



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



In the matter of:)	
)	
-----)	ISCR Case No. 14-04089
)	
Applicant for Security Clearance)	

Appearances

For Government:
Jeff A. Nagel, Esquire, Department Counsel

For Applicant:
Ryan C. Nerney, Esquire
The Edmunds Law Firm

November 17, 2015

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigation Processing (e-QIP) on May 22, 2013. (Government Exhibit 1.) On November 7, 2014, the Department of Defense issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H (Drug Involvement) and E (Personal Conduct) concerning Applicant. The 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) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on March 13, 2015 (Answer), and requested a hearing before an administrative judge.¹ Department Counsel was prepared to proceed on April 27, 2015. This case was assigned to me on May 4, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 11, 2015. I convened the hearing as scheduled on June 16, 2015. The Government offered Government Exhibits 1 and 2, which were admitted without objection. Applicant testified on his own behalf, and he submitted Applicant Exhibits A through J, which were also admitted without objection. DOHA received the transcript of the hearing (Tr.) on June 24, 2015. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

Applicant is 56, divorced, and has bachelor's and master's degrees. He is employed by a defense contractor and seeks to retain a security clearance. Applicant denied all the allegations of the SOR. He also provided additional information to support his retention of a security clearance.

Paragraph 1 (Guideline H, Drug Involvement)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he purchased and used marijuana while holding a security clearance.

Applicant first used marijuana from 1982 through 1987. During that time he used it several times a week. Applicant stopped using marijuana in 1987 and did not use it again for over 20 years. In 2009 Applicant used marijuana on a single occasion. Applicant used marijuana after being granted a security clearance in 1984. (Government Exhibit 1 at Section 23, Exhibit 2 at 3; Tr. 38-41.)

Concerning the event in 2009, he testified:

My wife, at the time, had gone to a yard sale and bought a jewelry box, and when she came home, she discovered a small amount of green substance, and she asked me what it was, and I smelled it, and I identified it as marijuana. And then I put it away. I didn't dispose of it right away, and then later on that night I got curious, and had a momentary lapse of judgment and I smoked it, about two puffs, and after that, you know, as soon as I smoked it, I regretted it, because I had a lot of paranoia. (Tr. 25.) (See Tr. 44-45, 48-49.)

¹The date referred to in the Transcript at page 7 is incorrect. That date, December 3, 2014, is when Applicant retained counsel.

Applicant has not used marijuana since 2009 and evinces a credible intent not to use marijuana in the future. He submitted a signed statement of intent with automatic revocation of clearance for any violation. (Applicant Exhibits A and B; Tr. 26-28.)

Paragraph 2 (Guideline E, Personal Conduct)

The Government alleges that Applicant's conduct in using marijuana while holding a security clearance is cognizable under this paragraph.

Mitigation

Applicant attends Alcoholics Anonymous (AA) meetings four to five times a week, and has since 2003. He has sponsored several people during his time at AA, and is well-respected by people in the program. He has been receiving professional psychiatric care for two years. His psychiatrist states, "Although he has a remote history of alcohol and marijuana use, there has [sic] been no incidents of relapse during the time I have been seeing him. I do not believe, at this time, that he requires any formal type of drug rehabilitation." (Applicant Exhibits D, E, G, and J at 1, 4; Tr. 28-29, 46.)

Applicant is a respected worker and colleague. His performance evaluations from 2010 through 2014 reflect that he consistently meets or exceeds expectations. (Applicant Exhibit F.)

Applicant stated that two co-workers who wrote letters for him know of his drug use. He is described by them as a person who is "truthful and honest," "without guile or deceit." (Applicant Exhibit J at 2-3; Tr. 33, 49.)

Policies

Security clearance decisions are not made in a vacuum. 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 to be used as appropriate 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 AG ¶ 2(a) describing 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. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that, “Any 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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. Security clearance decisions include, by necessity, consideration of the possible risk that the 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.

Finally, as emphasized in Section 7 of Executive Order 10865, “Any determination under this order adverse to an applicant shall be a determination 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

Paragraph 1 (Guideline H - Drug Involvement)

The security concern relating to the guideline 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. 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; Drug abuse is the illegal use of a

drug or use of a legal drug in a manner that deviates from approved medical direction.

I have considered the disqualifying conditions under AG ¶ 25 and especially considered the following:

(a) any drug abuse; and

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

I have considered all of the mitigating conditions under AG ¶ 26 and especially considered the following:

(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 from 1982 through 1987, and once in 2009, when holding a security clearance. Both of the disqualifying conditions have application to this case.

Applicant has, however, overcome the Government's case. His use was infrequent, the most recent use happened six years ago after over 20 years of abstinence, and it is very unlikely to recur. He informed DoD about his use in 2009, both on his questionnaire and in an interview, and credibly states that he will not use marijuana or other drugs in the future. Guideline H is found for Applicant.

Paragraph 2 (Guideline E - Personal Conduct)

The security concern relating to Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty or unwillingness to comply with rules or 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.

I have examined the disqualifying conditions under AG ¶ 16 and especially considered the following:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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; 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. . . .

I have also considered the mitigating conditions under AG ¶ 17, with particular emphasis on the following:

(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; and

(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 the untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant's conduct in using marijuana as described above while holding a security clearance was untrustworthy behavior. The incidents were minor in nature, are very unlikely to recur, the most recent occurred six years ago, and do not cast doubt on the individual's current reliability, trustworthiness, or good judgment.

Applicant has mitigated the single allegation under this guideline. Paragraph 2 is found 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 applicant's conduct and all the relevant circumstances. 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 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. My comments under Guidelines H and E, above, should be viewed under the whole-person concept as well. Applicant's conduct was not appropriate for a security clearance holder. However, under AG ¶ 2(a)(3), Applicant's conduct is not recent, last occurring about six years ago. Based on the state of the record, I find that there have been permanent behavioral changes under AG ¶ 2(a)(6). Accordingly, at the present time, I find that there is little potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)), and that there is also little likelihood of recurrence (AG ¶ 2(a)(9)).

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 has mitigated the security concerns arising from his drug use and personal conduct.

On balance, it is concluded that Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the Government's Statement of Reasons.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ 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.

WILFORD H. ROSS
Administrative Judge