



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



In the matter of:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 08-10572

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: Steven R. Freeman, Esquire

June 29, 2009

Decision

LYNCH, Noreen, Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on August 13, 2008. On February 4, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H and J for Applicant. 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 February 23, 2009, and answered through Counsel. Applicant requested a hearing before an Administrative Judge. I received the case assignment on April 16, 2009. DOHA issued a notice of hearing on May 12, 2009, and I convened the hearing as scheduled on June 16, 2009. The government presented one witness and offered Exhibits (Ex.) 1-5, which were received without objection. Applicant testified on his own behalf and presented the testimony of

one witness. He submitted Exhibits A-B without objection. DOHA received the transcript of the hearing (Tr.) on June 23, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

In his Answer to the SOR, received February 23, 2009, Applicant admitted the factual allegations in ¶¶ 1.a, and 2.a and 2.b of the SOR with explanations. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is a 30-year-old employee of a defense contractor. He graduated from high school in 1996 and obtained his undergraduate degree in 2000. He received a Master of Business Administration in 2007. He has never married and has a child from a previous relationship. He is currently engaged to be married and has a child with his intended wife. He has been with his current employer since 2001 (GE 1). He has not previously held a security clearance.

Applicant started smoking marijuana when he was 17 years old in high school. He smoked marijuana from March 1996 until May 2008. The frequency varied, but he estimates that he used the illegal drug approximately 100 times. His use diminished in frequency from once a week with friends, when he was younger, at parties to four times a year in a social setting. His first son was born in 1999 and lived with Applicant's girlfriend. At that point in 1999, he used marijuana very infrequently (Tr. 92). He has never used marijuana in his home with his family (GE 1).

In 2001, Applicant was arrested for possession of marijuana and possession of paraphernalia. He was a passenger in an automobile with a friend who had used marijuana. An officer stopped the vehicle and found marijuana and drug paraphernalia in the glove compartment of the car (Tr. 17). He was arrested and spent a night in jail (Tr. 94). As a first time offender, Applicant was given an assessment and education program. The court "diversion program" allowed the charges to remain on an inactive docket. Applicant voluntarily completed the program by attending class for five to ten weeks (Tr. 95). The charges were nolle prosequi. His record is now expunged (GE 5).

Applicant completed his security clearance application on August 13, 2008, and listed his use of marijuana from March 1996 until May 2008. He reported the number of times as 100+. He also noted that he used marijuana "much more frequently than I do now"; the usage now is 4 times a year in a social setting;" and "at no time does this substance enter my household" (Tr. 82).

An agent from the Office of Personnel Management (OPM) interviewed Applicant in September 2008. She prepared a report of investigation concerning the interview (GE 3). The agent knew of Applicant's admitted drug use before the interview. During the interview Applicant was candid and admitted to the agent that although he had not used marijuana since May 2008, he did not "know if he will use marijuana in the future" (GE

4). Applicant elaborated that if he learns that his job would be negatively impacted by marijuana use, he would stop to keep his job. The agent believed the interview was unique because she does not recall anyone answering the question concerning "future intent" in the way that Applicant did. At the hearing, she acknowledged that she could not remember verbatim what Applicant said when she asked a follow up question about under what circumstances would he or would he not use marijuana in the future (Tr. 35). She remembers that he said if he learns that his job would be negatively impacted, then he would not use marijuana. The agent testified that Applicant was cooperative and candid during the interview (Tr. 39).

Applicant's future wife testified at the hearing. She has known Applicant for four years. She and Applicant reside together in their own home. They have one child as a result of their relationship who lives with them. Applicant's son from his previous relationship and his future wife's oldest daughter from her first marriage also live in the home (Tr. 48).

Applicant's future wife knew about Applicant's use of marijuana. She acknowledged that she smoked marijuana with him when they first met about four years ago. She explained that he has changed his lifestyle and habits because of their blended family. He completely stopped using marijuana in part due to her condition that if they would be married, she did not want that to be a part of the marriage or impact on their family (Tr. 52). She is not working outside of the home at the current time because she is expecting their second child. She and Applicant spend weekends with the children. Applicant puts the children first. They attend sporting events and PTA (Tr. 54). They socialize with other families in the neighborhood.

Applicant does not have friends who smoke marijuana. He comes home every evening after work (Tr. 56). He has relocated to a different community and he associates with families with children (Tr. 82). He acknowledged that his first son was in the custody of his wife during the earlier years when he was still using marijuana occasionally. His life consists of work and home activities (Tr. 83).

Applicant has received a promotion and a raise every year for the past nine years. He has been promoted to Program Operations Manager (Tr. 87). He enjoys his work and applied for a security clearance so that he could enhance his career opportunities. He has a family to support and wants to remain financially responsible for the entire household.

Applicant was candid, open, forthright and credible at the hearing. He was thoughtful in his responses to questions concerning the exact number of times he used marijuana after 2001 until 2008. He believed it may have been once or twice a year (Tr. 102). He was also honest when he admitted that in completing his security questionnaire in August 2008, he answered to the best of his ability. He noted in response to his December 2008 interrogatories to DOHA that he objected to the agent's description of his comment concerning future use. He believes he reported to the agent that he would not use in the future because he understood what the ramifications were

for his career and for his family (Tr. 113). He acknowledged at the hearing that he made a firm decision not to use marijuana in the future after the interview with the agent (Tr. 114).

