



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



In the matter of:)	
)	
-----)	ISCR Case No. 10-10895
)	
Applicant for Security Clearance)	

Appearances

For Government: David Hayes, Esquire, Department Counsel
For Applicant: Christopher Graham, Esquire

August 18, 2011

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

On April 21, 2011, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) enumerating security concerns under Guideline H (Drug Involvement) and Guideline E (Personal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

In a response dated June 3, 2011, Applicant admitted one of two allegations raised under Guideline H and four of five allegations raised under Guideline E. He also requested a hearing before a DOHA administrative judge. The case was assigned to me on July 5, 2011. The parties agreed to a hearing date of July 28, 2011, a notice for which was issued on July 8, 2011. I convened the hearing as scheduled.

Applicant gave testimony, introduced two witnesses, and offered five documents, which were admitted into the record without objection as exhibits (Exs.) A-E. Department Counsel offered four documents, which were admitted as Exs. 1-4 without objection. The transcript (Tr.) of the proceeding was received on August 5, 2011, and the record was closed. Based on a thorough review of the testimony, submissions, and

exhibits, I find Applicant failed to meet his burden of mitigating security concerns related to personal conduct and drug involvement. Clearance is denied.

Findings of Fact

Applicant is a 24-year-old senior consultant/software engineer who has worked for the same defense contractor for nearly a year-and-a-half. He earned a bachelor of arts degree in a rigorous discipline from a prestigious university, where he balanced his studies with participation in sports.¹ Appellant is single and has no children.

In March 2007, not long after he turned 20 years old, Applicant started using marijuana. He bought it on more than one occasion.² At the time he was an undergraduate student. He continued using marijuana about five times a month until about March 2009. He stopped using the illegal drug when he “became serious about finding a job.”³ Two months later, in May 2009, he graduated from college. He commenced a “lifestyle turnaround” and began concentrating on his future.⁴ Shortly thereafter, he started his present career track. In July 2009, he began work for a major defense contractor and was ultimately granted a security clearance on approximately October 5, 2009.

On December 31, 2009, Applicant, his girlfriend, and a trusted friend met before a New Year’s Eve party. They proceeded to the party, which was held in a private home owned by an associate of Applicant’s girlfriend. Applicant and his friend had some alcoholic beverages. Sometime between 10 p.m. and midnight, marijuana began circulating in the back yard, in the form of either a marijuana cigarette (joint) or pipe of marijuana.⁵ Applicant and his friend were standing around a table with others, while Applicant’s girlfriend occasionally observed them from time to time from a different part of the yard, where she was conversing with others. Applicant, who had been drinking alcohol, was focused on his conversation and not paying attention to all that was going on around him.⁶ When the joint or pipe was handed to him, Applicant, apparently without thinking, took possession of it and brought it to his lips. Before he could inhale the drug or “pretend to smoke it just to make no social awkwardness,” his friend said, “I

¹ Tr. 35, 39.

² Ex. 3 (Interrogatories, dated Mar. 8, 2011) at 4 (Interview of Aug. 2, 2010); Tr. 39.

³ Tr. 18.

⁴ Tr. 22.

⁵ Applicant testified that the marijuana was contained in a joint; his witnesses both testified that it was contained in a pipe. *Compare* Tr. 20-21 and Tr. 73,88. Similar discrepancies exist with regard to the number of attendees who were in the backyard at the time. *Compare* Tr. 20-21 and Tr. 77, 87, 93.

⁶ Tr. 49.

would strongly reconsider” or “don’t do that.”⁷ Applicant then either passed on the marijuana or placed it on the table, and went into the house with his friend and his girlfriend, who had observed the exchange.

Applicant and his girlfriend moved to another part of the country. In May 2010, Applicant began working for his present employer and completed a new security clearance application.⁸ On the application, he denied having used, purchased, or possessing illegal drugs in the preceding seven years. He made the same denial on a May 25, 2010, security clearance application.⁹ On August 2, 2010, he was interviewed by Office of Personnel Management (OPM) investigators. During the interview, he wanted to come clean regarding a prior statement he had given a few days earlier, in which he had denied any recent use of marijuana.¹⁰ During the August 2010 interview, it was noted that on “1/1/2010 the subject stated that he was at a New Years [sic] party and used marijuana that a friend provided.”¹¹

On March 8, 2011, in response to written interrogatories, Applicant was asked to explain why he had used marijuana in January 2010 after being granted a security clearance on October 5, 2009. He answered, “My decision to use marijuana in January 2010 was a one-time mistake that satisfied my determination to stay away from marijuana in the future, as I do not want to live the lifestyle of a marijuana user. I have not used [it] since January 2010 and I do not intend to do so at any point in the future.”¹²

On April 11, 2011, the SOR was issued, referencing both Applicant’s 2007-2009 marijuana use, his use of marijuana after being granted a security clearance in October 2009, and his denial of various drug-related issues in his June 2009 and May 2010 security clearance applications. By that time, Applicant had come to believe his situation at the New Year’s Eve party did not constitute “use” of marijuana, only a “temporary possession” of the illegal drug.¹³ Between June 8, 2011, and July 5, 2011,

⁷ Tr. 21, 41, 49. In later admitting he had “used” marijuana at the time, Applicant explained at the hearing that he was admitting only to having had “temporary possession” of the illegal drug. During the hearing, Applicant stated, “I deny inhaling marijuana,” and said he did not intend “to get high.” See Tr. 40, 50.

⁸ Ex. 2 (Security Clearance Application, dated June 9, 2009).

⁹ Ex. 1 (Security Clearance Application, dated May 25, 2010).

¹⁰ See, e.g., Tr. 26-29, 55-59. Applicant could not contact the interviewer after the initial interview because it was on a Friday afternoon. He contacted the interviewer on the following Monday and “came clean.”

¹¹ Ex. 3 (Interrogatories, dated Mar. 8, 2011) at 4 (Interview of Aug. 2, 2010).

¹² *Id.* at 13. In making this statement, Applicant apparently relied on the commonly accepted definition of the terms “use” and “user.” As a verb, Merriam-Webster primarily defines the verb “use” as “to put into action or service; to consume or take (as liquor or drugs) regularly. . . .”; the noun “use” as “the act or practice of employing something,” and the noun “user” as “one that uses.” See <http://www.merriam-webster.com/dictionary/> (as of Aug. 12, 2011).

¹³ See, e.g., Tr. 61. See also note 10, *supra*.

He consulted seven entities that had drug counseling or screening programs.¹⁴ Because he was not considered to have a drug addiction, he was denied admittance to two of the entities. He was also denied admittance to three other centers for other reasons, such as income threshold or insurance coverage. At one drug screening lab, he was twice given a drug screening which revealed a negative result, while one drug treatment assessment was administered with the finding that no treatment was necessary.¹⁵

On July 8, 2011, the notice of hearing in this case was issued, setting the date for the hearing on July 28, 2011. On that same date, Applicant completed a "Statement of Intent Not to Abuse Any Drugs," in which he swore he would refrain from future drug use and noted that any violation of that oath would constitute grounds for automatic revocation of any security clearance granted.¹⁶ At hearing, he stressed he has not been around drugs since the New Year's Eve party, he now avoids drugs, and has a different set of friends than he had when he went to college in another part of the country. His new circle of friends are more mature and work in professional capacities.¹⁷ Applicant hopes to become engaged to his girlfriend in the near future.¹⁸ He admitted that he denied past drug use on his 2009 and 2010 security clearance applications because he did not want to jeopardize his job offers or career.¹⁹

At the hearing, Applicant introduced his friend and his girlfriend, both of whom attended the 2009 New Year's Eve party at issue. The friend, who was highly credible and forthright, received his bachelor's degree from a U.S. military academy and has maintained a security clearance since 2003. He has known Applicant for a few years, both as a former colleague and friend. He has no experience with marijuana and avoids exposure to it. His recollection of the party roughly mirrors that of Applicant, except he stated that the marijuana at issue was conveyed in a pipe.²⁰ He noted that he had been drinking alcoholic beverages and was probably legally intoxicated at the time. He testified that he was standing next to Applicant outside the house where the party was held and that he saw Applicant bring a lit marijuana pipe to his lips. He urged Applicant to reconsider using the drug, then went indoors so as to avoid indirect inhalation of the drug's smoke; Applicant then followed him indoors. He stated he was unable to discern

¹⁴ Ex. A (Schematic of drug-related resources).

¹⁵ *Id.* See also Exs. B-D (related reports).

¹⁶ Ex. E (Statement of Intent, dated Jul. 28, 2011).

¹⁷ Tr. 31.

¹⁸ Applicant described his girlfriend as being "strongly opposed" to his past drug use and said she is now "totally against drugs." Tr. 34. However, she noted that she does not "have a negative opinion of anyone who has recreationally (sic) or has tried [the drug]." Tr. 92-93.

¹⁹ See, e.g., Tr. 25-26, 53-57. Applicant testified that he felt the "need to come clean," so he later disclosed the truth about his past illegal drug use to an OPM investigator. Tr. 26-28. He did so by calling the investigator on the next business day after the interview, which was a Monday. Tr. 27-29.

²⁰ Tr. 72-72.

whether Applicant ingested any of the marijuana smoke.²¹ He and Applicant did not discuss the incident again until about May or June 2011.²²

Applicant's girlfriend's recollection of the party also generally supports Applicant's portrayal of events. She was not intoxicated that evening. She saw a pipe passed around the area in which Applicant and his friend were standing. She later saw Applicant "draw [the pipe] to himself," then pass it along or put it on the table after the friend made a comment to him.²³ She could not hear their comments.

Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions. 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. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all 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.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." ²⁴ The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant.²⁵

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

²¹ Tr. 78, 82.

²² Tr. 81.

²³ Tr. 86, 89.

²⁴ See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

²⁵ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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). “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”²⁶ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.²⁷

Based upon consideration of the evidence, Guideline H (Drug Involvement) and Guideline E (Personal Conduct) are the most pertinent to this case. Conditions pertaining to these AGs that could raise a security concern and may be disqualifying, and those which would mitigate such concerns, are discussed below.

Analysis

Guideline H - 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.²⁸ “Drugs” are defined as mood and behavior altering substances and include 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 inhalants and other substances.²⁹ “Drug abuse” is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.³⁰

Applicant admitted he used marijuana, an illegal drug, about five times a month between March 2007 and March 2009. During that time, he purchased the drug on more than one occasion. Between December 31, 2009, and January 1, 2010, he raised either a marijuana cigarette or pipe filled with marijuana to his lips, seemingly ready to ingest, but he now denies having used or inhaled the illegal drug at that time. He also

²⁶ *Id.*

²⁷ *Id.*

²⁸ AG ¶ 24.

²⁹ *Id.* at ¶ 24(a)(1-2).

³⁰ *Id.* at ¶ 24(b).

testified that once done with the cigarette or pipe, that he furthered its circulation among those gathered at a party. Such facts are sufficient to raise Drug Involvement Disqualifying Conditions AG ¶ 25(a) (*any drug abuse*) and AG ¶ 25(c) (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*). With disqualifying conditions raised, the burden shifts to Applicant to mitigate related security concerns.

Applicant admitted that he regularly used marijuana about five times a month from March 2007 until March 2009, less than two-and-a-half years ago. After being granted a security clearance in October 2009, Applicant was in possession of a lit marijuana cigarette or pipe, which he drew it to his lips on New Year's Eve 2009, less than two years ago. Whether he inhaled the illegal drug, only contemplated inhaling the drug until he was advised not to do so, or merely planned to feign illegally using the marijuana as part of a social ritual is unclear. Under these facts, however, Drug Involvement 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*) does not apply.

Applicant no longer associates with those who use drugs and now eschews those venues where drugs might be in use. His girlfriend does not use marijuana and his friend, who is adamantly against drugs, exercises appropriate caution when they are present. Applicant has not been around marijuana since about January 1, 2010. AG ¶ 26(b)(1) (*disassociation from drug-using associates and contacts*) and AG ¶ 26(b)(2) (*changing or avoiding the environment where drugs were used*) apply.

Applicant stopped using marijuana in March 2009, while an undergraduate student. That was a little less than two-and-a-half years ago. While it is unclear whether he actually used marijuana on December 31, 2009, it is clear that he was socializing with those illegally using marijuana, that he took possession of a lit marijuana joint or pipe, raised it to his lips, and then put the smoldering drug back into circulation. These facts are sufficient to raise independent concerns regarding conduct, judgment, and reliability. However, viewing all of these facts in the best light, less than two-and-a-half years of genuine abstinence is insufficient to demonstrate a persuasive record of committed abstinence after two full years of regular marijuana abuse.³¹ AG ¶ 26(b)(3) (*an appropriate period of abstinence*) does not apply.

At the hearing, Applicant made credible statements regarding his reasons for quitting marijuana and signed a statement of intent with automatic revocation of clearance for any future drug-related violations. Therefore, AG ¶ 26(b)(4) (*a signed statement of intent with automatic revocation of clearance for any violation*) applies. None of the other mitigating conditions are applicable to this case.

Guideline E – Personal Conduct

³¹ Despite Applicant's dubious handling of the drug at the New Year's Eve party, this purported period of abstinence would be even briefer if he did, in fact, ingest marijuana at the December 31, 2009, party.

Security concerns arise from matters of personal conduct because “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.”³² In addition, “any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process” is of special interest.³³

Applicant admitted that he provided false information on both his May 2010 and June 2009 security clearance applications when he denied using, purchasing, and possessing illegal drugs in the preceding seven years. He denied that he falsified material facts on his May 2010 application when he denied having used a controlled substance while possessing a security clearance. Such facts are sufficient to raise Personal Conduct Disqualifying Condition 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*). Consequently, the burden is on Applicant to raise any mitigating conditions.

