



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



In the matter of:)
)
-----) ISCR Case No. 09-04421
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Gina L. Marine, Esquire, Department Counsel
For Applicant: Leonard L. Bergersen, Esquire

April 7, 2010

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant is a 22-year-old recent college graduate who smoked marijuana on several occasions after he had been granted a security clearance. Discrepant accounts about the extent of his illegal drug involvement compound the doubts about his judgment, reliability, and trustworthiness. Clearance is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on May 16, 2006. On September 25, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline H, drug involvement, and Guideline E, personal conduct, 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 responded to the SOR on October 16, 2009, and he requested a hearing. On November 2, 2009, the case was assigned to me to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On November 20, 2009, I scheduled a hearing for December 16, 2009.

I convened the hearing as scheduled. Three Government exhibits were offered into evidence. Exhibit 1, Applicant's May 2006 e-QIP, was admitted without an objection. Exhibit 2 was accepted over Applicant's objection about the accuracy of the transcription of the personal subject interview. Applicant had reviewed and attested to the accuracy of the interview with the exception of one representation in the report that his friend had been arrested during an incident of August 2008. Proposed exhibit 3, a JPAS Incident History, was objected to on the basis of hearsay and lack of foundation. The record was held open following the hearing, until January 4, 2010, for the Government to authenticate the document. Applicant submitted one exhibit at the hearing (Ex. A) that was accepted into the record without an objection. Applicant and one witness testified on Applicant's behalf, as reflected in a transcript (Tr.) received on December 26, 2009.

Procedural and Evidentiary Rulings

The record was open until January 4, 2010, to allow the Government to provide evidence about the information source for the JPAS Incident History report offered as Exhibit 3 over Applicant's objection. Nothing was received by the due-date. The Government failed to establish that the document was a business record that would qualify for admission under Section 5 of the Directive. Given the hearsay nature of the information and the lack of sufficient authentication, proposed exhibit 3 is not admitted. However, it is attached to the record for potential appellate purposes.

Findings of Fact

DOHA alleged under Guideline H, drug involvement, that Applicant used marijuana from about 2005 until at least August 2008 (SOR 1.a), including after he had been granted a DoD security clearance in about September 2006 (SOR 1.b), and that marijuana and drug paraphernalia were found in his car during a police search in about August 2008 (SOR 1.c). Under Guideline E, personal conduct, Applicant was alleged to have deliberately falsified a May 26, 2006, Questionnaire for National Security Positions¹ by denying any illegal drug use since age 16 or within the last seven years (SOR 2.a). Also, his use of marijuana while holding a security clearance was cross-alleged under Guideline E (SOR 2.b).

¹The Questionnaire for National Security Positions is a component of the e-QIP, which was admitted into evidence as Exhibit 1.

In his Answer, Applicant denied any use of marijuana before mid-to-late September 2006, and contended that he had been truthful on his security clearance application when he responded negatively to the illegal drug inquiry. He admitted experimenting with the drug “on a limited basis” after mid to late September 2006, and after he had been granted a security clearance. Concerning the search of his vehicle in August 2008, Applicant denied any illegal drugs were found in his car. While a pipe belonging to a passenger was found, Applicant indicated he was not sure whether it was “paraphernalia” because it was not tested or confiscated. After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is a 22-year-old employee of a defense contractor. He started as an intern with the company in May 2008, and has been a full-time employee since June 2009. (Tr. 41.)

Applicant attended college from September 2005 to June 2009. (Tr. 33.) At the end of his freshman year, he applied for an internship with the U.S. military. In conjunction with his application, he completed an e-QIP on May 16, 2006, on which he responded negatively to illegal drug inquiries, including 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?” (Ex. 1.) Applicant was hired, and he started working for the U.S. military in June 2006. (Tr. 31.) At the end of the summer of 2006, he was granted a Department of Defense security clearance. (Tr. 32.)

Applicant worked as an intern for the military part-time, about ten hours per week, while college was in session and full-time during school vacations and over the summers. (Tr. 32-34.) Starting in mid-May 2008, he began to intern for his current employer, although he continued to hold his clearance through his student contract with the military. (Tr. 39-41.)

On August 31, 2008, Applicant and some friends from his hometown went to the city where they planned to meet some other friends. On their arrival, his companions left, and Applicant joined another old friend from his hometown in his friend’s vehicle. Apparently within seconds of Applicant entering his friend’s car, the police arrived and searched both of them. No drugs were found on Applicant’s person, or to Applicant’s knowledge, on his friend. (Tr. 49.) Applicant has not had any contact with this friend since that day. (Tr. 48, 52.) Applicant consented to a search of his own vehicle because he felt he had no choice if he didn’t want to spend the weekend in jail. (Tr. 27.) The police found a marijuana pipe belonging to one of Applicant’s two passengers. (Ex. 2, Tr. 27-28, 48-49.) Applicant was not arrested and the paraphernalia was not confiscated. (Ex. 2, Tr. 49.) Applicant denies knowing that either of his passengers had the marijuana pipe on him that day, or that marijuana was smoked in his vehicle that

day.² He also testified that he has had no contact with the friend who owned the marijuana pipe since that day.³ (Tr. 59-60, 66-67.)

Someone apprised security personnel at the military base of the August 2008 incident.⁴ In September 2008, Applicant's government sponsor removed his credentials (badge and parking sticker) needed to access the installation. Applicant was told that his friend had a drug problem, the nature of which Applicant had been previously unaware. (Tr. 28, 50-51.) Applicant was told that he was under investigation and could not return to work for the military while the investigation was pending. (Tr. 34.)

On January 7, 2009, Applicant was interviewed by a government investigator about the August 2008 incident. The investigator summarized the interview, in part as follows:

[Applicant] was interviewed on 1/7/09 in reference to an incident on 8/08 in [city and state omitted] where he met a friend [name omitted] after parking his car and once meeting his friend in his car, the police surrounded [his friend's] car and he was arrested for a drug charge. [Applicant] was then taken out of the car by police and searched for drugs and none was found. [Applicant] then gave the police permission to search his car and they found a marijuana pipe (paraphernalia) with trace amounts of marijuana. The police did not arrest [Applicant] and released him after this matter.

[Applicant] has smoked marijuana about 10-20 times between summer/2005 to 8/2008. He smoked small amounts in pipe form with friends at one another's [sic] homes. He smoked the marijuana out of curiosity and recreational use while in college. It was obtained from friends of friends. [Applicant] has never sold, supplied or dealt drugs. He stopped use after the 8/08 incident as he wanted to focus on his engineering career. He has no plans for any future drug use. . . . He does have an acquaintance he has contact with about once a month who uses marijuana but he does not do it around him or ask him to participate. (Ex. 2.)

On his graduation from college in June 2009, Applicant became a full-time employee of his current defense contractor employer. (Tr. 38, 41.) Around July 2009,

²Applicant testified that there was an unknown residue in the marijuana pipe that was never tested by police. (Tr. 66.) It is unclear how Applicant knew there was residue in the pipe if it did not belong to him and no passenger smoked in his vehicle that day. He was apparently shown the pipe, but denied that he was able to identify the presence of marijuana in the pipe. (Tr. 66.)

³As for whether he knew if either of his passengers was a user of marijuana, Applicant responded, "I don't keep track of what they do on their daily basis." (Tr. 65.)

⁴The Government proffered that the source of the information was the police agency involved in the search, but there is no evidence confirming the source of the information that led the military to remove Applicant's access to work at the facility.

DOHA asked Applicant to review the investigator's summary of his January 2009 interview for accuracy. On August 19, 2009, Applicant certified that the information was correct with one exception—that no one was arrested during the August 2008 incident.⁵ (Ex. 2.) But in his Answer to the SOR, and at his hearing, Applicant asserted that his first use of marijuana was not until September 2006, when he was a college sophomore living in his own apartment ("I had a bunch of buddies that were living close to me, a bunch of them came over, one of them came over with it, supplied it, and it happened"). (Tr. 45.) Applicant denied telling the investigator that he had used marijuana from the summer of 2005 ("I told him that it was in the early years of my college experience, limited in use and done in a social environment" (Tr. 25.); "I told him that it was done through my college years, and he said of, you were in college from 2005 to 2008 or, and that's where those dates came from. And I agreed to it because it was my college years"). (Tr. 56.) Applicant testified that he was unable to provide dates of use when asked by the investigator. (Tr. 59.)

Applicant's explanation is not particularly persuasive, in light of the fact that he was not yet in college in the summer of 2005, and in August 2009, he certified the accuracy of the investigator's summary concerning his past drug use. Applicant had the interrogatories a month or so before he responded, so he had ample opportunity to clarify the record concerning his drug involvement and he did not do so. When asked why he failed to indicate that he used marijuana initially in September 2006 rather than in the summer of 2005, Applicant responded:

The only reason I can think of is that the information that I had given was I was trying to be as truthful as possible at that given point in time and I didn't have any information at that given time saying that any of these things would, I would be, I don't—

(Tr. 43.) Applicant offered no credible explanation for what prompted his present recall of an initial experimentation with marijuana in September 2006 when he was unable to provide any dates for his drug use during his more contemporaneous January 2009 interview. It was not until after the SOR was issued, and concerns surfaced about Applicant's failure to report any illicit drug use on his e-QIP, that Applicant first asserted that his drug use began in September 2006. The account of his drug use provided to the investigator, and certified as accurate by him in August 2009, is likely more credible than his hearing testimony under the circumstances. That having been said, there is no evidence that Applicant has used marijuana since August 2008, that he has been in the presence of anyone smoking marijuana since late 2008, or that he ever bought any illegal drugs. (Ex. 2, Tr. 46, 55.)

As of January 2009, Applicant was associating about once a month with a friend from high school, who he knew used marijuana. They had attended college together, and Applicant listed this friend as a reference on his e-QIP. (Ex. 1.) Applicant saw this friend most recently in November 2009. To Applicant's knowledge, this friend was no

⁵Applicant testified that it took him about a month to respond to the interrogatories from DOHA. (Tr. 56.)

longer using marijuana. (Tr. 54-55.) Applicant denies any intent to use marijuana in the future. (Ex. 2, Tr. 47.)

Applicant's present employer is aware that Applicant used marijuana in college. The president of the company has not discussed Applicant's illicit drug involvement with him. Applicant's security clearance was not an issue when Applicant started with the company, and the president has observed nothing about Applicant's duty performance that would lead him to question Applicant's technical competence, or his judgment, trustworthiness, or reliability. (Tr. 69-77.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has 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 adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered 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

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),⁶ 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 smoked marijuana at social gatherings on 10 to 20 occasions while he held a security clearance. AG ¶ 25(a), “any drug abuse,” and AG ¶ 25(g), “any illegal drug use after being granted a security clearance,” apply. AG ¶ 25(c), “illegal drug possession, cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia,” applies only in the limited sense that Applicant can be said to have had physical custody or possession of the marijuana when he smoked it.

Applicant had friends from his hometown that were drug users, and there is credible evidence that he started using marijuana the summer preceding college. Even assuming that he first tried marijuana in September 2006, as he now claims, then he would have smoked marijuana as many as 20 occasions over a two-year time span. 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

⁶Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act, are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule I controlled substance.

current reliability, trustworthiness, or good judgment,” is not particularly persuasive, given the relative recency of his abuse and the fact that it occurred while he held a secret-level security clearance.

Concerning whether Applicant has demonstrated an intent to forego future drug abuse sufficient to satisfy AG ¶ 26(b), “a demonstrated intent not to abuse any drugs in the future,” he has denied any contact since August 2008 with the friends involved in the incident where drug paraphernalia was found in his vehicle, and there is no evidence to the contrary in the record reviewed. Applicant’s continued association with the close high school friend who was using marijuana as recently as January 2009 makes it difficult to fully apply AG ¶ 26(b)(1) (stating, “disassociation from drug-using associates and contacts”), even if I accept Applicant’s uncorroborated testimony that this friend was no longer using marijuana as of their latest meeting in November 2009. AG ¶ 26(b)(2), “changing or avoiding the environment where drugs were used,” requires affirmative changes consistent with a drug-free lifestyle. Apart from Applicant’s denials of any ongoing association with those persons involved in the August 2008 incident, there is little to no information about his present social activities or his living environment upon which to base an affirmative finding that his drug use is safely in the past. Applicant denies any intent or plan to use marijuana in the future. Yet, he has not executed a written statement of intent to refrain from drug abuse that would satisfy AG ¶ 26(b)(4), “a signed statement of intent with automatic revocation of clearance for any violation.” Applicant’s present abstinence from August 2008 is consistent with intent not to abuse any drugs in future, but given the concerns about Applicant’s credibility (see Guideline E, *infra*), and his ongoing friendship with someone whom he knew was using marijuana as of January 2009, AG ¶ 26(b)(3), “an appropriate period of abstinence,” is not yet satisfied. Applicant’s current employment situation could serve as a significant deterrent to any future drug abuse, but he smoked marijuana in the past while working as an intern for the military and then for his present employer.

Personal Conduct

The security concern for personal conduct is set out in Guideline E, 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.

Applicant exercised poor judgment within the context of AG ¶ 15 when he abused marijuana while holding an active security clearance (SOR 2.b). He may not have been thinking about his clearance obligations when he accepted the offers to smoke marijuana, but he knew he was violating the law by doing so. While the concerns about his illicit substance abuse are more appropriately covered under Guideline H, *supra*, personal conduct AG ¶ 16(e), “personal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress, such

as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing," is pertinent. Drug abuse is conduct, which if known, could adversely affect one's reputation.

Furthermore, there is credible evidence that would establish knowing falsification of his e-QIP by failing to disclose his marijuana use. Applicant testified that he was candid with the investigator in January 2009. As reported by the investigator, and certified by Applicant to be accurate, he smoked marijuana from the summer of 2005 until the August 2008 incident. Applicant had some friends from his hometown who were drug users, including the friend who left the marijuana pipe in Applicant's vehicle in August 2008, so AG ¶ 16(g), "association with persons involved in criminal activity," must also be considered. Given Applicant can be held to have admitted using marijuana in the summer of 2005, which would have been before he went off to college, the weight of the evidence likewise supports application of 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."

Applicant's disclosure of his illegal drug involvement during his subject interview in January 2009 is not sufficiently prompt to qualify for mitigation under AG ¶ 17(a), "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts." Applicant continued his illicit substance abuse after he completed his e-QIP, and after he had been granted a secret-level security clearance. There is no indication that he made any effort to come forward with this information before his credentials were revoked by his government sponsor. AG ¶ 17(c), "the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment," cannot apply. His drug use and concealment of that abuse while in a position of trust with the U.S. military was inconsistent with the fiduciary obligations of his security clearance.

AG ¶ 17(e), "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress," applies in that his employer and the Government are aware that he used marijuana. But AG ¶ 17(e) does not mitigate the ongoing concerns about Applicant's credibility, and whether he can be counted on to provide complete and accurate information to relevant inquiries. Notwithstanding his prior admission to drug use commencing in the summer of 2005, and of socializing with hometown friends known by him to use marijuana, Applicant would have the Government believe that he did not use marijuana until his sophomore year in college. When asked at his hearing about his once monthly acquaintance with a marijuana user as of January 2009, Applicant initially responded that he did not still have contact with that acquaintance, who was from college. After being pressed about the identity of the person, Applicant admitted that it was a friend from high school as well as college, who lives in the same town, and that he had seen him in about November 2009. (Tr. 53-54.) Concerning how he knew that this friend was no longer smoking marijuana, Applicant

responded, "I'm not his mother, I don't really monitor what he does." (Tr. 55.) Irrespective of whether I accept his correction at the hearing about his first use of marijuana, which would mean that he did not falsify his e-QIP, Applicant has not demonstrated the level of candor that must be demanded of those persons with access to classified information. AG ¶ 17(d), "the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur," is not satisfied.

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 his conduct and all relevant 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 displayed extremely poor judgment in using marijuana while he held a security clearance and in associating with known users of illegal drugs. As the August 2008 incident shows, he had two groups of friends that were drug users, the friends in the college setting with whom he smoked marijuana, and those friends from his hometown. His immaturity only partially extenuates the drug involvement and personal conduct concerns. His initial use of marijuana was in all likelihood in the summer of 2005. His involvement with marijuana cannot reasonably be described as limited experimentation based on his reported duration and frequency of marijuana use. I am not convinced that he was fully candid about his drug use at his hearing. Based on the evidence before me, I am unable to conclude at this time that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

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
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant

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