



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



In the matter of:)	
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SSN: -----)	ISCR Case No. 07-13294
)	
Applicant for Security Clearance)	

Appearances

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

December 30, 2008

Decision

WESLEY, Roger C., Administrative Judge:

History of Case

On July 25, 2008, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, and Department of Defense (DoD) Regulation 5200.2-R, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on August 27, 2008, and elected to have his case decided on the basis of the written record. Applicant received the File of Relevant Material (FORM) on September 18, 2008. Applicant did not submit any information in response to the FORM. The case was assigned to me on November 14, 2008.

Procedural Issues

Both SOR and Department Counsel contend that the covered allegations of drug use rightfully invoke application of the *per se* bar of the Bond Amendment (*viz.*, Section 3002 of 50 U.S.C. ¶ 435b). Applicant provides no rebuttal to these Bond contentions in his answer. As shown *infra*, the Bond Amendment's explicit statutory prohibition against granting security clearances to unlawful drug users and addicts under Adjudicative Guideline (AG) H has potential application to the facts of this case. Whether or not the exclusion is invoked will depend on how Applicant's use frequency is considered recent under the statutory requirements of the Bond Amendment and its implementing guidelines.

Summary of Pleadings

Under Guideline H, Applicant is alleged to (a) have used marijuana approximately 50 times from September 2003 through October 2006, (b) have used marijuana approximately 5 times from around March 2007 through July 2007, even though he has applied for a DoD security clearance in March 2007, (c) have used marijuana approximately 3 times around November 2007 in connection with his security clearance application, (d) have purchased approximately \$25.00 per month worth of marijuana from approximately September 2003 through September 2006, and (e) to be disqualified from having a security clearance by virtue of Public Law 110-181 (the Bond Amendment). Allegations of use of marijuana while applying for a security clearance are incorporated under Guideline E.

For his response to the SOR, Applicant admitted each of the allegations. He claimed infrequent and declining use of marijuana. He claimed his spouse has not renewed her prescription for medical marijuana, which means he can no longer legally purchase the substance as her caretaker. He claimed he no longer associates with anyone who can provide any illegal marijuana.

Findings of Fact

Applicant is a 53-year-old software engineer for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant are adopted as relevant and material findings. Additional findings follow.

Between September 2003 and October 2006, Applicant smoked marijuana approximately 50 times. He reduced his marijuana use somewhat after October 2006: He estimates he smoked the substance only five times between March 2007 and July 2007 (*see exs. 6 and 7*). He admits to continuing to use marijuana even after applying for a security clearance in March 2007. After he suffered a heart attack in April 2007 he reduced his marijuana use to once every two to three weeks (*see ex. 6*). Albeit, his wife continued using marijuana for medicinal purposes (*ex. 6*). When Applicant smoked marijuana. He did so at home with his wife for pleasure and relaxation. He purchased the substance for the personal needs of his wife and himself, spending around \$25.00 a month (*see ex. 7*). Although he assured the investigator from the Office of Personnel management (OPM) who interviewed him in August 2007 that he would not use

marijuana or any other illegal substance in the future, he resumed his usage in November 2007. Between November 2007 and June 2008, he used marijuana on approximately five separate occasions (see ex. 8).

Applicant is physically active (see ex. 6). He does aerobic exercises at a local gym and surfs on the weekends (ex. 6). Applicant provided no documentation in his behalf to support any further progress in the resolution of his drug usage. He provided no endorsements or performance evaluations either.

Policies

The revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (effective September 2006) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Drug Involvement

The Concern: 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 AG ¶ 24.

Personal Conduct

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, 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. See AG, ¶ 18.

Burden of Proof

By virtue of the precepts framed by the revised Adjudicative Guidelines, a decision to grant or continue an applicant's security clearance may be made only upon a

threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

Analysis

Between September 2003 and at least June 2008, Applicant used and purchased marijuana on what must be described as a regular and recurrent basis. His admission to using marijuana after applying for a security clearance raises security concerns not only about his continued drug use, but judgment issues as well, given his declination to cease his use of a substance he knew to violate established DoD drug policy requirements. Because he continued using marijuana so close to the date of issuance of the SOR in July 2008, his drug use also raises the potential for applying the *per se* prohibition of the Bond Amendment for concluded drug users.

Application of Bond Amendment to Applicant's drug usage

Before January 2008, certain types of conduct were subject to mandatory prohibitions against the granting of security clearances under the Smith Amendment (10 U.S.C. § 986). Conduct subject to the Smith Amendment's prohibition included ongoing drug usage or addiction. However, this section of the U.S. Code, which applied only to security clearances granted by DoD, was repealed on January 28, 2008, when the President signed the National Defense Authorization Act for fiscal year 2008 into law. The previous Smith Amendment provisions were replaced by adding Section 2002 to 50 U.S.C. § 435b (known as the Bond Amendment), which applies throughout the Federal Government (not just DoD anymore).

Section 3002 as it applies to drug users precludes the head of a Federal agency from granting or renewing a security clearance "for a covered person who is an unlawful user of a controlled substance or an addict (as defined in section 102(1)) of the

Controlled Substances Act (21 U.S.C. § 802) (see ex. 9). Unlike its other legislative counterparts that cover persons convicted of a crime, persons discharged or dismissed from the Armed Forces under dishonorable conditions, or persons determined to be mentally incompetent, the drug user prohibition in the Bond Amendment includes collateral clearances and provides for no waiver authority (see ex. 9).

