



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



In the matter of:)
)
-----) ISCR Case No. 14-07057
)
Applicant for Security Clearance)

Appearances

For Government: Robert J. Kilmartin, Esq., Department Counsel
For Applicant: *Pro se*

04/21/2016

Decision

HARVEY, Mark, Administrative Judge:

Applicant’s statement of reasons (SOR) alleges and the record establishes that Applicant used marijuana about 6 to 10 times from April 2008 until August 2012. His marijuana use occurred after he left active duty with the Air Force, where he held a security clearance. He self-reported his marijuana use. He does not associate with drug-using associates and contacts; he avoids the environment where drugs were used; and he provided a signed statement of intent 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 October 18, 2013, Applicant completed and signed a Questionnaire for National Security Positions (SCA). (GE 1) On August 4, 2015, 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 (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. (Hearing Exhibit (HE) 2) Specifically, the SOR set forth security concerns arising under AGs H (drug involvement) and E (personal conduct).

On August 17, 2015, Applicant responded to the SOR and requested a hearing. On January 14, 2016, Department Counsel was ready to proceed. On February 11, 2016, the case was assigned to me. On March 9, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for March 29, 2016. (HE 1) Applicant waived his right to 15 days of notice of the date, time, and location of the hearing. (Tr. 12-13) His hearing was held as scheduled on March 29, 2016. During the hearing, Department Counsel offered two exhibits and Applicant offered three exhibits. (Transcript (Tr.) 17-19, 33-34; GE 1-2; AE A-C) There were no objections, and all proffered exhibits were admitted into evidence. (Tr. 17-19, 34; GE 1-2; AE A-C) On April 6, 2016, I received a transcript of the hearing. There were no post-hearing exhibits.

Findings of Fact¹

In Applicant's SOR response, he admitted the SOR allegations, and he also provided some extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is a 34-year-old engineer, who is seeking his security clearance. (Tr. 5, 7) The same defense contractor has employed him since October 2013. (Tr. 25) In 1999, he graduated from high school, and in 2003, he received a bachelor of science degree in civil engineering. (Tr. 5) In 2014, he was awarded a master's of science degree in civil engineering. (Tr. 5)

In 2003, Applicant received a commission in the Air Force under the Reserve Officer Training Program (ROTC). (Tr. 6) In 2005, he served a six-month tour in Iraq. (Tr. 15) He served three years and eight months on active duty, and in January 2007, he received an honorable discharge.² (Tr. 6, 14) His Air Force specialty was civil engineering. (Tr. 6) He was a first lieutenant when he left active duty. In 2011, Applicant married, and he does not have any children. (Tr. 15; GE 1)

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

²In 2005, Applicant had a brief sexual relationship with an enlisted woman. (Tr. 32) She was in his squadron; however, she was not in his unit or under his direct supervision. (Tr. 35) After the relationship with her ended, his command learned about it, and his squadron commander imposed a reprimand under Article 15, Uniform Code of Military Justice for fraternization. (Tr. 32; GE 1) The 2005 fraternization was not alleged in Applicant's statement of reasons.

Personal Conduct and Drug Involvement

Applicant had a security clearance when he was in the Air Force from 2003 to 2007, and he abstained from using illegal drugs, including marijuana. (Tr. 20-21) About a year after leaving active duty, he used marijuana for the first time with a coworker. (Tr. 21) He did not drive after using marijuana. (Tr. 21) He used marijuana about 6 to 10 times from April 2008 until August 2012. (SOR response; GE 1; GE 2) He did not purchase marijuana or sell it. (GE 2) At the time he used marijuana, he was working as an engineer for a private company, and he was not involved in any sensitive government projects. (Tr. 22-23) Applicant was in the inactive reserve after leaving active duty until 2011. (Tr. 23-24) He believed he was unaffiliated with the Government when he used marijuana. (Tr. 25) He was surprised to learn during the processing of his security clearance application that his security clearance continued after he left active duty.

When Applicant completed his October 18, 2013 SCA, he was asked about illegal drug use in the previous seven years, and he said he used marijuana from April 2008 to August 2012 on about 6 to 10 occasions after he left active duty. (GE 1)

Applicant does not associate with the person who provided him the marijuana he used, and he does not knowingly associate with anyone who uses marijuana. (Tr. 27) He said he would leave an environment if illegal drugs were being used at that location. He did not complete a drug-treatment program. He provided a signed statement of intent not to use marijuana or any other illegal drug with automatic revocation of clearance for any violation. (Tr. 88) He stated, "I have provided . . . this signed statement of intent not to use or possess any illegal drugs with automatic revocation of clearance for any violation under Guideline H, paragraph 26(b)(4)." (Tr. 33-34; AE C)

Character Evidence

Applicant provided letters from a colleague and supervisor who have known him from 2012 to 2014. (AE A, AE B) The general sense of the letters is that Applicant is courteous, professional, diligent, trustworthy, competent, and patriotic. (AE A; AE B)

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 revised adjudicative guidelines. 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, 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 three drug-involvement disqualifying conditions that could raise a security concern and may be disqualifying in this particular case: "(a) any drug abuse;"³ "(c) illegal drug possession;" and "(g) any illegal drug use after being granted a security clearance."⁴ AG ¶¶ 25(a), 25(c), and 25(g) apply because Applicant used marijuana about 6 to 10 times from April 2008 until August 2012. He possessed marijuana before he used it. His security clearance was granted in 2004 when he went on active duty in the Air Force.⁵ 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

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 ¶ 25(g) does not make a distinction about whether a current or former security clearance holder uses illegal drugs. When a person leaves a position requiring a security clearance, the security clearance becomes "inactive." After two years of not being in a position requiring a security clearance, the security clearance expires, and a new background investigation is required to reinstate the security clearance. See, e.g., Military Benefits website, "Security Clearance Jobs After the Military," <http://militarybenefits.info/security-clearance-jobs-after-the-military/>. Applicant used marijuana while his security clearance was inactive, but had not yet expired.

⁵AG ¶ 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).

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;

(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(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.

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

Applicant recognized the adverse impact future marijuana use will have on his continued access to classified information. There is no evidence of marijuana use after August 2012. He said he intends to continue to abstain from illegal drug possession and use. He does not associate with marijuana users, and he does not frequent the environment where illegal drugs are used. He provided a signed statement of intent not to use illegal drugs with automatic revocation of clearance for any violation. Applicant’s marijuana use after being granted a security clearance was more than three years ago, and no longer casts doubt on his current reliability, trustworthiness, or good judgment.

AG ¶¶ 26(a) and 26(b) apply. The only evidence of Applicant’s marijuana use is his disclosures during the security clearance process. He has disassociated from his drug-using associates and contacts, and he avoids environments where drugs were used. He provided a signed statement of intent with automatic revocation of clearance for any violation. He self-reported his marijuana use. He credibly described his marijuana use, and he sincerely promised not to use marijuana in the future. He has abstained from marijuana use for more than three years, 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;

(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 as well as marijuana use while holding a security clearance are 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 about 6 to 10 times from April 2008 until August 2012. His marijuana use occurred after his security clearance was granted. His marijuana use reflects adversely on his professionalism and creates a vulnerability to exploitation, manipulation, or duress. Marijuana use while holding a security clearance reflects "questionable judgment . . . or unwillingness to comply with rules and regulations [and raises] raise questions about [his] reliability, trustworthiness and ability to protect classified information." See AG ¶ 15.

AG ¶ 17 provides four 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;

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

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's

reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

AG ¶¶ 17(c), 17(d), 17(e), and 17(g) 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 August 2012, and it happened under unique circumstances that are unlikely to recur and do not cast doubt on Appellant's continued reliability, trustworthiness, or good judgment. He disclosed his marijuana use to his security officials, and he is not vulnerable to exploitation, manipulation, or duress. Personal conduct security concerns are mitigated. Even if Applicant's marijuana use were not mitigated under Guidelines E and H, it would be mitigated under the whole-person concept, *infra*.

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 34-year-old engineer, who has been employed by the same defense contractor since October 2013. In 2003, he received a bachelor of science degree in civil engineering, and in 2014, he was awarded a master's of science degree in civil engineering. From 2003 to January 2007, he served in the Air Force as a civil engineer, and he held a security clearance. In 2005, he served a six-month tour in Iraq. He received nonjudicial punishment for fraternization with an enlisted woman in 2005 after he returned from Iraq. He received an honorable discharge. A colleague and supervisor who have known him from 2012 to 2014 described Applicant as courteous, professional, diligent, trustworthy, competent, and patriotic.

Applicant used marijuana about 6 to 10 times from April 2008 until August 2012. His marijuana use occurred after he left active duty with the Air Force, where he held a security clearance. He self-reported his marijuana use. He does not associate with drug-using associates and contacts; he avoids the environment where drugs are used; and he provided a signed statement of intent with automatic revocation of clearance for any violation. Applicant expressed sincere regret for his history of marijuana use. He ended his marijuana use in August 2012, and his marijuana use is not recent. He sincerely and credibly assures he will not use marijuana in the future.

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
Subparagraph 1.a:	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 reinstate Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

MARK HARVEY
Administrative Judge