



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



In the matter of:)	
)	
)	ISCR Case No. 11-08269
)	
)	
Applicant for Security Clearance)	

Appearances

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

11/06/2012

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant smoked marijuana twice in college in 1997 or 1998 and once in August 2010 at his brother’s engagement party. Applicant raised doubts about his judgment by using marijuana while possessing a secret clearance issued in 2002, but there is little risk that he will use marijuana or any illegal drug in the future. Clearance granted.

Statement of the Case

On July 11, 2012, 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, and Guideline E, Personal Conduct, and explained why it was unable to find that it is clearly consistent with the national interest to continue his 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 August 2, 2012, and he requested a hearing. The case was assigned to me on October 5, 2012, and I scheduled a hearing for October 25, 2012. With Applicant's agreement, on October 17, 2012, I issued an Amended Notice of Hearing rescheduling his hearing for October 24, 2012.

At the hearing, three Government exhibits (GEs 1-3) and eight Applicant exhibits (AEs A-H) were admitted without objection. Applicant and his fiancée testified, as reflected in a transcript (Tr.) received on November 2, 2012. At Applicant's request, I held the record open for one week for him to submit the results of an October 19, 2012 drug screen. On October 25, 2012, Applicant submitted the report of the drug test (AE I) to conclude his evidentiary case. The document was admitted without objection.

Findings of Fact

The SOR alleged under Guideline H, and cross-alleged under Guideline E, that Applicant used marijuana with varying frequency from at least 1997 to June 2010, and that he used marijuana while holding a secret security clearance issued in November 2002. In his Answer, Applicant admitted that he had used marijuana on two separate occasions in college in 1997 and that he had inhaled marijuana once at his brother's engagement party in 2010. He denied any inference of use other than on those occasions and any intent of future use. Applicant admitted the instance of questionable judgment, but cited his voluntary disclosure of the drug involvement to the investigating agency as evidence of the trustworthiness required to maintain a security clearance.

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 37-year-old mechanical engineer who was awarded his bachelor's degree in February 2000. He has a certificate of graduate study in manufacturing engineering in 2002 after taking four courses. (GE 2.) Applicant has been employed by the same defense contractor since November 2000 (GE 1; AEs B-C.), and he seeks renewal of the secret clearance that he has held since 2002. (GE 1.)

Applicant tried marijuana on two separate instances around the 1997 to 1998 time frame while he was in college.¹ He first used marijuana in the summer while socializing with friends from high school. He smoked marijuana a second time with his then girlfriend at a party in a dormitory. (GEs 1-3; Tr. 52, 61-62.) He did not enjoy the burning sensation produced by the drug, and he abstained from any involvement with controlled dangerous substances as he focused on his career in the defense industry and later also on his life

¹Applicant indicated in his Answer to the SOR that he used marijuana on two separate occasions while in college in 1997. In his response to DOHA drug interrogatories (GE 3), he indicated that he inhaled marijuana twice in 12 years, the first time around April 1998. The discrepancies (once or twice in college and whether he used marijuana in 1997 or 1998) are minor and attributed to inaccurate recollection rather than intentional concealment. He now recalls that he smoked marijuana with friends from high school the first time and with his then girlfriend the second time. (Tr. 61-62.)

with his fiancée. (GE 2.) Applicant and his fiancée became friends around 2005, began dating three years later, and have been cohabiting since 2010. (Tr. 34.) Applicant's fiancée attests that illegal drugs have not been part of their life together. (Tr. 35-36, 41.)

In August 2010, Applicant took one puff from a marijuana cigarette passed to him at his brother's engagement party. It caused a burning sensation in his lungs, and he coughed on intake and several more times that evening. Applicant and his brother were within a small group of four or five of the 30 to 40 people at the family party when an old college friend of his brother's unexpectedly offered them marijuana. Applicant had been drinking at the time, but he was not intoxicated. Nor was he pressured to use the marijuana. (GEs 1-3; Tr. 34-49, 58.) To Applicant's knowledge, his brother did not use any marijuana. (Tr. 55-56.) Applicant's fiancée was present at the time, although she was not socializing within the small circle of the persons who smoked the drug. She was surprised to see Applicant use the marijuana because it was so out of character for him, and she "made fun" of him for using it. (Tr. 34-37.) Applicant cannot explain why he accepted the marijuana. He had been in situations, such as concerts, on a handful of occasions in the past and always declined offers to smoke marijuana. (Tr. 45.) The next morning, Applicant realized it was a mistake for him to have used marijuana, but even then, he did not consider the potential impact on his security clearance. (Tr. 45-47.) Although he held a security clearance, he had not accessed any classified information. (Tr. 48.)

To renew his secret clearance, Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on April 27, 2011. In response to question 23.a concerning any illegal drug use in the last seven years, Applicant indicated that he inhaled marijuana once around June 2010 at his brother's engagement party. He also responded "Yes" to 23.b regarding whether he had ever illegally used a controlled substance while possessing a security clearance. (GE 1.) Applicant gave no thought to concealing his involvement with marijuana. It happened, and he couldn't deny it. (Tr. 51.)

