



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



In the matter of:)	
)	
-----)	ISCR Case No. 11-06859
)	
Applicant for Security Clearance)	

Appearances

For Government: Raashid Williams, Esquire, Department Counsel
For Applicant: Leslie McAdoo Gordon, Esquire

02/29/2012

Decision

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

On September 30, 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 November 14, 2011, Applicant admitted all allegations and requested a hearing before a DOHA administrative judge. The case was assigned to me on December 21, 2011. The parties agreed to a hearing date of February 7, 2012, a notice for which was issued on January 24, 2012. I convened the hearing as scheduled.

Applicant gave testimony and offered 12 documents, which were admitted into the record without objection as exhibits (Exs.) A-L. Department Counsel offered three documents, which were admitted as Exs. 1-3 without objection. The transcript (Tr.) of the proceeding was received on February 16, 2012, 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 27-year-old database sustainment specialist who has worked for the same defense contractor since July 2010. A gifted athlete, he took time off during college to play professional-level sports abroad. Applicant returned to the United States and completed a degree in business administration in 2009. He is single.

During the end of Applicant's college studies, he began to experience a "funk" as to what direction his life was taking. After graduating from college in July 2009, Applicant began working for his father before starting his current job in July 2010. He began using marijuana with varying frequency from about October 2009 until December 2009.¹ He then stopped using marijuana because, "it wasn't something that I wanted to continue to do."²

When Applicant initially started his present employment, he was unsure whether his entry-level job was sufficiently satisfying. He did not know for sure, but he "inferred" that his employer probably had a policy against illegal drug use.³ He completed a Questionnaire for Public Trust Positions (SF85P) in electronic form (e-QIP), which was certified on October 5, 2010. In completing that e-QIP, Applicant was advised in the instructions section that the purpose of the questionnaire was "to establish that applicants or incumbents either employed by the Government or working for the Government under contract, are suitable for the job and/or eligible for a public trust or sensitive position."⁴ The paragraph noted as "The Investigative Process," stated:

Background investigations are conducted using your responses on this form . . . to develop information to show whether you are reliable, trustworthy, of good conduct and character. . . . In addition to the questions on this form, inquiry is also made about a person's adherence to security requirements, honesty, and integrity, vulnerability to exploitation or coercion, falsification, misrepresentation, and any other behavior, activities, or associations that tend to show the person is not reliable, trustworthy, or loyal.⁵

¹ Ex. 1 (E-QIP, dated Oct. 5, 2010) at 34 of 35. In response to the question as to how often he used marijuana, Applicant answered "experimented."

² Tr. 57.

³ Tr. 67.

⁴ *Id.* at 2 of 35. Notice is taken that similar language is used in the standard SF86 form, which is used for security clearance applicants.

⁵ *Id.* Again, similar language is used in the SF86 form.

In executing the e-QIP, he disclosed his 2009 use of marijuana. He now acknowledges that the question was asked because, “they wanted for the applicant to be truthful if it indeed occurred and that it would possibly be prohibitive to security concerns.”⁶

Although initially unhappy with his early assignments at work, Applicant persevered. He was granted a Position of Trust/IT3 in about December 2010, although he did not discover this fact until March 2011.⁷ His anxiety about his future became compounded with difficulties in his romantic life. Applicant’s girlfriend had a vision as to what she wanted to do with her life, while Applicant felt aimless.

Applicant decided to again use marijuana in October 2010. He continued using the drug with varying frequency through January 1, 2011. It occurred to him that “it may be common sense to abstain from the use of marijuana” and he knew that marijuana was an illegal drug.⁸ Applicant quit using the drug after coming to the realization that he needed to quit using drugs to advance his career. He wrote a three-year plan for his life, noting that he wanted to be better read, live independently, continue his education, save money for a down payment on a house, and reduce his student loan obligation.

In March 2011, Applicant was told that his job had been upgraded and that he needed a security clearance. He completed a SF86 application that was certified on March 9, 2011. On that form, he again noted his 2009 drug use, explaining that he used it about 5 times a month between October 2009 and December 2009.⁹ He also disclosed that he used the drug from November 2010 through January 2011, explaining that the use had been “experimental, occasional, approx. 4 times in a month.”¹⁰

By this time, Applicant had learned time-management techniques and changed his priorities. He proceeded to make considerable progress on his three-year plan. He began regular reading of the classics, reduced his student loan debt by nearly 20 percent, and saved money to put toward a home purchase. He moved out of his mother’s house and found roommates to share an apartment. He returned to the gym and took up skiing. Using a database, he began tracking his considerable progress. Applicant also focused on his job and his career prospects. He completed a management professional certification program. He replaced any interest in marijuana with positive goals. Applicant also developed a “dream board,” which helps him visualize his goals.¹¹

⁶ Tr. 68. Applicant conceded that drug use would have been a concern to his employer.

⁷ Tr. 28.

⁸ Tr. 69.

⁹ Ex. 2 (SF86, dated Mar. 9, 2011) at 40 of 44.

¹⁰ *Id.*

¹¹ Tr. 36.

Applicant has no interest in using drugs in the future and he has been drug-free since January 1, 2011. His girlfriend supports his decision stay drug-free. Applicant signed a statement of intent not to use drugs in the future or risk forfeiture of any security clearance granted. Because they no longer live near each other, Applicant and the friend with whom he used marijuana have only occasional contact.¹² Applicant is well-regarded at work and in his community.

