



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



In the matter of:)
)
-----) ISCR Case No. 08-03276
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Gregg Cervi, Esquire, Department Counsel
For Applicant: Pro Se

October 21, 2008

Decision

LYNCH, Noreen, Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on November 26, 2007. On June 5, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H and E for Applicant. 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 acknowledged receipt of the SOR on June 19, 2008. He requested a hearing before an Administrative Judge. I received the case assignment on July 11, 2008. Applicant was available in September for a hearing. DOHA issued a notice of hearing on September 3, 2008, and I convened the hearing as scheduled on September 23, 2008. The government offered Exhibits (Ex.) 1-4, which were received without objection. Applicant testified on his own behalf and did not submit any exhibits for the

record. DOHA received the transcript of the hearing (Tr.) on September 30, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

In his Answer to the SOR, received June 19, 2008, Applicant admitted the factual allegations in ¶ 1.a, 1.b and 1.c of the SOR. He denied the allegation in ¶ 2.a. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is a 53-year-old employee of a defense contractor. He graduated from high school in 1972 and completed college in 1983. He is divorced and has no children. He held a Q security clearance (equivalent to a top secret) from 1993 until 1999 while employed in a federal agency. He has worked in a professional capacity in the software engineering field for his entire career. He has been with his current employer since August 2007 (GE 1).

Applicant used marijuana when he was in high school and college. He also smoked with his wife and friends either at parties or when camping as an adult. He smoked the illegal drug from approximately 1972 until at least January 1993 on average about 20 times per year (Tr. 30). Applicant maintains that he stopped using marijuana when he held a Q clearance during his federal employment.

In 1993, Applicant decided that he would no longer use marijuana. He believed the use of marijuana was “no big deal” but would stop so that he could obtain a security clearance. He felt he had no real need to use marijuana. He admitted that if it were not a bar to a security clearance, he would use marijuana (Tr. 23).

Applicant also used cocaine twice in 1984 or 1986. He wanted to experiment with the illegal drug (Tr. 27). Applicant also recalls that someone left marijuana in his car in 1987 or 1988 when he gave them a ride (Tr. 40-41).

In August and September 2000, Applicant again used marijuana for a short period of time. He smoked marijuana approximately eight times either by himself or with his girlfriend (GE 4). He maintains that he found the marijuana while biking on a trail (Tr. 31). The marijuana was in a film cannister in the middle of the road according to Applicant. He smoked the marijuana when he returned home. He purchased a pipe so that he could smoke the marijuana (Tr. 33). He smoked the marijuana because he was “rebellious.” He acknowledged that since he did not smoke marijuana while he had a security clearance, he would try it again. He did not like the control of the Department of Defense (DoD) drug policy (Tr. 34-35). He believes marijuana should be legalized. He believes it is a personal choice (Tr. 22).

Applicant stated he again found marijuana in 2007. He was driving his car on the highway and a backpack fell from a bike that was in front of his car. He pulled his car to

the side of the road and picked up the pack. He could not catch up with the biker. At that point Applicant took the pack home. When he opened it, he found that a pipe and some marijuana were inside the pack. He decided to smoke the marijuana the next night (Tr. 38).

Applicant experienced a racing of his heart when he smoked the “found” marijuana in 2007. He felt as though he were having a heart attack. He went to the emergency room at the hospital. He does not want to use marijuana again because it made him feel really sick (Tr. 41). He also does not want to smoke it again because it has caused him so much “grief.”

At the hearing, Applicant explained he still associates with people who use drugs. He brought a friend to his house in the summer of 2008 because the friend was stranded. His friend had marijuana with him and smoked it when he was in Applicant’s home (Tr. 57).

In April 2008, Applicant answered written interrogatories concerning use of any narcotics. He answered “yes.” He then listed his 2000 and 2007 use of marijuana, the frequency of use, and the average quantity (GE 3). He declared he had no intention to use marijuana again because he had a bad experience in 2007. He did not list the use of marijuana in 1972 until at least 1993.

At the hearing, Applicant explained that he denied any intent to deceive the government. He stated the government has no evidence that he intentionally omitted any information. He assumed that the government had his information concerning the 1972 to 1993 drug use from earlier forms and investigations. He believed the government would have a paper trail and that his answer to the question on the 2008 interrogatory was answered correctly. He would answer the question the same way if asked again. He explained the earlier information was freely obtainable by the government. He believes the government’s question was misleading in its wording.

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

The security concern relating to the guideline for Drug Involvement is set out in AG & 24:

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.

The guideline notes several conditions that could raise security concerns. Under AG & 25(a), Any drug abuse[@] is potentially disqualifying. Under AG ¶ 25(c) “illegal drug

possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia” is also potentially disqualifying. Applicant admitted his use of marijuana from 1972 until at least January 1993. He also admitted to using it again in 2000 and 2007 for a period of time. He used cocaine once or twice in 1986.

Under AG ¶ 25(g) “any illegal drug use after being granted a security clearance” is a disqualifying condition. Applicant used marijuana in 2000 and 2007 after he had a security clearance from an earlier time. Granted, he did not have a clearance in 2000 but he resorted to illegal drug use again after once having an earlier clearance examination. The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The guideline also includes examples of conditions that could mitigate security concerns arising from drug involvement. Under AG ¶ 26(a), the disqualifying condition may be mitigated where the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment. Applicant’s 2007 use of marijuana and his explanations that he found the marijuana on two separate occasions are not credible and casts doubts on his trustworthiness, reliability and judgment. I do not find that this mitigating condition applies.

Under AG ¶ 26(b), it may be mitigating where 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.” This is not a factor for consideration in this case for the reasons discussed above.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment

qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

I have considered all the facts and find Applicant deliberately omitted, concealed, misled, and falsified information in his April 8, 2008 interrogatories with respect to his marijuana use from 1972 until 1993. Applicant is not credible in his explanations or reasoning about the question. He is not credible in his explanations that he found the marijuana on two different occasions. Nor is he credible in his statement that he does not intend to use any illegal drug in the future. His only expressed reason for not using marijuana any more is because it made him sick in 2007. He also made a commitment in 1993 and did not keep that promise.

After considering the mitigating conditions under AG ¶ 17, I find that none of them apply in 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 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. Applicant is a mature, well-educated professional. He held a Q clearance for years when employed with a federal agency. He served in a professional capacity for his entire career. He has a long history of smoking marijuana. His decision to stop using the illegal drug in 1993 was solely based on obtaining a security clearance. His expressed resolve to not use an illegal drug again was broken in 2000 and 2007. His explanation that he found the marijuana is not credible. His recent decision to stop using marijuana because he became ill and that it has caused him problems is not sufficient to mitigate the drug involvement guideline.

Applicant was not credible in his explanation concerning his omission of the 1972 to 1993 marijuana use when answering his 2008 interrogatories. His reasoning that the government did not have any evidence about his intentional omission and that he knew the government could obtain this information from his previous forms and investigations does not mitigate the personal conduct guideline.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility, judgment, and suitability for a security clearance. For all the reasons discussed above, I conclude Applicant has not mitigated the security concerns arising from his drug involvement and personal conduct.

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
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.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. Eligibility for access to classified information is denied.

Noreen A. Lynch
Administrative Judge