



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-16756
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Candace Le'i, Esquire, Department Counsel

For Applicant: *Pro Se*

November 19, 2008

Decision

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

Applicant completed a Questionnaire for National Security Positions (SF-86) on November 7, 2002, a second SF-86 on June 5, 2006, and an electronic Questionnaire for Investigations Processing (e-QIP) on April 12, 2007. On April 15, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline E (Personal Conduct), Guideline H (Drug Involvement), and Guideline J (Criminal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised Adjudicative Guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

In a response received on May 14, 2008, Applicant admitted two of the four allegations raised under Guideline E and denied all allegations raised under Guidelines H and J. Applicant requested a hearing before a DOHA Administrative Judge. I was

assigned the case on June 19, 2008. Department Counsel and Applicant proposed a July 22, 2008, hearing, and a Notice of Hearing was issued on July 1, 2008.

The hearing took place as scheduled. Department Counsel submitted six exhibits (Exs.) which were accepted into the record as Exs. 1-6 without objection. Applicant submitted four exhibits, accepted as Exs. A-D without objection.¹ No witnesses were called. Applicant was given until August 6, 2008, to submit any further materials. The transcript (Tr.) was received on July 30, 2008. Department Counsel received and reviewed four additional submissions from Applicant on August 6, 2008. Department Counsel forwarded the package, noting her lack of objection to any of its contents. That package was received on August 8, 2008, and accepted into the record as Exs. E-H. The record was then closed. Based upon a review of the case file, exhibits, and testimony, security clearance is denied.

Findings of Fact

Applicant is an information analyst who has worked for the same defense contractor for approximately two years. He turned 25-years-old shortly before the hearing. He received his high school diploma in June 2002 and earned a bachelor of science degree in information technology in 2006. He is single and has no children. At issue are three security clearance applications completed by Applicant: a SF-86 dated on November 7, 2002, a second SF-86 dated on June 5, 2006, and an e-QIP dated April 12, 2007. In each of his applications, Applicant denied having used illegal drugs since the age of 16 or within the past seven years.²

In the autumn of 2002, Applicant enrolled in college. There, he entered the Reserve Officer Training Corp (ROTC) program to investigate the option of a future military career. As part of the program, he was required to complete a significant amount of paperwork, including what he later understood to be a paper SF-86. That form was later reformatted and submitted by the ROTC program on or about November 11, 2002.³ Applicant passed a required drug test and completed one semester in the program.⁴ He then dropped out of ROTC. He would not learn that a security clearance was granted in December 2002 until 2006.⁵

¹ Ex. A was a letter reserved for later submission. It was subsequently replaced by Ex. F, a facsimile copy of that letter.

² This question is asked in each application form as Question 27.

³ Tr. 15, 17, 29. *See also*, FORM, Item 2 (SF-86, dated Nov. 7, 2002) is an unsigned, word-processed version of a an SF-86. It states that Applicant previously signed the form on Nov. 4, 2002).

⁴ Tr. 23-24; Ex. E (Explaining Ex. H and its significance).

⁵ *Id.*

During the spring of 2003, Applicant illegally used marijuana with a high school friend.⁶ This started a pattern of monthly marijuana use that would continue for about three years. He used marijuana socially about once or twice a month during this time.⁷

During his senior year, from March 2006 through May 2006, Applicant had an internship with a defense contractor. In June 2006, he completed a SF-86. He denied recent and past drug use: "I was stupid. I was in college, I probably didn't take it as seriously as I should. . . . I have no defense for that. It was basically an immature and stupid decision."⁸ He did not initially realize that this form was a form equivalent to one he completed for the ROTC program a few years earlier. In completing the form, however, he read that using marijuana while holding a security clearance was a felony. As a consequence, he quit using marijuana shortly thereafter.⁹ This decision was an attempt to demonstrate compliance with the law, as well as an attempt to act as a mature, responsible adult.¹⁰

Applicant graduated from college in December 2006. After finding his current position in March 2007, he completed an e-QIP in April 2007. On that application, he again denied having used marijuana since age 16 or within the past seven years. He did this because he was afraid that changing his answer and admitting past drug use would jeopardize his job.¹¹ During a July 2007 interview with investigators, however, Applicant volunteered the correct information regarding his past drug use: "I came clean. It was on my own free will. . . . I had been out of college for about six months and I had begun to recognize the responsibility, not just with the security clearance, but as a member of society. . . . I needed to tell the truth"¹² In openly disclosing the true facts, which had thus far not been uncovered despite prior investigation, Applicant knew he risked losing his security clearance.¹³ Despite that risk, he "still chose to come forward and to tell the truth."¹⁴

⁶ In signed Responses to Interrogatories, dated Feb. 5, 2008, (Ex. 4) Applicant stated he started using marijuana during high school while elsewhere he stated he started using it in the summer of 2002. Applicant maintains, however, that he meant the year 2003, while he was in college. His credible testimony dispels concerns that inconsistency implies falsity.

⁷ Tr. 27.

⁸ *Id.*

⁹ Tr. 26.

¹⁰ Interrogatories, dated Feb. 5, 2008, at 2.

¹¹ Tr. 25.

¹² Tr. 25-26.

¹³ Tr. 26.

¹⁴ *Id.*

Applicant has proven to be an excellent and reliable employee. His work records show outstanding performance and superior growth. He was promoted to the next professional level within 16 months of his hiring, based on his technical performance and commitment to meeting customer network security requirements.¹⁵ His employer is aware of Applicant's appeal and assisted him in preparing a document stating that 1) Applicant is aware of Department of Defense drug policies and 2) Applicant would waive his right to appeal if he is caught or suspected of using illegal drugs in the future.¹⁶ Applicant successfully passed a drug screening when he was first hired in 2007.¹⁷

Applicant has actively and earnestly attempted to demonstrate a growing level of maturity since leaving school and joining the workforce. He is genuinely embarrassed and contrite over his past drug use and misrepresentations. He is committed to not using illegal drugs again in the future. He no longer associates with those using illegal drugs. He notes that his collegiate peers with whom he maintains contact and who also used drugs at school have similarly matured and become drug-free.¹⁸ Applicant fully appreciates the importance of candor in this process, an appreciation which motivated him to correct his 2007 SF-86 answer regarding past drug use.

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 over-arching adjudicative goal is a fair, impartial and common sense decision. Under AG ¶ 2(c), this 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

¹⁵ Ex.F (Promotion letter, emailed Jul. 21, 2008).

¹⁶ Ex. G (Waiver letter, signed Aug. 6, 2008).

¹⁷ Tr. 37.

¹⁸ Tr. 39.

on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

The Government must present evidence to establish controverted facts alleged in the SOR. 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. . . .”¹⁹ The burden of proof is something less than a preponderance of evidence.²⁰ The ultimate burden of persuasion to obtain a favorable clearance decision is on the applicant.²¹

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 protect or 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). “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”²² Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.²³ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.²⁴ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon consideration of the evidence, I find the following adjudicative guidelines to be the most pertinent to the evaluation of the facts in this case:

¹⁹ See *also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

²⁰ *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

²¹ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

²² *Id.*

²³ *Id.*

²⁴ Executive Order 10865 § 7.

Guideline E - Personal Conduct. *The Concern:* 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.

Guideline H - Drug Involvement. *The Concern:* 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 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. "Drug abuse" is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

Guideline J – Criminal Conduct. *The Concern:* 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.

Conditions pertaining to these adjudicative guidelines that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, are set forth and discussed in the conclusions below.

Analysis

Guideline E, Personal Conduct

Under this guideline, examination is made of an Applicant's reliability, trustworthiness, and ability to protect classified information based on his past personal conduct and actions. 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. On more than one occasion, Applicant deliberately denied using illegal drugs since the age of 16 or within seven years preceding his application for a security clearance. Consequently, Personal Conduct (PC) Disqualifying Condition (DC), AG ¶ 16(a) (*deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities*) applies.

