



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



In the matter of:)
)
) ISCR Case No. 14-02068
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esquire, Department Counsel
For Applicant: *Pro se*

07/13/2015

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant smoked marijuana on three occasions in the last 11 years while socializing with three close friends: at a holiday party in early January 2008; at a friend’s bachelor’s party in late August 2013; and then at the friend’s wedding celebration in mid-September 2013. He regrets his drug use and does not intend to use any illegal drug in the future. Clearance is granted.

Statement of the Case

On October 9, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline H, Drug Involvement, and explaining why it was unable to find that it is clearly consistent with the national interest to grant him security clearance eligibility. The DOD CAF took the action under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (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.

Applicant responded to the SOR allegations on October 29, 2014, and he requested a decision on the written record without a hearing. On February 4, 2015, the Government submitted a File of Relevant Material (FORM) consisting of six documents (Items 1-6). On February 18, 2015, the Defense Office of Hearings and Appeals (DOHA) forwarded a copy of the FORM to Applicant and instructed him to respond within 30 days of receipt. Applicant received the FORM on March 5, 2015. Applicant submitted a timely response on March 5, 2015. On March 19, 2015, Department Counsel indicated that the Government did not object to Applicant's response. Accordingly, Applicant's rebuttal to the FORM was admitted into evidence as Applicant Exhibit (AE) A.

Findings of Fact

The SOR alleged that Applicant used marijuana on three occasions between 2006 and September 2013 (SOR 1.a). (Item 1.) When he answered the SOR, Applicant admitted the allegation without explanation. (Item 4.) His admission to the drug involvement is accepted and incorporated as a finding of fact. After considering the FORM and Applicant's rebuttal (AE A), I make the following additional findings of fact.

Applicant is a 33-year-old tenure-track assistant professor at a private university (university X) in the United States. He has a doctorate degree that was awarded to him in May 2012. He seeks a DOD security clearance for his part-time work as a senior policy analyst with a DOD contractor. (Item 5.)

Through academic study, and knowledge and experience gained in part through internships and fellowships, including pre-doctoral and post-doctoral fellowships at highly regarded private universities in the United States, Applicant has amassed expertise in international affairs and international security issues. During the fall semester in 2003, Applicant worked as an intern on international conflict issues for a nonprofit public policy organization. After he earned his bachelor's degree in May 2004, he held a prestigious and highly selective year-long junior fellowship with a nonprofit organization focused on international affairs. Applicant authored published articles on military operations in South Asia during his fellowship from August 2004 to August 2005. (Item 5; AE A.)

Applicant held a graduate internship through a defense contractor with the DOD from May 2006 to August 2006. The DOD granted him a secret-level security clearance to work on national security issues that summer. (Item 5.) According to the DOD office's director, Applicant made "immediate and profound" contributions in the area of strategic policy and planning. He earned the trust and respect of his colleagues, and they considered him an integral team member. (AE A.)

Applicant was awarded the first of his two master's degrees in May 2007. From September 2007 to September 2008, Applicant was a teaching fellow at the university. During the academic break in early January 2008, Applicant smoked marijuana once, while vacationing with friends out of state. (Item 4.) In May 2008, he was awarded a master's degree in philosophy. (Item 6.)

Applicant held a full-time academic position as a pre-doctoral fellow at a university's school of government from 2011 to 2012. (AE A.) After he earned his doctorate degree in May 2012, Applicant taught summer school classes part time for university X. From August 2012 to August 2013, he held a post-doctoral academic fellowship at another college. He also taught summer classes for university X in the summer of 2013 before assuming his tenure-track position in September 2013. He smoked marijuana once in late August 2013, at a bachelor party for a close friend, and once in mid-September, at a friend's wedding celebration. (Items 5, 6.)

In October 2013, Applicant took on part-time work, around 20 hours per week, as a policy analyst for a defense contractor. On October 10, 2013, Applicant completed and certified to the accuracy of an Electronic Questionnaire for Investigations Processing (e-QIP) for a security clearance for his analyst duties. Applicant responded affirmatively to an e-QIP inquiry concerning any illegal use of a drug or controlled substance in the last seven years. Applicant indicated "05/1995" as the estimated month and year of his first use and "09/2013" as the month and year of his most recent use.¹ About the nature and frequency of his abuse, Applicant elaborated that he took three "drugs" from a marijuana joint or pipe on three separate occasions: at a friend's wedding in September 2013, at a friend's bachelor party in August 2013, and at a winter holiday party in January 2008.² Applicant responded "No" to whether he intended to use the drug in the future, and he cited its illegality as the reason. (Item 6.)

On December 13, 2013, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). About the marijuana use listed on his e-QIP, Applicant explained that he used the drug with three friends, who provided it. He denied any marijuana use beyond the three occasions listed and any intent to use marijuana in the future. Applicant asserted that he had no awareness of any associates that continue to use marijuana. (Item 6.)

In his March 2015 response to the FORM, Applicant attributed his marijuana use "once at a New Year's party in 2008 [and] twice during celebrations of the wedding of a close friend in 2013" to partying too hard and making "three stupid, horrible choices." He apologized to the DOD for his drug use and expressed willingness "to provide additional information and undergo probationary measures (e.g., drug tests, polygraph)." (AE A.)

¹ Applicant would have been only 12 years of age in May 1995. Assuming that the date was not listed in error, this youthful experimentation bears little relevance to his current security suitability, particularly given the absence of any evidence of other marijuana involvement before 2008.

² In his rebuttal to the FORM, Applicant stated in part, "I disclosed my illegal drug use voluntarily, after passing a drug test, and with an understanding that doing so would jeopardize my current and future employment." He presented no corroborating documentation of that reportedly negative drug screen. It is unclear whether he submitted to the drug screen before he used marijuana at his friend's wedding in September 2013.

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 required to 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 overall 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 that the applicant may deliberately or inadvertently fail to 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

Guideline H, Drug Involvement

The security concern for drug involvement 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.

Under AG ¶ 24(a), drugs are defined as "mood and behavior altering substances," and include:

- (1) 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),³ and
- (2) inhalants and other similar substances.

Under AG ¶ 24(b), drug abuse is defined as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction." Disqualifying condition AG ¶ 25(a), "any drug abuse," applies because Applicant used marijuana while at a party with friends celebrating the New Year 2008,⁴ at a friend's bachelor party in late August 2013, and then at this friend's wedding two weeks later in September 2013. The drug was provided to him by his friends. There is no evidence that he contributed funds to its purchase.

Applicant's use of marijuana on two celebratory occasions between late August 2013 and mid-September 2013 was certainly very recent as of his e-QIP in October 2013. As of his rebuttal to the FORM in March 2015, Applicant claimed 1.5 years of abstinence with no evidence to the contrary. In assessing whether security concerns may have become attenuated by the passage of time to no longer cast doubt on an individual's reliability, trustworthiness, or good judgment, the DOHA Appeal Board has consistently held that it is a question for the administrative judge to resolve based on the evidence as a whole. See e.g., ISCR Case No. 14-01847 (App. Bd. Apr. 9, 2015); ISCR Case No. 11-12165 (App. Bd. Jan. 29, 2014). Applicant abused marijuana on only three occasions in the last 11 years. AG ¶ 26(a) contemplates mitigation when the drug involvement is "so infrequent" to not cast doubt on a person's current judgment:

- (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.

On the other hand, the circumstances surrounding his abuse were not so aberrational to preclude a recurrence. His abuses of marijuana in 2008 and 2013 were to celebrate different occasions, but the abuses occurred while socializing with close friends.

³Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act, are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule I controlled substance.

⁴The SOR alleges that Applicant used marijuana on three occasions between approximately 2006 to at least September 2013. There is no evidence establishing that Applicant used marijuana in 2006.

On his e-QIP, during his subject interview, and in response to the FORM, Applicant denied any intent of future marijuana involvement. In March 2015, he expressed willingness to undergo drug testing or take a polygraph examination to prove his abstinence. As a threshold matter, I did not have an opportunity to assess Applicant's credibility in person on this issue. Applicant's candor about his drug use allows me to find him sincere about his intent and his willingness to submit to drug testing and polygraph examination. However, the Directive does not authorize a probationary term or status to give an applicant time "to earn the Government's trust." The risk of recurrence of drug abuse must be evaluated in light of the evidence before me for review. Apart from the character reference from the DOD program director, it includes no statements of Applicant's former colleagues and personal contacts that Applicant has requested be considered. They were not included in the FORM or with Applicant's rebuttal.

Under AG ¶ 26(b), "a demonstrated intent not to abuse any drugs in the future" can be shown by:

- (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.

Concerning AG ¶ 26(b)(1), after naming the three friends with whom he had smoked marijuana "to get high," Applicant told the OPM investigator that he was not aware of any associates who continue to use marijuana. Applicant cannot avail himself of mitigation under AG ¶ 26(b)(1) without credible evidence that the close friends involved in his drug use no longer abuse marijuana, or if they are using, that he has terminated these friendships. As for avoiding social activities that could present a risk of relapse, there is no evidence that Applicant has been offered any marijuana or been in the presence of anyone smoking marijuana since September 2013. To the extent that AG ¶ 26(b)(2) is implicated, it does not fully address the concerns surrounding his use of marijuana while partying with close friends in the past.

Applicant's present 1.5 years of abstinence is of short duration when compared to the five years of abstinence that preceded his relapse in 2013. Yet, I am persuaded that Applicant understands that any future illegal drug use on his part would be inconsistent with his DOD security clearance obligations and would jeopardize his current and any future defense-related employment. He is not likely to risk his reputation or his career by engaging in illegal drug use in the future. He has not executed a separate signed statement of intent acknowledging automatic revocation of security clearance for any illegal drug involvement, but he has repeatedly indicated that he does not intend to use any marijuana in the future, including on his e-QIP under advisement of 18 U.S.C. §1001. Marijuana was not typically a part of Applicant's socialization or recreation. He has had no drug treatment,

but there is no evidence of a physiological or psychological drug dependency that would suggest an inability to refrain from substance abuse. After considering all the evidence, I am persuaded Applicant can be counted on to abide by his commitment to abstain from any future drug involvement.

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 his conduct and all relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(a).⁵ In making the overall commonsense determination required under AG ¶ 2(c), I have to consider Applicant's very poor judgment in abusing marijuana at social gatherings on three occasions between early January 2008 and mid-September 2013. Whether or not he had accepted the tenure-track position at university X when he smoked marijuana in August 2013, he had been teaching in the university's summer school. By the time he smoked marijuana in celebration of his friend's wedding, he held his full-time, tenure-track position. His conduct was incompatible with the judgment that one would expect from someone in his position and with his experience. He admitted he smoked the marijuana "to get high."

Applicant's candor about his drug involvement does not mandate a favorable outcome. The investigative and adjudicative process requires, and the Government has a legitimate expectation, that applicants for security clearance eligibility will respond accurately to inquiries. At the same time, Applicant's disclosures of his drug involvement allow for a degree of trust and confidence in Applicant's representations regarding his willingness to abstain from illegal drug use. After considering the facts and circumstances, I conclude it is clearly consistent with the national interest to grant Applicant security clearance eligibility at this time.

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

⁵The factors under AG ¶ 2(a) are as follows:

(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.

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.

Elizabeth M. Matchinski
Administrative Judge