Although Applicant “came clean” about his past drug use in August 2010 to an OPM investigator, it was well after he had certified his June 2009 and May 2010 security clearance applications. While he ultimately divulged the truth, his disclosure was too late to give rise to AG ¶ 17(a) (*the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts*).

Applicant intentionally falsified the truth about his past drug use because he was afraid the truth would jeopardize his job prospects. He provided a false answer with regard to past drug use in his June 2009 and May 2010 security clearance applications. He failed to correct the record until after he had met with an OPM investigator about one year ago, during the summer of 2010. These facts reflect recent and highly serious events which were purposefully undertaken to undermine the investigative process. Although Applicant deserves credit for finally coming “clean” about his past drug use, there is insufficient evidence to raise 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*). However, his ultimate disclosure and subsequent candor raise AG ¶ 17(e) (*the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress*).

³² AG ¶ 15.

³³ *Id.*

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). Under AG ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based on careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the "whole-person" factors. Multiple facts speak in Applicant's favor. He is intelligent and well-educated. He has found a niche within his chosen profession and enjoys his work. He has matured considerably over the past year. Appellant is in a committed relationship, and he has a friend who evidences superior professionalism and judgment.

As an undergraduate, Applicant abused marijuana from March 2007 through March 2009. During that time, he used it about five times a month, and illegally purchased it on more than one occasion. He quit using the drug shortly before he graduated and began to pursue a professional career. While he has made changes in his life supportive of a drug-free lifestyle, security concerns remain. For example, he regularly abused marijuana for two years, but has allegedly only been drug-free for less than two-and-a-half years.

While this period of abstinence could be construed to be a sufficient demonstration of commitment, this period was interrupted and compounded by a fact pattern that raises another security concern. On December 31, 2009, Applicant attended a party where he was or should have been aware that marijuana was circulating. During that evening, a lit marijuana joint or pipe was passed to him. Distracted and under the influence of alcohol, he accepted the lit marijuana, took the illegal substance and related paraphernalia into his possession, and raised it to his lips. At the prompting of his more seasoned friend, he withdrew the fuming drug and related paraphernalia from his lips and put the marijuana back into circulation among the party-goers. Under the circumstances presented in this particular instance, I find no need to further address Applicant's arguments regarding his earlier admissions of marijuana "use" that night or his revised interpretation of that word.

Simply put, Applicant failed to timely extricate himself from a highly questionable and illegal situation. Whether he initially intended to use the marijuana, feign use, or was simply toying with the drug, is as unclear as it is irrelevant. This situation, which interrupted his abstinence period, sustains questions about his reliability, trustworthiness, and willingness to comply with the law – the very security concerns underlying Guideline H. In light of the brevity of Applicant's post-collegiate abstinence and his questionable conduct on December 31, 2009, both of which independently sustain security concerns, drug involvement security concerns remain unmitigated.

Applicant admitted that he lied on his 2009 and 2010 security clearance applications about his past drug use because he feared the truth would jeopardize his job opportunities. He failed to come clean about his drug use until the summer of 2010. While his ultimate confession to his falsity must be commended, more than one year is needed for him to demonstrate his trustworthiness and honesty. In making this assessment, I have favorably considered his recent maturation, forthright testimony, personal resolve, and the degree of trust displayed by his more experienced friend. Given these considerations, I am confident that Applicant will be able to demonstrate his reliability and overcome related issues in the future.

Finally, there remains the issue of whether Applicant “used” marijuana after being granted a security clearance. This question lingers in singular allegations raised under both Guideline H and Guideline E. While the scenario Applicant presented is highly self-serving, it is not incredible. Applicant, who had been drinking, was in a social setting in which marijuana was being passed around. He was not paying attention to activities around him, but was concentrating on his conversation with his friend. Without thinking, he brought the marijuana to his lips, either to reflexively ingest the drug or to feign its use. His more seasoned friend, who had significantly more experience with maintaining a security clearance, served as a reminder of his security clearance obligations. At his urging, it appears Applicant immediately withdrew the marijuana from his lips and retired to the interior of his host’s home along with his companions. While neither witness can fully attest as to whether Applicant “used” any marijuana, their credible testimony generally indicates that none was ingested. While this does not excuse the exceptionally poor judgment underlying Applicant’s actions, it does serve to refute and mitigate the allegation that he used marijuana on New Year’s Eve 2009.

As noted, any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting such classified information. The brevity of Applicant’s period of drug abstinence and the recency of his security clearance application falsifications leave drug involvement and personal conduct security concerns unmitigated. Clearance is denied.

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:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a:	Against Applicant
Subparagraph 2.b:	For Applicant
Subparagraph 2.c-2.e:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant a security clearance. Clearance is denied.

ARTHUR E. MARSHALL, JR.
Administrative Judge