To be sure, the Bond Amendment's drug user prohibition provides no definitions of the term "drug user." In June 2008, the Under Secretary of Defense (Intelligence) issued a clarifying memorandum (USD memorandum) providing interim guidance for implementation of the Bond Amendment (see ex. 10).. This memorandum set forth guidance for adjudicators, department counsel and administrative judges to assess the potential application of the Bond Amendment to security clearance determinations and requirements for "Exception" identification of persons subject to its limitations in the Joint Adjudication management System (JAMS) if a collateral clearance is granted. For purposes of the unlawful user prohibition in the Bond Amendment, the memorandum described an "unlawful user of a controlled substances" as (a) a person who uses a controlled substance and has lost the power of self-control and (b) any person who is a current user of the controlled substance in a manner other than as prescribed by a licensed physician. Current use is not limited to the use of a drugs on a particular day, or within a matter of days or weeks before, but rather enough usage to indicate the individual "is actively engaged in such conduct" (see ex. 10).

Still, the USD memorandum does not provide any bright lines for determining frequency patterns and contemporaneous use parameters relative to applicants with security clearances or pending clearance applications. This is a potential problem for determining where to draw boundaries for applying *per se* prohibitions for established drug users under the Bond Amendment. We need not reach precise boundary limits in this case, though, for the Government has established a *prima facie* case for applying the Bond Amendment's drug user prohibitions to Applicant's case specific circumstances.

By all accounts, Applicant's continuous and recurrent use of marijuana to within several weeks of the issuance of the SOR in this case to fall within the Bond Amendment's prohibition on drug users absent any persuasive contrary authority from Applicant. Invoking the drug user prohibition in these circumstances serves to bar Applicant from being granted a security clearance on a *per se* basis. Applicant has provided no documented reasons why the Amendment's prohibition should not be applied to his situation.

Applicant's drug abuse history and Bond Amendment application

Over a five-year period, Applicant used marijuana on a virtually continuous basis, purchasing enough to meet the personal needs of himself and his wife. He currently uses marijuana and reports a last use about a month before the issuance of the SOR. With so many returns to marijuana use after commitments to abstain, and lacking in any reliable track history of drug use avoidance, too much doubt and uncertainty exist to make safe predictable judgments about his ability to avoid recurrent drug involvement.

On the strength of the evidence presented, several disqualifying conditions of the Adjudicative Guidelines for drug abuse are applicable: DC ¶ 25(a), “any drug abuse,” DC ¶ 25(c), “illegal possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia,” and DC ¶ 25(h), “expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.” Afforded an opportunity to respond to the FORM materials, Applicant did not reply.

Judgment concerns exist over Applicant’s continued drug use after applying for a security clearance in March 2007. These actions reflect both serious judgment lapses and disregard of the DoD’s rules and policies for clearance holders. Applicant’s actions are expressly covered by Guideline E, and are entitled to independent cognizance under this Guideline according to the Appeal Board. See ISCR Case No. 06-20964, at 6 (April 10, 2008). Where (as here) there is additional probative adverse information covered by Guideline E that is not covered by Guideline H, and *vice versa*, and which reflects a recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior, independent grounds do exist for considering questionable judgment and trustworthiness allegations under Guideline E, as well as Guideline H. Authority for considering overlapping conduct under both guidelines is contained in the guidance provided in Enclosure 2, ¶ 2(d) of the Directive’s August 2006 amendments.

So, under Guideline E, core judgment and trustworthiness concerns covered by D.C. ¶ 16(d), “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,” are applicable in this case

Because of the Bond Amendment’s mandatory preclusion of clearance eligibility for anyone determined to be an illegal drug user (*see* Sec. 3002 of 50 U.S. § 435b), Applicant, by virtue of his determined current illegal use of marijuana, is barred from continued access to classified information without regard to any extenuating or mitigating circumstances that might be found in his behalf. Further, in view of his continuous and recurrent history use of marijuana, even after he applied for a security clearance and even despite past promises to abstain, considerable time in demonstrated abstinence would be required without the mandatory preclusive effects of the Bond Amendment.

From a whole person perspective, Applicant has established no independent probative evidence in this administrative record to warrant any different conclusions under the whole person concept in the Directive. He has provided no endorsements from supervisors and coworkers with his employer to soften or mitigate any of the drug and judgment concerns associated with his ongoing use of marijuana.

Taking into account all of the facts and circumstances surrounding Applicant’s drug use and judgment lapses, Applicant does not mitigate security concerns related to his drug use and personal conduct issues. Unfavorable conclusions warrant with respect to the allegations covered by Guidelines H and E.

In reaching my decision, I have considered the evidence as a whole, including each of the E2(a) factors enumerated in the Adjudicative Guidelines of the Directive.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE H: (DRUG INVOLVEMENT): AGAINST APPLICANT

 Sub-paras. 1.b through 1.e: AGAINST APPLICANT

GUIDELINE E: (PERSONAL CONDUCT): AGAINST APPLICANT

 Sub-para. 1.a: AGAINST APPLICANT

Conclusions

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge