



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



In the matter of:)	
)	
)	ISCR Case No. 12-01241
)	
Applicant for Security Clearance)	

Appearances

For Government: Candace Le'i Garcia, Esquire, Department Counsel
For Applicant: *Pro se*

04/08/2014

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, Applicant's eligibility for access to classified information is granted.

Statement of the Case

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on September 27, 2011. The Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) on June 14, 2013, detailing security concerns under Guideline H, Drug Involvement, and Guideline E, Personal Conduct. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *Adjudicative Guidelines For Determining Eligibility for Access to Classified Information* (AG), implemented on September 1, 2006.

Applicant received the SOR on June 25, 2013, and he answered it on July 11, 2013. Department Counsel requested a hearing before an administrative judge with the Defense Office of Hearings and Appeals (DOHA). Department Counsel was prepared to proceed on January 24, 2014, and I received the case assignment on February 10, 2014. DOHA issued a Notice of Hearing on February 25, 2014, and I convened the hearing as scheduled on March 25, 2014. The Government offered exhibits (GE) marked as GE 1 through GE 6, which were received and admitted into evidence without objection. Applicant testified. The Government also submitted a copy of a letter addressed to Applicant and dated January 22, 2014 as Hearing Exhibit 1. Applicant submitted one exhibit (AE) marked as AE A, which was received and admitted into evidence without objection. I held the record open until April 1, 2014, for Applicant to submit additional matters. Applicant timely submitted AE B - AE E, which were received and admitted without objection. DOHA received the hearing transcript (Tr.) on April 2, 2014. The record closed on April 1, 2014.

Findings of Fact

In his Answer to the SOR, Applicant admitted, with explanation, all the factual allegations of the SOR. His admissions are incorporated herein as findings of fact. He also provided additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant, who is 52 years old, works as a senior systems engineer for a DOD contractor. He has worked for his employer since 1987 and has held a security clearance for most of his employment. The record contains no negative employment information on him. Between August 2008 and December 2013, Applicant received 10 recognition awards following nomination by co-workers. His program manager describes him as a man of integrity, who does the right thing. He protects the security of the information with which he is entrusted.¹

Applicant graduated from college in June 1984 with a bachelor's degree in mathematics and a physics minor. He married in October 1992. He has a 19-year-old daughter and a 16-year-old son. His primary focus outside of work is his family. He plays softball and golf.²

When he completed his e-QIP in September 2011, Applicant acknowledged smoking marijuana on two occasions between August 2010 and April 2011. He has not smoked marijuana or used any other illegal drug since April 2011. He does not have an

¹GE 1 - GE 5; AE D; AE E; Tr. 16.

²GE 1; Tr. 16.

alcohol problem or financial problems. He has not been arrested for criminal or alcohol related matters.³

Applicant injured his hamstring playing baseball in 2009. He sought medical treatment with his regular physician, who recommended that he use over-the-counter pain medicine, but did not recommend further treatment. Sometime after his injury, he asked his doctor about physical therapy because the pain continued, but the doctor did not refer him for physical therapy. Recently, he sought the opinion of another physician for his injury as he continues to experience intermittent pain. He is awaiting an appointment with an orthopedist. He states that the pain in his hamstring occurs from sitting in tight places or after excessive activity such as moving and lifting.⁴

In August 2010, Applicant helped his brother move from his home to another location. Because his brother was moving to a smaller living space, they not only moved furniture into his brother's new living space, but into a storage unit. At the end of a long day of lifting and moving furniture, Applicant began to experience pain in his injured hamstring. He asked his brother for some ibuprofen to treat his pain. His brother did not have any ibuprofen, but offered him some marijuana. With some reluctance, Applicant accepted the marijuana. Applicant took a few puffs from the marijuana cigarette as did his brother. Applicant did not feel any effects from the marijuana nor did it relieve his pain. Applicant fell asleep within 30 minutes of smoking the marijuana and did not wake up until the next day. He then returned home.⁵

In April 2011, Applicant's brother again asked Applicant to help him move to another house, and Applicant agreed. After another day of moving and lifting furniture and boxes, Applicant again experienced pain in his hamstring. He again asked his brother for ibuprofen, but his brother did not have any ibuprofen. For a second time, Applicant's brother offered him marijuana to relive his pain. His brother told him that the marijuana was better than the marijuana Applicant last used and should relieve his pain. Although skeptical, Applicant smoked marijuana with his brother for a second time. Applicant estimated that they smoked the marijuana for approximately 5 minutes. Shortly after, Applicant's heart began to race, and he started to sweat. He felt like he was having an anxiety attack. He attempted to sleep, but he did not sleep well. He stayed the night at his brother's house. The next day he was paranoid and anxious. He drove home and told his wife.⁶

Applicant's brother has a medical marijuana card, which his brother used to purchase the marijuana Applicant smoked. Applicant does not have a medical marijuana card, and he has not purchased marijuana. Since April 2011, Applicant has

³GE 1 - GE 5.

⁴GE 6; Tr. 24, 26-27, 48.

⁵GE 1; GE 6; Tr. 17-18, 29-31.

⁶GE 1; GE 6; Tr. 18, 31-37.

not smoked or used marijuana. He signed a declaration of intent not to use marijuana in the future on March 25, 2014. He also stated this intent at the hearing, during his meeting with the investigator, and in his answers to interrogatories. Applicant sees his brother four to six times a year. Other than his brother, Applicant does not associate with anyone who uses marijuana. If he smells marijuana in the air at an event, he walks away.⁷

Applicant acknowledged that his decision to smoke marijuana was wrong, and he accepted responsibility for his poor decision. He also acknowledged that he knew when he smoked the marijuana that it was illegal. He indicated that while he was skeptical about smoking marijuana, he did not think about his security clearance or any adverse consequences should he smoke it. He did not think to drive to the store and purchase ibuprofen or Advil, which are the usual medications he uses to relieve his pain. After he smoked marijuana the second time, he recognized “what he had done wrong.” He reported his marijuana use because it was the “right thing to do”.⁸

Applicant knew he could not use illegal drugs while holding a security clearance. When he completed his 2011 e-QIP, he decided to refresh his memory on his employer’s drug use reporting policy as he was not clear about his employer’s policy. He did this by reading his employer’s adverse action documents. From this decision, he understood that he needed to report his marijuana use. He first reported his marijuana use to his employer in 2013 after he received the DOHA interrogatories. He understands that his employer has a “no drug” policy. His employer does not conduct random drug tests and only recently began annual security training addressing roles, obligations, and requirements of holding a security clearance.⁹

Finally, Applicant and his wife have a strict policy about drug use in their home because of their children. When his brother obtained his medical marijuana card in 2006 or 2007, Applicant informed his brother about the house drug policy. His brother has complied with the policy. His wife is aware of both times he smoked marijuana.¹⁰

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, which are used in evaluating an applicant’s eligibility for access to classified information.

⁷GE 1; GE 6; AE A; Tr. 17, 19-20, 23-24, 28.

⁸Tr. 19, 21-22, 29, 35, 37.

⁹AE B; AE C; Tr. 21- 22, 35, 37, 38-43.

¹⁰Tr. 19- 20, 23-24, 37-38.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. 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, an applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." An applicant has the ultimate burden of persuasion for obtaining 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 an applicant may deliberately or inadvertently fail to protect or 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

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.

AG ¶ 25 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

(a) any drug abuse (see above definition);

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

(g) any illegal drug use after being granted a security clearance .

Applicant smoked marijuana once in 2010 and once in 2011 to relieve pain in his leg. At the time he smoked the marijuana, he held a DOD security clearance. To smoke marijuana, he must possess it. A security concern has been established under AG ¶¶ 25(a), 25(c), and 25(g).

The Drug Involvement guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 26(a) through ¶ 26(d), and the following are potentially applicable:

(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; and,

(4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant credibly testified that he had no intent to use any illegal drugs in the future or to smoke marijuana in the future. His testimony reinforced similar statements in his answers to interrogatories and during his personal subject interview. He supported his testimony with a written declaration not to use any drugs in the future with automatic revocation of his security clearance for any violation. Applicant clearly understands that he acted inappropriately and in violation of policy when he smoked marijuana in 2010 and 2011. He has expressed regret for his actions and has taken steps to assure that he will not smoke marijuana again. His brother uses marijuana infrequently as his use is for medical purposes. While Applicant understandably has not ceased his association with his brother, his contacts with his brother are limited to six or fewer times in a year. Applicant does not associate with individuals who regularly use marijuana. Based on his credible testimony, Applicant is not likely to smoke marijuana in the future and his past use cannot be used to pressure or coerce him into mishandling classified information.

Applicant, however, has not fully mitigated the security concerns raised by his marijuana use because he smoked marijuana, an illegal drug, while holding a security clearance. When he did this conduct, he betrayed a sacred trust given to him by the United States government. He exercised poor judgment when he decided to use illegal drugs in his late forties. He did so when he knew it was against the rules at work and use of an illegal drug was not permitted while holding a security clearance. The SOR allegation in ¶ 1.a is partially mitigated.

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 the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

(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. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information:

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and,

(4) evidence of significant misuse of Government or other employer's time or resources; and

(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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

The Government alleges that Applicant's use of marijuana to self-medicate raises a separate concern under AG ¶¶ 16(d) and 16(e). Because Applicant's conduct involved an illegal drug, he violated the law and the rules concerning use of an illegal drug while holding a security clearance, which raises a security concern under AG ¶¶ 16(d)(3) and 16(e).

AG ¶ 17 provides conditions that could mitigate security concerns:

(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;

(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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant smoked marijuana on two occasions to relieve pain in his injured hamstring because he did not have his usual over-the-counter pain relief medicine. He reacted negatively to the marijuana the second time he used it. Because of his reaction

and his realization that he made the wrong decision to smoke the marijuana, there is little likelihood that he will ever smoke marijuana or use any other illegal drug in the future. Without his volunteering the information about his marijuana use, the Government would not have known about his use. He acknowledged that he was wrong to make this decision and he has shown remorse for his decision. Given his focus on his family and his household rules about drugs around his children, it is unlikely that he can be coerced, manipulated, or exploited to reveal classified information or mishandle classified information because of his past decision. He has mitigated the security concerns about his decision to self-medicate with marijuana. Guideline E is found in favor of 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 an 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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is well-educated and a highly productive employee. His work performance his recognition awards, and his supervisor's letter of recommendation reflect his employer's favorable view of his work. He generally complies with the law and the rules of the work place. During a one-year period of time, he twice used marijuana, an illegal drug, to relieve the pain in his hamstring. He knew that he was using an illegal drug, but did not think about the consequences of his use the first time he smoked the marijuana. After he

experienced some negative effects from the marijuana on his second use, he realized what he had done. When he smoked the marijuana, he had strict rules about drug use to protect his children, yet he decided to violate his own rules. His decision to smoke marijuana reflects a lapse in judgment on two separate occasions. His decision to acknowledge his conduct on his e-QIP and to accept responsibility for his poor decision making reflects good judgment. His testimony and his expression of an intent not smoke marijuana or use any other drugs in the future is credible. There is little likelihood that he will use any illegal drugs in the future.

Applicant made a conscious decision to smoke marijuana, an illegal drug, on two separate occasions while holding a security clearance. He knew that what he was doing was illegal, and he knew that his company had a “no drug” policy, but he chose to smoke marijuana to relieve his hamstring pain. He did not think about the impact of his use on his security clearance. He had many months in between his first and second use of marijuana to reflect about his decision to smoke marijuana in August 2010 and the impact of this decision on his security clearance. Even with this time, he made a second decision to smoke marijuana. His decision reflects negatively on his judgment and reliability, raising questions about his trustworthiness, and his ability to exercise good judgment under all circumstances. After weighing his credible testimony about his future intent not to use drugs, his honesty about his marijuana use on his e-QIP, his showing of remorse for his conduct at the hearing, and his employer’s high regard and trust for handling classified information against his decision to twice use marijuana for pain while holding a security clearance, I find that Applicant has mitigated the security concerns about his drug use.

Overall, the record evidence leaves me without questions or doubts as to Applicant’s eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his personal conduct and drug involvement under Guidelines E and H.

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

MARY E. HENRY
Administrative Judge