



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



In the matter of:)	
)	
)	ISCR Case No. 11-12412
)	
Applicant for Security Clearance)	

Appearances

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

04/10/2013

Decision

DUFFY, James F., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant refuted the Guideline E (Personal Conduct) allegation and mitigated the Guideline H (Drug Involvement) allegation. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on August 10, 2011. On December 3, 2012, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H and E. This action was taken under Executive Order (EO) 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) implemented on September 1, 2006.

On December 20, 2012, Applicant answered the SOR and requested a hearing. Department Counsel submitted the ready-to-proceed notification on February 4, 2013.

The case was assigned to me on February 11, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on February 15, 2011. The hearing was held as scheduled on March 19, 2013. At the hearing, Department Counsel offered Government's Exhibits (GE) 1 and 2 that were admitted into evidence without objection. Department Counsel's list of exhibits was marked as Hearing Exhibit (HE) 1. Applicant testified and offered Applicant's Exhibits (AE) A through C, which were admitted into evidence without objection. The record was held open until March 26, 2013, for Applicant to submit additional information. Applicant timely submitted an email (AE D) with an attachment (AE E) that was admitted into evidence without objection. Department Counsel's letter forwarding the post-hearing submission was marked as HE 2. DOHA received the hearing transcript (Tr.) on March 26, 2013.

Findings of Facts

Applicant is a 41-year-old senior subcontract administrator who works for a defense contractor. He began working for that defense contractor in December 2005. He earned a bachelor's degree in 1995 and a master's degree in 1999. He is married and has one child who is six years old. This is the first time that he has sought a security clearance.¹

The SOR alleged that Applicant used marijuana from about 1990 to at least February 2011 and that he falsified material facts about his marijuana use during a security clearance interview in September 2011. In his Answer to the SOR, Applicant admitted the drug involvement allegation and denied the falsification allegation. His admission is incorporated as a finding of fact.²

In responding to Section 23 (Illegal Use of Drugs or Drug Activity) on his e-QIP, Applicant was asked if he had illegally used drugs in the last seven years. He answered "Yes" to that question and disclosed the following:

Dates of use/activity

From (Month/Year): **01/2004 (Estimated)** To (Month/Year):
12/2010 (Estimated)

Type of controlled substance(s)

THC

Explain (nature of use/activity, frequency of activity and number of times used)

In the last 7 years I have smoked marijuana less than 5 times. I did not purchase marijuana during that time. The times were at a (sic) concert settings. I am willing to take a drug test at any

¹ Tr. 6-7, 22-25, 40; GE 1.

² Applicant's Answer to the SOR.

time being that I have not used marijuana for an extended time and do not plan on ever using it again.³

On September 1, 2011, an Office of Personnel Management (OPM) investigator interviewed Applicant as part of a security clearance investigation. The summary of that interview stated,

Subject answered 'Yes' to Question 23(a) on case papers indicating that he has used an illegal substance within the past seven years.

In or about 02/05, subject smoked marijuana on two occasions with unrecalled companions while skiing at [location specified]. Subject does not remember the identities of anyone he was skiing with or the specific dates. On each occasion, both in or about 02/05, subject was given a marijuana cigarette by unrecalled person(s); subject smoked a small quantity of the cigarette and passed it to another unrecalled person.

In 02/11, subject was attending a musical concert at [location specified]. An unknown person passed a marijuana cigarette to subject, who took a puff and handed it back. Subject does not know the identity of the person who passed him the marijuana.

On each occasion, both in 02/05 and 02/11, subject used less than ¼ gram of marijuana, which was smoked in the form of dry vegetation. Subject does not normally use marijuana or any illegal substances; the reason for use on these three occasions is described by subject as experimentation only. Subject's marijuana use has never caused or contributed to any problems. Other than twice in or about 02/05 and once in 02/11, subject has never used any illegal substances. These are isolated incidents and not reflective of a pattern of behavior. Subject has never participated in selling, distributing or manufacturing any illegal substances.

Subject was never professionally diagnosed as abusing drugs or being drug dependent; no treatment was ever obtained or recommended. He has completely stopped using marijuana, does not associate with anyone who uses drugs illegally, has never had a position drug test, and has no future intent on using marijuana, or any other drugs illegally.

Subject used marijuana voluntarily at age 35 on two occasions while skiing, and once at age 39 at the concert, each time due to indiscretion. Nothing regarding his marijuana use has potential to be used against him to pressure, coerce, blackmail, or otherwise influence future conduct or behavior. There is no likelihood of the recurrence of this conduct, and no related incidents, other than mentioned above.

³ GE 1.

Other than subject and the unrecalled companions while skiing and at the concert, [friend identified by name] is the only person aware of subject's marijuana use.⁴

In responding to interrogatories on October 16, 2012, Applicant indicated that he used marijuana monthly from 1990 to 2000 and that he used it three times from 2000 to 2011. He also indicated that his last use of marijuana was in February 2011 and that he had no intention of using it again. In the interrogatories, he adopted the summary of the OPM interview without making any modifications to it. He stated that he probably skimmed the summary of interview before adopting it.⁵

In denying the falsification allegation in his Answer to the SOR, Applicant stated,

I did not state that I never used illegal drugs on any other occasion during a September 1, 2011 interview. I do not recall being asked that question. I did not deliberately falsify material facts during this interview or in completing any of the questionnaires. The questionnaire for national security positions that I completed on 8/10/11, Section 23 Illegal Use of Drugs or Drug Activity requested information dating back 7 years. The questionnaire that I received on 10/3/12 requested any drug involvement. No time period assigned to it. I completed ever (sic) section honestly and to the best of my ability. I answered all the questions honestly during the interview.⁶

At the hearing, Applicant testified he began using marijuana in about 1990, most likely when he was a senior in high school. For about ten years, he used it about monthly. While in college, he would purchase marijuana from friends. After completing his education, his marijuana use effectively ceased. He stated that he started working and grew up at that point. Since 2000, he indicated that he used marijuana about three to five times. He recalled using marijuana twice with friends while skiing in 2005. His last use of marijuana occurred at a concert, but did not recall exactly when that concert was held. He thought that it was held sometime in late 2010 or early 2011, which explained why he used different dates in referring to that incident, *i.e.*, December 2010 in his e-QIP and February 2011 during his interview. At that concert, he ran into high school acquaintances that he had not seen in years, and they handed him the marijuana. He described that use of marijuana as "foolish" and indicated it was a great mistake. He said he never used any illegal drugs other than marijuana and never misused prescription drugs.⁷

⁴ GE 2.

⁵ Tr. 34-35; GE 2.

⁶ Applicant's Answer to the SOR.

⁷ Tr. 25-28, 30-51, 54-55; GE 2.

In testifying about the OPM interview, Applicant explained that he thought the investigator was only asking him about his drug involvement in the last seven years. Consequently, his statements about his marijuana use during that interview only addressed that seven-year period.⁸

At the hearing, Applicant was open and forthcoming about his marijuana use. I found his testimony credible. In his post-hearing submission, he provided a statement of intent to not abuse drugs in the future and acknowledged that any future drug abuse would subject him to an automatic revocation of his security clearance.⁹

Applicant has worked part-time in a ski shop since 1991. The owner of the ski shop submitted a reference letter stating that Applicant was a reliable and highly trustworthy individual. The owner indicated that Applicant ran the ski shop on many occasions in the owner's absence.¹⁰

Applicant's latest work performance evaluation from his full-time employment indicated that he performed his duties with the utmost integrity and the highest ethical standards. It also stated that he could be counted on to follow all corporate policies and that he consistently exceeded requirements. His performance evaluation for the preceding six years described him as a dedicated professional and valued team player.¹¹

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 that are to be 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, administrative judges apply the guidelines 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.

⁸ Tr. 19-21, 25-26, 28-35, 41-45, 54-55, 60-62; GE 2.

⁹ Tr. 19-55, 60-62; AE D, E.

¹⁰ Tr. 21-22, 26-27; AE A.

¹¹ AE B, C.

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 the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain a favorable 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 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 EO 10865 provides that adverse 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* Executive Order 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.

(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), and

(2) inhalants and other similar substances;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

The guideline lists several conditions that could raise disqualifying security concerns under AG ¶ 25. Two are potentially applicable in this case:

(a) any drug abuse; and

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

From 1990 to 2000, Applicant used marijuana monthly and purchased that substance from friends. From 2000 to 2011, he used marijuana three times, twice in 2005 and once in either late 2010 or early 2011. AG ¶¶ 25(a) and 25(c) apply.

Two drug involvement mitigating conditions under AG ¶ 26 are potentially applicable:

(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; 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 were used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation.

In the past 13 years, Applicant used marijuana three times. His latest use of marijuana was relatively recent when he was approximately 39 years old. His latest use of marijuana cannot be categorized as a youthful indiscretion or as experimental. He described his last use of marijuana as foolish and a great mistake.

Applicant is well aware of the negative consequences that illegal drug involvement could have on him, particularly his career. He signed a statement of intent that he will abstain from any illegal drug use and acknowledged that any future use of such substances would result in automatic revocation of his security clearance. He does not associate with drug users. His latest use of marijuana was an aberration from his recent abstinence that is not likely to recur and does not cast doubt about his current reliability, trustworthiness, and good judgment. He has not used marijuana for the past two years. He has acknowledged his wrongdoing and expressed remorse. He will not abuse drugs in the future. AG ¶ 26(a) and 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 a condition that could raise security concerns and may be disqualifying in this case:

(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.

On his e-QIP dated August 10, 2011, Applicant disclosed his use of marijuana during the previous seven years. He testified that, during his subsequent OPM interview, he thought the investigator only asked him about his drug abuse during that seven-year period. Of note, the portion of the summary of the interview addressing Applicant's drug abuse started with a discussion of his response to Section 23A of the e-QIP, which only addressed his use of marijuana in the last seven years. In later responding to interrogatories that clearly asked when he first used drugs, Applicant disclosed his entire history of marijuana use. Applicant's explanation for not disclosing his marijuana use between 1990 and 2000 during the interview is plausible and credible. The evidence supports a determination that Applicant was not attempting to conceal his earlier marijuana usage during the OPM interview and either Applicant or the OPM investigator misinterpreted or misunderstood the exchange between them. I find that Applicant did not intentionally fail to disclose the extent of his use of marijuana during the OPM interview. AG ¶ 16(a) is not applicable. Personal conduct security concerns are concluded for Applicant.

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 relevant 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 relevant 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 those guidelines, but some warrant additional comment.

Applicant is a mature adult. His performance evaluations vouch for his trustworthiness and reliability. He knows that his most recent use of marijuana was a foolish mistake. He understands the potential negative consequences that could arise from using marijuana in the future and is committed to abstaining from it. Overall, the record evidence leaves me with no questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated the security concerns arising from the drug involvement and personal conduct guidelines.

Formal Findings

Formal findings 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 Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

James F. Duffy
Administrative Judge