



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



In the matter of:)	
)	
)	ISCR Case No. 14-05294
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: Dana D. Jacobson, Esq.

12/15/2015

Decision

HEINY, Claude R., Administrative Judge:

Applicant contests the Department of Defense’s (DoD) intent to deny his eligibility for a security clearance to work in the defense industry. During a six-week period in June and July 2013, Applicant used marijuana and tested positive on a drug urinalysis. He has mitigated the drug involvement and personal conduct security concerns. Clearance is granted.

History of the Case

On December 13, 2014, acting under the relevant Executive Order and DoD Directive,¹ the DoD issued a Statement of Reason (SOR) detailing drug involvement and personal conduct security concerns. DoD adjudicators could not find that it is clearly consistent with the national interest to grant or continue Applicant’s security clearance.

¹ Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

On January 17, 2015, Applicant answered the SOR and requested a hearing. On May 27, 2015, I was assigned the case. On June 16, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing for a hearing to be convened on July 7, 2015.

At the hearing, Government's Exhibits (Ex.) 1 and 2 and Applicant's Exhibits A through E were admitted without objection. Applicant testified at the hearing, as did his two supervisors. On July 15, 2015, DOHA received the hearing transcript (Tr.).

Findings of Fact

In Applicant's Answer to the SOR, he admitted the drug involvement and personal conduct allegations. His admissions are incorporated as facts. After a thorough review of the pleadings, exhibits, and testimony, I make the following additional findings of fact:

Applicant is a 61-year-old senior research engineer who has worked for a defense contractor since February 2005, and he seeks to retain a security clearance. (Tr. 49) He received clearances in April 1974 and October 2008. He served four years in the U.S. Navy directly after leaving high school. (Ex. E, Tr. 47)

Applicant did not use marijuana in high school or in college. (Tr. 61) He first used it during the summer of 2013. (Tr. 61) During that summer, he attended a block party. He no longer associates with these individuals. For six weeks during June and July 2013, he continued to smoke marijuana with these individuals four or five times a week. (Ex. 1) He had family responsibility, financial worries, concern for his grandson, and no time off from work, all of which interfered with his sleeping. (Tr. 62) He thought the marijuana use might help him to relax and sleep better. (Ex. 2)

On July 24, 2013, he tested positive for marijuana metabolites on a urinalysis. (Ex. D) On August 5, 2013, he also tested positive for marijuana metabolites. (Ex. D) The nanogram reading for the July 24, 2013 test was 205 and had decreased to 40 nanograms two weeks later on the August 5, 2013 test. (Tr. 80) Applicant asserts his last marijuana use was July 23, 2013, the day before he took the July urinalysis. He asserts the positive test in August was a "spin-down" and positive only because a trace amount remained in his urine. (Tr. 72)

On Applicant's October 2013 Electronic Questionnaires for Investigations Processing (e-QIP), he listed his marijuana use and frequency. (Ex. 1) He indicated his use was caused by stress and that he was taking stress management and wellness classes. He stated he had no intention of using marijuana in the future. (Ex. 1)

In 2013, Applicant's three sons and mother were living with him. (Tr. 59) His mother was suffering from stage IV lung cancer. (Tr. 60) She was not living with him when she died on July 2013. (Tr. 88) One of Applicant's sons has Tourette syndrome. (Tr. 54) Another son, that son's wife, and child were living with Applicant. Applicant's

grandson suffers from cerebral palsy, which causes the grandson to frequently wake up crying during the night. (Tr. 56) The household's sleeping periods are routinely limited to about five hours. (Tr. 56) At the time, he was working long hours. He had one period of overtime when he had no time off for six weeks. (Ex. 2)

Applicant was very remorseful and ashamed about his actions and for letting down himself, his family, and his employer. (Tr. 74) He has told his family about his marijuana use. He acknowledged he made a stupid and wrong decision to use marijuana. His explanation for why he, an intelligent and highly educated person, would chose to start using marijuana for the first time at age 59 was:

The pressures at home, just the working, the not sleeping, just wore me down. That's all I can tell you sir. I just – I was beat. (Tr. 84)

A licensed marriage family therapist supervisor gave Applicant a Substance Abuse Subtle Screening Inventory, Adult (SASSI-3) and conducted four counseling session with him (Tr. 68) The therapist indicated the SASSI-3 showed no substance abuse or dependence issues. (Ex. B) She found Applicant was not substance dependent, but had used cannabis to cope with stress. (Ex. B) Applicant received a good prognosis and the therapist stated there was no reason to believe Applicant would return to cannabis use. (Ex. B, C) Applicant took meditation training classes to help address his stress. (Tr. 71)

From September 2013 through August 2014, Applicant had one random urinalysis each month. (Ex. D) All 12 random urinalyses were negative for the presence of marijuana. (Ex. D) Applicant attended Narcotics Anonymous, which reinforced his belief not to use illegal drugs in the future. (Tr. 73-74) It is his intent to never use illegal drugs again.

