



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)	
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-----, -----)	ISCR Case No. 08-04933
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: Kevin Peck, Esquire

May 29, 2009

Decision

WHITE, David M., Administrative Judge:

Applicant used marijuana during school more than 22 years ago, and during three camping trips with school friends in 2005 and 2006 while holding a security clearance. He honestly admitted this use during the security clearance investigation, and there was no other evidence of it. He persuasively established his intent not to abuse any drugs in the future. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Applicant submitted his Electronic Questionnaires for Investigation Processing (e-QIP), on October 7, 2007. On November 17, 2008, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H and E. 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 acknowledged receipt of the SOR on November 26, 2008. He answered the SOR in writing on December 12, 2008, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on January 30, 2009, and the case was assigned to me on February 5, 2009. DOHA issued a notice of hearing on February 17, 2009, and I convened the hearing as scheduled on March 10, 2009. The Government offered exhibits (GE) 1 through 3, which were admitted without objection except for pages 3 and 4 of GE 3. Those two pages were excluded pursuant to Directive ¶ E.3.1.20. The Government also requested that I take administrative notice of the fact that marijuana is a controlled substance. Applicant had no objection, and administrative notice was taken of that fact. Applicant testified on his own behalf, and submitted exhibits (AE) A through Y, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on March 20, 2009.

Findings of Fact

In his answer to the SOR, Applicant admitted to the truth of SOR ¶ 1.b, and denied SOR ¶¶ 1.a, 1.c, and 2.a. During the hearing, Department Counsel moved to dismiss SOR ¶ 2, alleging security concerns under Guideline E, in its entirety. Applicant had no objection, and I granted that motion. Applicant's admissions, including those contained on his e-QIP (GE 2) and in his response to DOHA Interrogatories (GE 3), are incorporated in the following findings.

Applicant is a 45-year-old engineering manager for a major defense contractor. He has worked for his present employer since July 1987. He has no military service, but has held a security clearance throughout his present employment. He and his wife have been married since 1988, and they have two children, ages 18 and 15. (GE 2 at 6, 10, 13, 16-17, 19, 24-25.)

On his October 2007 e-QIP, Applicant responded "Yes" to questions 24a and 24b, asking whether he had illegally used any controlled substance during the past 7 years, or had ever done so while possessing a security clearance. He admitted to using marijuana ("Canabis" [sic]) from "01/2000 (Estimated)" to "01/2007 (Estimated)." Under "Number of Times Used" he responded, "<3 times per year." (GE 2 at 23.) In a September 1991 security clearance application submitted in connection with upgrading his clearance from Secret to Top Secret, he also answered "Yes" to the question asking about drug use, and stated he "experimented with cannabis about 6 times between 1980-1986, no future intent." (GE 1 at 4, 7.)

In his July 10, 2008, response to DOHA interrogatories concerning drugs, Applicant confirmed his use of cannabis. He described the frequency as "1-3 times over several years time," with an average quantity of "1/20 gram." He stated the date last used was "late 2006 or early 2007," and that he had "no intention for future use." He said he decided to stop using illegal substances "in mid to late 2006 or early 2007," because "after ethics training and the determination was made that even thou [sic] the use of cannabis is socially acceptable (with some groups) it is not ethacly [sic] legal in any quantity." When asked if he frequented places where he had reason to believe

illegal substances are being used, he replied “yes” and explained “it is not planned to be in places where the use of illegal substances are present but at infrequent social events (1-2 times annually) it could be present.” When asked to describe changes in his situation which might be indicative of a change of lifestyle away from past drug usage, he responded “professional training on ethics vs. socially acceptable has changed my view on drug usage. Some things even if accepted are still illegal, like the social use of cannabis or speeding in your car.” His final comments were “The use of any cannabis is illegal. I have not been using any illegal substances and have no intention of using any in the future.” (GE 3 at 9, 11, 12.)

Applicant testified that his post-college drug use occurred on only three occasions, during camping trips with high school friends in October 2005, March 2006, and October 2006. He said that on one evening during each trip, marijuana provided by the friends was passed around and he smoked it by inhaling one to three times per use. He was unable to explain why his earlier descriptions of his drug use apparently described more frequent activity than this explanation, except to say that he was in a hurry when making the earlier statements. He admitted purchasing marijuana while in college, but denied doing so in the past seven years. (Tr. at 95-96, 114-120, 129.)

Department Counsel asked Applicant whether he knew he was not supposed to smoke marijuana while holding a security clearance after having been questioned about his prior marijuana use during earlier security clearance processing. After discussing “an inferred expectation” and “an inferred intention that you are not supposed to use marijuana,” he finally admitted that he did know that as early as 1991 and through completing four or five questionnaires for updating his clearance over the years. (Tr. at 106-109.)

After receiving the SOR, Applicant underwent a Chemical Dependency Assessment by a state-licensed Chemical Dependency Counselor. This included a urinalysis test that was negative. Based on the information obtained in the assessment process, the counselor found insufficient evidence of substance abuse or dependence. However, based on the circumstances that led to his referral for assessment by his attorney, the counselor recommended that he attend the eight-hour Alcohol and Other Drug Information School, which he completed in February 2009. Applicant told the counselor that he had used marijuana on only three occasions since age 22. He also reported having used marijuana from one to four times per week from ages 16 to 22, during 1980 to 1986. (AE B; AE C.)

