



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



In the matter of:)	
)	
)	ISCR Case No. 11-00208
)	
Applicant for Security Clearance)	

Appearances

For Government: David Hayes, Esq., Department Counsel
For Applicant: *Pro se*

November 21, 2011

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant mitigated the Government’s security concerns under Guideline H, Drug Involvement, and Guideline E, Personal Conduct. Applicant’s eligibility for a security clearance is granted.

Statement of the Case

On July 26, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H and E. 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) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR on August 17, 2011, and requested a hearing before an administrative judge. The case was assigned to me on October 6, 2011. DOHA issued a Notice of Hearing on October 18, 2011. I convened the hearing as

scheduled on November 3, 2011. The Government offered exhibits (GE) 1 through 4. Applicant did not object and they were admitted into evidence. Applicant testified and offered exhibits (AE) A through G, which were admitted into evidence without objections. DOHA received the hearing transcript (Tr.) on November 10, 2011.

Findings of Fact

Applicant denied all of the allegations in the SOR. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 24 years old. He earned a bachelor's degree in 2009. He has worked for a federal contractor since August 2009 as an engineer. He is attending night school and has three classes remaining to complete his master's degree. Applicant is not married and has no children.¹

Applicant graduated from high school in 2005. He earned high grades and was the captain of the cross country team and the most valuable player. He was in the honor society and was a member of student leadership program. Applicant did not get in any trouble while in high school. He attended a prestigious college and graduated with high distinction. He was recognized as the outstanding student in his field of study. During college he coached a youth basketball team. He spent his college years focused on his studies.²

Applicant consistently and adamantly denied he has ever used any illegal drugs. None of Applicant's close college friends or roommates used illegal drugs. In December 2007, Applicant and his friends attended a large college party. While at the party, he was in a circle of people and one of them, who was not a friend of Applicant's, handed him a marijuana cigarette. He laughed and jokingly pretended like he was going to smoke it. He did not put the cigarette to his lips. He did not inhale the cigarette. He did not smoke the cigarette. His actions were obvious to everyone who witnessed his actions that he was pretending and joking, but never actually took a puff or in any way used marijuana. He then passed the cigarette to another person and left the group. This was the only time he ever held marijuana.³

Later in December 2007, Applicant applied for an internship and was required to take a drug test. His test results were negative. Although he could not remember the exact day of the party, the drug test was two weeks later.⁴

¹ Tr. 25.

² Tr. 33-36.

³ Tr. 22-25, 38-43, 46-48.

⁴ Tr. 27, 36-37.

In February 2008, as part of a security interview, Applicant was asked by an investigator if he had ever used illegal drugs. He answered “no.”⁵

In March 2008, Applicant took a polygraph. Prior to the polygraph, he was informed he would be asked questions about drugs. Applicant credibly testified that he was not concerned because he had never used drugs. When asked, Applicant denied ever using drugs. The polygrapher informed him the results of the polygraph showed he was deceptive. The polygrapher then asked if he had ever been around people who used drugs or had any contact with people who used drugs. He told the polygrapher he and his close friends did not use illegal drugs. He informed the polygrapher that he had been around some people who had drugs at the party in December 2007. He again denied ever using drugs, but said he pretended to use marijuana on one occasion. Applicant was very clear that he told the polygrapher that he only pretended and never used marijuana. He admitted he did not disclose this incident initially because he did not use the marijuana and that is what was being asked. The polygrapher then asked “isn’t pretending the same as using.” Applicant did not believe pretending to use marijuana was the same as actually using marijuana. Applicant stated that the polygrapher then asked “Well, how do you know that’s still not defined as use under the code, just being around it and being right next to it?”⁶ He testified that the polygrapher was convinced that pretending to use marijuana was the same as using it. Applicant received a letter from the government agency advising him he was denied a security clearance because “he admitted to using Marijuana on one occasion in December 2007.” The Government did not offer any evidence that Applicant used marijuana in December 2007. Applicant did not appeal the decision because the job he was applying for was no longer available, and he was advised that an appeal could take up to three years.⁷

Applicant was also denied a security clearance because “you reported that you witnessed the sale of marijuana by a friend in August 2007, and that you believe you provided transportation to this friend while he possessed marijuana.”⁸ Applicant elaborated on these admissions at his hearing. He disclosed to the polygrapher that in August 2007 he was home from college for the summer. His next door neighbor was a man younger than Applicant. His neighbor had a reputation for using drugs. One day while Applicant was at his own house, he observed his neighbor at the neighbor’s house conduct what appeared to Applicant to be a drug transaction. Applicant never confirmed this with the neighbor and has no proof that that is what occurred, but he assumed that was what was happening. This is the incident that Applicant reported to the polygrapher. Applicant also reported that he gave this neighbor a ride to work occasionally because his neighbor did not have a driver’s license. Because the neighbor had a reputation for using drugs, Applicant believed the neighbor may have had drugs in his possession

⁵ Tr. 42-44.

⁶ Tr. 52.

⁷ Tr. 26-32; 44-53, 59; GE 3.

⁸ GE 3.

when he gave him a ride. Applicant never confirmed this, but just made an assumption. This is the instance that Applicant reported to the polygrapher. Applicant did not give his neighbor transportation so he could make a drug sale. Applicant no longer lives at that residence. This information was disclosed at Applicant's polygraph because the polygrapher asked him if at any time he may have been around illegal drugs. Applicant made the assumption his neighbor might have had drugs in his possession and he made the assumption that he may have observed his neighbor sell drugs when he saw him through the window.⁹

On June 30, 2009, Applicant completed a security clearance application. In response to Section 23(a) which asked if Applicant had illegally used drugs in the last seven years, he responded "No." In response to Section 23(c) which asked if he had been involved in the illegal possession, purchase, manufacture, trafficking, production, transfer, shipping, receiving, handling, or sale of any controlled substance, he answered "No." When questioned about why he answered "No" when he admitted he had held a marijuana cigarette at the party, Applicant credibly testified that he thought the question was referring to the type of possession that was part of a larger transaction such as manufacturing or selling it. He admitted he held the marijuana cigarette at the party, but did nothing else. Applicant did not intentionally and deliberately fail to disclose this information.¹⁰

When asked why he did not just admit a one-time use and put the incident behind him. Applicant felt that if he admitted he used marijuana when he really did not, then he would be lying. He did not want to lie on his security clearance application. He has consistently contended that he has never used marijuana. A drug test taken two weeks after he attended the party confirmed there were no illegal drugs in his system.¹¹

Applicant's long-time girlfriend, whom he has been dating since September 2008, and with whom he has daily interaction, provided a letter stating she has never observed Applicant using, handling, buying or selling illegal drugs. He does not associate with those who use drugs and avoids environments where drugs are used.¹² His present roommate since August 2009 provided a letter stating the same.¹³

Applicant credibly testified that he does not associate with anyone who uses illegal drugs. His three roommates all have security clearances and work for government contractors. None of his other friends use illegal drugs. He no longer has contact with his old neighborhood. His employer has a zero tolerance for drugs. Violation of the policy would result in loss of his job. He credibly testified that he has

⁹ Tr. 53-59.

¹⁰ Tr. 60.

¹¹ Tr. 60-64.

¹² Tr. 32, 64; AE A.

¹³ Tr. 64; AE B.

never been around any other illegal drugs. Applicant's father worked in the intelligence community for 31 years. He asked his father for advice and his father told him to explain what happened.¹⁴

Applicant provided a statement swearing that he will never use, handle, buy, or sell illegal drugs for the remainder of his life. He does not associate with known drug users. His statement confirmed he will avoid environments where drugs are used. In addition, he agrees to an automatic revocation of any security clearance if he violates his promise.¹⁵

Policies

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 used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, 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 and 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

¹⁴ Tr. 65-66.

