



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



In the matter of:)
)
) ISCR Case No. 08-00177
)
)
Applicant for Security Clearance)

Appearances

For Government: Ray T. Blank, Jr., Department Counsel
For Applicant: *Pro Se*

September 19, 2008

Decision

HEINY, Claude R., Administrative Judge:

Applicant used marijuana from 1972 until early 2007, using it during the last 20 years a few times a year. Applicant has not rebutted or mitigated the government's security concerns under guideline H, drug involvement. Clearance is denied.

Statement of the Case

Applicant contests the Defense Department's intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a

¹ 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.

Statement of Reasons (SOR) on June 25, 2008, detailing security concerns under drug involvement.

On July 8, 2008, Applicant answered the SOR, and elected to have the matter decided without a hearing. Department Counsel submitted the government's case in a File of Relevant Material (FORM), dated August 7, 2008. The FORM contained attachments Items 1-5. In an undated letter, Applicant responded to the FORM. Department Counsel did not object to the material. Applicant's response was admitted into the record. On September 15, 2008, I was assigned the case.

Findings of Fact

In his Answer to the SOR, Applicant denied the factual allegations in ¶¶ 1.d and 1.e. of the SOR. He admitted the factual allegations in ¶¶ 1.a, 1.b, and 1.c of the SOR. Applicant neither admitted nor denied the allegation in SOR ¶ 1.f.

Applicant is a 54-year-old satellite engineer who has worked for a defense contractor since November 2006, and is seeking to obtain a security clearance. In 1973, Applicant was granted a secret clearance and in 1984, he obtained a top secret clearance. No information about his duty performance has been presented. Applicant stated, but failed to document, he had many letters of commendation. (Applicant's Answer to FORM)

In his November 2006 Electronic Questionnaires for Investigations Processing (e-QIP), in response to question 24, the use of illegal drugs and drug activity, Applicant states he used marijuana "100+" times between January 1972 and the present. He stated within the last 20 years he was present when marijuana was being smoked and he would occasionally take a puff and inhale. (Item 4)

In June 1974, Applicant was a member of the U.S. Navy when charged with sale of marijuana, a felony, and convicted of possession of marijuana. He was fined and received probation. In June 1976, he was honorably discharged from the Navy. (Item 4) In a February 2007-personal subject interview (Item 5), Applicant admitted he used marijuana on occasion. His last use was in January 2007 or February 2007 with old friends at a funeral. (Item 5) Applicant first used marijuana in the 1970's. During the last 20 years, he has used marijuana once or twice a year, when available, in a safe place, and among friends.

Applicant stated he did not plan to use marijuana in the future, but did state he would smoke it again if offered. In his response to the SOR (Item 2), Applicant states he is not a security risk, his use of marijuana was "a couple of puffs here," and, except for the 1974 incident while he was in the Navy, never used while possessing a security clearance. In his response to the FORM, Applicant stated he never smoked "while on assignment CONUS nor OCONUS."

The National Defense Authorization Act for the Fiscal Year 2008, Public Law 110-181, codified in 50 U.S.C. § 435c, states: "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.

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 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).

Analysis

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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying:

- (a) any drug abuse;
- (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.

From the 1972 until early 2007, Applicant used marijuana in excess of 100 times, using it once or twice a year during the past 20 years. He last smoked marijuana in January 2007 or February 2007, while with old friends attending a funeral. This last use occurred after he had completed his November 2006-e-QIP and was seeking a clearance. At the time of his 1974 arrest and conviction, Applicant was a member of the U.S. Navy and held a secret clearance. In November 2006, when asked if he would smoke marijuana in the future, Applicant stated he would use if offered marijuana and the occasion conducive. AG ¶ 25a, 25c, 25g, and 25h apply.

AG ¶ 26 provides conditions that could mitigate security concerns:

- (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.

SOR ¶¶ 1.d and 1.e charge Applicant used marijuana when he held a security clearance. In 1973 and 1984, Applicant was granted security clearances. He used marijuana from 1972 until early 2007. However, there is no evidence, except for the 1974-incident, that his use occurred while he held a clearance. In 1974, he held a secret clearance when he was arrested for the sale of marijuana and convicted of possessing marijuana. The 1974 incident was more than 30 years ago and, as such, the passage of time lessens the security significance of this event.

Applicant has denied using while holding a clearance. The government presented no evidence refuting his denial. Applicant also denied using while on assignment. The disqualifying condition of using illegal drugs while holding a clearance makes no distinction between using at work or while off-duty. Illegal drug use is illegal drug use no matter where it occurs. The issue is whether or not Applicant held a clearance while using and the record fails to establish he had a clearance when he used. I find for Applicant as to SOR ¶¶ 1. d and 1.e.

None of the mitigating factors apply to Applicant's use of illegal drugs. AG ¶ 26a does not apply because the behavior did not happen long ago. His last use was less than two years ago. He used it in excess of 100 times so his use was not infrequent. There is no evidence his use occurred under circumstances that are unlikely to recur or do not cast doubt on the individual's current reliability, trustworthiness, or good judgment. He last used with old friends at a funeral. Seeing old friends at a funeral is likely to recur.

AG ¶ 26b does not apply because there is no demonstrated intent not to abuse drugs in the future. Applicant states he will not use marijuana in the future, unless it was offered to him and the occasion conducive. There is no showing of a disassociation from drug-using associates or contacts or a changing or avoiding the environment where drugs were used. Nor the period of abstinence, which is slightly more than a year and a half, an appropriate period of abstinence when balanced against his use over a 35 year period.

AG ¶ 26c does not apply because use of prescription drugs was not an issue. AG ¶ 26d does not apply because there was no satisfactory completion of a drug treatment program.

Applicant's last marijuana use occurred in early 2007, which was after he had completed his November 2006-e-QIP. Even though he was seeking a clearance, he lacked the knowledge that his illegal use marijuana was inappropriate and incompatible with holding a clearance. During the 35-year period from the 1970's through early 2007, Applicant lacked either the knowledge that using marijuana was wrong or the fortitude not to use. Either way, he fails to display the reliability and trustworthiness necessary to obtain access to our country's secrets. His continued marijuana use over a 35-year period raises questions about his ability or willingness to comply with laws, rules, and regulations.

Under the National Defense Authorization Act for the Fiscal Year 2008, Public Law 110-181, codified in 50 U.S.C. § 435c, an unlawful user of marijuana may not be granted a security clearance. 50 U.S.C. § 435c(b) uses the present tense, making it applicable only if the person "is" an unlawful user or "is" an addict. See ISCR Case No. 03-25009 (App. Bd. Jun. 28, 2005). Based on the evidence, I conclude Applicant is disqualified as an unlawful user of marijuana. He has used it for most of his adult life. He stated he would smoke marijuana if offered to him and the occasion conducive, making it likely he will continue to use it. I am satisfied Applicant is a present user of marijuana within the meaning of 50 U.S.C. § 435c. Applicant is disqualified from being granted a clearance.

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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. In 1974, Applicant, while a member of the U.S. Navy, was arrested and found guilty of marijuana possession. Had his marijuana use ended there, this incident would not be a security concern. However, his use continued for the next 33 years. For the past twenty years he has been using marijuana once or twice a year. When asked if he would use in the future, he said he would if it were offered and the occasion conducive. Applicant still fails to understand his use of marijuana is illegal, inappropriate, and incompatible with holding a clearance.

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

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, Drug Involvement: **AGAINST APPLICANT**

Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	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.

CLAUDE R. HEINY II
Administrative Judge