



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



In the matter of:)	
)	
)	ISCR Case No. 13-01228
)	
Applicant for Security Clearance)	

Appearances

For Government: Philip J. Katauskas, Esq., Department Counsel
For Applicant: Christopher Graham, Esq.

05/22/2014

Decision

O'BRIEN, Rita C., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, I conclude Applicant has mitigated the security concerns raised under the guidelines for drug involvement and personal conduct. Accordingly, his request for a security clearance is granted.

Statement of the Case

On December 9, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) citing security concerns under Guideline H (drug involvement) and Guideline E (personal conduct) of the Adjudicative Guidelines (AG).¹ In his Answer to the SOR, Applicant admitted the allegation under Guideline H, but denied the allegation under Guideline E. He also requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on March 24, 2014, and I convened the hearing as scheduled on April 15, 2014. I admitted two Government exhibits (GE 1-2), and three Applicant exhibits (AE A-C). DOHA received the transcript on April 23, 2014.

¹ Adjudication of the case is controlled by Executive Order 10865, as amended; DOD Directive 5220.6 (Directive), as amended; and the Adjudicative Guidelines, which supersede the guidelines listed in Enclosure 2 to the Directive. They apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

Findings of Fact

Applicant's admission to the drug involvement allegation is incorporated as a finding of fact. After a thorough review of the pleadings and the record evidence, I make the following additional findings of fact.

Applicant is 32 years old, single, and has no children. He received a bachelor's degree in 2004 in State A, his home state. After college, he moved to State B, and worked as a software engineer for a defense contractor from 2005 to 2012. He was granted a secret security clearance in July 2006. In August 2012, he accepted his current position as a software engineer with a defense contractor in State B. In March 2013, he submitted an application for a top secret security clearance. (GE 1; Tr. 23-25)

Applicant disclosed in his 2013 security clearance application that he used marijuana, and estimated his marijuana use occurred between January 2003 and January 2011. At the hearing, he stated he did not use marijuana in 2011, but entered that year only to be sure that his last use in 2010 would be encompassed by the dates he entered. He was unsure of the exact number of times he used marijuana and testified, "[I] smoked it less than 10 times in my entire life I can think of four instances, . . ." The instances Applicant discussed occurred twice in college and twice after he began working. He testified that his use was minimal because it made him feel ill on several occasions. (GE 1; Tr. 27, 30-31)

In his security clearance application, Applicant listed March 2006 as the date his first security clearance investigation was completed, and July 2006 as the date his security clearance was granted. After college, he used once in 2006 and once in 2010. However, he testified he was unsure if both instances occurred while he held a security clearance, because he does not remember if the 2006 use occurred after July 2006, when he was granted his security clearance. He was visiting his family in State A when he used marijuana in 2006. (GE 1; Tr. 26-27, 32)

Applicant is certain that he used marijuana while holding a security clearance in 2010. He was with a new friend in State A, and "[I] made a bad judgment call. I took a hit off of it and – and I regretted it immediately." The friend now lives in State C, and Applicant no longer sees him. His current friends, in State B, do not use marijuana. The friends with whom he used marijuana live in State A, and Applicant has no ongoing association with them. (Tr. 27-33) He testified that the friends in State A,

[H]ave not really advanced in their lives and gotten jobs and moved away from home. And they – their lives have definitely not been the better for it. And so, as I've grown and moved on, they haven't. So they're just kind of left behind. (Tr. 33)

Applicant attached to his Answer a Statement of Intent, signed on January 21, 2014, that he will not use any illegal drug in the future, and agreeing that such use

constitutes grounds for automatic revocation of any security clearance he holds at that time. (Answer)

Applicant's performance evaluations show that in his first two years with his current employer, he scored 4 or 5, of a possible 5, on all measurements. His supervisor commented that Applicant excelled at meeting his objectives and consistently exceeded his goals. (AE B, C; Answer)

Applicant's second line supervisor testified. He has held a top secret security clearance for 11 years, and has known Applicant for two years. He opined that Applicant is "[P]robably my best developer on the team." He noted that Applicant has shown no indications of illegal drug use at his employment. He described Applicant as diligent and studious. A friend, who has known Applicant for four years, testified that they socialize six or seven times per year. He has seen no indication that Applicant uses illegal drugs. (Tr. 15-19, 40-46)

Several of Applicant's long-time friends submitted character reference letters. They consistently describe him as reliable, trustworthy, and credible. One friend opines that Applicant's drug use was out of character for him, and his honesty in disclosing it, knowing that it would put him at risk, is typical and shows his good character. The acting director of a federal office has known Applicant through their participation on community sports teams and at fundraising events. He respects and trusts Applicant, who is a frequent guest in his home. (AE A)

