



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 14-03334
)	
Applicant for Security Clearance)	

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: Nicole Pruss, PhD, Personal Representative

03/31/2016

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant mitigated security concerns raised by his past marijuana use and employment termination after revealing his past drug use on a security clearance application. Over five years have passed since Applicant last used marijuana. In the intervening years, he has established a track record of responsible behavior, leading to a conclusion that his past security-significant conduct is unlikely to be repeated. Clearance is granted.

History of the Case

On March 30, 2015, the Department of Defense (DOD) sent Applicant a Statement of Reasons (SOR), alleging that his past conduct raised security concerns under the drug involvement and personal conduct guidelines.¹ On April 14, 2015, Applicant answered the SOR and requested a hearing to re-establish his eligibility for access to classified information. (Answer)

¹ This action was taken under Executive Order (E.O.) 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 implemented by DOD on September 1, 2006.

On July 31, 2015, Department Counsel indicated that the Government was ready to proceed to hearing. I was assigned the case on August 31, 2015, and after conferring with the parties, scheduled the hearing for September 29, 2015. The hearing was rescheduled, with the agreement of the parties, for October 6, 2015.²

At hearing, Department Counsel offered three exhibits (Ex. 1 – 3). Applicant testified and post-hearing submitted two exhibits (Ex. A – B).³ All exhibits were admitted into the record without objection. The hearing transcript (Tr.) was received on October 14, 2015, and the record closed on October 23, 2015.

Findings of Fact

Applicant, 35, is divorced with no children. His employment history primarily reflects work as a security guard. Currently, he is a supervisor for a private security for a large retail shopping mall. He manages about 60 security guards and works approximately 70 hours per week. He is also pursuing an undergraduate degree and, as of the hearing, was a few credits shy of receiving a degree in criminal justice.

In 2007, Applicant was working as a federal contractor when, on short notice, he was asked to deploy overseas in support of a U.S. Government (USG) program. Applicant accepted the year-long overseas assignment and deployed. He was first granted a security clearance in connection with this deployment. Upon Applicant's return to the United States, his efforts on behalf of the USG were recognized by another government agency. He was then hired as a federal contractor for the other agency.

Applicant acknowledges he used marijuana on two occasions while working as a federal contractor and after being granted a security clearance. In 2008, shortly after returning to the United States from the overseas deployment, Applicant was at a social gathering when a marijuana cigarette was passed around. He took "two drags" from the cigarette. He again used marijuana in 2010, when he was at another social function and smoked from a hookah. After inhaling, Applicant realized that the hookah contained marijuana and did not use the hookah again. (Tr. at 41; Ex. 3)

Applicant disclosed his marijuana use on his 2012 security clearance application (SCA). (Ex. 1 at 31) He received a reprimand from his former employer for failing to report the drug use upon being hired. Applicant's former employer cited the reprimand and multiple incidents of being late to work as a basis for his discharge in June 2012.

Applicant acknowledges he exercised poor judgment in using marijuana while holding a security clearance and the conduct that led to his job termination. He no longer associates with those he used marijuana with in the past. He submitted a signed statement reflecting his intent not to use marijuana or any illegal drugs in the future, and

² See Hearing Exhibit (Hx.) I, scheduling correspondence and notice of hearing. See *also*, Hx. II, documents establishing that, at the time of the hearing, Applicant was being sponsored for a clearance.

³ Hx. III, Department Counsel acknowledges receipt of Applicant's post-hearing exhibits and notes that the Government has no objection to their admission.

further declared that if he violated his written promise the DOD could “permanently deny me any type of security clearance for life.” (Ex. B) Since 2010, Applicant has voluntarily submitted to workplace drug screens, including random drug screens, and passed them all. He is regularly on time for his job. His exemplary work performance resulted in his promotion to his current supervisory position.

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are eligible for access to classified information “only upon a finding that it is clearly consistent with the national interest” to authorize such access. E.O. 10865, § 2.

When evaluating an applicant’s eligibility, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15.

Administrative Judges are responsible for ensuring that due process proceedings are conducted “in a fair, timely and orderly manner.” Directive ¶ E3.1.10. Judges make certain that an applicant receives fair notice of the issues raised, has a reasonable opportunity to litigate those issues, and is not subjected to unfair surprise. ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014).

In resolving the ultimate question regarding an applicant’s eligibility, an administrative judge must resolve “[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security.” AG ¶ 2(b). Moreover, recognizing the paramount importance of protecting national security in all suitability determinations, the Supreme Court has held that “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

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. 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 an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline H, Drug Involvement

The security concern regarding illegal drug involvement by a current or a prospective clearance holder is explained at 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.

Applicant's past marijuana use raises the drug involvement concern and the following disqualifying conditions:

AG ¶ 25(a): any drug abuse; and

AG ¶ 25(g): any illegal drug use after being granted a security clearance.

Applicant's marijuana use qualifies as "drug abuse," as defined by the Directive.⁴ Furthermore, his marijuana use in 2008 and 2010, although limited, took place after he was granted a security clearance.⁵ Accordingly, both disqualifying conditions apply.

Applicant's last use of marijuana occurred more than five years ago. Since then, he has taken and passed several drug screens and stopped associating with drug-using individuals. He returned to school and is on the verge of attaining his undergraduate degree. He has also amassed a good employment record at his current place of employment. Furthermore, he credibly testified that he would not use marijuana or other illegal drugs in the future and submitted a signed, sworn statement that fully reflects his testimony. In short, both through his words and actions, Applicant established the following drug involvement mitigating conditions:

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; and

AG ¶ 26(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; [or] (4) a signed statement of intent with automatic revocation of clearance for any violation.

⁴ The Directive defines "drug abuse" as the "illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction." See AG ¶ 24(b).

⁵ I have considered that Applicant's 2010 use was unknowing and he did not use from the hookah again after he became aware it contained marijuana. However, the Directive does not require proof that the individual's drug use was knowing before it can be considered potentially disqualifying.

Guideline E, Personal Conduct

The personal conduct security concern is set forth at AG ¶ 15:

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.

Applicant's past marijuana use and 2012 employment termination raised concerns about his judgment, honesty, and reliability. See AG ¶ 16(c). However, these concerns were mitigated for the reasons explained under the drug involvement guideline. In addition, Applicant's failure to reveal his past drug use to his former employer when initially hired was mitigated by his subsequent voluntary disclosure of this adverse information on the SCA and his candor discussing the matter during the security clearance background investigation. See AG ¶¶ 17(a), 17(c), 17(d), and 17(e).

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).⁶ I incorporate my drug involvement and personal conduct analysis herein and highlight some additional whole-person factors.

Applicant's past drug use and dishonesty when hired by his former employer raised legitimate concerns about his eligibility for access to classified information. Moreover, although his past marijuana use was of limited scope and duration, it occurred after he was granted a security clearance, raising heightened security concerns. In light of this heightened security concern, the passage of time alone, without evidence of true reform and rehabilitation, would be insufficient to overcome the doubts raised about his eligibility.

Applicant met his high burden of persuasion. In the time that has passed since the security-significant conduct at issue, he has demonstrated true reform. He stopped socializing and associating with former friends who were involved with illegal drugs. He established a good employment record, leading to a promotion to his current position as a supervisor. On average, he works about 70 hours per week and is on track to earn his undergraduate degree. In short, Applicant has a demonstrated track record of

⁶ The non-exhaustive list of factors are: (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.

responsible behavior, to include abstaining from any involvement with illegal drugs over the past five years.

In addition to this good track record, Applicant's honesty in revealing the adverse information at issue stands as a testament to his trustworthiness. He continued to be fully candid about his past conduct during the ensuing security clearance investigation and at hearing. Applicant's honesty further demonstrates rehabilitation on his part and the lack of any potential for coercion from his past conduct. Therefore, I find that Applicant mitigated the security concerns raised by his past conduct.

A security clearance determination is not intended to punish a person for past conduct. Rather, an administrative judge examines a person's past conduct for it is generally the best indicator of an individual's potential future behavior.⁷ Here, Applicant mitigated the concerns raised by his past conduct by demonstrating that he is no longer the individual who engaged in the questionable conduct giving rise to the SOR. Instead, for the past five years, Applicant has handled and conducted his affairs in a responsible fashion. This favorable track record, coupled with Applicant honesty during the security clearance process, remove any doubt about his current and future ability to handle and safeguard classified information. Overall, the record evidence leaves me with no questions or doubts about Applicant's present eligibility for a security clearance.

Formal Findings

I make the following formal findings regarding the allegations in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive:

Paragraph 1, Guideline H (Drug Involvement)	APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E (Personal Conduct)	FOR APPLICANT
Subparagraphs 2.a and 2.b:	For Applicant

Conclusion

In light of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant access to classified information. Applicant's request for a security clearance is granted.

Francisco Mendez
Administrative Judge

⁷ ISCR Case No. 01-25941 at 5 (App. Bd. May 7, 2004) ("Security clearance determinations are not an exact science, but rather predicative judgments about a person's security suitability in light of that person's past conduct and present circumstances.") (citing, *Egan*, 484 U.S. at 528-529).