When Applicant denied past drug use on his April 2007 security clearance application, he did so in order to make his answers consistent with those he provided while still in college. Having matured considerably since finishing school, he regretted

this decision and wanted to set the record straight regardless of the repercussions. In July 2007, on his own initiative, Applicant disclosed the truth about his past drug at his first meeting with investigators. But for this disclosure, the truth may never have come to light. The Appeal Board, however, has repeatedly determined that such a protracted period of time is insufficient to be deemed “prompt” under PC Mitigating Condition (MC) 1, AG ¶ 17(a) (*the individual has made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts*).

Applicant concedes that he first failed to disclose his past drug use because he was immature, then felt trapped into not varying from his prior answers. He described his decisions to conceal the truth as “stupid.” Therefore, PC MC 2, AG ¶ 17(b) (*the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully*) does not apply.

Using marijuana and giving false information during an investigation are criminal acts. Applicant used marijuana on a monthly basis during a three year period in college. He concealed his drug use more than once. Applicant admits his drug use and his misrepresentations were immature and ill advised. Therefore, PC MC 3, AG ¶ 12(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*) does not apply.

To his credit, Applicant matured considerably between 2006 and 2007. Although he kept it secret, he took the initiative to quit using drugs, change his lifestyle, and focus on a career. Feeling compelled to perpetuate his “stupid” lie about past drug use, he again denied it in 2007. Maturity and adult integrity, however, won out. This was demonstrated when he chose to tell the truth and correct the record despite any adverse professional repercussions. Further, since taking that corrective action, he has moved on and proven himself to be a reliable, valued professional who has learned a valuable lesson. Consequently, PC MC 4, AG ¶ 17(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 untrustworthiness, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur*), PC MC 5, AG ¶ 17(e) (*the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress*), and PC MC 7, AG ¶ 17(g) (*association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual’s reliability, trustworthiness, judgment, or willingness to comply with rules and regulations*) apply. No other mitigating conditions apply.

The amended adjudicative guidelines provide slightly more leniency than their predecessors. Applicant’s correction as to his false answers was not sufficiently prompt to invoke AG ¶ 17(a). It does, however, seem sufficient under the facts and circumstances unique to this Applicant to demonstrate his mature and earnest attempt

to rectify his immature, collegiate actions. He did so after weighing his recognition of doing the right thing versus jeopardizing his career and his eligibility for a security clearance. Today, he is drug-free, performs reliably at work, and comports his behavior with that expected of a 25-year-old professional adult.

Guideline H, Drug Involvement

Applicant used marijuana once or twice a month for three years in college. Consequently, Drug Involvement (DI) Disqualifying Condition (DC) AG ¶ 25(a) (*any drug abuse*) applies.²⁵ With a disqualifying condition thus established, the burden shifts to Applicant to mitigate security concerns.

Applicant's collegiate use of marijuana, while illegal, is far from unique. As his graduation day approached, he recognized that it was time to comport his behavior with that expected within the professional milieu to which he aspired. This included discontinuing his occasional use of marijuana, a use he learned in 2006 was proscribed for those holding a security clearance. He has now been drug-free for two and a half years, a not insignificant amount of time considering the few years he abused the drug and given his relative youth. In disclosing the truth regarding his past drug use, Applicant demonstrated personal growth, maturity, and candor. It also demonstrated a clear understanding and acknowledgment that drug abuse is illegal and incompatible with the possession of a security clearance. Given the adult honesty and responsibility demonstrated, in conjunction with his resolve never to again use drugs, DI Mitigating Condition (MC) 1, 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*) applies.

Applicant ceased using marijuana two and a half years ago, a not insignificant amount of time given the fact he recently turned 25. He has repeatedly declared his intent not to use drugs in the future. He no longer associates with those who use drugs or moves within an environment that accepts them. With the aid of his security officer, Applicant has signed a statement noting that he is aware of Department of Defense drug policies and that he will waive his right to appeal if he is caught or suspected of using illegal drugs in the future. DI MC 2, AG ¶ 26(b) (*a documented 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*) applies. None of the remaining mitigating conditions apply.

