



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



In the matter of:)
)
) ISCR Case No. 14-04924
)
Applicant for Security Clearance)

Appearances

For Government: Eric H. Borgstrom, Esquire, Department Counsel
For Applicant: *Pro se*

08/13/2015

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant indicated on his security clearance application that he smoked marijuana recreationally, two or three times a year, between June 2011 and July 2013. He now asserts that he used marijuana only twice. There is no evidence that he has used marijuana since becoming employed by a defense contractor in February 2014, and he intends no future illegal drug use. However, his inconsistent statements about his marijuana involvement make it difficult to find sufficient reform. Clearance is denied.

Statement of the Case

On November 5, 2014, 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 continue his security clearance eligibility. The DOD CAF took the action under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (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 December 3, 2014, and he requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On April 24, 2015, 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 April 30, 2015, I issued a Notice of Hearing scheduling the hearing for May 27, 2015.

I convened the hearing as scheduled. The Government submitted two exhibits (GEs): an Electronic Questionnaire for Investigations Processing (e-QIP) as GE 1 and an unsigned report of a personal subject interview as GE 2. The e-QIP was admitted without objection. Applicant objected to the report of interview in that it did not accurately report what he stated regarding his drug use. I sustained the objection due to lack of authentication under ¶ E3.1.20 of the Directive. The Government called Applicant as a witness. Applicant also testified on his behalf on direct examination, but he did not submit any exhibits.

At Applicant's request, I held the record open for two weeks after his hearing for him to submit documentation. On June 10, 2015, Applicant submitted five character references, which were marked as Applicant exhibits (AEs) A through E. Department Counsel filed no objections by the June 30, 2015 deadline, so the documents were accepted into the record.

Findings of Fact

The SOR alleges under Guideline H (SOR 1.a) that Applicant used marijuana from approximately June 2011 to at least July 2013 with varying frequency. When he responded to the SOR, Applicant admitted that he used marijuana, but on only two occasions, once in 2011 and in 2013. After considering the pleadings, exhibits, and transcript, I make the following findings of fact:

Applicant is a 39-year-old high school graduate. He and his spouse have been married since July 2013. Applicant has a 22-year-old son and a 12-year-old daughter from previous relationships. Applicant's spouse has an 18-year-old son and a 14-year-old daughter. As of May 2015, the three younger children were living with Applicant and his spouse. (GE 1; Tr. 35.) Applicant has worked as a pipefitter for his current employer, a defense contractor, since mid-April 2014. (GE 1; AEs A, D; Tr. 21.) Applicant's spouse also works for the defense contractor, but as an electrical designer. (AE B.)

Applicant testified that he and the mother of his daughter lived together for four years, from 2003 until late 2007. After they ended their relationship, his daughter's mother was sent to federal prison for trafficking cocaine with intent to sell in 2008. Applicant became a single dad for his daughter, who has lived with him since birth. As a finance manager at an automobile dealership, Applicant worked long hours. He resigned from his

job and took a position as a bar porter at a casino to have more time for his daughter. For the next five years, he was involved in a protracted custody battle with his daughter's maternal grandmother until he was granted legal custody around March 2014. (GE 1; AE B; Tr. 46, 49-52.)

Applicant left his job at the casino in January 2011, for reported "personal reasons." (GE 1.) He elaborated at his security clearance hearing that his spouse (then girlfriend) wanted him to stay at home with their children. (Tr. 52-53.) He was unemployed until November 2011, when he obtained seasonal employment for a package delivery company. In March 2013, he began working in the insurance industry while also delivering newspapers part time. In February 2014, he accepted an offer of employment with his current employer, although he did not start work until April 2014. (Tr. 21, 53-54.)

Around March 2014, the defense contractor requested Applicant complete an Electronic Questionnaire for Investigations Processing (e-QIP). Applicant filled it out at home one night in his own handwriting. (Tr. 22-23.) The following day, Applicant turned in the handwritten form to his employer's security office, who then prepared a typed version for Applicant's review and signature. Applicant recalls reviewing the form for its accuracy, and making several corrections, before signing a final version on March 3, 2014. (GE 1; Tr. 22-25, 42-44.) The final version (GE 1) shows he responded "Yes" to whether he had illegally used any drugs or controlled substances in the last seven years. He indicated that he used marijuana for the first time in June 2011 and for the last time in July 2013. In response to inquiry concerning the nature of use, frequency, and number of times used, he indicated that it was recreational, two to three times a year. He answered "No" to whether he intended to use the drug in the future and offered the following explanation: "Tried it a couple of times with friends, dislike taste, feel, nature of it." (capitals in original) (GE 1.) Applicant maintains that he completed his security clearance application with 100% integrity. (Tr. 58.)

At his security clearance hearing, Applicant confirmed that he had provided the aforesaid information about his drug use on his handwritten form, with the following exception:

Everything but the two to three times per year because that was a question that was asked to me verbally with the agent. And he said we need to—and I said I only did it twice. And I said these dates were significant dates in my life, and that's how I know that it was at these two times. (Tr. 26-27.)

When asked how the frequency of his marijuana use came to be reported on his e-QIP as two to three times a year if he only used it twice, Applicant responded, "Then that was an oversight on my behalf." (Tr. 27-28, 68.)

Applicant acknowledged that he was interviewed by a government investigator a few weeks after he completed his e-QIP. When shown a report of his subject interview apparently indicating that he used marijuana three to four times, Applicant confirmed that

the information, including the circumstances of his drug use, was accurate with that one exception. (Tr. 36-40.)

Applicant testified at his hearing that he first used marijuana in June 2011, on his birthday. “[His] cousin had—had just had a huge party. And I was hanging out with those guys. Tried it then.” He also testified that after he took “maybe two pulls” from a bowl, he started choking and decided that he did not care for it. He denied any additional use of marijuana until July 1, 2013, when he was “hanging out with—with those same guys right before [he] got married.” On their urging, he tried marijuana again. When asked whether he recalled how many times he had pulls on the joint, Applicant responded, “I actually consumed the whole thing with them.” (Tr. 29-33.) Applicant added that after he consumed an entire joint, “paranoia set in.” When later asked why he smoked an entire joint if he disliked the drug, Applicant responded that he did not mean that he smoked all of it:

Because it was a group of people and—and it was the—I didn’t just do—it was maybe—maybe three because it was a group of people. So by the—so I—so answering the question, it was—I was there the whole time. Maybe two pulls. But it wasn’t like I sat there and it was you and I and we went back and forth until it was gone. I sat there during the—during the whole time with them.

He reiterated that he had smoked marijuana only twice in his life and that he took only a couple of puffs of marijuana each time he used it. (Tr. 71.) Applicant knew when he smoked marijuana that it was illegal to do so. (Tr. 59.)

Applicant denies any illegal drug use since becoming employed by a defense contractor and any continuing association with illegal drug users. There is no evidence that Applicant has used any illegal drug since he accepted an offer of employment with the defense contractor or that he continues to associate with known drug users. On cross-examination, Applicant was asked about when he last saw the two friends who provided him the marijuana he smoked in 2013. Applicant responded initially that he had not seen them since 2011. He later corrected the date to 2013 when asked by Department Counsel whether he meant 2013, and claimed that he had a “huge falling out” with these friends, who reportedly said a couple of things about his wife during his wedding. Additionally, Applicant asserted that one of the friends stole money out of his car. (Tr. 34.) Applicant explained that he had “to change his number” a couple of times because he did not want to be around people who were not engaged in family-oriented or productive activities, and that if those persons were really friends, they would have been looking out for his and his daughter’s best interest. He then proceeded to deny ever being around anyone using marijuana apart from the two times that he had used the drug. (Tr. 47-48.) He later acknowledged that he had socialized with persons who used illegal drugs in his presence where he did not partake.¹ (Tr. 36, 45-48.) Applicant had previously admitted that he had a

¹ Applicant asserted that his former drug-using associates “all went by the wayside.” He testified inconsistently about whether he had been at social gatherings where marijuana was present, but he had not used:

Q: Have there been other times you’ve been at social gatherings where there’s been

“hard time sort of letting the—the hanging-out lifestyle go in 2011.” The evidence substantiates that at least in 2011, his social circle included persons who smoked marijuana in his presence. About his use in 2013, he wanted to have a big party for his wedding. He testified that reuniting “these people” led to his marijuana use. (Tr. 54-55.)

Applicant asserts that his outlook on life has been “completely redirected due to the joy of [his] children, the joy of being married just as well.” (Tr. 57.) There is other evidence that suggests a change to a drug-free lifestyle. Applicant has never tested positive for an illegal drug. He apparently took a hair follicle test for his employment with the defense contractor and passed. (Tr. 59.)

Applicant’s spouse has seen Applicant mature over the years since they first met in 2007. He is a father figure to her two children, whose fathers neglected them over the years and provided no support of any kind. She attests that illegal drugs are not part of their life together. Applicant’s spouse indicates that Applicant was hesitant to disclose his marijuana use on his security clearance application, but he listed it, even knowing that it could jeopardize his employment. (AE B.)

Applicant has a favorable work record. He has received three pay increases since April 2014. (Tr. 60.) An operations manager at work attests to the positive and professional attitude Applicant has displayed in fulfilling his job duties. (AE D.) Applicant’s immediate supervisor, who has known Applicant since April 2014 and supervised him since March 2015, has found Applicant to be respectful of privacy and regulations, including handling classified information. He considers Applicant to be an exemplary employee and a great asset to their team. Applicant has been nominated by upper management for a management training program. (AE A.)

A church elder, who has known Applicant since approximately May 2014, has completed 23 years with Applicant’s employer. He considers Applicant to be a person of good character. (AE C.) Applicant’s cousin is an associate minister at the church that he

marijuana present even if you weren’t using it yourself?

A: No.

Q: You’ve never been to a party where there have [sic] been other people using marijuana?

A: No.

Q: So the only two times you were around marijuana are the two times you used it?

A: Correct. Yes. And those are because those are the people that I were—that I was around.

Q: Okay. But you made it sound like at one point in your life you were around a different crowd.

A: Correct.

Q: And that crowd is the crowd that used the drugs.

A: Correct. Yes. Yes. Excuse me. Yes. I’ve been around it and not used it when I was in that social circle. It never appealed to me. Therefore, it was never anything that I wanted to try. With—with these situations that have come up, I’m not sure what I was thinking or—or what cognitive decisions that I was making. But it was well, here, I’ll try this. And as I tried it, it was something that I said no. Now I really understand why it’s nothing that I’m interested in at this point. (Tr. 48-49.)

and Applicant attend. He attests to their close family relationship and to Applicant's honesty and church involvement. (AE E.)

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),² 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 used marijuana recreationally at least two times between June 2011 and July 2013. Applicant knew when he smoked marijuana that it was illegal to do so. AG ¶ 25(c), "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia," applies only in the sense that he had physical control of marijuana when he was given it by friends in social settings. He did not otherwise possess it and never purchased it.

Applicant asserts that he has not used marijuana in the past two years, and that he has no intent to use marijuana in the future. In assessing whether security concerns may have become attenuated by the passage of time to no longer cast doubt on an individual's reliability, trustworthiness, or good judgment, the DOHA Appeal Board has consistently held that it is a question for the administrative judge to resolve based on the evidence as a whole. See e.g., ISCR Case No. 14-01847 (App. Bd. Apr. 9, 2015); ISCR Case No. 11-12165 (App. Bd. Jan. 29, 2014). The extent of drug involvement is a consideration when determining whether enough time has passed. Applicant indicated on his security clearance application that he used marijuana two to three times a year between June 2011 and July 2013. He now asserts that he used marijuana only twice. Whether he used marijuana twice or as many as six times, AG ¶ 26(a) applies because his drug involvement was limited in frequency:

²Schedules 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 controlled substance.

(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.

While the passage of two years without any drug involvement is viewed favorably, it is not sufficient to preclude the risk of recurrence if other evidence shows a failure to fully commit to a drug-free lifestyle. Under AG ¶ 26(b), "a demonstrated intent not to abuse any drugs in the future" can be shown by:

- (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.

Particularly with respect to AG ¶ 26(b)(1), Applicant did not bolster his case in mitigation by initially testifying that he had been around marijuana only on two occasions, in June 2011 and in July 2013 when he smoked it. Although he later admitted that persons in his social circle in 2011 smoked marijuana in his presence at times when he did not partake, Applicant engendered doubts about his credibility in another aspect. He indicated on his e-QIP and at his hearing that he tried marijuana and did not like it. He testified at his hearing that he smoked an entire joint, which caused him paranoia, when socializing with his friends in July 2013. When asked why he smoked a full joint if he did not enjoy it, he attempted to recant, testifying to the effect that he had stayed with others smoking marijuana the whole time, but took "maybe two pulls." It is more likely than not that Applicant attempted to downplay the extent of his marijuana use and association with drug users at his security clearance hearing, to protect his employment and chance of being granted a security clearance. Applicant is credited with disclosing some marijuana involvement on his e-QIP. Even so, his inconsistent testimony about salient aspects of his marijuana use raise doubts about his judgment and whether he can be counted on to comply with the DOD prohibitions against illegal drug use, especially if he finds himself in a situation where others are using illegal drugs. His lack of candor at times when testifying about his drug involvement is difficult to reconcile with his reputation for honesty and integrity held by his work and personal references. His evidence in reform falls short of overcoming the security concerns raised by his knowing involvement in illegal drug use.

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).³ In making the overall commonsense determination required under AG ¶ 2(c), I have

³The factors under AG ¶ 2(a) are as follows:

to consider that Applicant's marijuana use was limited and that he disclosed on his security clearance application that he had used marijuana within the year of his application. Applicant has expressed regret over his illegal drug use. Yet, his false testimony about some aspects of his drug involvement engenders doubt about whether the Government has full knowledge about his drug abuse history.

The investigative and adjudicative process requires, and the Government has a legitimate expectation, that applicants for security clearance eligibility will respond accurately to inquiries. His contradictory testimony at times about his drug involvement raises considerable doubts about his judgment, reliability, and trustworthiness.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990.). For the reasons noted above, based on the facts and the adjudicative guidelines that I am required to consider, I am unable to conclude that it is clearly consistent with the national interest to grant security clearance eligibility for Applicant at this time.

Formal Findings

Formal findings for or against Applicant on the allegation set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Elizabeth M. Matchinski
Administrative Judge

(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.