



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



In the matter of:)
)
) ISCR Case No. 10-06025
)
Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: *Pro se*

June 23, 2011

Decision

RIVERA, Juan J., Administrative Judge:

Applicant used marijuana twice in 2008, while working for a Government contractor in a foreign country, and after he was granted access to classified information at the secret level in 2002. His behavior is not recent, it was an isolated incident, and it occurred under circumstances that make it unlikely to recur. He acknowledged his questionable behavior, reduced his vulnerability to exploitation, and submitted a written statement of intent with automatic revocation of his security clearance for any future violation. His questionable behavior does not cast doubt on his current reliability, judgment, and his ability and willingness to comply with the law and follow rules. He mitigated the Guidelines H and E security clearance concerns. Clearance is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on October 13, 2009. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary

affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request for a security clearance.

On March 14, 2011, DOHA issued Applicant a statement of reasons (SOR) alleging security concerns under Guidelines H (Drug Involvement) and E (Personal Conduct) of the adjudicative guidelines (AG).²

Applicant responded to the SOR allegations on March 23, 2011. He requested a hearing before an administrative judge. The case was assigned to me on April 13, 2011. DOHA issued a notice of hearing on May 23, 2011, convening a hearing on June 8, 2011. At the hearing, the Government offered four exhibits (GE 1 through 4). Applicant testified and presented one exhibit (AE 1), post-hearing. All exhibits were received without objection. DOHA received the transcript of the hearing (Tr.) on June 13, 2011.

Findings of Fact

Applicant admitted all the SOR factual allegations with explanations. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, his answers to the SOR and interrogatories, and his demeanor and testimony, I make the following additional findings of fact.

Applicant is a 29-year-old certified electrician working with a Government contractor since June 2008. He graduated from high school in May 2000, and completed his electrician certification in May 2005. Applicant married his wife in October 2005, and they were divorced in 2010. He has no children.

Applicant has worked with several Government contractors since July 2000. He submitted his first SCA around October 2000. He was granted access to classified information at the secret level in April 2002. There is no evidence to show that he has ever compromised or caused others to compromise classified or proprietary information.

In December 2008, Applicant was working with his current employer, performing electrician duties in a U.S. Government facility located in Amsterdam. While off duty, Applicant visited an Amsterdam coffee shop where he purchased and smoked two marijuana cigarettes. At the time, he possessed access to classified information at the secret level.

Applicant testified he never used marijuana, or any other illegal drugs, before or after December 2008. He experimented with marijuana in Amsterdam because he believed the use of marijuana was legal in that country. The marijuana was sold, and he

¹ Required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; and Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as revised.

² Adjudication of this case is controlled by the AGs, implemented by the DoD on September 1, 2006.

used it, in a public establishment. He testified that he has never associated with, and does not currently associate with, people who use illegal drugs.

Applicant submitted an SCA in October 2009. Section 23 of the SCA asked whether in the last seven years he had: (a) **illegally** (emphasis added) used any controlled substance (including marijuana); (b) ever **illegally** used a controlled substance while possessing a security clearance; (c) been involved in the **illegal** possession or purchase of an controlled substance; and (d) received counseling or treatment as the result of his use of drugs. Applicant answered “No” to the above questions, and did not disclose his December 2008 use of marijuana in Amsterdam while possessing a security clearance.

In May 2010, Applicant participated in a security clearance background interview. During the interview, he was asked whether he had illegally used marijuana. He answered “No.” The investigator then asked Applicant whether he used marijuana during his 2008 trip to Amsterdam. Applicant answered “Yes,” and he disclosed his marijuana use as described above.

Applicant believed that his December 2008 use of marijuana in Amsterdam was not wrongful or illegal because the use of marijuana is legal in Amsterdam. He purchased and used the marijuana in a public place. He did not disclose his 2008 marijuana use in his SCA, because Section 23 asked whether he had **illegally** (emphasis added) possessed, purchased, or use marijuana. Applicant believes he truthfully answered the SCA questions. He also was truthful and forthcoming with the investigator when he disclosed he used marijuana in 2008.

At his hearing, Applicant acknowledged that he knew marijuana is a controlled substance, and that it is illegal to purchase and use marijuana in the United States. He also acknowledged knowing that the use of marijuana, or any illegal drug, is a concern to the U.S. Government because of the drug activity and drug use questions asked in the several SCAs he completed since 2000.

Applicant testified that he finally realized it was not smart for him to use marijuana in Amsterdam. He also acknowledged that he should have disclosed in his October 2009 SCA, that he used marijuana while in Amsterdam in 2008. He apologized about his questionable behavior in 2008, and for not disclosing his marijuana use in his 2009 SCA. Applicant testified he is committed to never using any illegal drugs ever again. He submitted a written statement of intent with automatic revocation of his security clearance for any future violation. (AE 1) He disclosed his marijuana use to his parents, friends, and supervisors as a result of the pending security clearance hearing. Applicant believes that his performance during the last 10 years, and his honesty through the security clearance process, including his disclosure of marijuana use to the Government investigator, demonstrate his integrity and that he is trustworthy.

Policies

The President of the United States has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. 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).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole-person. An administrative judge’s adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable to reach his decision.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See *also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication that the Applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline H, Drug Involvement

AG ¶ 24 articulates the security concern about drug involvement:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual’s reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations.

Applicant used marijuana twice during his 2008 trip to Amsterdam, after he was granted access to classified information at the secret level in 2002. Although marijuana use is legal in Amsterdam, marijuana is a controlled substance and a mood and behavior altering substance. Applicant knew that the use of marijuana was illegal in the United States, and that the Federal government is concerned about the abuse of any drug by personnel possessing a security clearance.

AG ¶ 25 describes eight conditions related to drug involvement that could raise a security concern and may be disqualifying. Three drug involvement disqualifying conditions raise a security concern and are disqualifying in this particular case: AG ¶ 25(a) “any drug abuse,”³ AG ¶ 25(c) “illegal drug possession . . . purchase, sale, or distribution,” and AG ¶ 25(g) “any illegal drug use after being granted a security clearance.”

Applicant’s use of marijuana was limited to two isolated incidents in Amsterdam in December 2008. There is no evidence to show that Applicant used any illegal drugs prior to, or after December 2008, or that he has ever associated with any illegal drug users. As such, his use is not recent, and it could be considered an isolated incident. His use of marijuana occurred under such circumstances that it is unlikely to recur. He

³ AG ¶ 24(b) defines “drug abuse” as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.”

AG ¶ 24(a) defines “drugs” as substances that alter mood and behavior, including: (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.

is no longer assigned to Amsterdam. Moreover, Applicant now understands that even if his use of marijuana was legal in another country, it still creates a security clearance concern that could make him ineligible for a security clearance. He submitted a written statement of intent with automatic revocation of his security clearance for any violation.

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;” and 26(b): “a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; and (4) a signed statement of intent with automatic revocation of clearance for any violation,” apply. The two remaining mitigating conditions are not raised by the facts in this case.

Considering the evidence as a whole, Applicant's past questionable behavior does not cast doubts on his current reliability, judgment, and his ability and willingness to comply with the law. Applicant mitigated the Guideline H security concerns.

Guideline E, Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern:

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 was 26 years old when he used marijuana in Amsterdam in 2008. He had been working for Government contractors since 2000, and he was granted access to classified information at the secret level in 2002. He became a certified electrician in 2005. Although Applicant believed his marijuana use was legal in Amsterdam, he knew that marijuana use was illegal in the United States, and that the use of marijuana would create security concerns with the U.S. Government.

Applicant's behavior triggered the applicability of disqualifying condition: AG ¶ 16(e): “personal 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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.”

For the same reasons discussed under Guideline H (incorporated herein), I find that Applicant mitigated the Guideline E security concerns. Applicant's use of marijuana

in Amsterdam was legal. His use was limited to two isolated incidents in 2008. There is no evidence to show that Applicant used any illegal drugs prior to or after December 2008, or that he has ever associated with any illegal drug users. As such, his use is not recent, and could be considered an isolated incident.

Moreover, Applicant now understands that even if his use of marijuana is legal in another country, it still would create a security clearance concern that could make him ineligible for a security clearance. He has acknowledged his questionable behavior and promised never to use marijuana again. He submitted a written statement of intent with automatic revocation of his security clearance for any future violation. He also reduced his vulnerability to possible exploitation when he disclosed his use of marijuana to his parents, friends, and supervisors. Applicant's questionable behavior occurred under such circumstances that it is unlikely to recur. Applicant's 2008 marijuana use does not cast doubt on his current reliability, trustworthiness, and judgment, or in his ability and willingness to comply with the law, rules, and regulations. AG ¶¶ 17(c), (d), and (e) apply.

SOR ¶ 2.a alleged that Applicant falsified his SCA when he failed to disclose his 2008 marijuana use in his answer to Section 23b (asking: "Have you ever **illegally** used a controlled substance while possessing a security clearance"). (emphasis added) Applicant's 2008 marijuana use was legal in Amsterdam. Thus, he believed he did not have to disclose his 2008 marijuana use. Applicant answered the question that was asked, and he did not intend to falsify his SCA.

In reaching this conclusion, I considered that during his May 2010 interview Applicant was honest and forthcoming with the Government investigator. Applicant was asked whether he had illegally used marijuana, and he answered "No." Then, he was asked whether he used marijuana during his 2008 trip to Amsterdam, and Applicant answered "Yes." Applicant then cooperated with the investigator and disclosed his use of marijuana as described above. Applicant also was forthcoming at his hearing. He made the mistake of using marijuana, but I find that he did not intend to falsify his SCA. SOR ¶ 2.a is decided for Applicant.

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 relevant 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.

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. AG ¶ 2(c). I have incorporated in my whole-person analysis my comments on the analysis of Guidelines H and E.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant's marijuana use while holding a security clearance violated the trust placed in him by the U.S. Government. It shows a lack of reliability, trustworthiness, and judgment.

Applicant is a technically proficient and valuable employee with over 10 years working for Government contractors. He receives credit for disclosing his marijuana use during his 2010 background interview, and for cooperating in the security clearance process. He expressed regret for his questionable behavior, and promised to remain abstinent. His marijuana use is a remote, isolated incident that occurred under circumstances that are unlikely to recur. His past questionable behavior does not cast doubt on his current ability and willingness to comply with the law, rules, and regulations. On balance, the record evidence convinces me of Applicant's eligibility and suitability for a security clearance.

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
Subparagraphs 1.a – 1.c:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a and 2.b:	For Applicant

Conclusion

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

JUAN J. RIVERA
Administrative Judge