In resolutely quitting his use of marijuana, trading in his collegiate lifestyle for that of a professional, and coming clean with investigators, Applicant demonstrated that he has matured. As the result of his maturation, he demonstrated his ability and

²⁵ Because Applicant readily admits he bought the marijuana he used, specific discussion as to the unique facts involved in how he solicited such purchases is reserved for Guideline E, Personal Conduct.

willingness to comply with the rules and adult judgment. Such a showing directly addresses this guidelines concerns.

Guideline J – Criminal Conduct

With respect to Guideline J (Criminal Conduct), the Government has established its case. Under 18 U.S.C. ¶ 1001, it is a crime to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of the executive, legislative, or judicial branch of the United States. Applicant admits he answered questions regarding present and past drug use incorrectly. Such conduct and admissions are sufficient to raise security concerns, invoke Criminal Conduct Disqualifying Conditions (CC DC) 1, AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*), and CC DC 3, AG ¶31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted*), and initiate inquiry.

Applicant provided incorrect answers on two security clearance applications, one in 2006 and one in 2007. The only unique aspect of these two instances is the fact Applicant felt under pressure to keep his 2007 answers consistent with those he gave in 2006. Consequently, Criminal Conduct Mitigating Condition (CC MC) 1, AG ¶ 32(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*) does not apply. Moreover, the type of pressure experienced by Applicant to keep his answers consistent was not he type contemplated in CC MC 2, AG ¶ 32(b) (*the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life*), so it does not apply.

Because Applicant admits his actions, CC MC 3, AG ¶ 32(c) (*evidence that the person did not commit the offense*) does not apply. However, Applicant did come forward to correct the record at the first opportunity he had to meet with investigative personnel after submitting his 2007 questionnaire. He did so maturely and with full knowledge that disclosing the truth could jeopardize his obtaining a security clearance. This action is consistent with the personal growth and maturation Applicant has experienced as he has aged and entered the professional working world. There, he excels in his work and has merited promotion based on his skills and reliability. Despite this concerns raised through this process, he maintains the support and working rapport with his employer and security officer. Such factors raise CC MC 4, AG ¶ 32(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*) and highlight how his past acts of concealment were the result of an immaturity since replaced by maturity and a desire to set the record straight no matter the potential cost.

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 the 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) 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 public trust position must be an overall common sense 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, as well as the "whole person" factors noted above. Applicant is a college graduate who socially used marijuana for three years at school. Recently turning 25-years-old, he quit using marijuana before graduation as he prepared to transition from a sheltered college life to the working world. He has since focused on leading a responsible, professional lifestyle. While undergoing this transition, however, he falsely denied using marijuana shortly before he quit using it. Once the answer was given, he initially felt compelled to stick to the lie. Ultimately, and with full knowledge that setting the record straight could jeopardize his application and his career, he disclosed the truth and took all responsibility for his earlier, immature actions.

Applicant's initial conduct was clearly the result of ill judgment and it demonstrated unreliability. Given that his silence may well have left his secret undisclosed, his remedial disclosure and subsequent performance at work demonstrate his maturation and rehabilitation. They also demonstrate the type of candor and honesty expected of one holding a security clearance. While more time to demonstrate maturity is often required in such cases, Applicant's credible testimony and demeanor contain sufficient evidence that he has matured and is not likely to repeat any related conduct. Additional time and additional anecdotes would merely be cumulative. Applicant has adequately mitigated personal conduct, drug involvement, and criminal conduct security concerns. Clearance is granted.

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 E:	FOR APPLICANT
Subparagraph 1.a:	For Applicant

Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Paragraph 2, Guideline H:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	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 national security to grant Applicant eligibility for a security clearance. Clearance is granted.

ARTHUR E. MARSHALL, JR.
Administrative Judge