



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 12-05881
)	
Applicant for Security Clearance)	

Appearances

For Government: Fahryn Hoffman, Esq., Department Counsel
For Applicant: *Pro se*

01/20/2015

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines H (Drug Involvement) and E (Personal Conduct). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on January 18, 2012. On August 8, 2014, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H and E. The DOD acted under 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) implemented by DOD on September 1, 2006.

Applicant received the SOR on August 15, 2014; answered it on August 20, 2014; and requested a decision on the record. On October 15, 2014, he requested a hearing before an administrative judge. Department Counsel was ready to proceed on October 29, 2014, and the case was assigned to me on October 31, 2014. The Defense

Office of Hearings and Appeals (DOHA) issued a notice of hearing on November 3, 2014, scheduling the hearing for November 21, 2014. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. Department Counsel's letter transmitting copies of GX 1 and 2 to Applicant is attached to the record as Hearing Exhibit (HX) I. Applicant's request for a hearing is attached as HX II. Applicant testified and submitted Applicant's Exhibits (AX) A through H, which were admitted without objection. I kept the record open until December 5, 2014, to enable Applicant to submit additional documentary evidence. He timely submitted AX I, J, and K. Department Counsel's comments regarding AX I, J, and K are attached to the record as HX III. DOHA received the transcript (Tr.) on December 5, 2014.

Findings of Fact

In his answer to the SOR, Applicant admitted all the allegations. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 45-year-old engineering technician employed by a defense contractor. He has worked for his current employer since January 2012. He has held a security clearance since May 2003.

Applicant served on active duty in the U.S. Army from September 1987 to June 1991 and was honorably discharged. He held a security clearance while on active duty. (Tr. 34.) He served in the Army National Guard from July 1992 to May 1995 and was honorably discharged.

Applicant worked for a federal contractor from November 1996 to March 2005, resigned because of lack of advancement potential, and was unemployed from March to May 2005. He worked in the private sector for about three months, and then worked for a federal contractor from August 2005 to May 2006. He worked for a private-sector company from June to November 2006, when he was laid off. He worked for federal contractors from November 2006 to December 2012.

When Applicant submitted his January 2012 SCA, he disclosed that, between January 1987 and November 2011, he used marijuana four or five times with friends during holiday seasons. At the hearing, Applicant testified that his marijuana use was always in a social setting, except for the last use, when he used it with one person. (Tr. 28.) He testified that his last marijuana use before November 2011 was in 1997 or 1998. (Tr. 36.)

According to Applicant, his November 2011 use occurred when an acquaintance, known only by his first name, came to Applicant's house unannounced and told Applicant that he was leaving the area and wanted to say goodbye. The acquaintance offered to share a marijuana cigarette with Applicant, and Applicant accepted the offer. They smoked the cigarette, the acquaintance left, and Applicant has not seen or

communicated with him since. Applicant smoked the marijuana on a Sunday, and on the following Wednesday, he was randomly tested for marijuana and tested positive.

When Applicant learned that he had tested positive, he notified his facility security officer, his program manager, and the organization that he was supporting. Applicant was familiar with his employer's marijuana testing program and had been tested several times, but he had never previously tested positive. (GX 2; Tr. 29-30.) He testified that most of his coworkers knew that he had tested positive. (Tr. 43.)

In December 2011, Applicant left his job by mutual agreement. (GX 1 at 10, 30-31.) According to his supervisor, he was allowed to resign because he was a "trusted employee." (AX D.) His security clearance was not revoked.

Applicant married in July 2003. He and his wife have an eight-year-old daughter. His wife has a 25-year-old son from a prior marriage, who lives with his father's family. (Tr. 24-25, 47.) Applicant's wife was aware of his previous marijuana use, but she was not aware of his November 2011 use at the time of the hearing. (Tr. 46.) After the hearing, he informed her of his November 2011 marijuana use and the circumstances under which he left his previous job. (AX I.)

Applicant's current job was offered on the condition that he successfully complete a medical laboratory screening for illegal drugs. (AX E.) He complied with that condition, and submitted evidence of another negative drug test completed on the day of the hearing. (AX J and K.) He also submitted a statement of intent to never again abuse any illegal substance and agreed to an automatic revocation of his security clearance for any violation. (AX H.)

Applicant and his wife do not socialize frequently, preferring to spend time with the family. He testified that he is not worried about finding himself in a situation where marijuana is being used, but he tries to make sure that he avoids a drug-using environment. (Tr. 46.)

A friend of Applicant and coworker for five years submitted a letter describing Applicant as a person with a high degree of integrity, responsibility and ambition, with good judgment and superior communication skills. He also considers Applicant an outstanding father and husband. He states that the chief engineer, commander, and port engineer with whom Applicant has interacted have sent "glowing emails" about the outstanding support provided by Applicant. (AX A.) Applicant's neighbor for five years, a retired Navy veteran, considers him "a man of impeccable character and a devoted family man." (AX B.) A former coworker at Applicant's previous job is familiar with the circumstances of Applicant's marijuana use, but he states that he has never questioned Applicant's character or witnessed him engaging in improper behavior. (AX C.)

