



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



In the matter of:)
)
) ISCR Case No. 07-10118
Applicant for Security Clearance)

Appearances

For Government: Jennifer I. Goldstein, Esquire, Department Counsel
For Applicant: *Pro Se*

March 26, 2008

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the case file, pleadings, and exhibits, I conclude that Applicant has failed to rebut or mitigate the government’s security concerns under the Drug Involvement and Personal Conduct adjudicative guidelines. Pursuant to 50 U.S.C. 435b, Section 3002, Applicant does not qualify for a security clearance, and his eligibility for access to classified information is denied.

Applicant executed and certified a Security Clearance Application (SF 86) electronically on August 18, 2006. He provided a signed certification of his SF-86 on August 22, 2007. On November 27, 2007, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H (Drug Involvement) and Guideline E (Personal Conduct). DOHA’s action was taken pursuant to 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 December 20, 2007. In his answer, Applicant requested that his case be determined on the record in lieu of a hearing. The Government compiled its File of Relevant Material (FORM) on January 24, 2008. The FORM contained documents identified as Items 1 through 5. A copy of the FORM was provided to Applicant on January 25, 2008, with instructions to submit any additional information and/or objections within 30 days of receipt. Applicant received the file on February 28, 2008. He filed a response to the FORM within the required time period. Department Counsel did not object to Applicant's February 28, 2008 filing. On March 6, 2008, the case was assigned to another DOHA administrative judge. On March 12, 2008, the case was reassigned to me for a decision. I have marked Applicant's February 28, 2008, response to the FORM as his Exhibit A, and I have admitted it to the record of this case.

Procedural Issues

SOR allegation 1.f. alleges a violation of 10 U.S.C. 986 because Applicant is a present user and purchaser of marijuana, a controlled substance. On January 28, 2008, the President approved the National Defense Authorization Act for Fiscal Year 2008, which repealed 10 U.S.C. 986 and replaced it with 50 U.S.C. 435b, Section 3002. The newly enacted statute states that a person who is an unlawful user of a controlled substance or an addict cannot be granted a security clearance by any federal agency. Since the prohibitions of 10 U.S.C. 986 and 50 U.S.C.435b, Section 3002 are the same, there is no prejudice to Applicant and he has received adequate notice of the prohibition. In this decision, the prohibition will be discussed under 50 U.S.C. 435b, Section 3002 and not 10 U.S.C. 986.

Findings of Fact

The SOR contains six allegations of disqualifying conduct under Guideline H, Drug Involvement, and one allegation of disqualifying conduct under Guideline E, Personal Conduct. (Item 1.) Applicant admitted five allegations under Guideline H and denied one Guideline H allegation, with explanation. He also denied the one allegation under Guideline E. (Item 3; Ex. A.) His admissions are incorporated herein as findings of fact.

On March 22, 2008, Applicant will be 24 years old. He is single and employed as a software engineer by a Federal contractor. He holds bachelor of science degrees in applied mathematics and physics. (Item 4.)

Applicant completed a security clearance application (SF-86) and certified his answers electronically on August 18, 2006.¹ Section 24 on the SF-86 is titled "Your Use of Illegal Drugs and Drug Activity." In response to Section 24, Applicant admitted illegal use of marijuana from March 2005 to June 2006. He estimated he had used marijuana eight times during the fifteen month period from March 2005 to June 2006. (Item 4.)

¹Applicant also provided a signature to certify his responses on August 22, 2007.

Applicant was interviewed by an authorized investigator and provided a statement under oath on February 23, 2007. In the interview, Applicant admitted using marijuana with his girlfriend during the period beginning in June 2006 and ending in December 2006. He stated he would continue to use marijuana if it was presented to him in a social setting, and he speculated he might continue to smoke marijuana monthly or every two months depending on his social contacts. He stated he was in control of his use of marijuana and avoided smoking too much at a time. He stated he was comfortable using marijuana while holding a security clearance. While he recognized that the use of marijuana was illegal, he did not think there was a difference between the use of alcohol and the use of marijuana. Applicant stated that his twin brother smoked marijuana about three times a week. Applicant has frequent contact with his brother, and he once bought marijuana from his twin brother's friend. (Item 5 at 3-4.)

In September 2007, Applicant provided a sworn statement in which he admitted marijuana use approximately once a week from June 2007 to July 2007. He stated he had not smoked marijuana in August 2007 but expected to continue to smoke marijuana about once a month in the future. (Item 5 at 5-7.)

In his answer to the SOR, Applicant denied that he was disqualified from holding a security clearance under the provisions of 10 U.S.C. § 986 because he was ending his use of marijuana immediately. He attached the following statement to his answer to the SOR:

I intend to cease using marijuana from now (December 20, 2007) until at least the expiration/termination of any security clearance I may be granted. I also will not use any other illegal substances. I understand that any usage would likely result in the termination of any security clearance I may possess.

I also indicate my willingness to sign a more formal statement if that is required.

(Answer to SOR at 2.)

In his answer to the SOR, Applicant denied that his use of an illegal drug after completing a security clearance application and his statement that he would feel comfortable using an illegal drug while holding a security clearance raised any security issues about his reliability, judgment, and trustworthiness under the Personal Conduct adjudicative guideline. (Answer to SOR at 1.)

In his response to the FORM, dated February 28, 2008, Applicant stated that he had stopped using marijuana when he prepared his response to the SOR, which he submitted to DOHA on December 20, 2007. He stated he had not used or purchased any illegal substances since responding to the SOR. He stated he intended to avoid all illegal drugs during the time that he held a security clearance. (Response to FORM at 1.)

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). 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 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.

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).

10 U.S.C. § 986(c)(2) disqualified a person from being granted a security clearance if he or she was "an unlawful user of, or . . . [was] addicted to, a controlled

substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).” 10 U.S.C. § 986(c)(2) was in effect at the time Applicant’s SOR was issued and served on him. On January 28, 2008, the President signed Public Law 110-181, which, in pertinent part, repealed 10 U.S.C. § 986 and replaced it with a new statute, 50 U.S.C. 435b, Section 3002. The new statute also prohibits granting a security clearance to an individual who is an addict or an unlawful user of a controlled substance. The new statute applies in this case.

Analysis

Guideline H, Drug Involvement

An individual’s use of an illegal drug or misuse of a prescription drug raises questions of reliability and trustworthiness because drug use or misuse can impair judgment and raise questions about the person’s ability or willingness to comply with laws, rules, and regulations. Guideline H, ¶ 24. Guideline H defines drugs as *mood and behavior altering substances*. . . . Drugs 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*. Guideline H, ¶ 24(a)(1) and ¶ 24(a)(2). The Guideline further defines drug abuse as *the illegal use of drug or use of a legal drug in an manner that deviates from approved medical direction*. Guideline H, ¶ 24(b).

Applicant admitted using marijuana, an illegal drug, with varying frequency, from March 2005 through December 2007. He used marijuana after submitting his application for a security clearance in August 2006, after his interview with an authorized investigator in February 2007, and after receiving the SOR. He stated in his answer to the SOR that , as of December 20, 2007, he would no longer use marijuana and would not use it again until he no longer held a security clearance.

Applicant’s illegal drug use spanned approximately 2 ½ years of his post-college professional life. During that time, he also purchased marijuana. Applicant’s statements, when read as a whole, fail to demonstrate that he has clearly and convincingly committed to discontinue his use of marijuana.

Applicant’s conduct raises security concerns under Disqualifying Condition (DC) 25(a), (DC) 25(c), and (DC) 25(h) of Guideline H, and the provisions of 50 U.S.C. 435b, Section 3002. DC 25(a) reads: *any drug abuse*. DC 25(c) reads: *illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*. DC25(h) reads: *expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use*. Pursuant to 50 U.S.C. 435b, Section 3002, an applicant who is an unlawful user of a controlled substance may not be granted access to classified information.

Several Mitigating Conditions (MC) under Guideline H might be applicable to Applicant’s case. If the drug abuse 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, then MC 26(a) might apply. If Applicant intended not to abuse drugs in the future and demonstrated that intent as specified in the Guideline, then MC 26 (b) might apply.² Additionally, drug abuse that is of security concern can be mitigated under MC 26(d) by *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.**

The record shows that Applicant's marijuana abuse began in about 2005 and continued until at least December 20, 2007. Thus, his drug abuse is recent, and Applicant provided no credible evidence to corroborate his assertion that he no longer uses drugs and has no intent to use them in the future while holding a security clearance. Applicant's brother continues to use marijuana, and Applicant has on-going contact with him. Applicant failed to provide evidence he had satisfactorily completed a prescribed drug treatment program. While Applicant provided a statement that he would not use drugs while he held a security clearance, he also limited his commitment to abstinence to the duration of any security clearance granted to him. Applicant presumably felt free to begin using illegal drugs again when he no longer held a security clearance. Applicant failed to credibly demonstrate his intent not to abuse drugs again in the future. None of the Guideline H MCs apply to Applicant's use of marijuana.

Guideline E - Personal Conduct

Applicant continued to use an illegal drug after submitting a security clearance application, after an interview with an authorized investigator, and after receiving the SOR. Further, he stated to an authorized investigator that he would be comfortable using marijuana while holding a security clearance. Applicant's behavior demonstrates questionable judgment, unreliability, and lack of trustworthiness. His personal conduct raises doubts about his ability to follow rules and regulations for the protection of classified information. Moreover, his illegal drug use makes him vulnerable to exploitation, manipulation or duress. His drug use, if known, could affect his personal and professional standing.

A security concern under Guideline E is raised when an individual demonstrates questionable judgment and unwillingness to comply with rules and regulations. See Guideline E, ¶ 15. Additionally, Applicant's conduct raises a security concern under Disqualifying Condition (DC) 16(e)(1), which reads: *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.*³

²Specific examples of demonstrated intent that might apply under MC26(b) are as follows: (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.*

³In the FORM, the Government alleged that DC 16(d) also applied to the facts of Applicant's case. I conclude that DC 16(d) is inapplicable, since the credible adverse information about Applicant's drug use was alleged as disqualifying conduct under Guideline H. DC 16(d) addresses "credible adverse information that is not

Under Guideline E, there are two Mitigating Conditions (MC) that might be applicable to Applicant's case. If Applicant *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 untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur*, then MC 17(d) might apply. If *the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress*, then MC 17(e) might apply.

Applicant has indicated he would forego marijuana use while he held a security clearance. However, he continued his illegal drug use after applying for a security clearance. By his own admission, he continued to use marijuana until he prepared his answer to the SOR. Applicant has not sought counseling for unreliable conduct, nor has he taken any other positive steps to ensure that he will not use drugs in the future. His statement that he will abstain from marijuana use in the future is speculative and lacks credibility when viewed in the context of his recent behavior. I conclude that MC 17(d) does not apply to the facts of Applicant's case.

Applicant's pursuit of illegal drug use after applying for a security clearance makes him vulnerable to exploitation, manipulation, or duress and the subsequent compromise of classified material, should he be granted a security clearance. He failed to demonstrate that he had taken positive steps to reduce or eliminate vulnerabilities deriving from the personal conduct that results in his use of drugs. I conclude that MC 17(e) does not apply to the facts of Applicant's case. No other MCs under Guideline E apply.

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 carefully considered the potentially disqualifying and mitigating conditions under adjudicative Guidelines E and H in light of the whole person concept and the facts and circumstances surrounding this case.

explicitly covered under any other guideline. . . ."

Applicant's admissions and the record evidence establish recent illegal drug involvement and an absence of demonstrated resolve to cease illegal drug use unconditionally. Applicant's behavior raises concerns about his judgment, reliability, and trustworthiness. While Applicant asserted he had not used illegal drugs since preparing his Answer to the SOR, he failed to demonstrate credible rehabilitation and resolve to avoid illegal drugs in the future.

In ISCR Case No. 98-0761 at 3 (Dec.27, 1999), DOHA's Appeal Board states that an administrative judge, in deciding an Applicant's security worthiness, "must consider the record as a whole (Directive Section F.3.) and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*." I have considered the record as a whole and have evaluated Applicant's conduct under the whole person concept of the Directive.

I have also weighed Applicant's drug behavior in light of 50 U.S.C. 435b, Section 3002. Applicant's use of illegal drugs is recent, and, while he recently expressed an intention to cease illegal drug use in the future, he did so by limiting his abstinence to the length of time he would hold a security clearance, thereby suggesting that his promised avoidance of drugs was limited and conditional. Applicant has failed to mitigate his recent use of marijuana and presents an unacceptable security risk. I conclude that, pursuant to 50 U.S.C. 435b, Section 3002, Applicant is an unlawful user of a controlled substance and must be denied a security clearance.

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
Subparagraph 1.f.:	Against Applicant
Paragraph 2, Guideline E	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

JOAN CATON ANTHONY
Administrative Judge