



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



In the matter of:)
)
) ISCR Case No. 11-11138
)
)
Applicant for Security Clearance)

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

05/17/2013

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant smoked marijuana on two occasions in 2011 with a friend who served with him in the National Guard. Although Applicant showed extremely poor judgment, he reported his drug abuse on his security clearance application, and he does not intend to use any illegal drug in the future. Clearance granted.

Statement of the Case

On October 31, 2012, the DOD 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 grant him a security clearance. The DOD took action under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; 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.

Applicant submitted an undated response to the SOR allegations. He requested a decision on the written record without a hearing. On December 20, 2013, the Government asked for a hearing pursuant to ¶ E3.1.7 of the Directive. On February 7, 2013, the case was assigned to me to conduct a hearing to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. I scheduled a hearing for April 26, 2013.

At the hearing, Applicant appeared in person, and Department Counsel appeared by video teleconference. Two Government exhibits (GEs 1-2) were admitted without objection, and Applicant testified, as reflected in a transcript (Tr.) received on May 3, 2013.

Findings of Fact

The SOR alleged under Guideline H that Applicant used marijuana on two occasions around January 2011 (SOR 1.a). Under Guideline E, Applicant allegedly admitted that he continued to frequent a place and associate with a person who introduced him to marijuana and who continues to engage in criminal marijuana use and possession (SOR 2.a). When he answered the SOR, Applicant admitted that he had smoked marijuana as alleged under Guideline H. He denied the Guideline E allegation. While he saw this person weekly at the time that he smoked marijuana with him, he did not mean to indicate that he continued to see him. Applicant indicated that shortly after he was hired by his defense contractor employer, their contact ceased. Applicant's admission to using marijuana is incorporated as a finding of fact. After considering the pleadings, exhibits, and transcript, I make the following additional findings of fact.

Applicant is a 45-year-old high school graduate. He was married in May 1988 and divorced in March 1995. He has owned his current residence since February 2002. (GE 1.) From April 1994 until April 2009, Applicant served at the enlisted ranks in the Army National Guard (ANG), and he also held a civilian technical job with the ANG.¹ In April 2009, Applicant was honorably discharged at the rank of E-5 from the ANG due to his failure to meet weight requirements. On his discharge, he lost his WG-10 civilian position as well. Current service in the Guard was a condition of his civilian job with the ANG. (GEs 1, 2; Tr. 20, 31.) Applicant was unemployed until July 2011, when he began his current employment as a sheet metal installer for a defense contractor. (GE 1; Tr. 21, 26.) Applicant seeks his first security clearance. (GE 1.)

Applicant first tried marijuana at age 13. He continued to smoke marijuana occasionally, about once every few months, until he was around 15 years old. Applicant did not use any illegal drugs while he was in the ANG. (Tr. 22.) He took annual drug screens administered by the ANG (Tr. 33.), and there is no evidence that he tested positive for any

¹ When he applied for his security clearance, Applicant listed the dates of his military service with the ANG as June 1986 to April 2009, but the dates of his civilian employment as April 1994 to April 2009. (GE 1.) During his subject interview in July 2011, and at his April 2011 hearing, Applicant responded affirmatively when asked whether he was with the ANG from April 1994 to April 2009. (GE 2; Tr. 20.) While it is possible that Applicant's military affiliation began well before he assumed the civilian duties, the discrepancy was not explored during his interview or at his hearing.

banned substance. Applicant had a friend (Mr. X) from the Guard who was known to him to be an occasional user of marijuana. (Tr. 24.) Applicant socialized frequently with Mr. X, and their friendship continued after Applicant's discharge from the ANG. Within the span of one month in the spring of 2011, Applicant smoked marijuana with Mr. X on two separate occasions in the confines of Mr. X's home.² (GE 1; Tr. 17-18, 22-24, 28.) Mr. X provided the marijuana at no cost to Applicant. (Tr. 24.) Applicant attributes his admitted "failure in judgment" to being "pretty depressed at the time from being out of work for so long." (Tr. 23.)

Around May 2011, if not before then, Applicant applied to work with the defense contractor.³ On June 3, 2011, Applicant completed an Electronic Questionnaire for National Security Positions (e-QIP). Applicant responded affirmatively to section 23.a concerning any illegal drug use in the last seven years. He indicated that he used marijuana casually, only twice around January 2011, and that he did not intend any future use. (GE 1.) Applicant submitted to a pre-employment drug screen, which was negative for all substances tested. (Tr. 32.)

On July 5, 2011, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). When asked about the marijuana use reported on his e-QIP, Applicant indicated that he could not remember the exact dates of his illegal drug abuse. He admitted smoking one marijuana cigarette on two separate occasions at his friend's (Mr. X's) residence for recreational reasons. Applicant related that he had just passed a drug screen for his possible employment with the defense contractor, and he had "totally stopped" using marijuana. (GE 2.)

