



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



In the matter of:)	
)	
)	ISCR Case No. 08-02008
)	
Applicant for Security Clearance)	

Appearances

For Government: Emilio Jaksetic, Esquire, Department Counsel

For Applicant: *Pro Se*

August 29, 2008

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the government's security concerns under Guideline H, Drug Involvement. Applicant's eligibility for a security clearance is denied.

On June 9, 2008, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing the security concerns under Guideline H. 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 June 17, 2008, and requested a hearing before an Administrative Judge. The case was assigned to me on July 23, 2008. DOHA issued a notice of hearing on July 24, 2008, and I convened the hearing as scheduled on August 19, 2008. The government offered Exhibits (GE) 1 and 2. They

were admitted without objection. Applicant testified and did not submit any documentary evidence. One witness testified on Applicant's behalf. DOHA received the transcript of the hearing (Tr.) on August 25, 2008.

Findings of Fact

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 22 years old. He attends college full time during the school year and works part time for an employer who has contracts with the federal government. During the summer he is employed full time. He began his employment in November 2006 and was aware he would be recommended for a security clearance. He has attended college for four years, but after transferring schools he has only two years of credits. His major is Information Systems Technology. He graduated from high school in 2004.¹

Applicant first used marijuana in September 2004 while he was at home for vacation from college. From September 2004 through 2005 he used marijuana with varying frequency when he came home on school breaks. He did not use it while at college. He used it with his friends from high school. He stopped using marijuana in December 2005 and resumed in the summer of 2006, again with his high school friends while at home. He used it a couple of times a week during this period. In August 2006 he moved away from home and attended a different college. He continued his marijuana use with varying frequency from December 2006 to March 2007. He used it over the Thanksgiving and Christmas holiday periods at his friend's house, again in January 2007 and again over a three-day spring break vacation to visit a high school friend. During this three-day period he estimated he used marijuana several times a day each day. He stated he has not used marijuana since this trip in March 2007. In November and December 2007, on two occasions, during holiday vacations, he has been in the presence of others, high school friends, who used marijuana. Applicant has also contributed money, with varying frequency, toward the purchase of marijuana. On occasion he would go with a friend to purchase marijuana.²

Applicant started using marijuana because he wanted to try it and see what it was like. It made his body and mind "feel good" and different. He used it with friends and on one occasion by himself. Applicant was aware that his use and purchase of marijuana was illegal. He used it after he knew he would be applying for a security clearance.³

¹ Tr. 27-36.

² Tr. 21-23.

³ Tr. 35-37.

Applicant admitted that when he was interviewed by an investigator for his security clearance investigation that he told the investigator he was undecided about his intention to use marijuana in the future and he would like to use it again. Applicant admitted he made the statement, but has since changed his mind about his intention to use marijuana in the future. Applicant made the statement in November 2007. Sometime in December 2007 or January 2008 he changed his mind after he began reflecting on his future and also the impact it had on him obtaining a security clearance. He has now changed his mind and does not intend on using marijuana in the future. His future career is more important to him. He admitted that he used marijuana after being aware that he was being put in for a security clearance.⁴

Applicant has never used any other illegal drug other than marijuana. He did admit he used his stepmother's prescription painkiller without her permission on an occasion when he had a severe headache. He took four pills, which was more than the prescribed dose and had to go to the hospital. He stated he took the four pills by accident.⁵

Applicant has not seen his high school friends in over a year. He does communicate with one regularly that he used marijuana with, by instant messaging (IM) on a weekly basis. This person no longer lives in the area, but does come home for holidays. Applicant anticipates going home for the Thanksgiving and Christmas holidays. He admitted others have used marijuana in his presence on two occasions since he stated his intent to abstain.⁶

Applicant's supervisor testified on his behalf. He has been Applicant's first level and second level supervisor during the time he has been employed. He considers Applicant to be professional and responsible. He is on time and is reliable. He trusts him to get the job done. He was previously unaware of Applicant's drug use and only became aware of it approximately three weeks ago when he was asked to be a witness. His opinion about Applicant's work performance is unchanged, but he admitted his personal opinion and respect he had for him is lower now that he knows Applicant's history.⁷

Applicant does not believe his prior drug use affects his trustworthiness or reliability because he is always at work on time and performs his duties. He believes his employer trusts him.⁸

⁴ Tr. 20-22, 40-44, 49-50, 58-59.

