugs. He holds a good reputation for his hard work and reliability, and is considered a leader at work.¹⁰

Applicant obtained a mental “health / substance abuse evaluation” by a clinical psychologist for this case. The psychologist, who interviewed Applicant over the course of two days in April 2017, opined that Applicant “does not presently manifest a substance abuse problem and has made strides with respect to managing tension.”¹¹ The same psychologist conducted a follow-up examination about a month before the hearing. The psychologist was impressed with the positive lifestyle changes Applicant had made supportive of his stated desire to remain drug free.¹²

Law, Policies, and Regulations

This case is decided under Executive Order (E.O.) 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 National Security Adjudicative Guidelines (AG), which became effective on June 8, 2017. ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003) (security clearance decisions must be based on current DoD policy and standards).

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Instead, persons are only eligible for access to classified information “upon a finding that it is clearly consistent with the national interest” to authorize such access. E.O. 10865 § 2.

When evaluating an applicant’s eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision. AG ¶ 2.

⁸ Tr. at 22, 25.

⁹ Exhibit 4.

¹⁰ Tr. 25-29, 38; Exhibit C.

¹¹ Exhibit A at 5.

¹² Exhibit B .

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

Administrative Judges must remain fair and impartial, and carefully balance the needs for the expedient resolution of a case with the demands of due process. Therefore, an administrative judge will ensure that an applicant: (a) receives fair notice of the issues, (b) has a reasonable opportunity to address those issues, and (c) is not subjected to unfair surprise. Directive, ¶ E3.1.10; ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014).

In evaluating the evidence, a judge applies a “substantial evidence” standard, which is something less than a preponderance of the evidence. Specifically, substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” Directive, ¶ E3.1.32.1.¹³

Any doubt raised by the evidence must be resolved in favor of the national security. AG ¶ 2(b). See *also* Security Executive Agent Directive 4 (SEAD-4), ¶ E.4. Additionally, the Supreme Court has held that responsible officials making “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

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. 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 an 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.

Analysis

Guideline H, Drug Involvement and Substance Misuse

Applicant’s past marijuana use raises the security concern set forth at AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an

¹³ However, a judge’s mere disbelief of an applicant’s testimony, without actual evidence of disqualifying conduct or admission by an applicant to the disqualifying conduct, is not enough to sustain an unfavorable finding. ISCR Case No. 15-05565 (App. Bd. Aug. 2, 2017); ISCR Case No. 02-24452 (App. Bd. Aug. 4, 2004). Furthermore, an unfavorable decision cannot be based on solely non-alleged conduct. ISCR Case No. 14-05986 (App. Bd. May 26, 2017). Unless an applicant is provided notice that unalleged conduct raises a security concern, it can only be used for specific limited purposes, such as assessing mitigation and credibility. ISCR Case No. 16-02877 at 3 (App. Bd. Oct. 2, 2017).

individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

In assessing Applicant's case, I considered all applicable disqualifying and mitigating conditions, including:

AG ¶ 25(a): any substance misuse;

AG ¶ 25(f): any illegal drug use while granted access to classified information or holding a sensitive position;

AG ¶ 26(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

AG ¶ 26(b): the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence.

Applicant's illegal drug involvement establishes the disqualifying conditions in AG ¶¶ 25(a) and 25(f). Once disqualifying conditions are established, the burden shifts to an applicant to present evidence demonstrating extenuation or mitigation sufficient to warrant a favorable security clearance decision.¹⁴ Illegal involvement with a controlled substance(s) after being granted a security clearance raises heightened concerns about a person's judgment, reliability and trustworthiness, and requires a judge to closely scrutinize any claim of reform and rehabilitation.¹⁵

Applicant last used marijuana a little over two years ago, when he was 29 years old. Since then, Applicant has obtained professional help to deal with underlying mental health issues and changed the toxic environment he was laboring under, which together contributed to his poor decision to resume using marijuana from 2012-2015. He has also made positive lifestyle changes supportive of his sobriety. His employment record over the past two years has been good. At the hearing, Applicant appeared remorseful for his past drug use and sincere in his desire to conduct himself, both in his professional and personal affairs, in the manner expected of all clearance holders.

¹⁴ ISCR Case No. 15-01208 at 4 (App. Bd. Aug. 26, 2016) (citing Directive ¶ E3.1.15). See also ISCR Case No. 07-00029 at 3 (App. Bd. Dec. 7, 2007) (when AGs were last revised, Board held that its prior decisions remained valid when they were "not dependent on the language of any specific guideline," or "where the applicable language of the guideline is unchanged or the changes are not of sufficient magnitude to vitiate or overrule the substance of the precedent.")

¹⁵ ISCR Case No. 16-03451 (App. Bd. Dec. 26, 2017) ("The purpose of a clearance adjudication is to evaluate an applicant's judgment and reliability. An applicant who has demonstrated an unwillingness to abide by rules and regulations regarding illegal drugs may be similarly unwilling to follow rules governing the protection of classified information.")

Nonetheless, AG ¶¶ 26(a) and 26(b) have limited applicability and are insufficient to mitigate the heightened security concerns raised by Applicant's use of marijuana after being granted a security clearance. Although Applicant was not working with classified information from 2012-2015, he resumed using marijuana after going through a prior security clearance investigation that, in part, focused on his past marijuana use. He was granted a clearance only after telling a security clearance investigator that he would not use marijuana in the future. Moreover, his most recent use of marijuana took place after he began working for his current employer, a major defense contractor, and just two months after he submitted his most recent security clearance application.¹⁶ In that application, Applicant stated under oath that he would not use marijuana or any other illegal drugs in the future. Applicant's inability to keep the promises he made during the course of two separate security clearance investigations undercuts the mitigating value of the passage of time since Applicant last used marijuana and the other favorable evidence. Security concerns remain that similar security-significant conduct may recur.¹⁷

Guideline E, Personal Conduct

The SOR alleges that Applicant's past drug use also raises the personal conduct security concern, which is explained at AG ¶ 15:

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 or sensitive information.

Applicant's past drug involvement directly implicates the overall personal conduct security concern. However, the security concern here is adequately addressed and covered under Guideline H. Moreover, Applicant's honesty in reporting the adverse information and candor throughout the security clearance process weighs in favor of mitigating the Guideline E allegation. Accordingly, I find that Applicant presented sufficient evidence to mitigate the personal conduct security concern.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's

¹⁶ ISCR Case No. 16-00578 at 2 (App. Bd. Sep. 26, 2017) (in affirming denial, Board found that judge properly considered the fact major defense contractors are expected to follow and implement policies consistent with the Drug-Free Workplace Act); ISCR Case No. 16-02005 at 3 (App. Bd. June 2, 2017) ("an applicant's use of illegal drugs after having completed a security clearance application raises substantial questions about his or her judgment, reliability, and willingness to comply with laws, rules, and regulations.")

¹⁷ ISCR Case No. 15-06277 (App. Bd. July 19, 2017) (passage of five years since applicant last used marijuana insufficient to mitigate concerns raised by drug use over extended period of time and after granted a security clearance); ISCR Case No. 14-03522 (App. Bd. Feb. 24, 2016) (applicant's use of marijuana to help him recover from a serious back injury and four years of abstinence were insufficient to mitigate heightened security concerns raised by his illegal drug use while holding a clearance); ISCR Case No. 11-12165 (App. Bd. Jan. 29, 2014) (passage of three years since applicant last used marijuana and other favorable record evidence of reform insufficient to mitigate concerns raised by marijuana use after granted a security clearance).

conduct and all the relevant circumstances. AG ¶ 2. An administrative judge should consider the whole-person factors listed at AG ¶¶ 2(d) and 2(f). I hereby incorporate my above analysis and highlight some additional whole-person factors.

Applicant presented a strong case in mitigation. He appears to have made positive and healthy lifestyle changes supportive of his stated desire to remain drug free. He was honest in reporting the adverse information at issue and fully cooperative throughout the security clearance process. This and the other favorable record evidence weigh in favor of granting him continued access to classified information. However, Applicant's decision to use marijuana after being granted a security clearance and after making repeated promises that he would not engage in such conduct continues to raise doubts that similar security-significant conduct may recur. Overall, the record evidence leaves me with doubts as to Applicant's present eligibility for a security clearance.¹⁸

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 the record evidence, it is not clearly consistent with the interests of national security to grant Applicant initial or continued eligibility for access to classified information. Applicant's request for a security clearance is denied.

Francisco Mendez
Administrative Judge

¹⁸ Applicant's case appears to present a clear-cut instance where the grant of a clearance on condition that he remain drug free, which would be monitored and independently verified by his employer through random drug screens, would be sufficient to mitigate the remaining doubts raised by the evidence. The authority to grant or, at a minimum recommend to the appropriate official, a conditional clearance in the proper case appears to have been granted to administrative judges by the implementation of the new guidelines. Specifically, in Appendix C. See *also* SEAD-4, ¶ E.3 and Appendix A, ¶ 2(h). However, even more than six months after the current guidelines became effective, questions remain as to the applicability of Appendix C to security clearance cases involving contractors and no implementation guidance has yet been issued. Accordingly, at this time, I decline to provide a formal ruling or recommendation on this issue.