Applicant's start date with the defense contractor was July 11, 2011. (GE 2; Tr. 19.) On September 17, 2012, Applicant responded to DOD interrogatories concerning his drug use. Applicant affirmed the information previously reported of marijuana use in January 2011. Asked to provide a detailed history of all dates of use and frequency, Applicant indicated that he smoked one "joint" on two separate occasions "01/2011 to 01/2011." Applicant denied any intent to use marijuana again and that he had ever used any other illegal drug. To Applicant's knowledge, his employer did not have a random drug screening program or a substance use policy. Applicant answered yes to the following question: "Do you associate with persons who use illegal substances or frequent places where you have

² Applicant initially asserted that he smoked marijuana around January 2011. (GE 1; Tr. 18, 22-23.) When asked on cross-examination about the circumstances, Applicant responded, "I just happened to be at his house, he was outside doing the lawn, he took a break and he asked me if I wanted to have some with him." Applicant testified that his use of marijuana on the second occasion was under similar circumstances ("Basically it was the same thing because he spends a lot of time on his lawn."). (Tr. 25.) After I confronted him about what kind of lawn work his friend would be doing in January 2011, Applicant responded that he was possibly mixed up about the date of his marijuana abuse, although it occurred before he was hired by the defense contractor. (Tr. 28.)

³ On his e-QIP, Applicant gave a start date of May 2011 for his current employment. (GE 1.) However, as of his subject interview on July 5, 2011, he was unemployed and scheduled to start training with the defense contractor on July 11, 2011. (GE 2.) At his hearing, he testified that he was hired on July 11, 2011. (Tr. 19.) Applicant may have applied for his position in May 2011, although it is unclear.

reason to believe illegal substances are being used or are used in your presence?” About the frequency and nature of his association, Applicant explained:

One person; [Mr. X] who is a close friend as he was mentioned in the investigator’s report. I visit with him maybe once a week at his home. He uses occasionally [sic]. He does not deal or sell marijuana. (GE 2.)

Applicant now asserts that he did not mean to suggest that he was still associating with Mr. X as of September 2012. (Tr. 29.) When he answered the SOR, Applicant indicated that his contact with Mr. X ceased shortly after he was hired by the defense contractor. At his hearing, Applicant initially testified that their last contact “was probably at least a couple of months before [he] even applied.”⁴ (Tr. 18.) About the last time he saw Mr. X, Applicant responded that it was maybe a month after he last used marijuana with him. About why he stopped socializing with Mr. X, a friend of many years (Tr. 30) whom he listed as a personal reference on his e-QIP (GE 1.), Applicant explained that he had loaned Mr. X some money, and Mr. X had not repaid him (“And I was supposed to get it back from like his tax returns and I never saw it.”). (Tr. 25, 30.) Applicant has spoken with Mr. X by telephone since 2011 to see what Mr. X could do about getting him his money. (Tr. 25.)

Applicant does not intend to abuse any illegal drug in the future. He has not abused any prescription drug. (Tr. 26.) He spends his limited free time at home or with his mother. On the weekends, he sometimes visits a friend. (Tr. 32.)

Applicant received raises at work since July 2011. (Tr. 26.) It is unclear whether they were cost-of-living increases in pay or performance based. Applicant was also switched from second to first shift (Tr. 26.), although again, it is unclear why he was reassigned. In late March or early April 2013, Applicant was given a verbal warning and written up for retaliating against a coworker. This co-worker “was screwing around with [him] making a mess out of [his] area, so [he] made a mess out of his area.” The written warning was placed in his personnel file for one year, but he was not suspended from work. (Tr. 26-27.)

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,

⁴ Applicant was apparently referring to the last time that he smoked marijuana with Mr. X. When asked to provide a time frame for his last contact, Applicant responded, “I’m not sure of the date on what was given for my first interview, my initial interview, but I believe the hire was around or the interview was around January, I think. No, it was in January, sorry. The time frame should have been January that I smoked.” (Tr. 18.)

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 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).

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),⁵ 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 condition AG ¶ 25(a), “any drug abuse,” applies because of Applicant’s marijuana use on two separate occasions in 2011. Applicant’s occasional marijuana use during his early teen years was not alleged by the Government as raising current security concerns. In any event, it occurred so long ago to be mitigated under 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.” Disqualifying condition AG ¶ 25(c), “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia,” is implicated only in that Applicant had control of the marijuana on the occasions of his use. There is no evidence that Applicant sought out marijuana or possessed it for his future use, for the use of another person, or for sale or distribution.

Marijuana is a Schedule I controlled substance under the Controlled Substances Act (21 U.S.C. § 812). Under federal law, 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. Although Applicant did not hold a security clearance when he smoked the marijuana, he can reasonably be expected to have known that his drug use was illegal under federal law, given he had taken annual drug screens while in the ANG. Yet, there is no evidence of any illegal drug involvement by Applicant as an adult beyond the two occasions in the spring of 2011. Mitigating condition AG ¶ 26(a) is satisfied in that his abuse was “so infrequent.”