Applicant's former direct supervisor states that Applicant was very trustworthy, loyal, highly skilled, and dependable. (AX D.) Applicant's performance reviews for 2012

and 2013, pertaining to his current job, rated him as “Exceeds Expectations,” the second highest rating. (AX F and G.)

Policies

“[N]o 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 applicants 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 AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines 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 and 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 that 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 made “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. Thus, a 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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). “[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

Guideline H, Drug Involvement

The SOR alleges that Applicant used marijuana “on occasion” from about January 1987 to at least November 2011 (SOR ¶ 1.a); that he used marijuana on or about November 30, 2011, after being granted a security clearance in May 2003 (SOR ¶ 1.b); and that he tested positive for marijuana in a random urinalysis in December 2011 (SOR ¶ 1.c).

The concern under this guideline is set out in AG ¶ 24: “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.” Drugs are defined in AG ¶ 24(a)(1) as “[d]rugs, 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).”

Applicant’s admissions and testimony at the hearing establish three disqualifying conditions under this guideline:

AG ¶ 25(a): any drug abuse, defined in AG ¶ 24(b) as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction”;

AG ¶ 25(b): testing positive for illegal drug use; and

AG ¶ 25(c): illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

The following mitigating conditions are potentially relevant:

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): 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.

AG ¶ 26(a) is partially established. Applicant's use of marijuana was more than three years ago, and it occurred at least 13 years after his previous use. His December 2011 use was his only use while holding a security clearance. His previous use was in from 1987 to about 1998, before he was granted a security clearance. However, his most recent use did not occur under circumstances making recurrence unlikely. To the contrary, his willingness to risk his clearance and his job by using marijuana with a casual acquaintance, under circumstances involving no peer pressure or persuasion, could be interpreted as suggesting that he may use it again.

AG ¶ 26(b) is established. Applicant has not used marijuana for more than three years, does not associate with marijuana users, and has signed a statement of intent with provision for automatic revocation of his clearance for any violation.

Guideline E, Personal Conduct

SOR ¶ 2.a cross-alleges the conduct in SOR ¶¶ 1.a-1.c. SOR ¶ 2.b alleges that Applicant left his previous job in December 2011 after testing positive for marijuana, as alleged in SOR ¶ 1.c. The concern under this guideline is set out in 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 information. . . ."

The history, scope, purpose, and language of Guideline E reflect "the longstanding tenet that specific behavior can have security significance under more than one guideline." The adjudicative guidelines contemplate that "behavior will have independent security significance under Guideline E in a broad range of cases." ISCR Case No. 06-20964 (App. Bd. Apr. 10, 2008).

The evidence establishes two disqualifying conditions under this guideline:

AG ¶ 16(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

AG ¶ 16(e): personal conduct . . . that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant's admissions and his testimony at the hearing are sufficient to establish AG ¶ 16(c) and 16(e). The following mitigating conditions are potentially relevant:

AG ¶ 17(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; and

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

AG ¶ 17(c) is partially established. Although marijuana use is often treated as a minor offense in criminal law and has been decriminalized in some jurisdictions, it is not "minor" in security adjudications. It is a major breach of trust when it involves an applicant holding a security clearance, and it is inconsistent with federal employment. However, Applicant's use is mitigated by the passage of time and its infrequency.

AG ¶ 17(c) is established. Applicant notified his supervisor and facility security officer about his positive urinalysis. It is well known among his coworkers. After the hearing, he informed his wife of his positive urinalysis and the circumstances under which he left his previous job.

Whole-Person Concept

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. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. An 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.

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's use of marijuana one time after being granted a security clearance was a serious breach of trust. He used it under circumstances indicating that he had no reservations about using it, no concerns for his security clearance or his job, and no consideration of the impact of his marijuana use on his family. He accepted marijuana from a casual acquaintance and used it without hesitation.

On the other hand, Applicant was candid, sincere, and very remorseful at the hearing. He was regarded as a "trusted employee" at his previous job, even though he was given the choice of resigning or being fired. The disruption of his career was a wake-up call, and it made him realize the seriousness of drug use in the federal workplace. He has quickly reestablished himself as a talented and trustworthy employee. He served honorably in the U.S. Army and has a long record of outstanding service as a contractor employee. When he submitted his January 2012 SCA, he candidly disclosed his previously undisclosed use of marijuana starting in 1987. He has placed himself on probation by submitting his statement of intent.

After weighing the disqualifying and mitigating conditions under Guidelines H and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his drug involvement and personal conduct. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement):	FOR APPLICANT
Subparagraphs 1.a-1.c:	For Applicant
Paragraph 2, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraphs 2.a-2.b:	For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge