



In the matter of:)
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) ISCR Case No. 07-13480
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)
 Applicant for Security Clearance)

For Government: Braden M. Murphy, Esquire, Department Counsel
 For Applicant: Gregory L. Ryan, Esquire

May 30, 2008

Decision

DAM, Shari, Administrative Judge:

Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

On December 12, 2006, Applicant submitted his Security Clearance Application (e-QIP). On January 14, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline H (Drug Involvement). 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 February 5, 2008, and requested a hearing before an administrative judge. On March 11, 2008, DOHA assigned the case

to me. A Notice of Hearing was issued on April 9, 2008, and the case was heard on April 30, 2008, as scheduled. Department Counsel offered Exhibits (GE) 1 and 2 into evidence without objection. Applicant testified, called two witnesses, and offered Exhibits (AE) A through I into evidence without objection. DOHA received the hearing transcript (Tr.) on May 9, 2008.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations contained in ¶¶ 1.a and 1.b of the SOR, and offered explanations in support of his request for eligibility for a security clearance. His admissions are incorporated into the following findings:

Applicant is a 52-year-old married man, who is an interactive courseware designer for a defense contractor. He is part of the senior management team. (Tr. 45). Prior to working for a federal contractor, he had a successful career in the broadcasting field for over 17 years. In 1998, he began working with a federal contractor that merged with his current employer in August 2006. In December 2006, he submitted an e-QIP.

In response to Section 24: *Your Use of Illegal Drugs and Drug Activity* on the e-QIP, Applicant disclosed his history of illegal drug use. In November 1972, Applicant began using marijuana two to three times a week, while in college. He continued purchasing and using it with that frequency until November 2006, a month or so prior to completing his e-QIP.

Before submitting the e-QIP, Applicant met with his general manager and direct supervisor. He informed them of his history of using marijuana and of his intention to disclose it to the Government, because he did not intend to lie to them or the Government. He believes that making those disclosures was a positive step in his life and furthered his decision to stop using marijuana. (Tr. 43). He is committed to maintaining abstinence and signed a statement of his intention not to use any illegal drugs in the future. (AE I). He acknowledged that one of the reasons he stopped using marijuana related to the adverse consequence it could have on his employment. (Tr. 72).

In April 2008, Applicant voluntarily made an appointment with a professional clinical counselor, who has a specialty in substance abuse, for a drug assessment. After a one-hour interview with Applicant, which included a random drug screening (that was negative), a discussion of Applicant's reported substance abuse pattern, and a review of information pertaining to specific reason for the assessment referral, viz., the security clearance process, the counselor concluded that there were no symptoms of drug abuse or dependence. She determined he did not need, and thus did not recommend, participation in any form of rehabilitation. (AE G). Subsequently, he did not seek any additional professional assistance or participate in any formal substance abuse treatment or 12-Step program.

For the last 35 years, Applicant used marijuana recreationally with old friends and at home for purposes of relaxing. (Tr. 53-55; 69). After deciding to stop using it, he informed his friends of his decision. Although he no longer smokes marijuana, some of his old school friends continue to use it. Within the past week of this hearing, he went fishing with a group of those friends, who continue to smoke marijuana and did so in his presence. (Tr. 62-63).

While testifying Applicant, credibly and candidly, acknowledged that his long history of smoking marijuana, an illegal activity, demonstrated poor judgment. (Tr.59). In retrospect, he regrets having used it for such a long period of time. (Tr. 78). He has no intention of using it in the future. (Tr. 42).

Applicant's direct supervisor testified. He is an instructional designer and has a Secret security clearance. He has known Applicant since 1988 and worked with him in previous capacities. He has supervised Applicant for the last two years. He is aware of Applicant's marijuana history. (Tr. 30; 35). He considers Applicant to be a very reliable and trustworthy. (Tr. 31).

One of Applicant's previous colleagues from a radio station testified. She met Applicant in 1984 while they were news reporters, and subsequently became the news director and his supervisor. They worked together about ten years, and maintained their friendship for 24 years. Over the course of the years that she has known Applicant, she has been impressed with his strong adherence to the principle of maintaining confidentiality of sources in journalistic reporting. She does not have any reason to be concerned about Applicant's ability to keep government secrets. (Tr. 21).

Five of Applicant's friends and colleagues submitted letters in support of Applicant, attesting to his reliability, integrity and trustworthiness. Several of them have known him for many years. (AE A, B, C, D and E). His current manager, who has known him for nine years, commented on Applicant's strong sense of honesty and professional character. (AE F).

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 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 to obtain a favorable security decision. 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.”

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

AG ¶ 24 expresses the security concern pertaining to drug involvement:

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.

(a) 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;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

AG ¶ 25 sets forth conditions that could raise a drug involvement security concern and be disqualifying. They include:

(a) any drug abuse (see above definition);

(b) testing positive for illegal drug use;

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

(d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;

(e) evaluation of drug abuse or drug dependence by a licensed clinical social worker who is a staff member of a recognized drug treatment program;

(f) failure to successfully complete a drug treatment program prescribed by a duly qualified medical professional;

(g) any illegal drug use after being granted a security clearance; and

(h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

Applicant admitted that he purchased and used marijuana from November 1972 until November 2006. That evidence established facts that raise security concerns under AG ¶ 25(a) and AG ¶ 25(c).

After the Government raised a security concern, the burden shifted to Applicant to rebut or produce evidence that could mitigate the security concerns raised by his drug involvement. AG ¶ 26 provides the following mitigating conditions:

(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.

After considering the evidence in the record, only one of the four mitigating conditions applies to this case, viz., AG ¶ 26(b)(4). AG ¶ 26(a) does not apply because Applicant used marijuana recreationally for 35 years, with his last use occurring less than two years ago. Hence, his behavior was recent and frequent, casting doubt on his current reliability, trustworthiness and good judgment.

AG ¶ 26(b)(1) and (2) do not apply because Applicant continues to associate with friends with whom he previously used marijuana and in environments where he knows they may use marijuana, including within a week of this hearing. Applicant's assertion of two years of abstinence is not sufficient to trigger the application of AG ¶ 26(b)(3), given his long history of using marijuana. AG ¶ 26(b)(4) provides some mitigation. Applicant signed a statement of intent authorizing an automatic revocation of a clearance should it be determined that he uses marijuana in the future. This action demonstrated a commitment to abstain from drug use in the future.

The record evidence does not support the application of AG ¶ 26(c) or AG ¶ 26(d). Applicant began using marijuana for recreational purposes and not as an authorized medical prescription. He did not complete a prescribed drug treatment program as contemplated under the guidelines.

In addition to the normal concerns under Guideline H, at issue here is whether Applicant is disqualified, as a matter of law, from security clearance eligibility due to his illegal drug use. The pertinent law is now 50 U.S.C. § 435c, which provides, in relevant part, as follows: "After January 1, 2008, the head of a Federal agency may not grant or renew a security clearance for a covered person who is an unlawful user of a controlled substance or an addict" as defined by federal law. This prohibition uses language that is nearly identical to the previous prohibition in 10 U.S.C. § 986.¹

¹ 10 U.S.C. § 986(c) (2) (2008) ("The person is an unlawful user of, or is addicted to, a controlled substance" as defined by federal law.).

As a starting point, 50 U.S.C. § 435c applies to Applicant because he is an employee of a federal contractor.² Second, there is no evidence to prove that Applicant is an addict. Third, there is ample evidence to prove that Applicant **was** an unlawful user of a controlled substance, as the record evidence shows that Applicant smoked marijuana on a fairly regular basis for 35 years and did so until November 2006. But, there is insufficient evidence to prove that Applicant **is** currently an unlawful user. (Emphasis added).

The statutory prohibition in 50 U.S.C. § 435c(b), like its predecessor in 10 U.S.C. § 986(c)(2), uses the present tense, not the past tense. A plain-meaning reading of the statute cannot be stretched to apply Applicant's marijuana use that took place about 19 months ago in November 2006. To read it otherwise would result in a mandatory disqualification of a person who engaged in drug abuse three years ago or perhaps at any time in the past, a result inconsistent with the plain meaning of the statute. This interpretation of 50 U.S.C. § 435c(b) is consistent with Appeal Board case law from 2003 and 2005 when it interpreted 10 U.S.C. § 986(c) (2) in the same way.³ Hence, the current federal statute pertaining to substance abuse does not apply to this case.

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 following 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 include an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept.

² 50 U.S.C. § 435(a) (2) (defining a covered person under the statute).

³ See ISCR Case No. 03-25009 (App. Bd. Jun. 28, 2005) (10 U.S.C. § 986(c)(2) uses the present tense, not the past tense, when referring to unlawful use of, or addiction to, controlled substances, consequently, the Administrative Judge erred by concluding that Congress intended that persons who had been addicted to, or dependent on, controlled substances in the past to be forever barred from being granted a clearance); ISCR Case No. 01-20314 (App. Bd. Sep. 29, 2003) (Administrative Judge erred by applying 10 U.S.C. § 986(c)(2) to an applicant who last used marijuana about two years before the hearing).

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, including Applicant's candid testimony. Applicant is an intelligent and successful 52-year-old man, who has worked for his employer for more than ten years and has received the support of many colleagues and professionals.

Applicant began purchasing and using marijuana frequently in November 1972 and continued to use it until November 2006, which included time while working for the federal government. After initiating the security clearance process, he realized that it was time to stop. He subsequently, openly and honestly, discussed his drug history with his employer and some colleagues. He went for a drug assessment, albeit not with a health care provider recognized under the AGs, or one who performed a standard protocol of psychological testing and extensive interviews. These steps represent evidence of his decision to change his life. However, his history of frequent marijuana abuse spans more than thirty-five years and indicates an extensive pattern of exercising poor judgment. His evidence of abstinence spans two years, and primarily consists of his assertions, one drug screening, and a drug assessment that can be given little weight, all of which is insufficient to offset his history.

Clearly, Applicant has had a "blind spot" regarding his drug use for 35 years, which he acknowledges. He continues to associate with friends who use illegal drugs and is present when they use them. This shows a continuing course of poor judgment, violations of the law, and inability to extricate himself from the overall illegal drug culture. While he appears sincerely dedicated to abstinence, he has not established a sufficient track record of rehabilitation and good judgment, corroborated by independent and professional evidence, to persuade me that he has sufficiently addressed the underlying issues related to his long-term marijuana use. There is no evidence of other misconduct or adverse information in his record.

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

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

Conclusion

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

SHARI DAM
Administrative Judge