



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



In the matter of:)	
)	
)	ISCR Case No. 10-06575
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Marc G. Laverdiere, Esquire, Department Counsel
For Applicant: *Pro se*

July 13, 2011

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant abused marijuana about 15 times at parties or concerts from November 2000 to June 2003. He smoked marijuana five to ten more times between March 2008 and January 2010, despite being granted a Secret security clearance in December 2007. Applicant regrets his illicit drug use and intends no future involvement, but I cannot yet conclude that his drug abuse is safely behind him. Clearance denied.

Statement of the Case

On December 6, 2010, 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), which provided the basis for its preliminary decision to deny him a security clearance. DOHA took action 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) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR allegations on December 22, 2010, and he requested a hearing. On January 19, 2011, 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. I scheduled a hearing for February 15, 2011.

I convened the hearing as scheduled. Three Government exhibits (GE 1-3) and six Applicant exhibits (AE A-F) were entered into evidence. Applicant, his brother, and a former supervisor testified, as reflected in a transcript (Tr.) received on February 25, 2011.

I held the record open until March 1, 2011, for Applicant to submit additional exhibits. Applicant timely submitted a signed statement, which was admitted without objection as Exhibit G.

Findings of Fact

The SOR alleged that Applicant used marijuana with varying frequency from November 2000 to about June 2003 and from March 2008 to about January 2010 (SOR 1.a); that he used marijuana while possessing a DoD Secret-level security clearance (SOR 1.b); and that he was arrested in June 2003 for possession of marijuana (SOR 1.c). In his Answer, Applicant admitted the use of marijuana during the dates alleged with acquaintances at parties or concerts. He added that he ceased using marijuana on learning that he would be asked to apply for a Top Secret security clearance and that he intended no future involvement with marijuana. Applicant's admissions are incorporated as findings of fact. After considering the pleadings, exhibits, and transcript, I make the following additional findings of fact.

Applicant is a 29-year-old employee of a university-affiliated laboratory that contracts with the Department of Defense. He started with the defense contractor as a student research assistant in July 2007. Since March 2009, he has been a full-time associate staff member. (GE 1, 3; AE A.) Applicant holds a Secret clearance, which was granted to him in December 2007, and he seeks a Top Secret clearance. (GE 3; AE A.)

Applicant attended college from September 2000 to May 2004, when he was awarded his bachelor's degree in electrical engineering. (GE 1; Tr. 33-34.) Each summer, he worked as an intern at another university in the same city, under the supervision of a physics professor. (GE 1; Tr. 71-73.) He was unemployed during the academic school years. Between November 2000 and June 2003, Applicant smoked marijuana about 15 times, typically when it was passed to him by known acquaintances at parties and less often at concerts. His marijuana use was on random occasions and unplanned.¹ (GE 1; Tr. 29-30, 34-35, 50.) Applicant never paid for the marijuana that he used. (Tr. 48.)

¹Asked why he used marijuana with acquaintances rather than with close friends, Applicant responded, "Well I don't have many close friends that—at this point I don't have any close friends who smoke marijuana. (Tr. 35-36.)

In June 2003, Applicant was arrested for possession of marijuana. He provided discrepant accounts of the circumstances, originally testifying that he was given a ride home by a friend and that they were pulled over by police. (Tr. 36.) He then testified that they had not been pulled over. Instead, they had stopped on the roadside and were approached by the police, who asked to search the vehicle for weapons. Applicant subsequently testified that he was with his brother in his brother's car, and that his brother bailed him out of jail. (Tr. 37-38.) However, his brother testified that while he was in the area at the time, he was not with Applicant when he was arrested. He was not exactly sure why Applicant had been stopped. (Tr. 63-64.) The police apparently found a small quantity of marijuana in Applicant's bag that had been given to him free of charge by a friend.² (Tr. 37-38, 48-49.) In September 2003, his case was continued without a finding. Applicant was placed on six months probation, fined \$500, and assessed \$150 court costs. (Tr. 39.) Applicant's brother, who has never smoked marijuana, was upset to find out that Applicant used marijuana. It led to extensive discussions between him and Applicant about what could be done by Applicant to discontinue his use. (Tr. 59-60.) Applicant claims he abstained from using any illegal drugs after June 2003 until March 2008, and there is no evidence to the contrary.

Following his college graduation, Applicant began working as a full-time research assistant in the physics department where he had been an intern. In January 2005, he began graduate studies in electrical engineering at the university. He was unemployed from October 2005 until August 2006. Applicant then worked as a recording engineer at a small music studio for about seven months. In February 2007, Applicant went to work for another company as an audio/visual technician. Around July 2007, he was hired as a graduate student employee by his defense contractor employer. (GE 1; AE D.)

Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) version of a security clearance application for his new employer on August 28, 2007. He responded affirmatively to whether he had used any illegal drug in the last seven years, and disclosed that he had smoked marijuana an estimated 15 times between November 2000 and June 2003. Applicant also stated, "I occasionally used marijuana while in college: however, I have since stopped as I realized that it was detrimental to the advancement of my education and career." (GE 1.) In early December 2007, Applicant was granted a Secret clearance for his duties. (GE 3; AE C, G.)

²Applicant's possession of marijuana on that occasion was seemingly inconsistent with the typical circumstances of his marijuana abuse ("typically someone would just be passing around a joint"). (Tr. 47.) He testified that it had been offered to him by a friend and that he had no immediate intent to smoke it. When asked what he was going to do with the marijuana, Applicant responded:

I mean I may have—I would probably smoke it eventually. I would assume, maybe at a party or something, but I don't—I mean I was—I guess I was kind of in a different place in life and at that point it really was more youthful—I mean I know I can't claim youthful indiscretion for everything, but I didn't really have any kind of long-term outlook on life. I mean I knew I wanted to be an engineer but, you know, I didn't have the same kind of concerns that I do now that I do defense research and the consequences, I didn't start thinking about consequences of actions as well. (Tr. 48.)

Between March 2008 and January 2010, Applicant smoked marijuana on five to ten occasions at parties or concerts when the drug was passed to him by acquaintances. (AE A; Tr. 29, 50.) On at least one occasion in late 2009, Applicant's brother observed Applicant to be under the influence of marijuana. (Tr. 65.) Applicant always knew the people with whom he smoked the drug, but he also testified he may have met them only once or twice before, as friends of a friend. (Tr. 50-51.) Applicant knew that illegal drug use was inconsistent with his security responsibilities to the Government and his employer, but he "perceived [his] indiscretions to be fairly innocuous given the nature of some of the other activities addressed on the e-QIP application."³ (GE 2; Tr. 29, 42-44.) Recent decriminalization of marijuana in the state also led Applicant to view it less seriously than he should have.⁴ (Tr. 51.)

As a student research associate, Applicant exhibited significant talent in developing and demonstrating new algorithms, and he was conscientious in his handling of Secret-level technical information. (Ex. AE C, D.) In early 2009, he completed the requirements for his master's degree. In mid-March 2009, he was hired as a full-time associate staff member at the laboratory. (AE C, D.) Because of his previous experience as a student research assistant in the group, Applicant quickly transitioned into his new role, and he became a significant contributor to several programs. His performance for 2009 was rated overall as very good. (AE F.)

In August 2009, Applicant moved out of his parents' home. He had to pay his own rent and other bills, which he testified "kind of changes things." (Tr. 54.) Yet, he smoked marijuana at least once in late 2009 (Tr. 65.) and again in January 2010. (GE 1, 2.) In February 2010, Applicant learned that he would be asked to apply for an upgrade of his security clearance to Top Secret. He realized "just how truly unwise" his illegal drug use had been, and he resolved to cease his involvement with marijuana so as not to further jeopardize his clearance eligibility. Raised to believe that "honesty is the best policy," Applicant disclosed his marijuana involvement between five and ten times from March 2008 to January 2010 on his application for a Top Secret security clearance.⁵ (GE 2, 3; AE A; Tr. 40.) An incident report was filed in April 2010 based on Applicant's self-reported marijuana use from March 2008 to January 2010 while holding a security clearance. (GE 3.)

³Applicant elaborated at his hearing that in comparison to the inquiries on the e-QIP concerning efforts to overthrow the Government or any involvement in terrorist organizations, marijuana use "can seem less important." (Tr. 42.)

⁴Applicant testified he was not 100 % certain that marijuana had been decriminalized. (Tr. 51.) Review of the pertinent state's Controlled Substances Act, specifically Chapter 94C section 32L, confirms that effective December 4, 2008, possession of one ounce or less of marijuana is a civil offense subject to a civil penalty of \$100 and forfeiture of the marijuana. If under age 18, the offender is also required to complete a drug awareness program.

⁵The security application, which was completed around February 2010, was not available for review. A JPAS record presented by the Government indicates that Applicant "self reported marijuana use from March 2008–January 2010." (GE 3.)

On June 10, 2010, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM) about the details of that drug abuse. Applicant admitted that he took a few hits of marijuana about ten times between March 2008 and January 2010, when he last used it at a concert. He denied recall of the circumstances other than it was always “on the spur of the moment” at concerts or parties when it was passed to him by persons whose names he could not recall. He claimed to not recall the specifics of the concert in January 2010, such as the name of the performer or the venue. Applicant expressed his “deep regret” for using marijuana while holding a security clearance and working for a defense contractor. He asserted that he did not intend to use any illegal drug in the future, would be willing to submit to drug testing anytime, and did not associate with the “acquaintances” involved in his marijuana abuse. Applicant denied that he could be blackmailed or coerced because of this “isolated” marijuana use because his group leader, security personnel at work, and a few close friends knew about it. (GE 2.)

On October 15, 2010, Applicant indicated to DOHA that he understood the judgment and trustworthiness concerns raised by his drug abuse and by him “breaking any stated rule.” He expressed his intent to “continue to refrain from partaking in and being witness to illegal activity.” He was willing to sign a statement of intent to refrain from illegal drug activity and to submit to drug testing “now or at any point in the future.” (GE 2.) At his hearing on February 15, 2011, Applicant submitted a written statement of his “intent to continue to refrain from illegal drug use in the future with automatic revocation of clearance for any violation.” He added that he would submit to any drug testing or counseling or both if necessary. (AE A, B.)

As of mid-February 2011, Applicant denied associating with any known illegal drug users. He denied any use of an illicit drug since the concert in January 2010. Applicant also indicated that he was avoiding situations where illegal drugs were likely to be present. He reiterated his willingness to submit to drug testing or counseling to convince the DoD that he did not intend any future drug involvement. (AE A; Tr. 32, 54.) Applicant was last offered some marijuana at a party in February 2010. He declined the offer because of his security clearance (“it’s just an unnecessary risk to take”). (Tr. 56.) Applicant’s brother believes Applicant is not using any illegal drugs based on their discussions about Applicant distancing himself from the people that use marijuana. However, his brother also acknowledged that he did not know everyone with whom Applicant smoked marijuana (“I’m not sitting in his shoes”). (Tr. 66.)

Applicant did not allow his off-duty use of marijuana to negatively affect his work performance for the defense contractor. In June 2009, Applicant’s group leader, who supervised him since March 2009, gave Applicant his highest possible recommendation in terms of Applicant’s ability to excel in a new job opportunity. He found Applicant to be an excellent individual contributor in many and varied ways as well as a consummate team player. (AE D.) A coworker, who has been a member of the technical staff at the laboratory since 1986, considers Applicant to be trustworthy as a person and in the handling of Secret-level information entrusted to him. As of February 2011, Applicant was making critical contributions to several projects that could substantially reduce physical harm to deployed military personnel. Aware of Applicant’s past marijuana use, this supervisor

recommended that Applicant retain his Secret clearance with the caveat that he enroll in a substance abuse counseling program. (AE C.)

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. 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 overall 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. 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 to obtain 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 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 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.

Under AG ¶ 24(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.

Under AG ¶ 24(b), drug abuse is defined as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction." As for the potentially disqualifying conditions, AG ¶ 25(a), "any drug abuse," applies because Applicant abused marijuana in college around 15 times between November 2000 and June 2003, and on five to ten additional occasions between March 2008 and January 2010. AG ¶ 25(c), "illegal drug possession, including cultivation, processing, manufacture, purchase, sale or distribution; or possession of drug paraphernalia," applies in that he had possession of marijuana when he was arrested in June 2003. Moreover, AG ¶ 25(g), "any illegal drug use after being granted a security clearance," is implicated because he held a Secret clearance when he smoked marijuana between March 2008 and January 2010.