For Applicant to be eligible for a security clearance there must be adequate assurances of no future illegal drug involvement. Under AG ¶ 26(b), “a demonstrated intent not to abuse any drugs in the future,” can be shown by “(1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; or (4) a signed statement of intent with automatic revocation of clearance for any violation.” Applicant has not executed a separate signed statement acknowledging the automatic revocation of his security clearance for any future drug involvement, but he indicated in his notarized response to interrogatories that he did not intend any future illegal drug involvement. AG ¶¶ 26(b)(3) and 26(b)(4) apply, but the risk of recurrence depends in large part on whether Applicant has terminated his relationship with Mr. X, who provided him the marijuana. Applicant listed Mr. X as a

⁵Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act, are contained in 21 U.S.C. § 812(c).

personal reference on his June 2011 e-QIP. Applicant described Mr. X as a friend during his July 2011 subject interview, although their relations have since been strained because of Mr. X's failure to repay Applicant.

Applicant testified that he had a falling out with Mr. X shortly after he [Applicant] was hired by the defense contractor around July 11, 2011. When the DOD asked Applicant in September 2012 about any associations with persons who use illegal drugs, Applicant described Mr. X as a close friend, and he reported socializing with Mr. X "maybe once a week" at Mr. X's home. Applicant did not mention a loan to Mr. X that had not been repaid or any disagreement with Mr. X leading to a termination of their friendship. When he responded to the SOR sometime in November 2012, Applicant explained that he was describing the extent of his contact with Mr. X around the time that they used illegal drugs together, and he did not mean to suggest he had ongoing contact with Mr. X. Applicant would have had a stronger case in mitigation had he provided some evidence corroborating the termination of his friendship with Mr. X, but his self-reported drug involvement lends to his credibility generally. There is no evidence that marijuana played a significant role in Applicant's recreational lifestyle or in his usual socialization with Mr. X. Applicant's drug abuse appears to be an aberration, and he is not likely to jeopardize his employment by abusing any illegal drug 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.

The DOD alleged that Applicant exercised poor judgment within the context of Guideline E by continuing to associate with the person who introduced him to marijuana and engages in criminal drug activity (possessing and using marijuana). Applicant admits that he had weekly contact with Mr. X during his own drug use, but that their contact ended shortly after Applicant was hired by the defense contractor. As discussed under Guideline H, *supra*, Applicant told the DOD in September 2012 that he associates with "one person; [Mr. X] who is a close friend," and someone who uses marijuana occasionally. When confronted about that admission, Applicant did not deny that he wrote the statement: "I remember writing that statement but I could swear that there was another statement made after that, I believe, that said that that was meant for at the time that I was smoking with him when I was out of work." Applicant has offered little detail about his interactions with Mr. X, and the possibility of fabrication was considered in light of Applicant's failure to mention his dispute over money with Mr. X before his hearing. Yet, Applicant was also the

sole source of information about his drug involvement. Applicant exhibited candor at his hearing when asked about any reprimands at work.

Applicant's friendship with Mr. X may have ended around the summer of 2011, but three disqualifying conditions are applicable under AG ¶ 16 because of his close association with a known drug abuser:

(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;

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing; and

(g) association with persons involved in criminal activity.

Applicant's disclosures of his own marijuana use, and of his close friendship with a known marijuana abuser, are evidence of reform under AG ¶ 17(d):

(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.

By reporting his marijuana use on his e-QIP, Applicant has eliminated a significant source of vulnerability, so AG ¶ 17(e), "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress," is also established. There is some discrepancy in the record about Applicant's last contact with Mr. X. Applicant indicated in response to the SOR that he "no longer had contact with that person shortly after being hired at [his defense contractor employer]." At his hearing, he admitted that he had contacted Mr. X since then, by telephone, but it was to demand his money. (Tr. 25.) In the absence of any evidence showing that they continue to socialize, AG ¶ 17(g), "association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations," applies. With what little free time Applicant has, he spends it at home or with his mother. On the weekends, he visits with another friend. There is no indication that his current activities or associates use any illegal drugs. 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).⁶ Applicant gave no thought to the illegality of his conduct when, as a mature adult, he smoked marijuana twice with a longtime friend. However, Applicant did not seek to excuse his drug involvement, and he does not intend any future abuse. His lengthy service with the ANG weighs in his favor under the whole-person concept. Applicant should have brought his co-worker's inappropriate conduct to a supervisor's attention rather than retaliated, but the incident was not considered serious enough for his employer to suspend him. Based on all the facts and circumstances, I conclude that it is clearly consistent with the national interest to grant Applicant a security clearance 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
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

⁶The 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.