



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



In the matter of:)
)
) ISCR Case No. 11-03952
)
Applicant for Security Clearance)

Appearances

For Government: Stephanie C. Hess, Esquire, Department Counsel
For Applicant: *Pro se*

January 9, 2012

Decision

DUFFY, James F., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant has mitigated the security concerns arising under Guidelines H (Drug Involvement) and E (Personal Conduct). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on September 30, 2010. On July 7, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H and E. DOHA acted 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 July 18, 2011, Applicant answered the SOR and requested a hearing. Department Counsel submitted the ready-to-proceed notification on October 12, 2011. The case was assigned to me on October 20, 2011. DOHA issued a notice of hearing on November 17, 2011. The hearing was convened as scheduled on December 7, 2011. The Government offered exhibits (GE) 1 and 2 that were admitted into evidence without objection. Applicant testified, called one witness, and offered one exhibit (AE) A, which was admitted into evidence without objection. The record was held open until December 14, 2011, for Applicant to submit additional information. Applicant timely submitted AE B and C, which were admitted into evidence without objection. Department Counsel's email noting she had no objection to the post-hearing submissions was marked as HE 1. DOHA received the hearing transcript (Tr.) on December 22, 2011.

Findings of Facts

Applicant is a 21-year-old employee of a defense contractor. He began working for his current employer in June 2010. He graduated from high school in 2008 and attended college for less than one year. He has never been married and has no children. This is the first time that he has sought a security clearance.¹

The SOR alleged that Applicant was charged with Possession of Marijuana in May 2009 and that he used marijuana with varying frequency from May 2009 through July 2010. The SOR also alleged that he deliberately falsified his e-QIP by failing to disclose the exact duration of his marijuana usage. In his Answer, Applicant admitted both of the drug allegations, but indicated that he was not certain of the exact month he stopped using marijuana. He stated he could have stopped using marijuana in May, June, or July 2010. He denied the falsification allegation and stated he misunderstood the question. His admissions are incorporated herein as findings of fact.²

In Section 23a of 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): **05/2009** To (Month/Year): **05/2009**

Type of controlled substance(s)

Marijuana

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

recreational use at a party on Memorial weekend³

¹ Tr. 4-5, 29-30, 39-40; GE 1.

² SOR; Applicant's Answer to the SOR.

³ Tr. 30-33; GE 1.

He also disclosed his marijuana offense in May 2009 in response to questions regarding his police record.⁴

At the hearing, Applicant testified he began using marijuana at the age of 16 in 2006. He would use it on weekends with friends. He did not use marijuana while in college because he was a student athlete who was subject to drug tests. He began using it again after he left college. He failed to qualify for military service in about January 2009 because he tested positive for marijuana during an induction drug test. He testified that he has never used any illegal drugs other than marijuana and never grew or sold marijuana. He has not been diagnosed as a drug abuser or as drug dependent. He has not received any drug counseling or treatment. He has not undergone any drug tests while working for his current employer. He stated that he no longer associates with drug users. He currently has two roommates neither of whom uses marijuana. He testified that he does not intend to use marijuana again.⁵

During an Office of Personnel Management interview in November 2010, Applicant reportedly indicated that he used marijuana from May 2009 to July 2010. He stated that he used marijuana about once a month with friends. He identified one friend with whom he used marijuana and indicated that he could not recall the names of other friends. He stated he obtained the marijuana either from friends or purchased it. He also advised the OPM investigator that he was rejected from the military because there was residue of marijuana in his system. The summary of that interview did not reflect if Applicant was specifically asked whether he used marijuana before his arrest in May 2009.⁶

In his Answer, Applicant acknowledged that he used marijuana “from at least May 2009 until approximately May, June, or July 2010.” He described his marijuana use as occasional. In addressing his marijuana arrest, he stated,

I admit on May 2009 (Memorial Holiday Weekend), [X] County [State A], I was stopped by the [X] County Sheriff Department. The Sheriff smelled the strong odor of marijuana coming from my vehicle while I was stopped at a stop sign and they were approximately 6 to 10 feet in the median. As a result, I was ordered to pull over and my car, passengers, and I were searched. I was issued a ticket with the charge of “Simple Possession of Marijuana” because I had a very small amount of marijuana in my pants pocket. [Y] Law Firm, P.A. represented me in this matter and I was ordered to perform services at a [charitable organization] during the period of January 7, 2010 to March 5, 2010.⁷

⁴ Tr. 33-36; GE 1.

