



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



In the matter of:)
)
) ISCR Case No. 14-02598
)
Applicant for Security Clearance)

Appearances

For Government: Gina L. Marine, Esq., Department Counsel
For Applicant: *Pro se*

04/29/2015

Decision

DUFFY, James F., Administrative Judge:

Applicant mitigated the security concerns under Guidelines H (drug involvement), E (personal conduct), and J (criminal conduct). Eligibility for access to classified information is granted.

Statement of the Case

On August 11, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H, E, and J. DOD CAF took that action under Executive Order (EO) 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) implemented on September 1, 2006.

The SOR set forth reasons why DOD CAF could not find under the Directive that it is clearly consistent with the national interest to grant Applicant a security clearance. On September 11, 2014, Applicant answered the SOR and requested a hearing. This case was assigned to me on January 23, 2015. On February 11, 2015, the Defense

Office of Hearings and Appeals (DOHA) issued a Notice of Hearing. The hearing was held as scheduled on February 24, 2015. Applicant waived the 15-day notice requirement for the hearing in ¶ E3.1.8 of the Directive.¹

At the hearing, Department Counsel offered Government's Exhibits (GE) 1 and 5, while Applicant testified and offered no documents. Department Counsel's prehearing letter to Applicant was marked as Hearing Exhibit (HE) 1 and her list of exhibits was marked as HE 2. The record of the proceeding was left open until March 3, 2015, to provide Applicant an opportunity to present documentary evidence. Applicant timely submitted documents that were marked as Applicant's Exhibits (AE) A and B. All proffered exhibits were admitted into evidence without objection. The transcript (Tr.) of the hearing was received on March 4, 2015.

Findings of Facts

Applicant is a 32-year-old employee of a defense contractor. He has worked for his current employer since July 2005. He graduated from high school in 2001 and from college with a bachelor's degree in December 2005. At the time of the hearing, he was engaged and planning to marry in three weeks. He has held a security clearance since about 2007.²

The SOR set forth two Guideline H allegations. SOR ¶ 1.a alleged that Applicant used marijuana from about August 1999 to December 2005, and once in about November 2012. SOR ¶ 1.b alleged that he used marijuana while possessing a security clearance in November 2012. The SOR set forth a single Guideline E allegation that cross-alleged the two Guideline H allegations (SOR ¶ 2.a), and a single Guideline J allegation that cross-alleged the first Guideline H allegation (SOR ¶ 3.a). In his Answer to the SOR, Applicant admitted each SOR allegation. His admissions are incorporated as findings of fact.³

On February 26, 2007, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). In the e-QIP, he disclosed that he occasionally used marijuana in high school and college from August 1999 to July 2004. He repeated that disclosure in an e-QIP submitted on June 20, 2008. In an interview with an Office of Personnel Management investigator in July 2008, he acknowledged that he used marijuana with his brother and friends during high school and college. He could not recall the exact number of times that he used marijuana, but indicated he used it about every other month. He obtained the marijuana from friends and was never involved in trafficking in illegal drugs. He further indicated that he had not used marijuana since July 2004 and had no desire to use it again.⁴

¹ Tr.12-13.

² Tr. 5-8, 33; GE 1, 2.

³ Applicant's Answer to the SOR.

⁴ GE 3, 4, 5.

On October 8, 2013, Applicant submitted another e-QIP. In this latest e-QIP, he disclosed his occasional use of marijuana during college and “some recent use.” He indicated that his most recent use occurred in November 2012, “while on vacation in what I felt was a safe and recreational situation with friends.” He also checked a block in the e-QIP indicating he intended to use marijuana in the future and stated, “My intention is not to use on a frequent basis, but I am not able to say that I would not if I felt I was in a safe and appropriate situation.”⁵

In an interview with an OPM investigator in December 2013, Applicant volunteered that his e-QIP statement about his intention to use marijuana in the future was incorrect and that he would not use any illegal drug at any time. He also clarified the timeline for his use of marijuana, stating he had not used marijuana between December 2005 and November 2012 and he used it on one occasion around Thanksgiving 2012. He further noted that he had not used any drugs since November 2012 and had no intention to do so.⁶

At the hearing, Applicant testified that he started an internship with his employer in the summer of 2005 and became a permanent employee in February 2006. His employer has a drug-free policy and he is subject to drug testing at work. He stated that, except for that onetime exception in November 2012, he did not use marijuana after starting the internship. In his latest e-QIP, he indicated the period of his marijuana usage extended to December 2005 to simply cover the period he was in college even though he had not used marijuana between July 2005 and December 2005.⁷

Around Thanksgiving in November 2012, Applicant vacationed with his family in another state. He is an avid mountain bicyclist. During that trip, he rode his bike up a mountain in a national forest. He ran into cyclists that he had met at past biking events who he knew only by their first names. One of the individuals began smoking marijuana and offered it to Applicant. He used it and subsequently acknowledged that was a bad decision.⁸

Applicant explained that, when he filled out his e-QIP, he was aware that some state laws were being changed to permit the use of marijuana. He indicated that he did not understand the impact of his e-QIP statement concerning future marijuana usage. His company later provided clarification of its drug policy and federal law on the use of marijuana. He is now aware that it remains illegal and will abide by that prohibition.⁹

⁵ GE 1.

⁶ GE 2.

⁷ Tr. 22-27, 36-37, GE 1.

⁸ Tr. 25-28, 36-38; GE 1, 2.

⁹ Tr. 28-31.

Applicant's fiancée has used marijuana in the past. She never used it with him and she no longer uses marijuana. His high school friend with whom he used marijuana also no longer uses marijuana. Applicant has not used marijuana with his friend since 2005. Applicant stated that he associates with no one that presently uses marijuana to his knowledge.¹⁰

In November 2014, Applicant was at a biking event when an individual smelled of marijuana. He indicated that he responded by avoiding that individual. He was contrite about his most recent marijuana use, realized he made a big mistake, and indicated that his company's and the federal government's drug prohibitions were now abundantly clear to him. He submitted a statement of intent that he will not abuse any drugs in the future and acknowledged that a violation will result in an automatic revocation of his security clearance.¹¹

In July 2014, Applicant received a letter from the president and chief executive officer of his company. This letter reflected that Applicant was a member of a team that received a major industry award. The letter stated that Applicant was "one of the Corporation's 'bright stars' and deserving of this highest honor for your extraordinary contributions to our success." Receipt of the award was a significant honor for the company.¹²

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 to be 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, administrative judges apply the guidelines 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

¹⁰ Tr. 31-32, 38.

¹¹ Tr. 33-35, 38-42; AE A, B.

¹² Applicant's Answer to the SOR.

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 the 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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

AG ¶ 24 expresses the security concern for 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.

(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), and

(2) inhalants and other similar substances;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

Of the drug involvement disqualifying conditions under AG ¶ 25, the following are potentially applicable:

- (a) any drug abuse;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, distribution; or possession of drug paraphernalia;
- (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.

From 1999 to July 2005, Applicant occasionally used marijuana while in high school and college. He also used marijuana on one occasion in November 2012 while holding a security clearance. AG ¶¶ 25(a), 25(c), and 25(g) apply.

In his e-QIP of October 2013, Applicant indicated that he intended to use marijuana in the future. He made that statement based on recent changes in some state laws and without understanding his company's and the federal government's prohibition on marijuana usage. After becoming aware of those prohibitions, he recognized that he erred in making that e-QIP statement, and convincingly committed to not abuse drugs in the future. AG ¶ 25(h) does not apply.

Of the drug involvement mitigating conditions under AG ¶ 26, the following are potentially applicable:

- (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 in high school and college was a youthful indiscretion. More troubling is his most recent use of marijuana in 2012 while holding a security clearance. He has no good explanation for that most recent marijuana usage. He got caught up in the moment and was not thinking clearly. He has accepted responsibility for that mistake and indicated that it will not happen again. He has not used marijuana in almost two-and-a-half years. He does not associate with drug users. He signed a statement of intent that he will not abuse any drugs in the future. He has been open and honest about his drug involvement throughout the security clearance

process. I find his commitment to not abuse drugs in the future to be convincing. AG ¶¶ 26(a) and 26(b) apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern for 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.

AG ¶ 16 describes two conditions that could raise a security concern and may be disqualifying in this case:

(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

(e) personal conduct, or concealment of information about one's 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 use of marijuana, including while holding a security clearance, triggers AG ¶ 16(c). AG ¶ 16(e) does not apply because Applicant has been forthcoming about his marijuana usage throughout the security clearance process.

Of the personal conduct mitigating conditions under AG ¶ 17, the following are potentially applicable:

(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

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

For the reasons stated under Guideline H above, I find that the mitigating conditions in AG ¶¶ 17(c) and 17(d) apply.

Guideline J, Criminal Conduct

AG ¶ 30 sets out the security concern for criminal conduct:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

I considered the disqualifying conditions under criminal conduct AG ¶ 31 and determined the following may apply:

(a) a single serious crime or multiple lesser offenses; and

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant used marijuana in violation of the law from 1999 to 2005 and again in 2012. The above disqualifying conditions apply.

Of the criminal conduct mitigating conditions under AG ¶ 23, the following potentially apply:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

For the reasons stated under Guideline H above, I find that the mitigating conditions in AG ¶¶ 23(a) and 23(d) apply.

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):

(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.

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 relevant facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H, E, and J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant has worked for his current employer for almost ten years. He is a valued employee. In 2014, he was recognized for being part of a team that received a prestigious award. He used marijuana in violation of the law and his company's policy. He acknowledged that his latest use of marijuana while holding a security clearance was a big mistake. He has convincingly stated that he will never use marijuana again.

Overall, the record leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the drug involvement, personal conduct, and criminal conduct security concerns.

Formal Findings

Formal findings on the allegations set forth in the SOR are:

Paragraph 1, Guideline H:	For Applicant
Subparagraphs 1.a-1.b:	For Applicant
Paragraph 2, Guideline E:	For Applicant
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline J:	For Applicant
Subparagraph 3.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 continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

James F. Duffy
Administrative Judge