



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



In the matter of:)
)
-----) ISCR Case No. 08-07668
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Eric H. Borgstrom, Esquire, Department Counsel
For Applicant: *Pro se*

August 5, 2009

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant smoked marijuana with varying frequency from about 1997 to 2008. He deliberately did not disclose on his March 2008 security clearance application that he had smoked marijuana after July 2007. Clearance is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on March 24, 2008. On March 2, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline H and Guideline E that provided the basis for its decision to deny him a security clearance. 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 adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense as of September 1, 2006.

Applicant answered the SOR on March 12, 2009, and requested a hearing before an administrative judge. The case was assigned to me on April 29, 2009, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for him. On May 4, 2009, I scheduled a hearing for May 28, 2009.

I convened the hearing as scheduled. The government submitted two exhibits (Ex. 1-2), which were entered into evidence without any objections. Department Counsel called Applicant to testify in its case and Applicant's spouse in rebuttal. Applicant submitted two exhibits (Ex. A-B), which were entered without any objections, and he, his spouse, and a friend testified on his behalf. A transcript (Tr.) of the hearing was received on June 8, 2009.

Findings of Fact

DOHA alleged under Guideline H (drug involvement) that Applicant used marijuana with varying frequency from about September 2000 to at least January 2008 (SOR ¶ 1.a). Applicant was alleged under Guideline E (personal conduct) to have falsified a Questionnaire for National Security Positions on March 24, 2008,¹ by not disclosing that he had used marijuana use after July 2007 (SOR ¶ 2.a). Applicant indicated in his Answer that he had last used marijuana in January 2008. He averred he was confused (dates mixed up) when he was interviewed and when he completed his security clearance application, but he also stated, "I do apologize for the falsified information." After considering the evidence of record, I make the following findings of fact.

Applicant is a 28-year-old "install mechanic" (outside electrician), who has been employed by a defense contractor since March 17, 2008 (Exs. 1, A, Tr. 20). He seeks his first security clearance (Tr. 58). He had previously worked for a jeweler in its call center until January 2003 (Ex. 1, Tr. 19). From March 2003 to November 2003, he worked for a supermarket (Ex. 1, Tr. 80). From December 2003 to October 2007, he was employed caring for residents in a state facility for the mentally disabled (Ex. 1, Tr. 25, 81). Applicant attended a local technical institute from July 2006 to September 2007 (Ex. 1, Tr. 19). He successfully completed a program of study to become an electronic systems technician (Tr. 71) before starting his defense contractor employment.

Applicant used marijuana as a high school student, as frequently as once weekly to twice monthly during his sophomore year in 1997, but only five times during his senior year (Tr. 24). He smoked marijuana at least once in September 2000 while working for the jeweler after he graduated from high school (Ex. 1).² He enjoyed the drug (Ex. 2) and continued to smoke it "in a bowl" with friends. He now claims to be unable to recall the dates that he used marijuana because he did not use it often

¹The e-QIP consists of an investigation request cover sheet and the QNSP (pages 2-36) (Ex. 1).

²At his hearing, Applicant denied that he had used any marijuana while employed by the jeweler (Tr. 25), but he had indicated on his e-QIP that he used marijuana 15 times within the listed dates of September 2000 to July 2007.

enough to give accurate dates (Tr. 27). A friend, with whom he worked both at the supermarket and at the state facility for the mentally disabled, testified that he smoked marijuana with Applicant about once a month while they were coworkers at the supermarket (Tr. 85-86). Applicant estimated at his hearing that he smoked marijuana “maybe about three or four times” (Tr. 27) after his marriage in October 2005, with a last use in January 2008. In summer 2006, Applicant’s spouse observed him smoke marijuana at a party. She has not otherwise seen him smoke marijuana (Tr. 46), although Applicant shared with her in January 2008 that he had recently smoked marijuana (Tr. 47). Applicant again smoked marijuana in spring 2008, sometime after he started working for the defense contractor in March 2008 but before June 2008 (Tr. 48).³ His use of marijuana in 2008 occurred after he became a father in May 2007 (Ex. 1, Tr. 20, 26, 43),⁴ and knowing that his spouse disapproved of his involvement with the drug (Tr. 52, 55). Applicant obtained his marijuana from friends (Ex. 2).

On March 24, 2008, Applicant applied for a security clearance. He indicated on his e-QIP that he had used marijuana 15 times within the September 2000 to July 2007 time frame (Ex. 1). Applicant was interviewed by a government investigator on June 3, 2008, in part about his illegal drug involvement. Applicant informed the investigator that he had smoked small quantities of marijuana with friends in their homes about 15 times from September 2000 to January 2008. He expressed plans to continue to use the drug a few times each month because he enjoyed it, and he admitted that he associated about once monthly with a few individuals who use marijuana. Applicant denied he was susceptible to blackmail because his spouse and some friends knew of his marijuana use (Ex. 2).

At DOHA’s request, Applicant reviewed the investigator’s report of his June 2008 interview. On September 29, 2008, Applicant confirmed that the report accurately reflected the information he had provided in June 2008, but he also indicated that his use of marijuana would no longer continue. He had not realized that marijuana use could cause him to lose his security clearance and his priority was to provide for his family. He denied any ongoing contact with the people from whom he had previously obtained marijuana (Ex. 2).

At his security clearance hearing in May 2009, Applicant denied he had used any marijuana after going to work for the defense contractor in March 2008 (Tr. 23, 30, 59).

³Applicant’s spouse testified that she had been informed by Applicant that he smoked marijuana shortly before he was hired by the defense contractor, that he stopped, but then he used it again before his interview (Tr. 48-52). Her testimony about him smoking marijuana in spring 2008 is credible. Applicant’s admission to the investigator in June 2008 that he intended to continue to use marijuana a few times each month strongly suggests that he was using marijuana as of spring 2008. Applicant’s spouse testified in rebuttal that Applicant also used marijuana around his birthday in December 2008 because he exhibited indicators of use (bloodshot eyes, tired, “out of it”). She confronted him in anger at that time and did not believe him when he denied he used the drug (Tr. 90-92). Applicant attributed his “really red eyes” to allergies (Tr. 64). While his spouse maintained that she knew the difference between allergies and “being high” (Tr. 92), she could not confirm whether Applicant smelled of marijuana on that occasion as she was not familiar with the odor (Tr. 93). The evidence is insufficient to prove that Applicant smoked marijuana in December 2008.

⁴Applicant and his spouse had their second child, a daughter, in late November 2008 (Tr. 21, 44).

Applicant had been offered some marijuana in his own home by his neighbors in 2009, “a couple of months ago,” but he declined the offer (Tr. 62-63). There is no evidence to rebut Applicant’s testimony that he denied his neighbor’s offer of marijuana in early 2009. Applicant’s job is very important to him and to his young family, and he resolved around September 2008 to forego any future use of the drug (Tr. 33, 57).

Applicant met his former employer’s expectations when he worked with mentally disabled residents (Ex. A). He has also been a productive employee for the defense contractor (Ex. B). He was awarded a merit pay increase at the end of his first six months on the job.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “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 (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 common sense 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. 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 as to obtaining 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 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).

Analysis

Guideline H, Drug Involvement

The security concern about 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.

(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.

Applicant began using marijuana in high school, up to weekly at times during his sophomore year. He claims to be unable to provide accurate dates of his marijuana use after high school and to have no recollection of any use after January 2008, but there is credible evidence of marijuana use monthly during part of the time that he worked at the supermarket in 2003, and occasionally after he was married in October 2005, including in July 2007, January 2008, and spring 2008. AG ¶ 25(a), “any drug abuse,” applies. Applicant obtained marijuana from friends on occasion, so AG ¶ 25(c), “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia,” applies. AG ¶ 25(h), “expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use,” applied as of June 2008 when he admitted to a government investigator that he intended to continue to smoke marijuana because he enjoyed it. However, he reconsidered that decision when he realized that continued marijuana use could cost him his defense contractor employment. Despite Applicant’s suspect credibility about his last use of marijuana (see Guideline E, *infra*), I accept his testimony that he no longer intends to smoke marijuana in the future.

