



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



In the matter of:)	
)	
)	ISCR Case No. 13-00337
)	
Applicant for Security Clearance)	

Appearances

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

09/16/2013

Decision

HEINY, Claude R., Administrative Judge:

Applicant contests the Department of Defense’s (DoD) intent to deny his eligibility for a security clearance to work in the defense industry. Applicant started using marijuana in January 1982 and last used it in August 2012. His drug involvement remains a security concern. Clearance is denied.

History of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on April 25, 2013, the DoD issued a Statement of Reasons (SOR) detailing drug involvement and personal conduct security concerns. DoD adjudicators could not make the preliminary affirmative finding that it is clearly consistent with the national interest to grant or continue Applicant’s security clearance. On May 9, 2013, Applicant answered the SOR and elected to have the matter decided without a hearing. Defense Office of Hearings and

¹ 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 (AG) effective within the DoD on September 1, 2006.

Appeals (DOHA) Department Counsel submitted the Government's case in a File of Relevant Material (FORM), dated July 30, 2013. The FORM contained six attachments. On August 13, 2013, Applicant received a copy of the FORM, along with notice of his opportunity to file objections and submit material to refute, extenuate, or mitigate the potentially disqualifying conditions. On August 27, 2013, Applicant responded to the FORM. Department Counsel did not object to the response, which was admitted into the record. On September 10, 2013, I was assigned the case.

Findings of Fact

In Applicant's Answer to the SOR, Applicant admitted purchasing and using marijuana between 1982 and the present. There are no contested facts. After a thorough review of the pleadings and exhibits, I make the following additional findings of fact:

Applicant is a 46-year-old president of a company he founded in March 1999, who seeks to obtain a security clearance. No evidence as to his job performance or character was submitted. In September 2012, he completed an Electronic Questionnaires for Investigations Processing (e-QIP). In response to questions in Section 23 – Illegal Use of Drugs or Drug Activity, he stated he used THC such as marijuana once or twice a quarter, four to eight times a year. (Item 5) He used it for relaxation and used it with his best friend. He indicated he intended to use the drug in the future.

During a December 2012 personal subject interview, Applicant stated he started using marijuana in January 1982 and last used it in August 2012. (Item 6) He stated he knew marijuana was illegal, but used it to relax at his home with friends. He would use it once or twice a quarter. At the time of his interview, he stated he intended to use marijuana in the future, but was willing to forgo future use if using marijuana would hinder him in obtaining a security clearance or obtaining government employment. (Item 6)

From 1982 to 1995, Applicant used marijuana two or three times a week. (Item 6) From 1995 to 1999, he used it weekly, and from 2000 to the present, he used it once a quarter. (Item 6) He stated he had occasionally purchased marijuana. In his response to the FORM, he stated he found the whole process to be an eye-opening experience. He has made a choice to refrain from using marijuana and has not used marijuana since his December 2012 interview. (FORM Answer)

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 must 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 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 interests of 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 the 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.

Section 7 of Executive Order (EO) 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 *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Drug Involvement

AG ¶ 24 expresses the security concern pertaining to drug involvement in that the 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 ¶ 25(a) any drug abuse could raise a security concern and may be disqualifying. Between 1982 and August 2012, Applicant purchased and used marijuana. In his December 2012 interview, he stated he intended to use marijuana in the future unless his future use interfered with obtaining government employment or obtaining a security clearance. AG ¶ 25(a) drug abuse applies.

AG ¶ 26 sets forth conditions that could mitigate security concerns:

(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;

(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; and,

(4) a signed statement of intent with automatic revocation of clearance for any violation;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and,

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant used marijuana with his best friend. There is no indication he no longer associates with this friend. Nor is there any testimony or other evidence he no longer associates with any other individuals with whom he used marijuana. He says he will not use marijuana in the future if using it would hinder him obtaining a security clearance or government employment. Because Applicant chose to have this matter handled administratively, I am unable to test the veracity of his assertion he will stop using marijuana in the future. I am unable to evaluate his demeanor, appearance, or to form a positive determination as to his truthfulness. From the record, I am unable to find Applicant was sincere, open, and honest in his claim he will not use illegal drugs in the future.

None of the conditions that could mitigate security concerns apply. AG ¶ 26(a) does not apply. He used marijuana four to eight times a year to relax and used over a thirty-year period. His usage is not infrequent. He did not use under unusual circumstances. His use does cast doubt on his reliability, trustworthiness, and good judgment.

AG ¶ 26(b) does not apply. There is no evidence he no longer associates with drug-using friends. There is no showing he has executed a signed statement of intent with automatic revocation of clearance for any violation. It has been less than one year since his last use of marijuana. Considering the thirty-year history of his use this period of abstinence is insufficient.

In September 2012, he stated he intended to use marijuana in the future. In December 2012, he stated he intended to use marijuana in the future, but was willing for forego future marijuana use if it hindered him obtaining a security clearance or government employment. In August 2013, he stated he had made a choice to no longer use illegal substance and has refrained from doing so since his December 2012 interview. I have no way of ascertaining the veracity of this assertion. He provided no explanation for his decision to refrain from marijuana use after having used it for thirty years other than he wants a security clearance and to obtain government employment.

AG ¶ 26(c) does not apply because prescription drugs were not abused. AG ¶ 26(d) does not apply because Applicant was never in aftercare.

Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct, which is 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.

Applicant used marijuana over a thirty-year period. He acknowledged he knew marijuana use was illegal. In completing his e-QIP, Applicant indicated he had used marijuana once or twice a quarter, four to eight times a year starting in January 1982. He indicated his last use was in August 2012. Applicant was forthcoming about this adverse information. There was no falsification of his e-QIP.

Under AG ¶ 16(d) a security concern could be raised and may be disqualifying if there is “credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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.” Having previously found against Applicant as to his marijuana use, I find no additional disqualifying or additional security concerns under the personal conduct guideline. I find for Applicant as to SOR ¶ 2.

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 the 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 the facts and circumstances surrounding this case. Applicant purchased and used marijuana over a thirty-year period. Applicant's last marijuana use occurred one year ago. I am unable to make a finding that illegal drugs are no longer a part of his life. The awarding of a security clearance is not a once in a life time occurrence, but is based on current disqualifying and mitigating conditions. Although the Applicant's evidence of rehabilitation is insufficient at this time, should he in the future be afforded an opportunity to reapply for a security clearance, with the passage of sufficient additional time and no future illegal drug usage, he may well demonstrate persuasive evidence of his security worthiness. But that time has not yet arrived.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the drug involvement security concerns.

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, Drug Involvement: AGAINST APPLICANT

Subparagraph 1.a-d: Against Applicant

Paragraph 2, Personal Conduct: FOR APPLICANT

Subparagraph 2.a: For 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 a security clearance. Eligibility for access to classified information is denied.

CLAUDE R. HEINY II
Administrative Judge