



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



In the matter of:)	
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)	ISCR Case No. 14-04452
Applicant for Security Clearance)	

Appearances

For Government: Chris Morin, Esquire, Department Counsel

For Applicant: *Pro se*

October 28, 2015

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigation Processing (e-QIP) on November 27, 2012. (Item 2.) On September 27, 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 December 30, 2014, and requested a decision by an administrative judge without a hearing. (Item 1.) Department Counsel submitted the Government’s written case (FORM) to Applicant on April 22, 2015. The FORM contained three documents. Applicant acknowledged receipt of the FORM on June 6, 2015. He was given 30 days from receipt of the FORM to submit any additional documentation. Applicant submitted additional information. Department Counsel had no objection, and Applicant’s statement of June 12, 2015, is entered into evidence as

Applicant's Exhibit A.¹ The case was assigned to me on July 21, 2015. Based upon a review of the pleadings and exhibits, eligibility for access to classified information is granted.

Findings of Fact

Applicant is 45, single, and has bachelor's and master's degrees. He is employed by a defense contractor and seeks to retain a security clearance. Applicant admitted all the allegations of the SOR, with the exception of 1.c, which he admitted in part and denied in part. He also provided additional information to support his retention of a security clearance. Applicant's admissions are incorporated into the following findings of fact, including those in Item 3.

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.

Concerning Applicant's use of marijuana, the Summary of Personal Subject Interview of Applicant by an investigator from the Office of Personnel Management states, "Subject [Applicant] volunteered the fact that during his foreign travel to the Netherlands, in July of 2008 and July of 2011, Subject smoked marijuana. . . . Subject smoked roughly 6 times between the two trips." (Item 3 at 4.) (See Applicant Exhibit A at 1.) The 2008 usage was the first time Applicant used marijuana, and the 2011 usage was the last time he used marijuana. He has never used marijuana in the United States. (Item 1 at 3.) Applicant also admitted that he purchased marijuana during these two visits to the Netherlands.² During the times he purchased and used marijuana Applicant held a Top Secret security clearance.

Applicant stated that he no longer associates with his friend and co-worker who is an "avid user of marijuana and enjoys the lifestyle." He went on to state that he no longer has direct contact with this person as Applicant has moved across the country, and their current relationship is strictly business-related. (Item 3 at 5.)

¹Item 3 is the summary of an unsworn interview of Applicant conducted by an interviewer from the Office of Personnel Management on March 5, 2013. Applicant discusses, adopts, and certifies the truthfulness of this statement in Applicant Exhibit A. Accordingly, under Directive ¶ E3.1.20, this Report of Investigation summary is admissible and will be considered.

²Applicant stated that purchase and use of marijuana is legal in the Netherlands. That may well be true, but is not determinative in reaching this decision, which is concerned with whether his drug use is compatible with holding a security clearance. There is no allegation that Applicant engaged in criminal conduct.

Paragraph 2 (Guideline E, Personal Conduct)

Applicant is a single man, who has never been married and has had no long-term relationships. He admitted visiting prostitutes in legal brothels both in Mexico and the Netherlands. The visits in Mexico occurred several times between 2008 and 2009. The visits in the Netherlands occurred during the trips he made to that country in 2008 and 2011. Item 3 states at 5:

Subject [Applicant] went alone and the purpose of the prostitution was to blow off steam from the stresses of his employment. . . . Subject has never used prostitution in the U.S. and has only engaged in it in Mexico and Netherlands because it is legal in those respective areas. All of Subject's friends are aware of these trips, and there are no issues with blackmail or coercion.

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

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;
- (c) illegal drug possession, including . . . purchase; 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 purchased and used marijuana a total of about six times in July 2008 and July 2011, when holding a security clearance. All three 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 four years ago, and it is very unlikely to recur. He has been truthful with DoD about his use, volunteering the information during an interview, and credibly states that he will not use marijuana or other drugs in the future. He no longer associates with the person he used drugs with in the Netherlands. 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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or another group.

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;

(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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant freely admitted visiting prostitutes in Mexico and the Netherlands from approximately 2008 to 2011. He does not engage in this conduct any more, and credibly states he will not engage in it in the future. As stated, Applicant is single and was not in a long-term relationship at the time of the incidents. In addition, Applicant has not kept this information a secret, and it is known by friends and family members. All three of the stated mitigating conditions apply.

Applicant's conduct in purchasing and using marijuana six times in 2008 and 2011 while holding a security clearance was untrustworthy behavior. The incidents were

minor in nature, occurred four years ago, are very unlikely to recur, and do not cast doubt on the individual's current reliability, trustworthiness, or good judgment.

Applicant has mitigated both allegations 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. Certainly, Applicant's conduct was not appropriate for a security clearance holder, even if he believed it to be legal in both countries. However, under AG ¶ 2(a)(3), Applicant's conduct is not recent, last occurring about four 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 through 1.e:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a and 2.b:	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