



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



In the matter of:)
)
-----) ISCR Case No. 07-08182
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: Pro Se

March 6, 2008

Decision

CREAN, Thomas M., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on December 17, 2004. (Gov X 4) On August 9, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines H (Drug Involvement). (Gov X 1) The action was taken under Executive Order 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 revised Adjudicative Guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on October 22, 2007. He admitted the allegations under Guideline H, except he did not respond to an allegation pertaining to a statutory prohibition against granting or renewing a security clearance for an unlawful drug user. He elected to have the matter decided on the written record in lieu of a hearing. (Gov X 3)

Department Counsel submitted the Government's written case on November 26, 2007. Applicant received a complete file of relevant material (FORM) on January 10, 2008, and was provided the opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions within 30 days. He has not responded with additional information. The case was assigned to me on March 4, 2008. Based upon a review of the case file and the pleadings, eligibility for access to classified information is denied.

Procedural Issues

SOR allegation 1.e alleges a violation of 10 U.S.C. § 986 because Appellant is a present user and purchaser of marijuana, a controlled substance. This section of the United States Code was repealed in the National Defense Authorization Act for Fiscal Year 2008 on January 28, 2008. It was replaced by adding section 3002 to 50 U.S.C. § 435b. This new provision is the same as 10 U.S.C. § 986 and states a person that is an unlawful user of a controlled substance or an addict cannot be granted a security clearance by any federal agency. Since the prohibitions are the same, there is no prejudice to the Applicant and he has received adequate notice of the prohibition. The prohibition will be discussed under 50 U.S.C. 435b and not 10 U.S.C. 986.

Findings of Fact

Applicant admitted the factual allegations under Guideline H. I thoroughly and carefully reviewed the case file and the pleadings. I make the following findings of fact.

Applicant is a 30-year-old college graduate in computer science employed by a defense contractor as a principal engineer since April 2004. He is not married. Applicant listed on his security clearance application that he used marijuana from March 2001 until December 2004 when he completed the application. He also answered "YES" to the question whether in the last seven years he had been involved in the illegal purchase, manufacture, trafficking, production, transfer, shipping, receiving or sale of any drug for his own intended profit or that of another.(Gov X 4)

Applicant admitted on April 12, 2007, in an affidavit to security investigators that he used marijuana once a week with friends from March 2002 until the date of the security interview and affidavit. In the affidavit, he admitted to smoking marijuana with band members after practice, claiming the marijuana helped with creativity. He stated he experienced no physical effects from the marijuana except to be relaxed. He further stated he continues to use marijuana about once a week and "do not intend on changing this frequency of use." In the affidavit, he also stated that he is not dependent on marijuana, has no problem relating to the drug, and the marijuana use has no impact on his professional or private life. He denies ever selling marijuana but admits to purchasing marijuana for his use. He stated that his use of the drug has no effect on his finances. (Gov X 5)

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised Administrative Guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 over-arching adjudicative goal is a fair, impartial and common sense 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. 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 applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to 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 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.

Analysis

Guideline H, Drug Involvement

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. Drugs are mood and behavior altering substances, and include those listed on the Controlled Substances Act of 1970. Marijuana is listed as a drug in the Controlled Substance Act of 1970. Drug abuse is the illegal use of a drug or the use of a legal drug in a manner that deviates from approved medical direction. (AG ¶ 24)

Applicant's admits to using and purchasing marijuana from March 2002 until he spoke to security investigators in April 2007. He also stated in April 2007 that he would continue to use marijuana at least weekly. His drug use raises Drug Involvement Disqualifying Conditions AG ¶ 25(a) (any drug use), and AG ¶ 25(c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution).

I have considered the Drug Involvement Mitigating Conditions and find none apply. Applicant's last admitted use was days before his most recent security interview in April 2007 and his statement of intent to continue to use marijuana makes his use recent and frequent. AG ¶ 26(a) (the behavior happened so long ago, was so infrequent, or happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment) does not apply. Applicant stated he intends to continue his present rate of marijuana use in the future. This clearly shows his intent to use illegal drugs in the future and is not a demonstrated intent to stop using marijuana. AG ¶ 26(b) (a demonstrated intent not to abuse 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) does not apply. Applicant demonstrated that he intends to abuse drugs in the future. Appellant established that he is a drug user with no intent to stop using drugs. Guideline H is decided against Applicant. His statement that he now uses and intends to continue to use marijuana is sufficient information for a finding that Applicant is at present an unlawful drug user in violation of section 3002 of 50 USC § 435b.

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) 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 common sense 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. I considered that Applicant has used drugs for at least six years while working for a federal contractor in violation of the law. He intends to continue to use drugs in the future. Overall, the record evidence leaves me with no questions and doubts as to Applicant's present and future abuse of drugs and his lack of good judgment, reliability, trustworthiness, and willingness to follow rules and regulations. He has not established that he is suitable for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his abuse of marijuana.

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: | AGAINST APPLICANT |
| Subparagraph 1.a: | Against Applicant |
| Subparagraph 1.b: | Against Applicant |
| Subparagraph 1.c: | Against Applicant |
| Subparagraph 1.d: | Against Applicant |
| Subparagraph 1.e: | 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.

THOMAS M. CREAN
Administrative Judge