



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



In the matter of:)
)
) ISCR Case No. 15-01720
)
Applicant for Security Clearance)

Appearances

For Government: Robert J. Kilmartin, Esq., Department Counsel
For Applicant: *Pro se*

09/01/2016

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant smoked marijuana with varying frequency from July 1995 to November 2012. He purchased marijuana between July 1995 and January 2008. Applicant does not intend any future illegal drug involvement. Clearance is granted.

Statement of the Case

On August 26, 2015, 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 explaining why it was unable to find that it is clearly consistent with the national interest to grant him security clearance eligibility. The DOD CAF took the 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 responded to the SOR allegations on September 9, 2015, and he requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. On February 23, 2016, 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 February 25, 2016, I scheduled a hearing for March 21, 2016.

I convened the hearing as scheduled. One Government exhibit (GE 1) and seven Applicant exhibits (AEs A-G) were admitted into evidence without objection. Applicant testified, as reflected in a transcript (Tr.) received on March 30, 2016.

Findings of Fact

The SOR alleges under Guideline H that Applicant used marijuana with varying frequency from July 1995 to present (SOR ¶ 1.a), which as of the SOR was August 26, 2015, and that Applicant purchased marijuana from approximately July 2005 to January 2008 (SOR ¶ 1.b). When he responded to the SOR, Applicant denied any current use of marijuana because he had not used any illegal controlled substance since he applied for a clearance in November 2012. He admitted that he had previously purchased marijuana, but he added that the behavior had ceased eight years ago. After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is a 37-year-old manufacturing engineer with a bachelor's degree awarded in June 2001. He is currently pursuing a master's degree in engineering management. (AE G; Tr. 26.) Applicant started his career as an electrical designer. (Tr. 27.) He has worked for his current employer, a defense contractor, since March 2008. (GE 1; AE F.) Applicant seeks his first DOD security clearance. (Tr. 34.)

Applicant and his spouse began cohabiting in September 2009, and they married in August 2010. (GE 1.) They have a three-year-old son and are expecting their second child in October 2016. (Tr. 25.) Applicant purchased his first residence in October 2009. (GE 1; AE F.) He and his spouse now own a home in the suburbs. (Tr. 25.)

Applicant smoked marijuana recreationally from July 1995 to November 2012. The drug relaxed him and made him feel happy. (AE F.) The frequency of his use varied over the years. As a college undergraduate from September 1995 to June 2001, he used marijuana three to five times a week with college friends. (GE 1; AE F; Tr. 30.) Marijuana was available at "any given party." (Tr. 29-30, 39.) After college, Applicant continued to use marijuana one or two times a month with fellow members of a hard-rock band that Applicant and a friend (Mr. X) formed in 2001. There was some variation in band members until 2009 when the group solidified into Applicant, Mr. X, and three other friends. (Tr. 38-39.) The band last performed in September 2012 (Tr. 32), but Applicant continued to use marijuana to at least November 2012. (GE 1; AE F; Tr. 36.) Applicant used marijuana at his home or at a friend's home. Applicant purchased marijuana in small amounts on several occasions, at a cost of \$10 to \$50, between July 1995 and January 2008. Thereafter, the marijuana was provided to Applicant free of charge by Mr. X. (AE F; Tr. 32-33.) Applicant

has not had any contact with any of his former band friends since the group disbanded in 2012. (Tr. 32.)

On November 19, 2012, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86). In response to an inquiry concerning any illegal use of a drug or controlled substance in the last seven years, Applicant disclosed that he used marijuana recreationally, one to two times a month, from approximately July 1995 to November 2012. He responded negatively to whether he intended to use the drug in the future, and he stated, "No-expecting first child soon. My use has been steadily decreasing as I've gotten older, and it will stop in the near future." Applicant answered "Yes" to an inquiry concerning any purchase of an illegal drug in the last seven years, but then indicated that he bought marijuana when he was younger between July 1995 and January 2008. He indicated that he had not purchased any marijuana in several years. (GE 1; AE F.)

On January 8, 2013, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). Applicant reportedly disclosed that he smoked marijuana three to five times a week from 1995 to 2001 and one to two times a month from 2001 to "present." About his future intent, Applicant indicated that he planned on stopping his use of marijuana in the near future as he and his spouse were expecting a child. (AE F.)

On January 6, 2016, Applicant executed a statement of intent not to use any illegal drug in the future with automatic revocation of his security clearance for any violation. Applicant also reaffirmed his answer to the SOR allegations by denying use of any illegal controlled substance since 2012 and any purchase of marijuana in the past eight years. (AE E.)

Applicant reiterated at his hearing that he last used marijuana before his submission of his SF 86 in 2012. (Tr. 25, 37-38.) About the apparent discrepancy between his denial of no use of marijuana after his November 19, 2012 SF 86 and his reported admission in January 2013 that he used marijuana to "present" with a plan to stop in the near future, Applicant indicated that the statements were "copied verbatim from the SF 86 which [he] filled out in November 2012." (Tr. 36.) When asked about his failure to unequivocally declare during his interview that he had stopped his drug use in November 2012 and intended no future involvement, Applicant responded:

I guess what I am saying is I intend to stop. I don't intend to use in the future. I feel those as being two parts of the same statement, which is what I feel I wrote in the SF 86, that I do not intend to use anything in the future and my use will be stopping. (Tr. 37.)

Applicant does not currently associate with anyone who uses illegal drugs. He maintains contact with two friends from college, neither of whom uses illegal drugs. (Tr. 30.) Applicant is focused on his family and career. (Tr. 25-26.)

Applicant is well regarded by his co-workers for his dedication, professionalism, timely performance, attention to detail, and strong working relationships. Applicant's manager (AE C), an electro-mechanical technician (AE D), and the company's facility security officer (AE B) all endorse him for security clearance eligibility without reservations. Applicant's performance reviews for 2012 through September 2015 show that Applicant has consistently exceeded his employer's expectations in several core competencies. (AE G.) He was selected for a supervisory position over a field of highly qualified and capable co-workers. (AE B; Tr. 26.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered in evaluating an applicant's eligibility for access to classified information. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overall adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in

no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H, Drug Involvement

The security concern for drug involvement is set out in AG ¶ 24:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual’s reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations.

Under AG ¶ 24(a), drugs are defined as “mood and behavior altering substances,” and include:

- (1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens),¹ 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.” Disqualifying condition AG ¶ 25(a), “any drug abuse,” applies because Applicant illegally used marijuana from July 1995 to November 2012, including on a regular basis while in college from 1995 to 2001. There is no evidence to substantiate the allegation that Applicant was using marijuana “to present” as of the issuance of the SOR in late August 2015. AG ¶ 25(c), “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia,” applies because Applicant purchased marijuana from July 1995 to 2008. Applicant possessed marijuana when he used it once or twice a month from 2009 to November 2012, but it was given to him free of charge. There is no evidence that Applicant ever sold or distributed marijuana to others.

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 established only in that it ceased in late 2012. While his use of marijuana declined after college to once or twice a month, it cannot reasonably be characterized as infrequent in light of his regular use of marijuana in college and his 17 years of involvement. His use of marijuana persisted after his marriage, albeit largely associated with his band activities. It is difficult to fully mitigate the drug involvement concerns under AG ¶ 26(a) given the circumstances.

¹Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act, are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule I drug.

Applicant denies that he used any marijuana after he completed his November 2012 SF 86. Under mitigating condition AG ¶ 26(b), “a demonstrated intent not to abuse any drugs in the future” may be shown by the following:

- (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.

Concerning AG ¶ 26(b)(1), Applicant’s uncontroverted testimony is that he does not associate with anyone who currently uses illegal drugs. He testified that he has had no contact with his former band members since their last performance in September 2012. If true, it raises some unanswered questions about the circumstances of his subsequent use of marijuana and how he obtained the drug. He was not specific about the last date of his marijuana use at his hearing other than that he did not use marijuana after he submitted his SF 86. He gave a date of November 2012 for his last use on his SF 86. There is no evidence to counter his claim that the band disbanded or that he has had no contact with any of the band members since 2012, however. Concerning his college friends with whom he smoked marijuana, Applicant testified that he maintains contact with two friends from college, neither of whom uses illegal drugs. AG ¶ 26(b)(2) applies in that Applicant is long removed from the undergraduate college environment where his heaviest drug use took place, and it has been almost four years since he was in the music scene conducive to his recreational use after college.

Applicant’s present abstinence of three plus years is insufficient in and of itself to guarantee against future use of marijuana. He used the drug to relax and feel happy for some 17 years, after he married and while working for his current employer, albeit without a security clearance. However, it also must be acknowledged that Applicant’s present life circumstances are not conducive to illegal drug involvement. He has a young son and expects his second child in October 2016. Furthermore, Applicant has executed the statement of intent required under AG ¶ 26(b)(4). Applicant understands that any future drug abuse would be incompatible with his security clearance obligations. His record of exemplary work performance does not alone mitigate his history of extensive marijuana use, but it is a significant deterrent to any future illegal drug use. I am persuaded that Applicant can be counted on to abstain from any illegal drug involvement in the future. 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).² In making the overall commonsense determination required under AG ¶ 2(c), I have to consider Applicant's very poor judgment in abusing marijuana, especially after he started working for his current employer. His many years of disregard of the laws concerning the use of controlled substances bear negative implications for his security worthiness.

Applicant's candor about his marijuana use on his SF 86 and during his subject interview weighs in his favor under the whole-person evaluation. His professionalism, dedication, and reliability at work have earned him the respect and trust of his co-workers, who have no hesitation in recommending him for security clearance eligibility. While his many years of marijuana use are not condoned, it also appears that Applicant has put his drug use behind him.

Once a security concern arises, there is a strong presumption against the grant or continuation of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). At the same time, security clearance decisions are not intended as punishment for past wrongdoing, but rather involve an assessment of future risk that one may not properly handle or safeguard classified information. For the reasons discussed under Guideline H, *supra*, it is clearly consistent with the national interest to grant Applicant security clearance eligibility.

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

²The 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.

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.

Elizabeth M. Matchinski
Administrative Judge