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," does not apply to relatively recent substance abuse, even if it was limited to random occasions when it was offered by others. Concerning AG ¶ 26(b), "a demonstrated intent not to abuse any drugs in the future," can be shown by "(1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; or (4) a signed statement of intent with automatic revocation of clearance for any violation." Applicant submits that he has not seen any of his drug-abusing acquaintances since March 2010, and that he is making an effort to avoid environments where illegal drugs may be present. To the extent that he is aware of

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.

Applicant's efforts to distance himself from his former acquaintances, Applicant's brother testified that Applicant "does not hang out with [those drug-using] people today." (Tr. 66.)

While AG ¶ 26(b)(1) and ¶ 26(b)(2) must be considered, Applicant's relatively recent positive changes to a drug-free lifestyle fall short of mitigating the drug involvement security concerns for several reasons. Applicant's illegal drug abuse was largely situational, if he happened to be at a party or concert, so a change in associates does not guarantee against relapse. Applicant testified that he always knew the persons with whom he smoked marijuana. At the same time, he was unable to recall during his subject interview in July 2010 the names of the persons with whom he smoked marijuana at a concert in January 2010, when he apparently used marijuana with a friend of a friend. It is difficult to believe that he cannot recall the particulars of the concert, such as the identity of the performer or the concert venue. It also appears that Applicant used marijuana on at least one occasion in late 2009, when his brother observed him to be under the influence of marijuana. Neither Applicant nor his brother elaborated about the circumstances in late 2009, so I cannot conclude whether what led Applicant to abuse marijuana on that occasion is likely to reoccur. Furthermore, Applicant's abuse in 2009 shows a disregard for the concerns of his brother, with whom he had extensive discussions back in 2003 about discontinuing marijuana use. More troubling from a security standpoint, Applicant understood that illegal drug use was inconsistent with his Secret clearance and he smoked the marijuana anyway. He resumed his drug use in March 2008, after almost five years of no use and six months after he told the DoD that he put his drug use behind him. He smoked marijuana at least twice after he was hired as a full-time associate staff member at the laboratory. His present abstention since January 2010 is not enough to establish AG ¶ 26(b)(3), "an appropriate period of abstinence," under the circumstances.

AG ¶ 26(b)(4), "a signed statement of intent with automatic revocation of clearance for any violation," applies. Applicant expressed his willingness to sign such a statement in response to DOHA interrogatories in October 2010 and when he answered the SOR in December 2010. At his hearing, he presented the signed statement required under mitigating condition AG ¶ 26(b)(4). When asked what had changed from August 2007 to where I could now trust that he had put his drug use behind him, Applicant indicated that it was having to answer for his drug use to the Government and the possible loss of his employment that stopped him from living in the moment and led him to think about the consequences of his decisions. (Tr. 55.) This reason is not so different from what he indicated on his August 2007 e-QIP. Applicant has repeatedly expressed a willingness to undergo counseling or submit to drug testing, but it is not enough to overcome the security concerns raised by drug involvement after being granted a security clearance.

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).⁷ In making the overall commonsense determination required under AG ¶ 2(c), I have

⁷The factors under AG ¶ 2(a) are as follows:

to consider Applicant's poor judgment in using illegal drugs, especially after he was granted a Secret clearance. The Government gave Applicant a chance to show that he had put his drug use behind him, and he violated the trust placed in him. In Applicant's favor, he disclosed his marijuana use on his August 2007 e-QIP and apparently also when he applied for an upgrade of his security clearance. This candor weighs in his favor, although it is undermined somewhat by his inconsistent testimony at his hearing about the circumstances of his illegal drug possession in June 2003, and by his seeming lack of recall about the circumstances of his last use in January 2010. Applicant's contributions to his employer have been significant, and security clearance decisions are not designed to punish an applicant for past misconduct. Nonetheless, his evidence in reform falls short of meeting his burden in light of his extremely poor judgment in using marijuana knowing that it was inconsistent with his security responsibilities.

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

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

(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.