¹⁵ Tr. 67; AE C.

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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to 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. 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), and (2) inhalants and other similar substances; Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

I have considered the disqualifying conditions under drug involvement AG ¶ 25 and the following are potentially applicable:

- (a) any drug abuse; and
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

After considering all of the evidence and Applicant's credible testimony, I find there is insufficient evidence to conclude he illegally used marijuana. I find there is evidence that he possessed marijuana one time at a party in December 2007. Therefore AG ¶ 25(c) applies.

I have considered all of the mitigating conditions under drug involvement AG ¶ 26. The following are potentially applicable:

(a) the behavior happened so long ago, was so infrequent or happened under circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(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 are used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation; (c) abuse of the prescription drugs was after a severe and prolonged illness during which these drugs were prescribed, and abuse has since ended.

Applicant credibly testified that on one occasion in December 2007 he held a marijuana cigarette at a party. He signed a statement of intent, with automatic revocation of clearance that he will never use, handle, buy, or sell illegal drugs for the remainder of his life. Applicant's one-time happenstance possession of marijuana occurred almost four years ago and under unique circumstances. Applicant does not have friends or roommates who use illegal drugs. It is very unlikely this type of behavior will recur. He was in college at the time, and it does not cast doubt on his reliability, trustworthiness or good judgment. I am convinced Applicant will avoid any places where there may be illegal drugs. I find a sufficient period of time has passed. Therefore, I find AG ¶¶ 26(a), 26(b) apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(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; and

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative

Applicant credibly denied he has ever used marijuana or any illegal drugs. He has consistently explained that he held marijuana at a party and pretended to use it. Applicant did not provide a false statement during a security interview in February 2008 when he denied he used marijuana. He did not admit during a technical testing session in March 2008 that he used marijuana. Applicant did not falsify material facts on his Electronic Questionnaire for Investigations Processing (e-QIP), executed on June 30, 2009, by failing to disclose he used illegal drugs because he did not use illegal drugs. Applicant's testimony was very credible. He refused to admit using illegal drugs because then he really would be lying. I believed his testimony that the polygrapher told him that pretending to use drugs was the same as using drugs. The polygrapher did not testify and there is no evidence to conclude Applicant ever used illegal drugs. There is evidence that Applicant held a marijuana cigarette at a party in December 2007. He did not disclose this information under Section 23 of the e-QIP. I found Applicant's testimony credible in that he believed the question was referring to possession of illegal drugs as part of a larger transaction such as manufacturing or selling it. I have considered Applicant's demeanor, candor, and forthrightness throughout the entire hearing. I find he did not deliberately or intentionally fail to disclose his one-time possession of marijuana. I find none of the personal conduct disqualifying conditions apply.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. 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.

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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but others warrant additional comment.

Applicant has a long and consistent record of achievement. He excelled in high school and college. He was involved in sports and was captain of his cross country team in high school. He volunteered as a youth coach in college. None of Applicant's past or current friends are drug users. His roommates and long-time girlfriend do not use illegal drugs and confirmed that Applicant does not either. Applicant found himself in a difficult situation when he admitted he had pretended to use marijuana at a party. I found him believable when he indicated that the polygrapher told him that pretending was the same as using. Applicant has consistently held that he never used illegal drugs. He was convincing when he stated he could not admit to something he did not do because then he would be lying. He refused to take the easy way out and admit to a one time use and move on. It is not unheard of for excellent students and employees to use drugs, but in this case, the evidence does not support it. I do not believe he made false statements during his security clearance process and on his e-QIP. It has been almost four years since Applicant attended the December 2007 party and held a marijuana cigarette. Sufficient time has passed and Applicant has no contact with those who use illegal drugs. Applicant has met his burden of persuasion. Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant successfully mitigated the security concerns arising under the guidelines for Drug Involvement and Personal Conduct.

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.b:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 1.a-1.e:	For Applicant

Conclusion

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

Carol G. Ricciardello
Administrative Judge