



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
)  
) ISCR Case No. 08-04241  
)  
)  
Applicant for Security Clearance )

For Government: Robert E. Coacher, Esquire, Department Counsel  
For Applicant: Alan V. Edmunds, Esquire

July 23, 2009

Decision

DAM, Shari, Administrative Judge:

Based upon a review of the record evidence as a whole, eligibility for access to classified information is granted.

On November 1, 2006, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). On March 12, 2009, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under 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 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.

Applicant answered the SOR on or about April 2, 2009, and requested a hearing. DOHA assigned the case to me on April 30, 2009, and issued a Notice of Hearing on

May 11, 2009. The case was heard on June 11, 2009, as scheduled. Department Counsel offered Government Exhibits (GE) 1 through 3 into evidence without objection. Applicant testified, called one witness and offered Exhibits (AE) A through M into evidence without objection. At the conclusion of the hearing, I left the record open until June 24, 2009, to give Applicant an opportunity to submit additional information. On June 16, 2009, Applicant submitted an exhibit that I marked as AE N and admitted into the record without objection by the Government. DOHA received the hearing transcript (Tr.) on June 29, 2009.

### **Findings of Fact**

Applicant denied the three allegations contained in Paragraph 1 of the SOR under Guideline E.

Applicant is 28 years old, married and has two children. In February 2000, he enlisted in the U. S. Air Force. He was honorably discharged in December 2004 as a staff sergeant (E-5). While in the Air Force, he held a Top Secret security clearance and had access to Sensitive Compartmented Information (SCI) beginning in 2002.

Prior to leaving the Air Force, Applicant started his own practice as a licensed massage therapist in October 2004. In April 2005, he began a full-time position as a communications technician with a defense contractor. He continued to practice massage therapy until December 2005 when his license lapsed. (GE 1)

In early 2005, a massage therapist working with Applicant offered him a marijuana cigarette. Applicant "took three puffs on the marijuana joint and then gave" it back to the other therapist. (Tr. 26) That was the first time he tried marijuana. He acknowledged that it was an impulsive act, one that he regretted afterward. (Tr. 42) He has not smoked marijuana since that day. (Tr. 41) He admitted that he held a security clearance at the time, having been discharged from the Air Force at the end of December 2004. (*Id.*) He told his wife after the incident. (Tr. 42) He was 24 years old at the time.<sup>1</sup>

In November 1, 2006, Applicant submitted an e-QIP. In response to "*Section 24: Your Use of Illegal Drugs and Drug Activity a. Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.) amphetamines, depressants, (barbiturates, methaqualone, tranquilizers, etc0, hallucinogenic (LSD, PCP, etc), or prescription drugs.*" he answered "no."<sup>2</sup>

In response to *Section 24: Your Use of Illegal Drugs and Drug Activity b. Have you ever illegally used a controlled substance while employed as a law enforcement*

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<sup>1</sup>The Government has not alleged security concerns under Guideline H, Drug Involvement.

<sup>2</sup>The November 2006 e-QIP was the second security clearance Applicant completed. He previously submitted one when he entered the Air Force. (Tr. 33)

*officer, prosecutor, or courtroom official; while possessing a security clearance, or while in a position directly or immediately affecting public,” Applicant answered “no.”*

When he completed the e-QIP, Applicant knew he had tried marijuana on one occasion in early 2005, but interpreted the word “use” in the two questions to imply a pattern of illegal abuse. He did not consider his one time experimentation as falling within the parameters of the questions. He did not intend to deceive or withhold information from the Government. (Tr. 29, 37) In April 2007, Applicant was interviewed by a Government investigator. During that interview, the investigator asked him whether he had ever “tried” any kind of illegal drug. He answered “yes” and disclosed the early 2005 incident. (Tr. 29) The Government did not have independent evidence of the 2005 incident until this disclosure.

While in the Air Force, Applicant was aware of the Government’s zero tolerance policy on drug abuse and its random drug screening practices. (Tr. 33-34) He also knew that if he had been in the Air Force at the time he smoked the marijuana cigarette and tested positive for illegal substances, he would have been disciplined. (Tr. 35) He admitted that he used poor judgment when he accepted the marijuana cigarette. (Tr. 38)

Applicant no longer associates with the therapist. He has no intention of using drugs illegally. He signed a Statement of Intent never to use any illegal substance again. (AE I) He submitted a June 11, 2009 random drug test that documents negative results. (AE N) His family and employer are aware of the incident and this proceeding. (Tr. 43)

Applicant’s step-brother testified. He is a business intelligence architect. He has held a Top Secret security clearance for two and a half years while in the U.S. Navy. He is aware of the facts underlying this proceeding. He does not believe Applicant uses controlled substances and has no reservations about Applicant possessing a security clearance. (Tr. 18-22)

