



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



In the matter of:)	
)	
)	ISCR Case No. 14-07049
)	
Applicant for Security Clearance)	

Appearances

For Government: Gregg A. Cervi, Esquire, Department Counsel
For Applicant: *Pro se*

02/29/2016

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings and exhibits, Applicant’s eligibility for access to classified information is granted.

Statement of the Case

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on April 15, 2014 and a previous e-QIP on January 8, 2008. The Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) on October 5, 2015, detailing security concerns under Guideline H, drug involvement, Guideline E, personal conduct, and Guideline J, criminal conduct. The action was taken under Executive Order 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 for Determining Eligibility for Access to Classified Information* (AG), implemented on September 1, 2006.

Applicant received the SOR. He submitted a notarized, written response to the SOR allegations dated October 16, 2015, and he requested a decision on the written record in lieu of a hearing.

Department Counsel prepared a file of relevant material (FORM) and mailed Applicant a complete copy on December 4, 2015. Applicant received the FORM on December 15, 2015. He had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. He submitted a response shortly thereafter. The Defense Office of Hearings and Appeals (DOHA) assigned this case to me on February 22, 2016. The Government submitted five exhibits, which have been marked as Items 1-5 and admitted into the record. Applicant's response to the SOR has been marked as Item 2, and the SOR has been marked as Item 1. His written response to the FORM is admitted into the record as Applicant Exhibit A (AE A).

Findings of Fact

In his Answer to the SOR, Applicant admitted all the factual allegations in the SOR. His admissions are incorporated herein as findings of fact. He also provided additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant, who is 32 years old, works as a systems engineer for a DOD contractor. He began his current employment with Company 2 in October 2010 in State A. He has never been fired or left a job under unfavorable circumstances. He worked as a systems engineer for Company 1 from August 2006 until August 2010. While working for Company 1, he moved from State A to State B in August 2009. When he ceased his employment with Company 1, he moved back to State A.¹

Applicant graduated from high school in 2001, and he graduated from college with a Bachelor of Science degree in electrical engineering in May 2006. Applicant married in November 2013, and he has an infant son. He has never served in the military. His parents were born in Vietnam. They are naturalized citizens, living in the United States.²

Applicant does not own any property in a foreign country. He does not have bank accounts or other assets in a foreign country. The record lacks any evidence of financial issues or misuse of technology issues.³

¹Item 3 - Item 5.

²Item 3; Item 4; AE A.

³Item 3; Item 4.

When he completed his first e-QIP in 2008, Applicant acknowledged that he used marijuana about five times between September 2001 and October 2001 as a college student. When he met with the Office of Personnel Management (OPM) investigator in April 2008, he clarified his answer. He advised that he used marijuana one or two times a year throughout college, beginning in either September or October 2001. His use occurred at a parties with friends, who provided the marijuana. He did not purchase, sell, or manufacture the marijuana.⁴

When he completed his e-QIP in April 2014, Applicant answered “no” to the questions in Section 23 about the use of illegal drugs in the previous seven years, including a question about the use of illegal drugs while holding a security clearance. During the interview process, Applicant told the investigator from OPM that he smoked a marijuana cigarette in 2009 at a bachelor party in State B. Applicant remembered this use when his memory was triggered by his conversation and discussions with the OPM investigator. He told the OPM investigator that he forgot about this singular marijuana use, and that he thought he held a security clearance at the time. The summary of his interview does not indicate that the OPM investigator confronted Applicant about his 2009 drug use. On his 2014 e-QIP, Applicant acknowledged a previous security clearance investigation, but did not recall which agency conducted the investigation. He indicated that he held a top secret clearance, but did not know the date he was granted the clearance or when his clearance became active. Finally, he advised the investigator that he had no future intent to use marijuana or any other illegal drug.⁵

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, which are 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 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.

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

⁴Item 5.

⁵Item 3 - Item 5; AE A.

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, an applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” An applicant has the ultimate burden of persuasion for obtaining 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 an 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.

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

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.

AG ¶ 25 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

(a) any drug abuse (see above definition);

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

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

In 2009, Applicant smoked a marijuana cigarette, an illegal drug under federal law, at a friend's bachelor party. He did not purchase the marijuana he used. In order to smoke marijuana, one must also possess it. At the time he possessed and used marijuana, he held a security clearance. A security concern has been established under AG ¶¶ 25(a), 25(c) and 25(g).

The drug involvement guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 26(a) through ¶ 26(d), and the following 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; and

(3) an appropriate period of abstinence.

In the last nearly ten years, Applicant used marijuana once when attending a bachelor party in State B in 2009. He does not regularly use marijuana or any other illegal drug. Applicant moved from State B in 2010. Applicant lives away from the friends in State B and has not used marijuana with them or anyone else in more than six years. His expressed intent not to use marijuana or other illegal drugs in the future is credible because the Government only learned about his marijuana use when he provided the information.

Applicant used marijuana, an illegal drug, while holding a security clearance, which is a serious violation of the trust given to him by the Government. In this case, the evidence reflects that Applicant did not repeatedly use marijuana over a period of time while holding a security clearance. His use was on one occasion and has not been

repeated. Given his onetime use and his continued abstinence from use of illegal drugs, Applicant has mitigated the security concerns about his drug involvement.

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 the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following is potentially applicable:

(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;

The Government alleges one incident of falsification by Applicant when he completed his e-QIP in 2014. For AG ¶ 16(a) to apply, Applicant's omissions must be deliberate. The Government established that Applicant omitted material facts from his 2014 e-QIP when he did not acknowledge use of marijuana at a bachelor party in 2009. This negative information is material to the evaluation of Applicant's trustworthiness and honesty. In his response to the FORM, Applicant denied that he intentionally falsified his e-QIP answer or had an intent to hide negative information from the Government. When the allegation of falsification is controverted, the Government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred.⁶

Applicant told the Government in 2008 that he occasionally used marijuana between the fall of 2001 and May 2006 while a college student. This information placed the Government on notice of past marijuana use. When he met with the OPM investigator in April 2014, they discussed various matters relevant to his application for a renewal of his security clearance. During their discussions, he recalled that he had used marijuana at a bachelor party in 2009 and immediately told the OPM investigator.

⁶See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

Applicant's statement that he forgot about this incident is credible because he acknowledged marijuana use in his previous e-QIP and because, without his admission, the Government would not have known about his use. The Government did not establish his use of marijuana through another source. Furthermore, the summary of the OPM investigator does not indicate that Applicant was confronted about his use of marijuana in 2009. The Government has not established that he intentionally falsified his E-QIP.

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 the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following is potentially applicable:

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

Applicant acknowledged use and possession of marijuana, an illegal drug, one time in 2009. Although he was not arrested for or charged with use of an illegal drug, the Government has established a security concern under AG ¶ 20(c) because Applicant used an illegal drug.

The criminal conduct guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 32(a) through ¶ 32(d), and the following are potentially applicable:

(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; 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.

Applicant used marijuana after graduating from college in May 2006, nearly ten years ago. He has not used marijuana in more than six years (2009) and does not intend to use marijuana or any other illegal drug in the future. He has stable employment; he is recently married; and he is now a father. His life has changed significantly in the last six years. He has mitigated the security concerns raised about his criminal conduct under AG ¶¶ 31(a) and 31(d).

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 an 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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

The evidence in support of granting a security clearance to Applicant under the whole-person concept is more substantial than the evidence in support of denial. In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. When he first smoked marijuana, Applicant was a young man, still in college. After graduation, he embarked on his professional career and chose to avoid using marijuana. In 2009, he attended a bachelor party, where he consumed alcohol and at some point in the evening, he joined his friends in smoking a marijuana cigarette. At this time, he held a security clearance, and his decision to smoke marijuana showed a lapse in judgment. He regrets his decision and does not intend to use marijuana again. Given this is the only time since college that he has smoked marijuana, and his life now centers more on his new family, he has mitigated his one-time use of marijuana. He has matured and fully understands his responsibilities towards drug use. Drugs are not a part of his life.

Applicant forgot about his use of marijuana when he completed his e-QIP. The conversation with the OPM investigator triggered his memory, and he immediately told the investigator about the 2009 incident. His honesty with the investigator is commendable and a favorable factor to consider in granting him a security clearance. Except for this one incident, Applicant has a clean record at work, good finances, and no

criminal record. He is now married and a new father with new responsibilities. His life has changed. He has matured.

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 mitigated the security concerns arising from use of marijuana and his omission of a relevant fact on his E-QIPQ under Guidelines H, E, and J.

Formal Findings

Formal findings for or against Applicant 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
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline J:	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 a security clearance is granted.

MARY E. HENRY
Administrative Judge