On May 24, 2011, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). Applicant indicated that "in a moment of bad judgment," he had taken a puff from a marijuana cigarette passed among his brother's friends at his brother's engagement party. He had previously believed that the party took place about a month after his brother announced his engagement in May 2010. However, he realized after some discussion with his fiancée that the party occurred more likely in August 2010. Applicant attributed his use to the "mirth-filled atmosphere" of the occasion. He had also been told in January 2010 by his supervisor that he was going to be laid off, and he did not think that he would be continuing to work in the defense industry. Applicant volunteered that he had tried marijuana in college and experienced the same unpleasant burning effect, so he had not used it or any other illegal substance again until the August 2010 party. Applicant estimated that once every couple of years, he found himself in the presence of "friends of friends" smoking marijuana at functions or parties. He did not know the persons and did not use any. Applicant denied ever purchasing marijuana and any intent to use any illegal drug, including marijuana, in the future. (GE 2.)

On May 31, 2012, Applicant indicated in response to drug interrogatories from DOHA that he had used marijuana twice in 12 years. He had taken one puff of marijuana in April 1998 and in August 2010 and did not intend any future use. As to why he decided not to use marijuana in the future, Applicant stated, "Risk not worth reward, especially since there is no reward." He also denied any association with known drug users. Applicant admitted that he held a security clearance the last time that he "puffed" marijuana, although he had not accessed any classified information. (GE 3.)

On October 19, 2012, Applicant voluntarily underwent a drug screen to prove his abstention from illegal drugs since August 2010. (AEs D, I; Tr. 55.) The result was negative for all substances tested, including marijuana. (AE I.) On October 24, 2012, Applicant executed a statement of intent no to use any illegal controlled substance in the future with automatic revocation of his security clearance for any violation. (AE H.) Applicant is also willing to submit to random drug testing if asked. (Tr. 55.) Four years have passed since he last saw or socialized with any of his old friends or acquaintances who offered him marijuana in the past.² (59.) His fiancée does not doubt Applicant's intent to abstain completely from all illegal drugs in the future. (Tr. 41.)

Applicant's employer has a drug policy consistent with the Federal Drug-Free Workplace Act. The use of illegal drugs is inconsistent with the behavior expected of its employees. Off-duty use of controlled dangerous substances violates the company's drug policy if the use impairs an employee's ability to perform his or her job or the drug involvement affects the company's reputation in the general public. Under company policy, periodic, unscheduled drug testing may be conducted on any employee considered to be in a sensitive position, which includes those employees whose duties involve access to U.S. government classified information. Employees may also be tested if they are in the workplace, performing work, or are otherwise on company time and reasonably suspected by two members of management to be under the influence or impaired by drugs. (AE F.) Pre-employment drug testing is required of all job applicants. Applicant's pre-employment drug screen was negative, and he has not otherwise taken a drug test for his job. (Tr. 26.)

Applicant was given an overall rating of "Achieved" for his work performance in 2010. In the opinion of his then supervisor, Applicant has strong insight into the potential causes of almost any problem, strong organizational skills, and strong statistical knowledge. (AE C.) In spring 2011, Applicant transferred to a new department at a different facility. His supervisor for the last 18 months considers him to be a valued asset. Applicant has been "dependable, hard-working, conscientious, honest in all [his] work," and he has a good record for attendance and punctuality. (AE A.) Applicant again achieved all his performance objectives in 2011. (AE B.) Applicant informed his supervisor about his use of marijuana in August 2010. They have mutually agreed that Applicant will not abuse any drug again. (Tr. 55.) Applicant has been "in the presence of classified materials" since August 2010 with no security violations. (Answer; Tr. 47.)

²Applicant did not have a social relationship with his brother's friend, who brought the marijuana to the engagement party in August 2010. (Tr. 58.)

Applicant has a close friend from college who has known him for the past 19 years. This friend has never known Applicant to be involved with illegal drugs. He considers Applicant to be extremely trustworthy and honest. (AE F.)

In January 2011, Applicant was elected to the board of trustees for his condominium association. (AE G; Tr. 29.) Applicant purchased his condominium around June 2008. (GE 1.) As of October 2012, Applicant was still a trustee, and as such, he is authorized to make decisions related to the budget and projects. (Tr. 56.)

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

Guideline H, 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),³ 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.” Potentially disqualifying conditions AG ¶ 25(a), “any drug abuse,” and AG ¶ 25(g), “any illegal drug use after being granted a security clearance,” are established. Applicant abused marijuana twice while in college between 1997 and 1998. Of greater concern in light of its recency, he took a puff from a marijuana cigarette in August 2010 after he had been issued a DOD secret clearance. Marijuana is a Schedule I controlled substance under the Controlled Substances Act (21 U.S.C. § 812). Schedule I controlled substances are those drugs or substances which have a high potential for abuse, no currently accepted medical use in treatment in the United States, and lack accepted safety for using the drug under medical supervision.

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,” applies in that his abuse was on rare occasions. Applicant smoked marijuana only when it was offered to him at two social functions while in college and once at his brother’s engagement party 12 years later.

Applicant denies any intent to abuse drugs, including marijuana, in the future. Under AG ¶ 26(b), “a demonstrated intent not to abuse any drugs in the future,” can be shown by

³Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act, are contained in 21 U.S.C. § 812(c).

“(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 volunteered to the OPM investigator that once every couple of years, he attended a function or party where “friends of friends” used marijuana, and he did not partake. He testified at his hearing that he had friends in the past known by him to use marijuana and that these friends offered him the drug once or twice. (Tr. 58-59.) Whether these persons were friends of his or friends of friends, Applicant’s unchallenged testimony is that he has neither seen nor socialized with them in the past four years. Applicant did not have a social relationship with his brother’s friend, who brought marijuana to the August 2010 engagement party. (Tr. 59.) Applicant’s fiancée does not use any illegal drugs, and to her knowledge, Applicant’s friends do not use dangerous drugs either. As for avoiding the environment where drugs were used, Applicant was not someone who frequented places conducive to drug involvement. Neither he nor his fiancée expected any marijuana to be present at his brother’s engagement party. It is more difficult to apply AG ¶ 26(b)(3) in that Applicant’s abuse of marijuana in August 2010 occurred only eight months or so before he completed his e-QIP, and his present two years of abstinence is well short of the 12 years that passed between his last use in college and his use in August 2010. However, Applicant has executed the signed statement of intent required under AG ¶ 26(b)(4). Applicant’s intent to abstain is credible in light of other indicia of his trustworthiness, including his candor about his illegal drug use on his e-QIP, during his interview with the OPM investigator, and in response to DOHA interrogatories. Applicant is not likely to jeopardize his relationship with his fiancée or his employment by using marijuana or any other illegal substance in the future. The drug involvement concerns are mitigated.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15:

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.

Concerning the Government’s case for disqualification under the personal conduct guideline because of Applicant’s marijuana use and the fact that he used the drug while holding a clearance, the DOHA Appeal Board has held that security-related conduct can be alleged under more than one guideline, and in an appropriate case, be given independent weight under each. See ISCR 11-06672 (App. Bd. Jul. 2, 2012). At the same time, the Government takes a seemingly inconsistent position with its Guideline H case by arguing for application of AG ¶ 16(c) to his drug use under Guideline E, which would require a finding that his marijuana involvement be insufficient in and of itself for denial under Guideline H. AG ¶ 16(c) provides as follows:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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.

Applicant's drug use is clearly covered under AG ¶¶ 25(a) and 25(g) of Guideline H and would have been disqualifying were it not for sufficient mitigation. However, separate from the risk of physiological impairment associated with the use of mood-altering substances, which is a Guideline H concern, Applicant had an obligation as a clearance holder to comply with DOD policy, including the prohibitions against drug involvement. AG ¶ 16(c) is implicated in that his use of marijuana while holding a security clearance contravened DOD policy. Furthermore, Applicant clearly exercised poor judgment under the personal conduct concern outlined in AG ¶ 15 by using marijuana at his brother's engagement party while he held a security clearance.

Applicant indicates that he gave no thought to his security clearance at the time. He had not been privy to any classified information before August 2010, despite the fact that he has held a clearance since 2002. Also, he believed that he was going to be laid off from his defense job. Neither his lack of classified access nor a pending layoff (which he apparently survived) justifies or mitigates his abuse of marijuana in contravention of DOD policy. That being said, Applicant knows it was a mistake to smoke marijuana, and he does not intend to repeat the same mistake. He cites his "candor and willingness in bring this [his marijuana use] to light as well as [his] trustworthiness before and since" as evidence of his good character. Two mitigating conditions apply under AG ¶ 17 of Guideline E:

(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; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant did not set out to knowingly violate the DOD drug policy. Instead, in what he has described as a "mirth-filled atmosphere," he exercised bad judgment that he now regrets and was out of character for him. The personal conduct concerns are mitigated.

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).⁴ In making the overall commonsense determination required under AG ¶ 2(c), I have to consider Applicant's poor judgment in smoking marijuana at his brother's party. Although he had been drinking, he was not intoxicated. It is particularly troubling that he gave no thought to his security clearance at the time. The Government can reasonably expect and require that persons with clearance eligibility are aware of, and will abide by, their security responsibilities, irrespective of whether they have handled classified information. That being said, security clearance decisions are not intended to punish applicants for past transgressions. Applicant has a stable lifestyle that is inconsistent with future drug use, and he understands the ramifications for any future violation. Based on the evidence before me, I conclude that it is clearly consistent with the national interest to continue his security clearance eligibility at this time.

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
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	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 or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Elizabeth M. Matchinski
Administrative Judge

⁴The factors under AG ¶ 2(a) are as follows:

(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.