Applicant submitted eight letters of recommendation. The operations noncommissioned officer (NCO) at the facility where Applicant worked in October 2001 as an airman wrote that he had no knowledge of any incidents regarding Applicant, which “would infringe on my trust in him to have this level of access or to be trusted in an environment where he would work alone with sensitive or critical communication systems with far-reaching impact to National Defense.” (AE A) A former airman, who served with Applicant and maintains a Top Secret/SCI level clearance, is familiar with the allegations of the SOR. He wrote, “I have never know him to exercise poor judgment in either his personal or professional life, and at no point have I ever thought that this individual could be seen as a risk to the US government while serving as a cleared employee or contractor.” (AE B) Applicant’s co-worker and mentor for four years stated, “Never have I known or suspected [Applicant] of being deceitful in any circumstance or capacity.” (AE C) The remaining five letters attest to Applicant’s good character. (AE D, E, F, G, H)

On April 29 and 30, 2009, Applicant voluntarily underwent a psychological assessment for substance abuse. The evaluating psychologist found that “Applicant does not meet diagnostic criteria for a substance use disorder . . . He does not meet diagnostic criteria for a personality disorder.” (AE J at 5) The psychologist noted that Applicant “admitted to a single episode of usage of cannabis.” (*Id.*) The psychologist did not recommend any form of mental health or substance abuse treatment. (*Id.*)

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

Directive ¶ E3.1.14 requires the Government to 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.” 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.”

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.

## Analysis

### Guideline E, Personal Conduct

The security concerns pertaining to the Personal Conduct guideline are 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.

The Government alleged in SOR ¶ 1.a that Applicant used marijuana while holding a security clearance in 2005. It alleged in SOR ¶¶ 1.b and 1.c that he falsified answers to two questions on his e-QIP because he failed to disclose his one-time use.

AG ¶ 16 describes seven conditions that could raise a security concern and be disqualifying. The Government contended that two conditions may apply in this case:

(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; and

(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, support a whole-person assessment of questionable judgment, untrustworthiness, unreliability.

Applicant's acknowledgement that he held a security clearance in early 2005 when he tried marijuana is sufficient to raise a potential disqualification under AG ¶ 16(c). His illegal one-time use of marijuana is not sufficient to raise security concerns under the guideline for drug involvement, but does support a finding of questionable judgment under this guideline, given his previous service in the Air Force and knowledge of its drug policy.

Applicant denied that he intentionally omitted information in the e-QIP about the marijuana incident.

When a falsification allegation is controverted or denied, as in this case, the Government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time the omission occurred. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

Based on the record evidence, which includes Applicant's four years of Air Force service, knowledge of the military's position on drug abuse, his previous experience with the security clearance process, his articulate and intelligent demeanor, and the fact that he was 26-years old when he completed the e-QIP, I do not find his explanation for failing to disclose the marijuana incident credible, but rather a deliberate concealment under AG ¶ 16 (a).

After the Government produced substantial evidence of these disqualifications, the burden shifted to Applicant to produce evidence and prove mitigation of the resulting security concerns. AG ¶ 17 includes six conditions that could mitigate security concerns arising under this guideline:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (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;
- (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;
- (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;
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(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.

As to the allegation contained in SOR ¶ 1.a, Applicant tried marijuana in early 2005 while holding a security clearance, approximately four years ago, and under circumstances that are unlikely to recur because he no longer works as a massage therapist or with the massage therapist who provided the marijuana. He admitted his wrongful conduct and the consequences of it and has no intention to use illegal substances again. Hence, AG ¶ 17(c) and AG ¶ 17(g) have some application as to the disqualification raised under AG ¶ 16(c). Applicant immediately told his wife about the incident in 2005, and subsequently told his family and current employer. Those disclosures constitute some evidence of positive steps to reduce or eliminate vulnerability to duress and warrant a limited application of AG ¶ 17(e).

As to the disqualification raised under AG ¶ 16(a), pertinent to the falsification allegations, AG ¶ 17(a) and AG ¶ 17(b) have limited application. When interviewed about his e-QIP answers, Applicant voluntarily offered information about his one-time experimentation with marijuana and cooperated fully. His honest disclosure subsequently served as the basis for this case.

### **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). They include the following:

(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.

According to AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must include 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. Applicant is a 28-year-old man, who honorably served in the U.S. Air Force for four years, during which time he held a TS/SCI level security clearance. His former NCO and other servicemen consider him

reliable and trustworthy based on their interaction with him while in the Air Force. His current mentor of four years finds him to be honest. He voluntarily underwent a psychological assessment in April 2009 that concluded he does not meet diagnostic criteria for substance abuse or a personality disorder that could raise concerns about his current or future reliability or judgment. He eliminated the potential for coercion through his disclosures of his marijuana use. As a consequence of this investigation and hearing, he is fully aware of his mistakes in smoking marijuana and failing to disclosing it, further reducing the likelihood of similar misconduct. I also recognize that his voluntarily and candid disclosure of the marijuana incident during an interview, which generated this proceeding, warrants consideration under this section.

Overall, the record evidence leaves me without questions as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under personal conduct.

### **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

Subparagraphs 1.a through 1.c: 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 grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

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SHARI DAM  
Administrative Judge