⁵ Tr. 59-63. This information is not considered for disqualifying purposes, but may be considered when analyzing the whole person.

⁶ Tr. 37-40, 47.

⁷ Tr. 67-78.

⁸ Tr. 50-56.

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

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. 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; Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.”

I have considered the disqualifying conditions under Drug Involvement AG ¶ 25 (a) (“any drug abuse”); (c) (“illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia”); and (h) (“expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use”). I conclude all of the above disqualifying conditions apply. Appellant used marijuana from September 2004 to at least March 2007. He contributed money towards the purchase of marijuana. He would go occasionally with a friend to purchase marijuana. During his interview with an investigator in November 2007, he admitted he would like to use marijuana again and had not decided definitely whether or not he would. He later changed his position and affirmatively declared his intention not to use marijuana in the future. I find all of the above disqualifying conditions apply.

I have considered all of the mitigating conditions under Drug Involvement AG ¶ 26 (a) (“the behavior happened so long ago, was so infrequent or happened under circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment”) and (b) (“a demonstrated intent not to abuse any drugs in the future, such as: (a) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs are used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation”).

Applicant's last drug use was in March 2007, eighteen months ago. Not until December 2007 or January 2008, approximately eight months ago, did he make a commitment not to use illegal drugs in the future. Applicant regularly communicates with at least one of his high school friends with whom he used drugs, although they do not live in the same city any longer. Both are from the same hometown and go home for the holidays. Applicant used illegal drugs when he would return home and get together with his high school friends. Under the circumstances I cannot find that Applicant's drug use was infrequent, as it occurred during a several year period. Nor can I find that it happened so far in the past, because his last use was only 18-months ago and while he

was working for the same employer. I also cannot find that it is unlikely to recur. It appears that Applicant's pattern is to use drugs when he returns home and/or visits his high school friends. There has not been a sufficient period of time to assess whether this part of Applicant's life is behind him. His demonstrated intent not to use drugs in the future is in its infancy. This period of abstinence must be considered along with a demonstrated intent to disassociate himself from those with whom he used drugs. This is not to say that Applicant can no longer be friends with his high school friends. However, it does require a certain level of maturity that recognizes if his high school friends continue to use drugs he can not partake nor associate with them or be in their presence when they do so. On two occasions Applicant was in the presence of people using drugs, certainly a risk situation. I have questions whether Applicant will be able to resist the temptation and use good judgment to extricate himself from a situation that may involve his friends and their continued use of drugs. It does not appear he has done this in the past, even after he made his commitment to abstain. Therefore, I find none of the above mitigating conditions apply. It is too soon to determine if Applicant's commitment to refrain from drug use is permanent. There is a certain level of maturity that comes with having a security clearance. Clearly, Applicant is a valued and trusted employee, but I am not convinced that he has made the transition to mature responsible adult in all aspects of his life.

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 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. Applicant is a young man who is working while also attending college. He has a history of using marijuana from 2004 to 2007. He knowingly used marijuana while employed and after he was aware he was being recommended by his employer for a security clearance. Applicant primarily used marijuana when he went back home and with high school friends. He still maintains regular contact with at least one friend. Although he clearly understood that his use and purchase of marijuana was illegal he did not appear to grasp the security concerns raised regarding his drug use and the trustworthiness, reliability and judgment issues. Insufficient time has elapsed to assess Applicant's commitment to abstinence.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising from his 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
Subparagraph 1.c:	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. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge