



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



In the matter of:)	
)	
)	ISCR Case No. 11-13627
)	
Applicant for Security Clearance)	

Appearances

For Government: Stephanie Hess, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

10/23/2013

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant smoked marijuana on two occasions after being granted a security clearance. He realizes the seriousness of his lapses of good judgment, and he intends no future illegal drug involvement. Clearance granted.

Statement of the Case

On January 24, 2013, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline H, Drug Involvement, and explained why it was unable to find that it is clearly consistent with the national interest to grant or continue his security clearance. The DOD CAF 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 a *pro se*, undated response to the SOR allegations. He did not indicate whether he wanted a hearing.¹ On August 15, 2013, Department Counsel indicated that the Government was ready to proceed to a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On August 22, 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. On August 29, 2013, counsel for Applicant entered his appearance, and I issued a notice scheduling a hearing for September 25, 2013.

I convened the hearing as scheduled. Three Government exhibits (GEs 1-3) and 15 Applicant exhibits (AEs A-O) were admitted into evidence without objection. Applicant and his former supervisor testified, as reflected in a transcript (Tr.) received by DOHA on October 4, 2013.

Findings of Fact

The SOR alleged under Guideline H that Applicant used marijuana on two occasions: once in May 2008 and once in September 2010 (SOR 1.a), while holding a DOD Secret clearance granted in August 2001 (SOR 1.b). Applicant admitted the allegations, expressing embarrassment and shame for his lapses in judgment. He denied any intent of future drug abuse. After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is a 31-year-old college graduate. Shortly after he earned a Bachelor of Science degree *cum laude* in May 2004 (AE A.), he began working as a full-time systems engineer for his current employer, a defense contractor. Applicant holds a DOD Secret clearance that was initially granted to him around August 2001.² His clearance went inactive until 2004, when he began his full-time employment. (GE 1; Tr. 26-27.)

Applicant did not use any illegal drugs in high school or college. Around May 2008, Applicant went camping with some friends.³ A “friend of a friend” brought some marijuana. Primarily out of curiosity but also feeling some peer pressure, Applicant took three to five puffs from a marijuana pipe passed to him around a campfire. (GEs 1-3; Tr. 28.) He hesitated before he smoked it because of his security clearance. (Tr. 40.)

¹ In his undated response to the SOR allegations, Applicant referenced a prior response. It is unclear whether he filed a previous answer in which he requested a hearing or whether he was referring to his interrogatory responses, which were submitted in evidence as Government exhibits. Applicant did not object to a hearing.

² Applicant gave a date for his security clearance as May 2001 on his security clearance application. (GE 1.) The DOD CAF alleged, and Applicant admitted, that he was granted a Secret clearance on August 22, 2001. (Answer.) At his hearing, he testified that his clearance was granted in 2000. (Tr. 27.) No evidence was presented confirming the exact date of the clearance grant, although presumably the DOD CAF would have access to the information.

³ When he was interviewed by an OPM investigator in September 2011, Applicant named four persons when asked about others involved in his marijuana use. (GE 3.) Two of these persons were listed as personal references on his security clearance application. (GE 1.)

Around September 2010, Applicant's house was robbed. Two weeks later, he and his then fiancée terminated their relationship, and she moved out of the house. That same week, Applicant's grandmother was admitted to the hospital for the last time. A female friend came over to Applicant's home to lift his spirits. She was accompanied by a friend of hers, who brought along some marijuana. Applicant was urged to smoke the drug to alleviate symptoms of anxiety and depression that he was experiencing. He hesitated at first because he did not want to use illegal drugs. In an acknowledged lapse of judgment, he smoked the marijuana in his home on that occasion. (GEs 1-3; Tr. 29.) Applicant did not think about his security clearance at that time. (Tr. 40.)

On August 22, 2011, Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP). He responded affirmatively to whether he had illegally used any controlled substance in the last seven years and to whether he had ever illegally used a controlled substance while possessing a security clearance. Applicant indicated that he used marijuana on two separate occasions, around May 2008 and September 2010, under the following circumstances:

Tried once while camping with friends at a bachelors party, and one other time with a group of friends when one friend was visiting from Florida. No excuses for either time, and dates are very much estimated because both were just a couple of poor decisions that were spur of the moment. (GE 1.)

On September 19, 2011, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). Applicant denied any illegal drug use other than what he had reported on his e-QIP. He averred that he smoked the drug for social reasons on the two occasions, and that he did not intend any future drug involvement. (GE 2.)

When he turned 30 years of age in July 2012, Applicant began reflecting on his life. It led him to seek medical treatment for symptoms of anxiety, which he had been experiencing for years, and which he felt contributed to his involvement with marijuana. Applicant was prescribed medications to alleviate his mental health issues. (AE G.)

In response to DOD drug interrogatories, Applicant indicated on December 2, 2012, that he never had a desire to use illegal drugs. He made some poor decisions out of curiosity in isolated situations that were not reflective of his lifestyle or of his usual friendships. To his knowledge, no one in his "direct group of friends" used illegal substances. Applicant indicated that he no longer socialized with the female friend involved in his 2010 drug use, and he denied that he could be pressured to use illegal drugs in the future. Applicant expressed regret over his poor decision to smoke marijuana, and he offered to take drug tests, starting immediately, to prove the sincerity of his intent not to abuse any drug in the future. (GE 3.)

On September 6, 2013, Applicant executed a statement of intent not to use illegal drugs again or to become involved with anyone who uses illegal drugs. He consented to automatic revocation of his security clearance for any violation. (AE K.) Applicant reiterated

at his hearing that he does not intend to use any illegal drug in the future. (Tr. 30.) He regards his decisions to smoke marijuana as “the two biggest mistakes of [his] life.” (Tr. 33.) The friend, who was involved in Applicant’s marijuana use in 2010, moved away from the area. Applicant no longer associates with her, even when she returns to visit family, because he does not condone her current life choices as reported by her brother. (Tr. 38.) Applicant does not believe that he would succumb to peer pressure to smoke marijuana in the future, primarily because he is being treated for generalized anxiety disorder with good effect. (Tr. 33.) Applicant is taking prescription medication and has frequent sessions with his physician to check his progress. (Tr. 35.)

Applicant’s involvement with marijuana did not negatively affect his work performance. He has no security violations on his record. (Tr. 34.) Both individually and as a member of a team, Applicant has received several achievement awards and other recognition from his employer since 2005. (AE E.) During the first half of 2010, Applicant was a lead investigator and software developer on a prototype data access and visualization tool. Applicant worked with two subcontractors and displayed technical acumen, passion for his work, and flexibility, as a member of an integrated team encompassing engineers from his company and outside partners. During the second half of the year, Applicant served primarily as a technical lead on a team of three to four persons. His technically challenging work met with wide acceptance and led, in part, to an overall annual assessment of exceeds requirements. (AE D.) In April 2011, Applicant transitioned to a new team, where he created new automation tools to expedite processes, took control of periphery tools, and worked to generate a set of comprehensive tools used in analysis. He earned an overall rating of exceeds requirements in 2011. (AE C.) In 2012, Applicant proved to be a key member of a sustainment engineering team for a radar program. (AE B.) Applicant is known among his managers and co-workers for his technical prowess, teamwork, dedication, and collaboration. (AEs G-J.)

Continuation of Applicant’s security eligibility is endorsed by his former supervisor, who monitored and evaluated his work performance over the last 2.5 years of her 39 years with the defense contractor before her recent retirement. Several months ago, Applicant informed her that he had violated the obligations of his security clearance by using marijuana on two occasions, the first time because of peer pressure and the second time because of personal reasons. She never observed him to be under the influence of any illegal drug at work. Applicant has advised her that he will not use any illegal drug in the future because he values his job with the defense contractor. (Tr. 15-24.)

Applicant still works in a classified area. His direct managers and the security department are aware of the concerns raised about his clearance eligibility because of his drug use. Applicant’s employer had wanted him to go on temporary duty to a military base to upgrade a radar system during the last week of September 2013. The trip was postponed because it conflicted with Applicant’s security clearance hearing. Applicant’s employer has another temporary duty assignment planned for him in November 2013. Applicant is expected to be a subject matter expert on the integration of a radar system. (Tr. 31-32.)

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 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),⁴ 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 separate occasions around May 2008 and September 2010. 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 physical control of the marijuana and pipe 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. AG ¶ 25(g), "any illegal drug use after being granted a security clearance," applies because Applicant's drug involvement occurred while he possessed a security clearance. 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. Applicant exercised extremely poor judgment in smoking marijuana while he held a security clearance.

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." is satisfied in that his drug abuse was "so infrequent." Applicant smoked marijuana on only two separate occasions, around a campfire in 2008 and then while socializing, albeit in his own home, with a friend and her companion, who provided the drug in 2010.

Applicant denies any intent to use any illegal drug in the future. 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

⁴Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act, are contained in 21 U.S.C. § 812(c).

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.” Of the four persons named by Applicant as being involved in his illegal drug use, two were listed as references on his e-QIP. One of his listed references was the female friend with whom he smoked marijuana in 2010. Yet, in December 2012, Applicant indicated that the friends with whom he usually socializes are not known by him to use illegal drugs. He was no longer associating with the female friend involved in his drug abuse in 2010. Applicant’s self-reported drug involvement leads me to accept as credible his uncorroborated, but also unrebutted, assertion that he does not now associate with anyone known by him to use illegal substances. AG ¶ 26(b)(1) applies. Furthermore, AG 26(b)(3), “an appropriate period of abstinence,” is established by his drug-free lifestyle over the past three years accompanied by his commitment to avoid any future drug use. Applicant has executed a signed statement acknowledging the automatic revocation of his security clearance for any future drug involvement, which is required under AG ¶ 26(b)(4).

Applicant did not set out to violate DOD policy contravening illegal drug use. His drug abuse appears to have been an aberration in his otherwise law-abiding lifestyle. Even so, he placed his continued security worthiness in doubt by failing to give appropriate consideration to his security responsibilities. Consideration of his security obligations led him to hesitate only momentarily before succumbing to curiosity and social pressure in 2008. His clearance was not even a consideration in his decision to smoke marijuana in 2010. However, Applicant understands that even limited, situational abuse is not justifiable. He regrets his serious lapses of good judgment and does not intend to repeat them. Concerns that he might use an illegal drug to deal with symptoms of anxiety are mitigated by his ongoing treatment under medical direction for this mental health issue. The drug involvement 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).⁵ Applicant smoked marijuana on a camping trip in 2008 and in his home in 2010. On both occasions, he was given the drug by others, but he was also an adult and longtime clearance holder with sensitive duties for a defense contractor. At the same time, his exposure to illegal drugs was limited and not indicative of his lifestyle generally. His record of dedicated contributions to his employer, and his self-report about his drug involvement,

⁵The 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.

weigh in his favor under the whole-person concept. With his direct managers and the security department aware that his security eligibility has been called into question, Applicant is not likely to jeopardize the job that he values by using any illegal drug in the future. Based on all the facts and circumstances, I conclude that it is clearly consistent with the national interest to continue Applicant's 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

Conclusion

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

Elizabeth M. Matchinski
Administrative Judge