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. . . ." ¹³ The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant.¹⁴

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 the Applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible

¹² Tr. 51. Applicant always used marijuana with the same friend, with the exception of one time when a second friend was involved. Drug use took place generally at Applicant's home or yard. Applicant does not believe that either of the individuals with whom he used the marijuana still uses the drug.

¹³ *Sees also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

¹⁴ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

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.”¹⁵ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.¹⁶

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.¹⁷ “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.¹⁸ “Drug abuse” is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.¹⁹

Applicant admitted he used marijuana with varying frequency from October 2009 through December 2009, and again from November 2010 through January 1, 2011. His more recent use of the drug occurred after being granted a Position of Trust/IT3 in December 2010. Such facts are sufficient to raise Drug Involvement Disqualifying Condition AG ¶ 25(a) (*any drug abuse*). Because Applicant’s drug use occurred after he was granted a public trust position and not a security clearance, however, AG ¶ 25(g) (*any illegal drug use after being granted a security clearance*) does not technically

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ AG ¶ 24.

¹⁸ *Id.* at ¶ 24(a)(1-2).

¹⁹ *Id.* at ¶ 24(b).

apply. However, with AG ¶ 25(a) applicable, the burden shifts to Applicant to mitigate related security concerns.

Applicant's drug abuse lasted until January 2011, only 13 months ago. During his period of drug abuse, he used marijuana between four to five times a month. Applicant's marijuana use coincided with periods of unhappiness or inner turmoil. Such periods are unavoidably part of the human condition. Indeed, such pressing times often test one's mettle in terms of judgment, resolve, and reliability. They are not so rare that it can be concluded that similar phases might not recur again in a young man of 28. Despite a year of self-improvement and maturation, 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 moved away from home and sees his former marijuana-using friends less frequently. However, such facts are only sufficient to raise AG ¶ 26(b)(2) (*changing or avoiding the environment where drugs were used*). They do not give rise to AG ¶ 26(b)(1) (*disassociation from drug-using associates and contacts*).

Applicant used marijuana from October 2009 through December 2009, then he quit using the drug. He again used marijuana from November 2010 through January 1, 2011, before quitting marijuana for a second time. While his break from drug use for nearly a year is notable, it highlights his inability to permanently quit marijuana the first time. Although he has made impressive strides toward personal and professional self-improvement, 13 months of abstinence is insufficient given both the total length of his period of drug use (October 2009 - January 1, 2011) and the fact he could not sustain his commitment to quit using drugs in December 2009 for more than 11 months. In light of these considerations, AG ¶ 26(b)(3) (*an appropriate period of abstinence*) does not presently apply.

Finally, Applicant has articulated his intent not to use drugs again. He credibly gave logical reasons for not revisiting marijuana use. He complemented these expressions by signing 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.

Guideline E – Personal Conduct

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.”²⁰ In addition, “any failure to

²⁰ AG ¶ 15.

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.²¹

In this case, Applicant admitted his past drug use. While drug involvement is sufficiently covered under Guideline H, his drug use after being granted a public trust position presents judgment concerns not clearly addressed under that guideline. Given these facts, Personal Conduct Disqualifying Condition AG ¶ 16(d) (*credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information*) applies.

With or without being granted a public trust position or security clearance, the use of marijuana is illegal. Applicant knew that. While drug use alone is sufficient to raise serious security concerns, those concerns are heightened when, in doing so, an applicant violates the public trust bestowed upon him. Although Applicant apparently did not know he had been granted a public trust position, he did know that he had executed an e-QIP, he knew the purpose of that form, and he knew or should have known that illegal drug use was a legitimate concern. Moreover, he inferred that drug use was prohibited by his employer. Applicant only renewed his commitment to abstinence 13 months ago. In light of the duration of his past drug use, his previous failure to maintain abstinence from marijuana, and the seriousness of using drugs again after completing his e-QIP, Personal Conduct Mitigating Condition 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*) does not apply.

To his credit, however, Applicant has been honest throughout. He self-disclosed both periods of drug use on his SF85P and SF86. Consequently, AG ¶ 16(e) (*the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress*) applies.

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.

²¹ *Id.*

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, credible, and well-educated. He is striving to be a well-rounded Renaissance man, making considerable improvements in his mind, body, and spirit. He is refocused on his work. He has matured considerably over the past year. Appellant is in a committed relationship. He has recently demonstrated maturation and true resolve toward his personal goals.

Applicant suggests that his use of marijuana after being granted a public trust position, rather than a security clearance, somehow reduces the concerns raised. As noted, however, both the SF85P and the SF86 instructions address the purpose of the applications and related investigations in the same language. While the extent of an applicant's vetting may differ, the same issues are addressed. Moreover, Applicant argues that the recency of one's drug use is a sliding scale which, given his age and recent accomplishments, should go in his favor. I disagree. Applicant's strides in the past year have been highly impressive. However, his drug use is not just the matter of two brief periods. Given his lapse after committing to quit using drugs, it became one longer period with an intervening 11 month period of failed abstinence. While that failure may be attributable to a "funk," it is unknown how Applicant will react when he faces future challenges.

In light of these considerations, I find that a 16 month period of drug use with an intervening period of 11 months failed abstinence merits a longer period to demonstrate both a commitment to refrain from marijuana and the ability to do so. More time is needed to demonstrate Applicant's ability to balance life's stressors with his ability to refrain from drugs. 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. I conclude drug involvement and personal conduct security concerns remain 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
Subparagraphs 1.a-b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	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