



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



In the matter of:	)	
	)	
1	)	ISCR Case No. 09-04338
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: James F. Duffy, *Esquire*, Department Counsel  
For Applicant: *Pro Se*

January 20, 2010

**Decision**

HEINY, Claude R., Administrative Judge:

Applicant used illegal drugs starting in 2002. Her last use of marijuana occurred ten months ago. Not enough time has passed for Applicant to have rebutted or mitigated the government’s security concerns under drug involvement. This is not to say that with additional time without further drug use, she would not qualify for a clearance. However, that time has not yet arrived. Clearance is denied.

**Statement of the Case**

Applicant contests the Defense Department’s intent to deny or revoke her eligibility for an industrial security clearance. Acting under the relevant Executive Order

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<sup>1</sup> In August 2001, Applicant married and her last name changed to her husband’s name. (Item 5)

and DoD Directive,<sup>2</sup> the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) on September 30, 2009, detailing security concerns due to illegal drug use.

On September 30, 2009, Applicant answered the SOR and elected to have the matter decided without a hearing. Department Counsel submitted the government's case in a File of Relevant Material (FORM), dated November 10, 2009. The FORM contained seven attachments, referenced as Items. On November 19, 2009, Applicant received a copy of the FORM, along with notice of her opportunity to file objections and submit material to refute, extenuate, or mitigate the potentially disqualifying conditions.

An undated response to the FORM from Applicant was received. Department Counsel did not object to the material. Applicant's response was admitted into the record as Item A. On January 11, 2010, I was assigned the case.

### **Findings of Fact**

In Applicant's Answer to the SOR, she admitted the factual allegations in ¶ 1.a and 1.b of the SOR. Applicant's admissions to the SOR allegations are incorporated herein. After a thorough review of the record, pleadings, and exhibits, I make the following findings of fact:

Applicant is a 33-year-old senior electronics technician who has worked for a defense contractor since January 2008, and is seeking to obtain a security clearance.

Applicant was in the U.S. Navy from September 1994 to September 1998, separating as an E-4. While in the Navy, she received a Navy Achievement Medal and a good Conduct Award. She is currently attending college online and maintaining a 4.0 GPA.

In April 2002, Applicant first used marijuana when she met and began dating her husband. She asserts her husband no longer uses marijuana. She used marijuana twice a year at parties. She asserts her total usage was approximately ten times. (Item 5) She revealed her usage when she completed her April 24, 2008, Electronic Questionnaires for Investigations Processing (e-QIP). Applicant last used marijuana while on vacation with college friends in March 2009. Applicant realizes her use of marijuana was a mistake. She does not intend to use any illegal drug in the future because it would interfere with her holding a job she wants. (Item 7) Applicant asserts her friends with whom she smoked marijuana are now married, homeowners, and no longer use illegal drugs. (Answer to FORM)

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<sup>2</sup> Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

## Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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 as to obtaining 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 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.

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 as to 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

Revised adjudicative guideline (AG) ¶ 24 articulates the security concerns relating 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.

AG ¶ 25 describes 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;
- (d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;
- (e) evaluation of drug abuse or drug dependence by a licensed clinical social worker who, is a staff member of a recognized drug treatment program;
- (f) failure to successfully complete a drug treatment program prescribed by a duly qualified medical professional;
- (g) any illegal drug use after being granted a security clearance; and,
- (h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

Applicant used marijuana for the first time in 2002. She used marijuana ten times and last used it in March 2009. AG ¶ 25(a) applies. AG ¶ 25(g) does not apply. Although Applicant had started her employment with her current employer in January 2008, she did not have a clearance as of March 2009.

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;

(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.

None of the mitigating conditions or factors listed in AG ¶ 26 fully applies. Applicant states she will not use illegal drugs in the future. She asserts the friends she used marijuana with are now married, homeowners, and no longer use illegal drugs. AG ¶ 26(a) lists disassociation from drug-using associates. She started using marijuana when she met and started dating her husband. She asserts her husband no longer uses marijuana. It appears she still sees the individuals she previously used marijuana with, but asserts they no longer use marijuana. Applicant has not signed a statement of intent with automatic revocation of clearance for any violation.

AG ¶ 26(a) partially applies because her marijuana use appears to be infrequent. Her marijuana use did not occur under unusual circumstances. However, her use of marijuana was recent and her use does cast doubt on her reliability, trustworthiness, and good judgment.

The major concern is that Applicant's last used marijuana ten months 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.”<sup>3</sup> I do not find ten months to be a significant period of time.

### **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.

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<sup>3</sup> 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.

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. To her credit, Applicant did not attempt to hide her marijuana usage when she completed her e-QIP. Applicant is attending college online and is maintaining a 4.0 GPA. Her last marijuana use was at age 33. I cannot attribute her marijuana use to youth, immaturity, or peer pressure.

Applicant, realizing smoking marijuana was a mistake, asserts she is drug free and intends to remain drug free. Applicant's intentions are good. The recency of her last use makes it difficult to ascertain the veracity of her assertions. She may indeed stay drug free. However, it is simply too soon to find illegal drugs are no longer a part of her life.

The awarding of a security clearance is not a once in a lifetime occurrence, but is based on current disqualifying and mitigating conditions. Applicant's evidence of rehabilitation is insufficient at this time. However, should she be afforded an opportunity to reapply for a security clearance, she may well demonstrate persuasive evidence of her security worthiness with the passage of sufficient additional time, continued rehabilitation, and no future incidents of illegal drug usage or misconduct. But that time has not yet arrived.

### **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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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CLAUDE R. HEINY II  
Administrative Judge