



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



In the matter of:)	
)	
SSN:)	ISCR Case No. 07-18207
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O'Connell, Esquire, Department Counsel
For Applicant: Pro Se

August 20, 2008

Decision

CREAN, Thomas M., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP), on July 6, 2007. (Item 4) On April 30, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines H (Drug Involvement). (Item 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 May 12, 2008. He admitted the allegations under Guideline H, without providing any additional information or explanation. He elected to have the matter decided on the written record in lieu of a hearing. (Item 3)

Department Counsel submitted the Government's written case on June 4, 2008. Applicant received a complete file of relevant material (FORM) on June 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 did not respond with additional information. The case was assigned to me on August 15, 2008. Based upon a review of the case file and the pleadings, eligibility for access to classified information is denied.

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 20 years old and graduated from high school in 2006. He started work for his employer, a defense contractor, in June 2007 as a maintenance mechanical specialist. He is not married.

Applicant stated on his security clearance application that he used marijuana four times from June 2005 until May 2007. He stated on the application:

I was young and every one was doing [sic] so I tried it but I no longer use it or have any desire to use in the future. Upon being hired, I had to take a drug test and the results came back positive. I have been informed by Human Resource Manager [Name] that I will be subject to random testing by the company and that I will not know when I will be scheduled for tests. I agreed to these terms and will cooperate with all terms and conditions placed on me by [employer]. (Item 4 at 25)

Applicant admitted in an interview with security investigators on September 4, 2007, that he used marijuana a total of four times from June 2005 until May 2007. On each occasion he was with friends at social gatherings and he took two or three puffs from a marijuana cigarette that was being shared. Applicant noted that he felt relaxed but otherwise did not care for the drug. He tried it out of curiosity. He has not used any other illegal drugs. He has not received counseling or treatment for drug use or had adverse law enforcement problems based on drug use. He tested positive in June 2007 for marijuana when tested by his new employer. His last use of marijuana had been a few weeks prior to the test. He agreed to random future tests to maintain his position with the defense contractor. He has no future intention to use marijuana or any other illegal drug. (Item 5 at 3)

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 marijuana four times from June 2005 until May 2007. He also tested positive for marijuana in June 2007. His drug use and positive test for marijuana raises Drug Involvement Disqualifying Conditions AG ¶ 25(a) (any drug use); AG ¶ 25(b) (testing positive for illegal drug use); and AG ¶ 25(c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution). Applicant had to possess the marijuana cigarette to use marijuana.

I have considered the Drug Involvement Mitigating Conditions (DI MC). Applicant's last admitted use was in May 2007. He voluntarily took three or four puffs of a marijuana cigarette that was being passed around by friends at a social occasion. DI MC 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's used marijuana four times. All of his use of marijuana was voluntary with his last use only a little over a year ago. This makes his use of marijuana recent, frequent, and not under unusual circumstances. Since his use was voluntary and in a gathering of friends, it may likely recur.

I considered DI MC 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 stated he intends not to use marijuana in the future. He has an agreement with his employer to be randomly tested for drug use. However, a stated intent not to use drugs is not sufficient to mitigate admitted drug use. Appellant has not presented information on any change of friends, environment, or social circumstances to indicate he will not use drugs. Only a little over a year has passed since Applicant's last admitted use of marijuana. He has not noted any counseling or rehabilitation programs for drug use. The only aspect of the mitigating condition that is applicable is Appellant's agreement with his employer to be randomly tested for drug use. Applicant has not presented sufficient information to meet his heavy burden to mitigate his admitted use of marijuana. Guideline H is decided against Applicant.

The Bond Amendment, 50 USC § 435b, prohibits all Federal agencies from granting or renewing a security clearance for any person who is an unlawful user of a controlled substance or is an addict. The Department of Defense (DoD) issued interim guidance defining an unlawful user of a controlled substance as "a person who uses a controlled substance and has lost the power of self-control with reference to the use of the controlled substance, and any person who is a current user of the controlled substance in a manner other than as prescribed by a licensed physician." Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct. An "addict" of a controlled substance is defined as "an individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare; or is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction. (Memorandum, Subject: Interim Guidance for the Implementation of Public Law 110-181, Section 3002

(the Bond Amendment) Regarding Adjudication of Security Clearances, date June 20, 2008). Applicant used marijuana four times, his last use being in May 2007. Since his last use was over a year ago, there is no indication that he has lost self-control over the use of the drug or that he habitually uses the drug. Applicant's use of marijuana does not rise to the level of a person prohibited from being granted a security clearance under the provisions of the Bond Amendment.

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 is only 20 years old and experimented with marijuana while a high school student and shortly thereafter. I considered that his last use was over a year ago, that he stated his intent not to use illegal drugs in the future, and agreed to random drug testing by his employer. A stated intention to not use drugs in the future is not sufficient by itself to overcome admitted voluntary use of drugs in the past. He has not provided sufficient information to mitigate the security concern based on his use of marijuana. He has not indicated he has changed friends or social environment that led to his use of drugs. He has not received counseling for drug use or participated in any rehabilitation programs. He agreed over a year ago to random testing for drug use. He has not indicated whether he has been tested and that the results were negative. Sufficient time has not passed since his last voluntary use of marijuana to indicate he will not use drugs in the future. Applicant has failed to provide sufficient information to mitigate security concerns for his drug use and positive random test for marijuana. Overall, the record evidence leaves me with 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

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