Applicant's direct supervisor is aware of the SOR allegation. He describes Applicant as honest and trustworthy, a "[V]ery reliable individual and extremely well respected member of my team." Applicant is an exemplary employee who is conscious that his work "[I]mpacts the mission of the Department of Defense. . . ." He stated Applicant "[H]olds himself and the team to the highest of standards . . ." and "[H]e is always the first to bring an issue or error of his to my attention and his willing to do whatever it takes to rectify the situation." (AE A)

Policies

Each security clearance decision must be a fair determination based on examination of all available relevant and material information, and consideration of the criteria and adjudication policy in the AG.² The presence or absence of a disqualifying or mitigating condition does not determine a conclusion for or against an applicant. However, specific applicable guidelines are followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guideline H (drug involvement) and Guideline E (personal conduct).

² Directive. 6.3.

A security clearance decision is intended only to resolve the question of whether it is clearly consistent with the national interest³ for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the Applicant to refute, extenuate, or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁴ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of one who will protect the national interests as her or his own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government.⁵

Analysis

Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern about 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.

Of the disqualifying conditions listed at AG ¶ 25, the following apply:

(a) any drug abuse; and

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

Applicant admits to using an illegal drug between 2003 and 2010. He used marijuana infrequently during college. He was granted a secret security clearance in 2006. He admits that he used marijuana twice while holding a security clearance, but opined that it may have been once, because he was uncertain if the 2006 use occurred before or after his security clearance was granted in July 2006. He again used marijuana in 2010. There is no record evidence that Applicant bought, sold, or cultivated

³ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁴ See *Egan*, 484 U.S. at 528, 531.

⁵ See *Egan*; AG ¶ 2(b).

marijuana, that he was diagnosed by a medical professional with drug abuse, or advised to attend a drug treatment program.

The following mitigating conditions are relevant under 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

(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;

(4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant's use of marijuana was not recent, and it was infrequent. He no longer lives near or associates with the friends with whom he used marijuana in State A. Given Applicant's four years' of abstinence, and the changed circumstances in his life, it is unlikely that the conduct will recur. Applicant's past behavior does not cast doubt on his current trustworthiness and reliability. AG ¶ 26(a) applies.

Mitigation is also available under AG ¶ 26(b). I find Applicant's testimony credible that he has no intent to use marijuana in the future, based on his abstention, his realization of the difference between his life and that of his drug-using friends, his residence in a different state than them, his lack of contact with them, and his notarized statement that he agrees to revocation of his security clearance if he uses marijuana or other illegal drugs in the future.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern about 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.

The following disqualifying condition is relevant under AG ¶ 16:

(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

Applicant engaged in untrustworthy and unreliable behavior when he used an illegal drug. He admits that he demonstrated poor judgment when he decided to use marijuana. AG ¶ 16 (d)(1) applies.

The following mitigating condition under AG ¶ 17 is relevant:

(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.

Applicant's offense violated the law, and so it was certainly not minor. However, his college use is long past, and his two uses in his nine years of employment were infrequent. Moreover, four years have passed since his last use. He expressed a realization that his friends who used marijuana have not "moved on" and he distinguished how his own path has diverged from theirs. I find it is unlikely he will engage in such conduct again. His current trustworthiness and reliability are not in doubt. AG ¶ 17(c) applies.

Whole-Person Analysis

Under the whole-person concept, an administrative judge evaluates security eligibility by considering the totality of an applicant's conduct and circumstances. An administrative judge should consider the following adjudicative process factors:

(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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the cited guidelines, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant used an illegal drug between four and ten times in the past 13 years. He realizes that he showed poor judgment in using marijuana. His subsequent conduct shows rehabilitation. His last use was four years ago. In the years since then, he has established himself in his career for almost ten years, and his superiors commend his performance. He no longer associates with the friends with whom he used marijuana. Applicant has matured, as shown by his belief that his drug-using friends have not “moved on.” They reside in a different state. He has distanced himself from them and no longer associates with them. He signed a statement that he will not use illegal drugs in the future, and accepts that such conduct will result in the loss of any security clearance he might hold at that time.

A fair and commonsense assessment of the available information shows Applicant has satisfied the doubts raised about his suitability for a security clearance. For these reasons, I conclude he has mitigated the security concerns arising from the cited adjudicative guidelines.

Formal Findings

Formal findings on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are as follows:

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 interests of national security to allow Applicant access to classified information. Applicant’s request for a security clearance is granted.

RITA C. O'BRIEN
Administrative Judge