



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



In the matter of:)	
)	
-----)	ISCR Case No. 13-01140
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

05/02/2014

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant mitigated security concerns under the guidelines for drugs and personal conduct. His eligibility for a security clearance, therefore, is granted.

Statement of the Case

On February 6, 2013, Applicant signed and completed a security clearance application (SCA). In the SCA, he admitted using marijuana once in 2009 after having been previously granted a security clearance. On November 19, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H (Drug Involvement) and Guideline E (Personal Conduct). The action was taken under 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 adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

In a December 6, 2013, response to the SOR, Applicant admitted the facts underlying the two allegations raised and requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. I was assigned the case on

March 12, 2014. On March 13, 2014, a notice was issued setting the hearing for April 16, 2014. The hearing was convened as scheduled.

At the hearing, the Government presented three documents, which were accepted into the record as exhibits (Exs.) 1-3. Applicant gave testimony, introduced two witnesses, and presented six documents, which were accepted into the record as Exs. A-F. The transcript (Tr.) of the proceeding was received on April 25, 2014, and the record was closed. Based on a thorough review of the record, I find that Applicant mitigated Guideline H and Guideline E security concerns. Security clearance is granted.

Findings of Fact

Applicant is a 32-year-old employee of a defense contractor. He has worked for his current employer since 2005. In 2007, he became the organization's business financial manager. Applicant has a bachelor's degree in political science. He is married and has no children.

In 2001, while in college, Applicant took one inhalation of marijuana being consumed by a peer. This occurred on one occasion. (Tr. 35) He did not like the drug. Applicant went on to complete his collegiate studies in May 2003, then he interned for almost two years. He started working full-time for his present employer in 2005, and was granted a security clearance shortly thereafter. He did not note his experiment with marijuana on his 2005 SCA. His omission was inadvertent. (Tr. 37-38) The single inhalation in 2001 was not memorable. (Tr. 38)

In July 2009, Applicant and his then-fiancée went to the out-of-state wedding of one of her cousins. While there, his fiancée decided she wanted to try marijuana, which was offered to them during their stay. Applicant knew he had a security clearance and knew it was wrong for him to use the drug, but he did so anyway. The next morning, Applicant and his fiancée discussed the incident. They found marijuana and its use to be "stupid and pointless." (Tr. 41) They jointly decided not to use the drug again.

Upon returning to work, Applicant did not report the incident. To date, he is unsure whether he knew he had any obligation to do so at that time. Applicant and his fiancée married in 2012. When Applicant applied for a higher level of clearance in February 2013, he noted the 2009 drug use in response to a question regarding illegal drug use in the preceding seven years. In September 2013, he explained the circumstances regarding his use of marijuana in both 2001 and 2009.

Applicant earnestly laments his 2009 lapse of judgment in using marijuana. He has no intention of using marijuana or any other illegal drug in the future. He has signed a statement of intent with automatic revocation of clearance for any violation in compliance with AG ¶ 26(b)(4). (Ex. C) Applicant's wife has not tried marijuana again and has no intention to do so. Applicant rarely has contact with his wife's cousins. He does not associate with those who use drugs, or frequent places where drugs are used.

Applicant's witnesses describe him as a man who has matured into a highly loyal and effective employee. His supervisor notes that Applicant is trustworthy, moral, ethical, and patriotic. (Ex. B). The president of the company employing Applicant has a very high degree of trust in Applicant, noting that he has been impressed as to how Applicant has made no excuses for his temporary lapse of judgment in 2009. Applicant is appreciative of their trust, his flexible terms of employment, and his salary of about \$100,000. He is sincere in his intent to not violate his witness' faith and trust in him. (Tr. 32) He has no intention of jeopardizing either his career or his current income level.

Applicant submitted two negative drug tests from late 2013 and early 2014, respectively. (Ex. D and Ex. F) The latter negative test was based on a hair sample, which is considered a superior test to the extent it can discern the trace presence of drugs over a longer period. (Tr. 30; Ex. F) Applicant is willing to repeat such drug testing.

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 are used 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 derived from 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, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and 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.

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

Guideline H - 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 ¶ 24) “Drugs” are defined as mood and behavior altering substances and include 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 inhalants and other substances. (AG ¶ 24(a)(1-2)) “Drug abuse” is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction. (AG ¶ 24(b))

Applicant admits using marijuana in 2009, after having been granted a security clearance in 2005. This is sufficient to raise Drug Involvement Disqualifying Conditions:

AG ¶ 25(a) - any drug abuse, and

AG ¶ 25(g) - any illegal drug use after being granted a security clearance.

With disqualifying conditions thus raised, the burden shifts to Applicant to mitigate related security concerns.

Applicant’s single inhalation from a marijuana source while in college took place when he was a teen. It was an isolated incident that can be categorized as a youthful indiscretion. Of immediate concern is his second use of marijuana in 2009, after he had been granted a security clearance. This occurred when he and his then-fiancée were out of town at a wedding, where one of her cousins offered the couple marijuana. Applicant’s future wife, who had never tried marijuana, expressed an interest in trying the drug. They tried the drug, then decided against using it in the future after a candid discussion the next day. To date, neither has used marijuana or any other illegal drugs since that time.

Applicant is clearly contrite about his 2009 lapse in judgment. He is fully aware that using marijuana after being granted a security clearance presents a grave breach of trust. He has no intention of using marijuana or any other illegal drug in the future. Applicant has signed a statement of intent with automatic revocation of clearance for any violation in compliance with AG ¶ 26(b)(4). He does not associate with those who use drugs, or frequent places where drugs are used. His wife has no intention of using marijuana again, and the couple has little contact with Applicant's wife's cousins. Since the 2009 incident, Applicant has married and grown professionally. His superiors report that he has matured over time and grown into a highly reliable, forthright, ethical, and loyal employee who possesses sound judgment. Applicant enjoys his work, is indebted to his superiors, and is appreciative of his salary. There is little chance he will again jeopardize his job or career. In light of such considerations, I find that the following mitigating conditions apply:

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;

AG ¶ 26(b) – demonstrated intent not to abuse 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.

Guideline E, Personal Conduct

The security concern for personal conduct 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. 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.

Under this guideline, the SOR repeats the allegation noted under Guideline H. Specifically, it alleges and Applicant acknowledges that he used marijuana in 2009 after having been granted a security clearance. Although the Guideline H disqualifying condition at AG ¶ 25(g) specifically covers this fact pattern, disqualifying condition AG ¶ 16(e) can apply:

AG ¶ 16(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.

The facts noted in the above analysis regarding Guideline H are identical here. Using illegal drugs while holding a security clearance was a unique, one-time lapse from when Applicant was in his 20s. Five years have passed without recurrence. He and his wife have jointly decided not to use marijuana again. Applicant has expressed that same intent independently, and signed a statement of intent not to use drugs again. He has been open about the incident with his superiors, including the company president, since noting it on his SCA. Given Applicant's obvious contrition, maturation, subsequent successes, and desire to maintain his lifestyle, it is highly unlikely he will again manifest such behavior. I find the following personal conduct mitigating conditions apply:

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 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.

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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). 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. I have incorporated my comments under the three above-referenced guidelines in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed above, but some warrant emphasis or additional comment.

Applicant acknowledges that his 2009 drug use violated the Government's trust and he accepts full responsibility for his poor judgment. In mitigation, he showed that he has matured over the past five years, no longer associates with those who use drugs or frequents places where drugs are present, and has made a commitment with his wife that they will not use marijuana again. Applicant has signed a statement of intent with automatic revocation of clearance for any violation. His superiors speak of him in the highest terms, especially with regard to ethics, reliability, and judgment. Applicant appreciates their trust, his work, and his salary. It is highly unlikely he will again

jeopardize his career. In light of these considerations and five years of abstinence, I find that Applicant mitigated drug involvement and personal conduct security concerns.

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 the national interest to grant Applicant a security clearance. Eligibility for access to classified information is granted.

Arthur E. Marshall, Jr.
Administrative Judge