



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



In the matter of:)	
)	
)	ISCR Case No. 14-04887
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Caroline E. Heintzelman, Esquire, Department Counsel
For Applicant: *Pro se*

02/29/2016

Decision

WHITE, David M., Administrative Judge:

In January 2013, Applicant was detected entering a military base with his fiancée’s medical marijuana pipe in the pocket of his jacket the morning after she borrowed the jacket to go smoke outside their home. He had recently experimented a couple times with her marijuana, and failed an employer-ordered urinalysis test. He has not abused any drugs during the past three years, and has no intention of doing so in the future. Resulting security concerns were mitigated. Based upon a review of the pleadings, testimony, and exhibits, eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on April 4, 2013. On February 5, 2015, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline H (Drug Involvement), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct). The action was taken under Executive Order 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 for Determining Eligibility for Access to Classified Information*, effective within the Department of Defense after September 1, 2006.

Applicant answered the SOR in writing (AR) on February 24, 2015, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on June 29, 2015, and the case was assigned to me on July 9, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on July 21, 2015, and I convened the hearing as scheduled on August 11, 2015. The Government offered Exhibits (GE) 1 through 5, which were admitted without objection. Applicant offered Exhibits (AE) A through G, which were admitted without objection, and testified on his own behalf. I granted Applicant's request to leave the record open until August 25, 2015, for submission of additional evidence. On August 14, 2015, Applicant submitted AE H, which was admitted without objection. DOHA received the transcript of the hearing (Tr.) on August 19, 2015.

Findings of Fact

Applicant is a 57-year-old employee of a defense contractor, where he has worked for seven years. He is a high school graduate, who has no military service. He has held a security clearance, on and off, during the past 15 years, including since 2009 in his current job, without incident. He has never married, but has lived with his fiancée for more than eight years. He has no children. (GE 1; AE E; Tr. 7-9, 41-42.)

Applicant admitted on his security clearance application, in his response to the SOR, and during testimony, that he used some of his fiancée's marijuana three times in December 2012 and early January 2013. His fiancée was undergoing treatment for cancer and had earlier been "prescribed" medical marijuana, which was legal under their state law at the time, to help her with the cancer treatment's side effects. Although he knew that it was a violation of his employer's no-drugs policy, and of Federal law, he decided to try smoking it with his fiancée after his state legalized recreational marijuana use and possession in December 2012. (AR; GE 1; GE 5; Tr.44-46.)

Applicant and his fiancée did not smoke in their house. On the evening of January 15, 2013, his fiancée borrowed his jacket to go outside and smoke some of her marijuana. The next morning, while Applicant was riding to work in a coworker's car and wearing that jacket, the gate guard at the base where they work detected the odor of marijuana and directed that they be searched. Applicant then found that his fiancée had left her marijuana pipe in his jacket pocket. He relinquished it to security personnel, who arrested him for possession of marijuana, questioned him, then turned him over to his employer's custody. He was ordered to undergo a urinalysis test, that was later reported to be positive for marijuana. (AR; GE 1; GE 3; GE 5; Tr. 46-49.)

Applicant agreed to enter his company's Employee Assistance Program (EAP), in which he successfully completed four substance abuse assessment and counseling

sessions between January 17, and February 5, 2013. The EAP counselor recommended no further services or treatment beyond those visits, but suggested that Applicant should undergo an initial and monthly random drug tests for the first year after his return to work. On January 25, 2013, he was served notice of a two-week formal disciplinary suspension that his employer imposed as a result of his violation of company policies and procedures regarding controlled substances. On February 27, 2013, he, his union, and his employer executed a one-year Last Chance and Release Agreement, permitting him to return to work subject to compliance with eight conditions as set forth in AE C. He received formal authorization to return to work on March 19, 2013. (GE 1; GE 3; GE 5; AE A; AE B; AE C; AE D; Tr. 54-55.)

Applicant was charged with a single misdemeanor count of possession of a controlled substance (marijuana) in Federal District Court, and pled guilty to that charge on May 20, 2013. Under a court-approved agreement with the prosecutor, he was granted a deferred entry of judgment and was ordered to serve one year of probation, obey all laws, and comply with the rules and conditions imposed by his probation officer. These conditions included abstinence from any drug or alcohol use, and submission to random urinalysis testing. Upon successful completion of this probation, the agreement called for the court to dismiss the proceedings without entry of a judgment of conviction. (GE 1; GE 3; GE 4; GE 5.)

Applicant's probation-related urinalysis program required him to call the supervising substance abuse treatment center every evening, and if his number came up he had to report the next day for testing. He was tested from one to four times per week during his probation, and estimated that he provided about 30 samples in total. All of the tests were negative, and after eight months he was informed that he had satisfactorily completed his probation and would be released early, with the charge and remaining conditions dismissed. All twelve of his monthly random samples under his employer's testing program also tested negative, and he resumed full employment status after the year he worked under the Last Chance Agreement. (GE 4; GE 5; Tr. 50-54.)

Applicant had experimented with marijuana occasionally while in high school during the early 1970s, but had not used it again until experimenting with it in December 2012. His last use of marijuana was several days before the January 16, 2013 incident involving his fiancée's pipe in his jacket pocket. He said that he tried her marijuana to feel the effects, because it provided her relaxation and helped her to sleep better. However, he decided that it was not for him because, instead of a calming effect, it made him anxious and prevented him from sleeping well. He credibly testified that he has no intention of ever abusing marijuana or any other drug in the future, and provided a signed statement of intent with automatic revocation of his clearance for any violation. His fiancée also quit smoking marijuana several years ago and no longer has any in their home, because she successfully completed her cancer treatments and felt responsible for all the trouble he got into when she left her pipe in his jacket pocket. (GE 1; GE 5; AE H; Tr. 43-44, 56, 60, 68-69.)

Two longtime coworkers, including his acting supervisor, wrote letters commending Applicant's good character, professional excellence, honesty, reliability, and trustworthiness. He earned Excellence Awards from his employer for his work and customer service in 2013 and 2015. (AE F; AE G; Tr. 32-36.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions (DCs) and mitigating conditions (MCs), which 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, these guidelines are applied in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 the 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, "[t]he 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." Section 7 of Executive Order 10865 provides: "[a]ny 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."

A person applying for access to classified information seeks to enter 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 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.

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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. The three DCs raised by the evidence in this case are:

- (a) any drug abuse (see above definition);
- (b) testing positive for illegal drug use; and
- (g) any illegal drug use after being granted a security clearance.

Applicant admittedly experimented with his fiancée's medical marijuana on three occasions during December 2012 and January 2013. He held a security clearance at the time. These facts support application of the foregoing DCs, shifting the burden to Applicant to prove mitigation of resulting security concerns.

AG ¶ 26 provides conditions that could mitigate the security concerns. The facts in this case support application of two of them:

- (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's marijuana use occurred three times more than three years ago, and was experimental in nature. He did not like the effect it had on him, he realized that it was a bad idea, and he successfully completed more than a year of intensive random drug testing. He shared some of the medical marijuana that his fiancée was using at the time in conjunction with her cancer treatment. She has since successfully completed that treatment and stopped using marijuana for the past several years. These incidents do not cast doubt on Applicant's current reliability, trustworthiness, or good judgment, and there is compelling evidence that drug abuse is unlikely to recur. Substantial mitigation under AG ¶ 26(a) was accordingly established.

Applicant's fiancée no longer uses marijuana or has any in their home, and he does not engage in recreational activities where peer pressure to use drugs might exist. He has been abstinent since that one brief period when he tried marijuana three times. He testified credibly and provided a signed statement of intent that he will not abuse any drugs in the future. These facts establish additional mitigation under AG ¶ 26(b).

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The two conditions raised by Appellant's actions are AG ¶ 31:

(a) a single serious crime or multiple lesser offenses; and

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Appellant committed minor violations of Federal law by smoking marijuana on three occasions as described above. He was not criminally charged with that marijuana use, nor was that alleged under this guideline in the SOR. He pled guilty to the marijuana possession offense that was alleged in the SOR, although he said that he did not know that his fiancée had left her marijuana pipe in the jacket which he wore going through the gate at the base the next morning. He was granted a deferred entry of judgment on that charge, which was dismissed after he successfully completed the resulting probation and drug testing program.

AG ¶ 32 provides conditions that could mitigate criminal conduct security concerns:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur

and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Appellant established substantial mitigation of any criminal conduct concerns under AG ¶¶ 20(a) and (d) for the reasons discussed above concerning the drug involvement aspects of this case. It has been more than three years since he briefly experimented with his fiancée's marijuana, and he clearly demonstrated sufficient remorse and rehabilitation to make recurrence unlikely.

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 conditions that could raise a security concern and may be disqualifying. The two DCs supported by some evidence are:

(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 . . .; and

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment.

Applicant knew that his experimentation with marijuana violated his company's policy prohibiting drug abuse, as well as Federal law. This both subjected him to adverse professional consequences and violated his commitment to his employer concerning drug abuse. Security concerns under AG ¶¶ 16(e) and (f) were accordingly raised by substantial evidence under these facts.

AG ¶ 17 describes conditions that could mitigate security concerns under the Personal Conduct guideline. The MCs that are plainly established by the evidence in this case are:

(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.

In addition to the discussion under the previous guidelines supporting these MCs, Applicant fully disclosed his activities to his employer, complied with all EAP and court-ordered requirements, and demonstrated an extended period of abstinence, thereby mitigating concerns arising from his personal conduct.

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 pertinent facts and circumstances surrounding this case. Applicant is a credible and mature individual who honestly admitted his brief lapse in judgment. His possession of his fiancée's pipe when entering the base more than three years ago was unknowing

and accidental. His family and employer are fully informed of his bad choices, and he has completely stopped any further drug abuse, thereby substantially eliminating the potential for pressure, coercion, or duress. Recurrence of such conduct is unlikely. Overall, the record evidence creates no doubt as to Applicant's present eligibility and suitability for a security clearance.

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 J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.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.

DAVID M. WHITE
Administrative Judge