Applicant’s wife was aware of his drug use. After receiving the SOR, he also informed his supervisors at work. He submitted very strong character reference letters from numerous supervisors, company security personnel, coworkers, and beneficiaries of his various community service efforts. All expressed their confidence in his integrity, dedication to serve the national defense, and commitment to meticulous protection of classified information. He received several exceptional performance awards and routinely outstanding annual performance appraisals for his work. (AE B at 5; AE D through Y; Tr. at 80-92, 125-126.)

Applicant has ended his association with the group involved in his 2005 and 2006 marijuana use. He firmly and convincingly declared his intent never to use marijuana or any other controlled substance again during his testimony, and submitted a sworn written declaration of his intent never to do so with an agreement to automatic revocation of his clearance for any violation. He also expressed his willingness to undergo any type of urinalysis screening his employer may ask him to undergo. (AE A; Tr. at 97-102.)

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. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the 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.

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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Section 7 of Executive Order 10865 provides that "Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

A person applying for access to classified information seeks to enter 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 H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to 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." AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Disqualifying conditions raised by the evidence in this case are: "(a) any drug abuse;" "(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;" and "(g) any illegal drug use after being granted a security clearance." Applicant frequently purchased and used marijuana between 1980 and 1986, when he finished college. He also admitted to recreational use of a small amount of marijuana on three different camping trips in October 2005, March 2006, and October 2006, during which time he held a security clearance. He then stopped using it, both because it is incompatible with holding a security clearance and because it is illegal. He does not intentionally attend social functions where marijuana will be present or used, and since October 2006 he has not used any even if others do so.

AG ¶ 26 provides conditions that an applicant could establish in order to mitigate security concerns. Mitigating conditions raised by this record include: "(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; and, (4) a signed statement of intent with automatic revocation of clearance for any violation."

Applicant's drug possession and use during the 1980s took place while he was young and a student, and occurred more than 22 years ago. He stopped after college, and successfully held high-level security clearances and responsible managerial positions for many years thereafter. On three more recent occasions, from 38 to 44 months ago, he used a small amount of marijuana in a social setting completely removed from any workplace connection. Applicant now understands that what he formerly considered casual and socially acceptable marijuana use is both morally wrong and incompatible with maintaining a security clearance. He clearly values the ability to perform the important work for which his supervisors and security managers support his clearance far more than he values any future drug use. Applicant met his burden of

establishing that his drug possession and use occurred under circumstances that it is unlikely to recur and does not cast doubt on his current reliability, trustworthiness or good judgment (AG ¶ 26(a)). Applicant provided substantial evidence of his intent not to abuse drugs in the future, including his disassociation from drug-using contacts, his abstinence for more than two and a half years, and his signed statement of intent with automatic revocation (¶ 26(b)). This case did not involve abuse of prescription drugs, nor was any drug treatment program prescribed after his positive chemical dependency assessment, so neither AG ¶¶ 26 (c) nor (d) apply. He did successfully complete and benefit from the recommended Alcohol and Other Drug Information School, however.

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 established by the record evidence. 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 the facts and circumstances surrounding this case. Applicant's conduct of security concern involved a six-year period of marijuana use more than 22 years ago while he was a student, and three times he used a small amount of marijuana while camping with friends in 2005 and 2006. He was never arrested for this, never distributed any drugs, never tested positive for use or showed any impairment or other effects at work, where he excelled. These three incidents occurred when he was mature and fully responsible for his choices, but in a social situation where it was considered acceptable behavior. He decided to stop smoking marijuana for good after attending ethics training and realizing it was morally wrongful to break the law in that way. He has not done so since. This behavioral change appears to be permanent and drug use is most unlikely to recur. Applicant's motivation for the conduct was social enjoyment, but that interest is now heavily outweighed by his desire to be a good parent and to be worthy of a security clearance to do pending, important work. A highly impressive, serious, and convincing group of character witnesses attested credibly to their confidence in his integrity and

determination to refrain from any future drug use or other irresponsible behavior. His integrity and the credibility of his commitment to abstain from further drug abuse are further bolstered by his sincerity and demeanor while testifying as well as the fact that the only evidence of his drug use are his candid admissions to having done so.

Applicant's use of marijuana while holding a security clearance was casual and occurred under unique circumstances while camping with old school friends that will not recur. His supervisors and coworkers were surprised to learn he had used marijuana, but were neither surprised by his honesty about it when asked, nor the least bit doubtful of his determination and ability to stop. There is no susceptibility to coercion or duress arising from this past conduct, since it is known to all whose knowledge of it could be detrimental to Applicant.

Overall, the record evidence leaves me with no doubt as to Applicant's present eligibility and suitability for a security clearance. He has fully met his burden to mitigate the security concerns arising from his drug involvement.

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
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Paragraph 2, Guideline E:	WITHDRAWN AND DISMISSED
Subparagraph 2.a:	Withdrawn and Dismissed

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.

DAVID M. WHITE
Administrative Judge