



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



In the matter of:)
)
-----) ISCR Case No. 09-01935
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Gina L. Marine, Esquire, Department Counsel
For Applicant: Brian R. Sullivan, Esquire

September 30, 2009

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant smoked marijuana once each in 2000 and in June 2002, and up to ten more times from June 2004 until August 2008. The drug involvement concerns are mitigated by his change to a drug-free lifestyle. Personal conduct concerns are not sufficient to deny Applicant access because any minimization on his part was minimal and rectified at his first opportunity. Clearance is granted.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on November 25, 2008. On April 27, 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 preliminary 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 received the SOR on April 30, 2009. On May 17, 2009, he answered the SOR and requested a hearing before a DOHA administrative judge. The case was assigned to me on June 3, 2009, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for him. On July 10, 2009, I scheduled a hearing for July 30, 2009.

The hearing was held as scheduled. The government initially submitted four exhibits, which were marked for identification (Ex. 1-4). Counsel for Applicant objected to the admission of proposed Exhibit 3, a report of personal subject interview, separate from Applicant's response to interrogatories (Ex. 2). Department Counsel then moved to include the report of subject interview in Exhibit 2, and her motion was granted without any objections. Accordingly, three government exhibits (Ex. 1, 2, 4) were entered into the record without any objections. Applicant submitted three exhibits (Ex. A-C), which were accepted into the record with no objections. Applicant and one witness also testified on his behalf, as reflected in a transcript (Tr.) received on August 7, 2009.

Findings of Fact

In the SOR, DOHA alleged under Guideline H, drug involvement, that Applicant used marijuana from about 2000 to at least August 2008 (SOR 1.a), and that he "placed money" toward the purchase of marijuana in at least the summer of 2008 (SOR 1.b). Under Guideline E, personal conduct, Applicant was alleged to have deliberately falsified a November 2009 [sic] e-QIP by indicating that he had used marijuana five times and not fully disclosing the extent of his marijuana use (SOR 2.a).¹ Applicant admitted the Guideline H allegations, explaining that he used marijuana recreationally on no more than ten occasions over six years. He expressed his intent to abstain from any illegal drug use in the future because he realized in the summer of 2008 that it was inconsistent with his personal and professional career goals. Applicant denied deliberate falsification, and averred that he had given his best estimate at the time about the number of occasions on which he used marijuana. After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is a 23-year-old associate software engineer who has worked for a defense contractor since mid-October 2008 (Ex. 1, Tr. 30-31). He seeks a security clearance so that he can work on some classified projects (Tr. 55).

¹The reference in the SOR to a November 25, 2009, e-QIP is attributed to inadvertent typographical error. The e-QIP (Ex. 1) is dated November 25, 2008. Neither party expressed confusion about which e-QIP Applicant was alleged to have falsified.

Applicant first smoked marijuana as a freshman in high school in the fall of 2000 (Ex. 1, Tr. 41, 59). He last smoked marijuana in August 2008, the summer after he graduated from college (Tr. 41). He does not recall the exact number of times that he used marijuana other than it was no more than ten times since the age of 16 (2002). (Ex. 2, Tr. 42, 48, 50). Applicant abstained from marijuana use from June 2002, after an adverse reaction (panic attack) from smoking the drug, until the fall of 2004. He smoked the drug always with one or both of two friends from high school (Tr. 59). One of these friends went to the same university with him after high school. Applicant smoked marijuana with him on one occasion during the fall of their freshman year. He claims to not recall any other use in college (Tr. 62). Applicant did not purchase marijuana himself, but on one occasion, he gave this friend some money toward a purchase of marijuana in the summer of 2008 at his friend's request (Ex. 2, Tr. 57). His friends otherwise provided the marijuana at no cost to him ("It was always my friend just had it." Tr. 58).

Applicant did not allow his use of marijuana to impact his studies at the state university, where he was in the Honors College and required to write, and present, a thesis during his senior year. Applicant was a member of the university's crew team from the spring semester freshman year until his junior year. He took the sport very seriously and did not smoke marijuana during crew season. During his senior year, Applicant wrote his honors thesis on robotics and he also worked as an intern writing software programs for a local company involved in small business innovative research grants from the government (Tr. 56). In May 2008, he earned his bachelor of science degree in computer science with a grade point average of 3.66 (Tr. 33-36, 62-63).

During the summer of 2008, Applicant continued working as an intern while residing in his hometown (Ex. 1, Tr. 36). He smoked marijuana on at least one occasion that summer, in August 2008. After he was called back for interviews by potential employers (Tr. 56), he resolved to not use any illegal drug in the future because it was incompatible with his professional and personal goals (Ex. 2).

In October 2008, Applicant relocated to an adjacent state where he began working for his present employer. On November 25, 2008, Applicant completed an e-QIP in application for a security clearance for his duties writing computer code (Tr. 32). He responded "Yes" to question 24.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, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?," and he indicated that he used marijuana five times from about June 2002 to present (Ex. 1, Tr. 39-41).

On December 15, 2008, Applicant was contacted by an investigator for the government. Later that day, they met in Applicant's office at work where Applicant was interviewed about his marijuana use. Applicant told the investigator that he had used marijuana approximately ten times since the age of 16, the first time as a freshman in high school in the fall of 2000, and the last time in August 2008. Applicant named the

two friends with whom he had used the marijuana. He indicated that he stopped using marijuana and did not intend to use it in the future because he realized it did not benefit him and he did not want to lose his job over it. The investigator reported that Applicant also stated that he had not been completely honest on his SF 86 about the number of times that he used marijuana because he was nervous that he would lose his job, but that he realized during his subject interview that it was best to tell the truth (Ex. 2).

On March 11, 2009, DOHA forwarded interrogatories to Applicant, asking him to review the enclosed investigator's summary of his interview and to verify its accuracy (Ex. 4). In his response of April 1, 2009, Applicant checked off "Yes" as to whether the investigator's summary accurately reflected the information he had provided during his interview. He offered no corrections, but added the following:

The intent of this letter is to reflect on my past use of marijuana and to provide assurance of ceased future use. At this point, I now see my past use as juvenile and an unnecessary deviation from my personal and professional goals. Realizing that I have now entered a new period in my life by starting a professional career and moving from my home in [state name omitted], I have ceased my use of marijuana and wish to continue my abstinence from this point forward. As a mark of seriousness on this issue, I would like to submit a signed statement indicating my intent to not use again. Under DODD 5220.6, Enclosure 1, Section H, #26, this is listed as a condition that could mitigate security concerns.

Applicant included as a separate attachment an unsigned, typewritten statement of his intent to abstain from the use of marijuana starting from March 31, 2009, with automatic revocation of his clearance for any violation. The response to interrogatories, which included this statement, was signed and notarized (Ex. 2).

On April 27, 2009, DOHA issued the SOR, alleging in part that Applicant had falsified his e-QIP by not fully disclosing the number of times that he had used marijuana. In his response of May 17, 2009, Applicant denied that he deliberately misrepresented his drug use when he completed his SF 86 and stated in relevant part, "I signed a statement admitting my past use of marijuana and based on my best memory and estimate at the time indicated that the number of occasions was five (5)." He explained that as the interview went on, he became "extremely nervous" that he may have used it more frequently than previously reported, so he indicated that he may have used it on more than five occasions but not more than ten. He maintained that on the e-QIP and during his interview, he told the truth based on "[his] best memory and belief." (Answer).

Applicant testified at his hearing on July 30, 2009, about his December 2008 personal subject interview. As the interview neared its end, Applicant asked the investigator if he could correct a statement he had made previously about the number of times he had used marijuana. He "started questioning whether it was five, four, six . . . and [he] was scared that maybe that wasn't as accurate as it could have been, so [he]

felt more comfortable saying ten, because [he] knew it was no more than ten.” (Tr. 47-48). On cross-examination, Applicant testified that he made his “best guess” on his e-QIP about the extent of his marijuana use (Tr. 66). He disclosed marijuana use to “present” on his e-QIP because he assumed August 2008 was present time (Tr. 67). He denied ever telling the investigator that he had not been completely honest. Rather, he had said to the investigator, “I find this silly, or something like that, I don’t want to lose my job over something like this.” (Tr. 73). He admits he was worried about his job, but continues to maintain that he was completely honest on his application (Tr. 74).

As of late July 2009, Applicant was sharing a rental unit with three others who were employed in the area (Tr. 37). To the best of his knowledge, none of his house mates use illegal drugs (Tr. 52). Applicant had not used any illegal drugs since August 2008. He socializes with a former college roommate who was on the crew team with him before this roommate transferred to another university during the spring of their sophomore year. Their activities involve running and eating (Tr. 89). This friend, who testified on Applicant’s behalf, has never observed Applicant consume any illegal drug, to include marijuana (Tr. 90). He understands that Applicant used marijuana a couple of times in the past in high school (Tr. 93-94). In his experience, Applicant has been very loyal and supportive, hardworking, and very honest (Tr. 91-92).

Applicant has not terminated his friendships with the two high school friends with whom he smoked marijuana in the past, although he no longer sees them on a regular basis. One friend still lives in their home state. Applicant has seen him three times since October 2008, twice back home and once “months ago” when this friend came to see him (Tr. 79). Applicant’s friend did not use marijuana in his presence and did not offer him any marijuana during the three times they have gotten together (Tr. 75-80). Applicant has not told this friend that he is no longer using any illegal drugs “[b]ecause I haven’t been using, it’s not something we would just discuss, I guess.” (Tr. 76). Applicant’s other close friend from high school is presently attending a university nearby to Applicant. Applicant socialized with this friend sometime in April/May 2009 and again in June 2009. Applicant has not told this friend that he is no longer using marijuana (“I don’t think it has come up”). (Tr. 82). Applicant testified he is unaware of whether either of these two friends still smoke marijuana (Tr. 76, 81).

Applicant’s work performance was evaluated at the end of his first three months on the job. His performance was rated as competent overall. He had shown himself to be a conscientious employee who paid attention to details (Ex. B). At his next appraisal in June 2009, Applicant was given an overall performance rating of superior. He had taken on challenging assignments and produced quality work each time. The director of engineering recommended that Applicant be given a \$1,000 performance bonus (Ex. C, Tr. 54).

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 that “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 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 used 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. 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.” Applicant smoked marijuana up to ten times while socializing with one or both of two high school friends between 2000 and August 2008. AG ¶ 25(a), “any drug abuse,” applies. The marijuana was given to him by his friends free of charge with the apparent exception of the summer of 2008, when he contributed money toward the purchase of marijuana. AG ¶ 25(c), “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia,” has limited applicability.

It is unclear how many times Applicant used marijuana during the summer of 2008, but his use in August 2008 is too recent to fall within mitigating condition 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.”

The evidence supports application of AG ¶ 26(b)(4), “a demonstrated intent not to abuse any drugs in the future, such as: (4) a signed statement of intent with automatic revocation of clearance for any violation.” During his subject interview in December 2008, Applicant indicated to a government investigator that he had ended his recreational use of marijuana and did not intend any future use (Ex. 2). Then, in response to DOHA interrogatories, Applicant submitted a typewritten statement expressing his willingness to abstain from the use of marijuana from March 31, 2009, with automatic revocation of his clearance for any violation. Although the typewritten statement was not signed, it was incorporated within his signed and notarized response to the interrogatories. Assuming that he would be required to complete a specific form (Tr. 69), Applicant reiterated in his SOR response that he would like to submit a signed statement of his intent to refrain from future drug involvement. His statement provided with his signed response to interrogatories is sufficient to satisfy AG ¶ 26(b)(4).

With his relocation for his employment in October 2008, Applicant is no longer in the same locale where he abused drugs in the past. There is no indication of illegal drug involvement by any of Applicant’s current roommates or by the friend who rowed crew with him in college and now frequently socializes with him. AG ¶ 26(b)(2), “changing or avoiding the environment where drugs were used,” applies. But Applicant also maintains his friendships with the two persons involved in his abuse of marijuana in the past. While one friend still lives in their home state, Applicant and this friend have gotten together three times since October 2008. Applicant’s other friend is attending a university nearby to Applicant. Applicant saw him in June 2009 and before that in either April or May 2009. Applicant testified, with no rebuttal from the government, that illegal

drugs were not involved in any of these visits. But in the absence of clear evidence that these friends are no longer using marijuana, AG ¶ 26(b)(1), “disassociation from drug-using associates and contacts,” does not apply. Applicant admitted at his hearing that he does not know one way or the other whether these friends are currently using marijuana.

Applicant’s case in mitigation is undermined somewhat by the fact that he has not informed these close friends from high school that he is no longer using marijuana. Even though their recent contacts did not involve illegal drugs, Applicant could certainly have brought up to his friends that he has foresworn any future illegal drug involvement. The possibility of him being offered marijuana in the future cannot be ruled out based on the evidence before me. However, his employment is likely to serve as a significant deterrent to him using any illicit substances in the future. He was never a frequent user of marijuana, and did not seek out the drug when he used it. His present one year of a drug-free lifestyle is sufficient for AG ¶ 26(b)(3), “an appropriate period of abstinence,” to apply, in light of his limited involvement in the past and his changed circumstances.

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.

DOHA alleged personal conduct concerns because Applicant disclosed on his e-QIP that he used marijuana only five times since June 2004.² Applicant does not dispute that he had smoked marijuana approximately 10 times since age 16, which would have been from June 2002. Given he abstained after June 2002 until 2004, most of his illegal drug use occurred during the time frame he listed on his SF 86. Applicant submits that the discrepancy about the extent of his marijuana use (five versus up to ten times) was unintentional, and he made his “best estimate” about the number of times he smoked marijuana.

To meet its burden of intentional falsification, the government relies on an admission against interest reportedly made by Applicant to the investigator during his subject interview (“The subject stated that he was not completely honest on the SF 86

²Applicant recalled during his December 2008 subject interview, which took place less than one month after he completed his e-QIP, that he had a panic attack in June 2002 after smoking marijuana, and that he abstained thereafter for about two years. Applicant would have turned 16 in June 2002. It is not clear whether his use of marijuana in June 2002 was before or after his birthday. Earlier use, including his first experience with the drug in high school, would have fallen outside of the scope of the e-QIP inquiry.

when providing the amount of times the subject used marijuana because he was nervous that he was going to lose his job . . . ”). Applicant denies he made that statement to the interviewer, who did not testify:

I never stated, I never told him that I was not completely honest, I told him that I wanted to go back to a question, I just said I’m trying to be completely honest here, and also during the course of the interview I said something about my job. I said I find this silly, or something like that, I don’t want to lose my job over something like this (Tr. 73).

The summary is not a verbatim recording of the interview. The investigator could have misunderstood Applicant’s motivations and reached his own conclusion that Applicant had intentionally concealed the extent of his drug involvement when he completed his e-QIP. Applicant testified on direct examination that nervousness led him to rethink his marijuana use (Tr. 45-45). Applicant was given the opportunity in April 2009 to review the investigator’s summary. Applicant verified its accuracy and made no effort to correct what the investigator wrote or to deny his reported admission that he had not been fully honest about the number of times that he smoked marijuana. There is nothing in the investigator’s summary to indicate that Applicant had estimated his marijuana use when he completed his e-QIP.

The government must be assured that those persons with access to classified information can be counted on to fulfill their fiduciary obligations, including full candor about a matter of potential security significance such as illegal drug use. It is difficult to see what Applicant would have had to gain by omitting at most five uses of marijuana, given he had disclosed marijuana use to “present” on his e-QIP. The security concerns in 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,” are only minimally established.

The investigator’s report substantiates a good-faith effort by Applicant to correct the record to reflect more accurately the extent of his drug abuse (“the subject realized during the PRSI that it was best to tell the truth and be honest”). Applicant’s admission to drug use on the order of up to ten times versus the five originally reported was sufficiently timely (within weeks of his e-QIP and at his first opportunity), and voluntary, to apply mitigating condition AG ¶ 17(a), “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.” Applicant’s present denials of any intentional concealment are not fatal to his case in mitigation when he has been the sole source of the information about his drug use relied on by the government, and he brought the information forward.

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 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 commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

Applicant's use of marijuana is attributed to his immaturity and to peer influences. He has not used marijuana since shortly after graduating from college and beginning his professional career. Despite his relative youth, he realizes that illicit substance involvement is incompatible with his defense contractor employment and he is not likely to jeopardize his position by resuming involvement with illicit substances.

Whatever concerns Applicant had about his employment, they did not prevent him from candidly disclosing what was then very recent involvement with marijuana when he completed his e-QIP. He provided as accurate an accounting of his drug use as he could recall during his subject interview, and the government presented no evidence to indicate more extensive abuse. Applicant's employment evaluations show a level of performance and maturity on the job consistent with the good judgment, reliability, and trustworthiness that must be required of those persons with access. On balance, the drug involvement and personal conduct concerns are safely in the past and are not likely to recur.

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

Paragraph 2, Guideline E:

FOR APPLICANT

Subparagraph 2.a:

For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

ELIZABETH M. MATCHINSKI
Administrative Judge