Applicant's use of marijuana is too recent for mitigation under AG ¶ 26(a), "the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is likely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment." Concerning AG ¶ 26(b), "a demonstrated intent not to abuse any drugs in the future," Applicant indicated in his September 2008 response to interrogatories that he no longer had contact with the persons who provided him marijuana (AG ¶ 26(b)(1), "disassociation from drug-using associates and contacts"), and that his use of marijuana would not continue (AG ¶ 26(b)(4), "a signed statement of intent with automatic revocation of clearance for any violation"). Applicant's spouse remains convinced that he used marijuana in December 2008 based on his outward appearance, but she was unable to confirm whether Applicant smelled of marijuana, and he denied using it. Irrespective of whether he used marijuana in December 2008, AG ¶ 26(b) would not fully mitigate the Guideline H concerns. Applicant admitted to his spouse that he smoked marijuana on one occasion after he started working for the defense contractor employer, and it can reasonably be inferred that he was smoking marijuana in spring 2008 in light of his June 2008 admission that he intended to continue to smoke marijuana a few times each month. A longer period of abstinence is warranted before I am able to conclude that his marijuana use is unlikely to recur. He clearly enjoyed the drug and smoked it despite his spouse's expressed disapproval.

Guideline E, Personal Conduct

The security concern about personal conduct is 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.

When Applicant applied for a security clearance in March 2008, he disclosed that he had used marijuana 15 times between September 2000 and July 2007. When he was interviewed in June 2008, and at his hearing, he admitted that he had used marijuana as recently as January 2008. In his Answer, he claimed he was confused ("I just got my dates mixed up"), but he also apologized "for the falsified information." It is difficult to believe Applicant would have not recalled that he had used marijuana in January 2008 when he applied for his security clearance in March 2008. When asked at his hearing to explain the omission of his January 2008 use, Applicant testified he had filled out his e-QIP in 2007. After his attention was directed to the March 2008 signature date on his e-QIP, Applicant responded, "I don't have an explanation for that." (Tr. 37). Moreover, his suspect denials of any marijuana involvement after he had begun working for his employer undermine his claim of confusion with regard to his e-QIP omission. 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.

Applicant acknowledged his use of marijuana between September 2000 and January 2008 when he was interviewed by the government investigator in June 2008.⁵ He candidly admitted that he intended to continue to smoke marijuana because he enjoyed it. AG ¶ 17(a), “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification, before being confronted with the facts,” cannot apply in mitigation, however. It is unclear whether he volunteered the information before he was questioned about his illegal drug involvement. Furthermore, his case in reform is undermined by his recent denials of any illegal drug use after January 2008. His spouse testified credibly that he told her he had used marijuana after he had begun working for the defense contractor, and he had admitted to the government investigator that he intended to continue to smoke marijuana because he enjoyed it. Under the circumstances, AG ¶ 17(d), “the individual has acknowledged 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,” also does not apply.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate Applicant’s eligibility for a security clearance by considering the totality of his conduct and all the circumstances in light of 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 common sense judgment based upon careful consideration of the guidelines and the whole person concept.

Applicant began using marijuana when he was in high school. Although he likely started using marijuana because of peer pressure, he came to enjoy it and continued to smoke the drug until at least the spring of 2008 despite his spouse’s disapproval. He

⁵There is no indication that Applicant told the government investigator about his use of marijuana in high school. He graduated in June 2000 (Ex. 1). However, not knowing whether Applicant was asked about any marijuana use before September 2000, I cannot conclude that Applicant concealed information from the investigator.

was not completely forthcoming about his marijuana use on his security clearance application. Applicant's decision to forego future drug use alleviates some of the security concerns in this case, but considerable doubts persist about whether he has been fully candid with the government about his marijuana involvement. While I can appreciate Applicant's desire to retain his defense contractor employment, the government must be assured that those persons granted access to classified information can be counted on to act without regard to personal interests. Given the recency of his drug use and his evasive testimony about his marijuana involvement, I am unable to conclude that it is clearly consistent with the national interest to grant Applicant access to classified information, notwithstanding his good work record with the defense contractor.

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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

ELIZABETH M. MATCHINSKI
Administrative Judge