Applicant's director and supervisor stated Applicant is honest, trustworthy, forthright, dedicated, efficient, and extremely remorseful. His work has been top quality, above reproach, and very important to the U.S. military and war fighters. (Ex. A, Tr. 22-30, Tr. 37-44) The company has a written policy against illegal drug use. (Tr. 43)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶

2(c), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

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

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination of the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Drug Involvement

AG ¶ 24 expresses the security concern pertaining to drug involvement: Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

For six weeks during the summer of 2013, Applicant used marijuana four or five times a week. AG ¶ 25 describes the applicable conditions that could raise a security concern and may be disqualifying:

- (a) any drug abuse;

(b) testing positive for illegal drug use;

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

(g) any illegal drug use after being granted a security clearance.

AG ¶ 26 provides conditions that could mitigate security concerns:

(a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(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; 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.

In July 2013, Applicant last used marijuana. He intends to never use illegal drugs again. He acknowledged his use was wrong. He realizes how stupid his decision was to use illegal drugs and what he risked. He is very remorseful and ashamed of his actions. He takes responsibility for his actions and understands the consequences. He is willing to sign an affidavit stating he would submit to drug testing and any future drug use would result in the loss of his clearance.

Applicant's marijuana use was confined to a six-week period more than two years ago. There are no "bright line" rules for determining when conduct is "recent." The determination must be based "on a careful evaluation of the totality of the record within the parameters set by the directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board 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.”²

Because of his abstention from drug use for two years, and his recognition of the adverse impact on his life that drug abuse could cause, the incompatibility of illegal use with his goals, and his stated desire never to use illegal drugs again, there is reasonable certitude that he will continue to abstain from drug use. Applicant did not attempt to hide his illegal usage. He disclosed it on his e-QIP. His illegal drug use ending more than two years ago does not cast doubt on his current reliability, trustworthiness, or good judgment. Because he will not use illegal drugs in the future, confidence in his current reliability, trustworthiness and good judgment with respect to drug use is restored. AG ¶ 26(a) applies.

AG ¶ 26(b) applies because he has disassociated from drug-using associates, has not used marijuana in more than two years, and is willing to sign a statement of intent with automatic revocation of his clearance for any future illegal drug use.

AG ¶ 26(d) has limited applicability. He received some counseling and a Substance Abuse Subtle Screening Inventory showed no substance abuse or dependence issues. Applicant was found not to be substance dependent, but had used cannabis to cope with stress. He received a good prognosis and took meditation training classes to help address his stress.

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

² 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.

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.

The Personal Conduct Disqualifying Conditions under AG ¶ 16 are potentially³ applicable:

(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.

(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;

³ AG ¶ 16(a) and (b) do not apply because there are no allegations of falsification. AG ¶ 16(c) and (d) do not apply because the conduct is explicitly covered under Guideline H, drug abuse. AG ¶ 16(f) does not apply because the company's policy against illegal drug use was not sufficiently explained or documented as to be a "commitment made by the individual to the employer as a condition of employment." Additionally, this was not alleged in the SOR.

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment; and

(g) association with persons involved in criminal activity.

With respect to the personal conduct concerns involving Applicant's drug abuse the pertinent disqualifying conditions are AG ¶ 16(d)(3), a pattern of rule violations and AG ¶ 16(e)(1), which states, "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." AG ¶ 16(g), was not alleged, but potentially applies. Certainly, past marijuana use violated the law in our society, and is conduct a person might wish to conceal, as it adversely affects a person's professional and community standing.

The mitigating condition outlined in AG ¶ 17(e), "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress" applies to Applicant's past drug abuse. Applicant's employer, government representatives, and family are aware of his past marijuana use. Applicant has taken the positive step of disclosure, eliminating any vulnerability to exploitation, manipulation, and duress. I do not believe Applicant would compromise national security to avoid public disclosure of his past marijuana use. Any personal conduct security concerns, pertaining to his past drug use 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant, at age 59, chose for the

first time to use marijuana and did so during a six week period in 2013. He is hard working, diligent, and responsible. His supervisors praise his character, duty performance, and dedication. The stressful conditions existing at the time of his use have changed. In July 2013, in the middle of his use, his mother died of cancer. He has taken meditation classes to help him address his stress. She gave him a good prognosis and the found there was no reason to believe Applicant would return to cannabis use. He realizes his conduct was wrong, inappropriate, and stupid. He is ashamed and remorseful about his marijuana use and intends to never use illegal drugs again, an intent reinforced during his attendance at Narcotics Anonymous.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his drug involvement and personal conduct.

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, Drug Involvement:	FOR APPLICANT
Subparagraphs 1.a and 1.b:	For Applicant
Paragraph 2, Personal Conduct:	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 the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

CLAUDE R. HEINY II
Administrative Judge