



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



In the matter of:)	
)	
SSN:)	ISCR Case No. 08-01508
)	
Applicant for Security Clearance)	

Appearances

For Government: Ray T. Blank, Esquire, Department Counsel

For Applicant: Joseph E. Propst, Esquire

November 24, 2008

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant completed Electronic Questionnaires for Investigations Processing (e-QIP) on February 5, 2008. On June 9, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing 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, and 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.

In a response received on July 7, 2008, Applicant admitted the sole allegation raised under Guideline H. Applicant also requested a hearing before a DOHA Administrative Judge. I was assigned the case on August 18, 2008. Department Counsel and Applicant proposed a September 16, 2008, hearing, and a Notice of Hearing was issued to that effect on August 27, 2008.

The hearing took place as scheduled. Department Counsel submitted three exhibits (Exs.) which were accepted into the record as Exs. 1-3 without objection. Applicant submitted five exhibits, accepted as Exs. A-E without objection. Applicant's boss appeared as a witness and gave testimony. Applicant was given until September 26, 2008, to submit any further materials. On September 23, 2008, Applicant submitted by facsimile transmission one additional document, a statement of intent, which was accepted into the record as Ex. F without objection; the original document followed by regular mail. The transcript (Tr.) was received on September 26, 2008. The record was then closed. Based upon a review of the case file, exhibits, and testimony, security clearance is denied.

Findings of Fact

Applicant is a 38-year-old developer for a defense contractor, working on software and web sites. Divorced in 1999, Applicant is currently in a stable relationship with a teacher's assistant. He is a home owner with excellent credit.

Starting in 1987, at about the age of 17 during his junior year, Applicant began the recreational use of marijuana, an illegal drug. He knew the substance was illegal.¹ He did not use the drug in public or at large gatherings, limiting his use to sporadic events with an inner circle of friends. The frequency of his use varied from daily, to just weekends, to only once or twice a month. "There were times where [he] just stopped for six months just because [he] didn't want to do it."² As a teen, he used the drug for "fun."³

Following high school he worked and completed an associate's degree in applied science and electronics. After visiting what is now his current area of residence, Applicant and his now ex-wife moved to that area in 1996. He worked in several technological and network areas and held various second jobs for several years and built a favorable reputation. Throughout this time, he continued to use marijuana to help him relax.⁴ By 2005, Applicant's drug abuse had decreased somewhat. In December 2005, he thought he would stop using marijuana. He used it at least two more time, however, after that time. He finally quit in April 2007. He did so for a number of reasons: His girlfriend would not tolerate its use. He is serving as sort of stepfather to his girlfriend's pre-teen children. He did not want to set a bad example for a nephew and niece who then lived nearby. The smoke irritated his eyes. He had a new inner circle of friends and he had been seeing less and less of the friends with whom he would use marijuana.⁵ Such considerations led him to quit cold turkey, without any assistance.

¹ Tr. 39.

² Tr. 25.

³ Tr. 26.

⁴ *Id.*

⁵ Applicant last saw one of his old friends in April 2007. Applicant did not use marijuana on that occasion, but it was the last month he used the drug. Tr. 33.

In executing his e-QIP on February 5, 2008, Applicant admitted in response to Question 24 that he had illegally used a controlled substance (marijuana) since the age of 16 or in the last 7 years. He noted that he used marijuana "100+" times between October 2000 (estimated) and April 2007 (estimated). He wrote in the space provided for additional comments: "I experimented on and off through out the years. I quit December 2005. I thought maybe just on special occasions. It only took a few occasions and decided that I didn't want anything to do with marijuana and I don't plan on ever trying it again."⁶ He provided substantially the same answers the following month during an interview.⁷ The two incidents of drug use between December 2005 and April 2007 were not special occasions. He was at home alone on the first occasion; the second time he used the drug was with a friend.

To date, Applicant has been drug-free for about a year and a half. He has no intention of illegally using marijuana again.⁸ He has successfully passed three drug screening tests since June 2007, when he started work for his current employer.⁹ Applicant has signed a notarized statement that any future violation of Guideline H shall constitute automatic revocation of any security clearance granted to him.¹⁰

Applicant has the support of many individuals, as reflected in the many recommendations introduced at the hearing. His boss describes him as an excellent employee who is reliable and trustworthy.¹¹ He has witnessed Applicant mature over the time they have worked together and noted that Applicant has never seemed happier.¹² Applicant's boss believes Applicant to be sincere with regard to his expressed intent not to use marijuana again in the future.

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

⁶ Ex. 1 (e-QIP) at 28 of 31.

⁷ Ex. 2 (Interrogatories).

⁸ Tr. 30, 44.

⁹ Tr. 35.

¹⁰ Ex.F (Statement of Intent, dated Sep. 23, 2008).

¹¹ Tr. 49.

¹² Tr. 53.

and common sense decision. Under AG ¶ 2(c), this 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.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .”¹³ The burden of proof is something less than a preponderance of evidence.¹⁴ The ultimate burden of persuasion to obtain a favorable clearance decision is on the applicant.¹⁵

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). “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹⁶ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.¹⁷ The decision to deny an individual a security clearance is not necessarily

¹³ See *also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

¹⁴ *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

¹⁵ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

¹⁶ *Id.*

¹⁷ *Id.*

a determination as to the loyalty of an applicant.¹⁸ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon consideration of the evidence, I find **Guideline H - Drug Involvement** to be the most pertinent to the evaluation of the facts in this case. The concern under that guideline is that 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 defined as mood and behavior altering substances, and include 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 inhalants and other substances. "Drug abuse" is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

Conditions pertaining to this adjudicative guideline that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, are set forth and discussed in the conclusions below.

Analysis

Applicant admits he used marijuana with varying frequency from the time he was a teenager in 1987 to until last year, 2007. Consequently, Drug Involvement (DI) Disqualifying Condition (DC) AG ¶ 25(a) (*any drug abuse*) applies.¹⁹ With a disqualifying condition thus established, the burden shifts to Applicant to mitigate security concerns.

Applicant began using marijuana during his junior year of high school. He continued using the drug, knowing it was illegal, into maturity. His use varied from daily to weekends only. Sometimes he would go for periods as long as six months without using the drug, but he would eventually relapse and continue its illegal use. Indeed, after he "quit" in 2005, he still relapsed and abused the drug at least twice before quitting again in April 2007. Under such facts, DI Mitigating Condition (MC) 1, AG ¶ 26(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*) does not apply.

Marijuana was Applicant's drug of choice. Consequently, DI MC 3, AG ¶ 26(c) (*abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended*) does not apply. Similarly, because Applicant did not undergo a prescribed drug treatment program, DI MC 4, AG ¶ 26(d)

¹⁸ Executive Order 10865 § 7.

¹⁹ Because Applicant readily admits he bought the marijuana he used, specific discussion as to the unique facts involved in how he solicited such purchases is reserved for Guideline E, Personal Conduct.

(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) does not apply.

Applicant has expressed his intent not to use marijuana again in the future, both orally and in writing. He rarely sees his old cohorts and now moves in a circle of peers who do not use drugs. His girlfriend is adamantly opposed to its use. He has signed a statement of intent with automatic revocation of clearance for any future violation. He has refrained from marijuana use for a year and a half. Such facts may raise sections (1), (2), and (4) of DI MC 2, AG ¶ 26(b) *(a documented 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; (4) a signed statement of intent with automatic revocation of clearance for any violation).*

The facts, however, do not raise section (3) – *an appropriate period of abstinence*. Applicant is 38-years-old. He has abused marijuana for 20 of those years, his entire adult life. He admits he went through periods of as long as six months without using marijuana simply because he “didn’t want to do it.” Then relapsed to using the drug as usual. His attempt to “quit” in 2005, unless a special occasion happened, resulted in him resorting to marijuana at least twice under less than stellar circumstances. Had he satisfactorily completed a drug treatment program in which he could have demonstrated a more concerted, guided effort to become drug-free, Applicant might have better demonstrated his resolve and ability to remain drug free. As it is, however, given the duration of his illegal drug use and his past relapses, a year and a half of being drug free is insufficient to establish a commitment to abstinence. Consequently, illegal drug related security concerns remain.

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 public trust position 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, as well as the “whole person” factors noted above. Applicant is an engaging, credible, and mature man who began

using marijuana as a teen. He continued this illegal abuse for two decades. While he voluntarily decided to quit drugs in 2007 for a number of persuasive and laudable reasons, he did so “cold turkey,” without professional or peer guidance. Although he is highly credible in expressing his intention and desire not to abuse drugs again, and his year-and-a-half of abstinence is a positive indicator, his track record to date gives one pause vis-a-vis the likelihood of continuation or recurrence. This is particularly true in light of the fact his efforts are self-initiated and without a support network. Had his resolve stood firm in April 2005, this judgment might be different. As it now stands, however, any residual doubt must be resolved by finding against an Applicant because the clearly consistent standard indicates that “security clearance determinations should err, if they must, on the side of denials.”²⁰ With security concerns remaining, clearance is denied.

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

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. Clearance is granted.

ARTHUR E. MARSHALL, JR.
Administrative Judge

²⁰ *Id.*