Applicant signed a Statement of Intent on June 16, 2009 that he would “refrain from engaging in any illegal drug activity whatsoever, including but not limited to using marijuana or any other illegal drug” (AE A). In the event that [I] fail to live up to the promises contained in this Statement of Intent, I hereby consent to the automatic revocation of my security clearance, should [I] be in the possession of a security clearance.

Applicant took a drug urine test in June 2009. He tested negative for nine possible drugs (AE B). He conceded that this was not a random drug sample (Tr. 76). He is willing to submit to random drug testing at any time (Tr. 78).

Applicant testified credibly at the hearing and consistent with his security clearance application. He was candid in his interview with the agent investigating his case. He has no contact with friends with whom he used marijuana. He is more settled and focused on his career. He has received promotions at work. He will be married very soon and has a blended family to care for. His social time is spent with other families in the neighborhood. Marijuana use is not part of that culture, and is viewed as immature and not responsible.

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(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 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 relating to the guideline for 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.

The guideline notes several conditions that could raise security concerns. Under AG & 25(a), Any drug abuse⁶ is potentially disqualifying. Under AG ¶ 25(c) “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia” is also potentially disqualifying. Applicant admitted using marijuana from 1996 until May 2008 approximately 100 times. The evidence is sufficient to raise these potentially disqualifying conditions.

The guideline also includes examples of conditions that could mitigate security concerns arising from drug involvement. Under AG ¶ 26(a), the disqualifying condition may be mitigated where Athe behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt

on the individual's current reliability, trustworthiness, or good judgment.⁶ Applicant's drug use was more frequent from 1996 until 2001. He used marijuana at parties when he was single. His use over the last six years is fairly described as casual and infrequent. Applicant's last use of marijuana was in May 2008, I find that this mitigating condition partially applies. Applicant is credible in his testimony concerning his commitment to his family and home situation. He and his intended wife are expecting their second child. He has a family. I do not find the marijuana use would likely recur under his new circumstances.

Under AG ¶ 26(b), it may be mitigating where Aa 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 signed a Statement of Intent. He does not associate with friends who smoke marijuana. He is living in a different community with his family. He spends his time at work and attending events with his family. He has focused on his career and wants to enhance his career opportunities. He has not used marijuana since May 2008. While his abstention from marijuana use for one year might not in another situation necessarily constitute an appropriate period of abstinence, given the minimal marijuana use by Applicant and his change in environment, I conclude that a year's abstinence is appropriate. He has shown an honesty and this goes to his trustworthiness for a security clearance. On this credible record, it is extremely unlikely that Applicant would return to illegal drug use. His firm commitment and his signed statement are sufficient for mitigation under 26(b).

Guideline J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30, "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 regulation."

The guideline notes several conditions that could raise security concerns. Under AG ¶ 31(a) an "single serious crime or multiple lesser offenses" may be potentially disqualifying. Also AG 31(c) "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted" is a potential disqualifying condition. As discussed above, Applicant admitted using marijuana from 1996 until 2008 approximately 100 times. Applicant's illegal marijuana use and 2001 charge for possession of marijuana is sufficient to establish AG ¶¶ 31(a) and 31(c).

The guideline also includes examples of conditions that could mitigate security concerns arising from criminal conduct. Under AG ¶ 32(a) the disqualifying condition may be mitigated where "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 current reliability, trustworthiness, or good judgment."

Under AG ¶ 30(d) it may be mitigating where "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 discussed above, I find that Applicant has provided mitigation under this guideline.

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) 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant used marijuana when he was young in 1999. He smoked the illegal drug with friends at social gatherings. He was charged with marijuana possession in 2001. He attended courses and completed a court diversion program. He has no conviction on his record. It was expunged. He has no other criminal record but he continued to smoke marijuana infrequently until May 2008.

Applicant has worked successfully for the same company for the past eight years. He has received promotions and raises. He is now engaged to be married. He and his future wife own a home together. He is focused on his family life with his future wife and children. His marijuana usage in the past seven years dramatically decreased and then completely stopped. He is fully committed to his family. He understands the importance of responsibility. He wants to enhance his career and provide for his family.

Applicant disclosed his marijuana use on his security clearance and in his interview with a government agent. He was candid and forthright at all times. He was brutally honest when answering all questions. He has not used marijuana since May

2008. He was credible in his statement of intent not to use marijuana in the future. He understands the ramifications of any illegal drug use. He is willing to submit to any random drug tests. He has demonstrated a trustworthiness in his security clearance application process.

Overall, the record evidence leaves me without questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all the reasons discussed above, I conclude Applicant has mitigated the security concerns arising from his drug involvement and criminal 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 H:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	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. Eligibility for access to classified information is granted.

Noreen A. Lynch
Administrative Judge