⁵ Tr. 28-30, 32-33, 36-37, 39-43; GE 2.

⁶ GE 2.

⁷ Applicant's Answer to the SOR.

He also stated that he stopped using marijuana shortly before he started working for his current employer. As for the falsification allegation, he stated that the question was confusing and he did not understand how to answer it. At the hearing, he testified that he was rushed in filling out the e-QIP and misunderstood the question about marijuana usage. He also stated that he was arrested for an open container violation and pled guilty to illegal possession of alcohol, but did not remember the date of that arrest. After he filled out the e-QIP, he was also arrested for driving under suspension, which was later dismissed.⁸

At the hearing, Applicant was open and forthcoming about his marijuana use. I found his testimony credible. In his post-hearing submission, he swore that he will no longer use illegal drugs and acknowledged that any future violation would subject him to an automatic revocation of his security clearance.⁹

Applicant's supervisor testified that Applicant goes above and beyond the call of duty. He stated Applicant is reliable and trustworthy. He indicated that he trusts Applicant to watch his children and stated he would not let a drug user in his house. In his most recent evaluation, Applicant received the highest grades. In a reference letter, a manager described Applicant as one of his most dependable team players. The manager also indicated that Applicant displayed a high degree of integrity, responsibility, and ambition. He referred to Applicant as an exemplary employee.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 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

⁸ Tr. 27-28, 30-37, 43-47; GE 2. Applicant's Answer to the SOR. Applicant testified that he was not sure when the open container violation occurred. His driver's license was suspended because he failed to pay his insurance. His insurance was reinstated and the charge was dismissed. The open container and driving under suspension violations were not alleged in the SOR and will not be considered in applying the disqualifying conditions, but will be considered in assessing Applicant's credibility and applying the whole-person concept.

⁹ Tr. 27-47; AE C.

¹⁰ Tr. 18-26; AE A.

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 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. Three are potentially applicable in this case:

(a) any drug abuse;

(b) testing positive for illegal drug use; and

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

Applicant used marijuana with varying frequency from approximately 2006 to mid-2010. During that time period, he purchased marijuana. In May 2009, he was charged with possession of marijuana. He was fined and served community service for that offense. In approximately January 2009, he tested positive for marijuana use during a military induction drug test. AG ¶¶ 25(a), 25(b), and 25(c) are applicable.

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.

Applicant used marijuana approximately weekly for a number of years. During that period, he was 16 to 20 years old. He has not used marijuana since he started working for his current employer in June 2010. He denied ever using any other types of illegal drugs.

Applicant's use of marijuana was a youthful indiscretion. He is now well aware of its negative consequences. He signed a statement that he will abstain from any illegal drug use and acknowledged that failure to do so would result in revocation of his security clearance. He stated that he no longer associates with drug users. He currently

lives in a house with two roommates who do not use illegal drugs. He has made lifestyle changes that have taken him away from the drug scene. A sufficient period of abstinence has elapsed that demonstrates he put the illegal use of marijuana behind him. I find that 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 September 30, 2010, Applicant disclosed that he used marijuana in May 2009. He failed, however, to disclose accurately the dates that he started and terminated his marijuana use. He has consistently denied the falsification allegation. He testified that he was rushed in filling out the e-QIP and misunderstood the question about marijuana usage. At the hearing, he was open and forthcoming about his marijuana use. Applicant's supervisors indicated that Applicant is trustworthy and displayed a high degree of integrity. I find that Applicant misunderstood the question in Section 32 of the e-QIP and did not intentionally fail to disclose the exact duration of his marijuana use. 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 has excelled in his current job. His character references vouch for his trustworthiness and reliability. His use of marijuana was a youthful indiscretion that he has put behind him. He now understands the negative consequences of using illegal drugs and is committed to abstaining from them. Overall, the record evidence leaves me with no questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant has mitigated the security concerns raised under 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
Subparagraphs 1.a – 1.b:	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