



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



In the matter of:)
)
) ISCR Case No. 08-04046
)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: *Pro Se*

February 24, 2009

Decision

DAM, Shari, Administrative Judge:

Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

On January 9, 2008, Applicant submitted a security clearance application (e-QIP). On October 13, 2008, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing the security concerns under Guideline H (Drug Involvement) and Guideline E (Personal Conduct). 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 November 12, 2008, and waived his right to a hearing before an administrative judge. The Department exercised its right to

request a hearing pursuant to Directive ¶ E3.1.8. On December 16, 2008, DOHA assigned the case to me and issued a Notice of Hearing the same day. The case was heard on January 15, 2009, as scheduled. Department Counsel offered exhibits (GE) 1 and 2 into evidence without objection. Applicant testified, and offered exhibits (AE) A through D into evidence without objection. DOHA received the hearing transcript (Tr.) on January 26, 2009.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations contained in Paragraph 1 of the SOR, but did not separately answer the allegations under Paragraph 2. Since the three paragraph 2 allegations merely incorporate the factual allegations in paragraphs 1.b through 1.d by reference, they are also considered to have been admitted. His admissions are incorporated into the following findings:

Applicant is a 58-year-old unmarried man, who enlisted in the U.S. Marine Corps when he was 17. He served from September 1967 until September 1971 when he received an early honorable discharge due to his service in Viet Nam. He was a corporal at the time, working as flight line mechanic on the Air Force's planes. (Tr. 24) In 1982, he started working for his current employer, a federal contractor, as a flight mechanic in field service. He had a very successful and impressive career with the contractor, becoming the company's Master Aircraft Mechanic, responsible for the maintenance of some U.S. military planes. During his career he was deployed overseas for three or four month intervals until February 2005, when he accepted a voluntary lay-off in lieu of termination.

In 1968, Applicant started using marijuana while in boot camp and did so during his deployment to Viet Nam. (Tr. 53) He continued using it casually after being discharged in 1971 and up to 1982, when he obtained a position with a Federal contractor and was granted a security clearance that he held until November 2004. (Tr. 11; 85-86)

In 1996, while working overseas, Applicant was bitten by a poisonous snake. He was taken to a hospital where he received a blood transfusion and was immediately sent home for medical care. About three years later, he began experiencing various symptoms requiring medical care, including loss of weight due to a decreased appetite. In December 2000, he was diagnosed with Hepatitis C, a liver disease, for which there was no cure. He believed that he would eventually die from the illness. (Tr. 63; 70) After receiving the diagnosis, he began smoking marijuana to stimulate his appetite and gain weight, which he was rapidly losing. (Tr. 64-65; 87) He generally smoked it on a daily basis at home alone, and not during work hours. He admitted he held a security clearance at the time. (Tr. 65)

Applicant continued using marijuana until March 2002 when he was again sent to work overseas to a country that had stringent drug laws. (Tr. 67; 88; GE 2) During that deployment, he periodically vacationed in a western European country where smoking

marijuana is legal. After using it on vacation and returning to his employment in November 2004, he was involved in an accident at work that resulted in minor damage to an aircraft. As a consequence of that incident, the company ordered Applicant to undergo a drug test. The results were positive for marijuana. He subsequently agreed to a voluntary layoff in lieu of a termination. (GE 2) In May 2005, Applicant left his position with the Federal contractor and returned to the United States.¹ Other than on vacation, he did not use marijuana while deployed overseas for his employment. Although he purchased it over the years for his personal use, he never distributed it. (Tr. 69)

After coming home in May 2005, Applicant learned of an experimental protocol for treating Hepatitis C that involved the use of chemotherapy. He enrolled in the program and began receiving injections that eventually cured him. During the treatment process, he continued using marijuana to relieve the severe side effects of chemotherapy. He decided to stop smoking marijuana when he learned that his former employer wanted to rehire him and he needed a security clearance. According to his testimony, the last time he smoked it was at a New Year's Eve party last year, even though he knew that he would be applying for a security clearance, which he did on January 9, 2008. However, in his response to Interrogatories, signed on May 7, 2008, he continued to use it until February 2008. (GE 2) He estimated that from December 2004 until sometime in February 2008, he used marijuana about 50 times. (GE 2) He admits he made a serious mistake. (Tr. 80) He believes he was addicted to it, but is no longer addicted. (Tr. 90) He does not intend to use it in the future, especially if he returns to work for a defense contractor. (Tr. 89; 93; GE 2; Answer)

Over the course of his military career and 23 years of employment with a defense contractor, Applicant received many impressive awards and commendations. He is particularly proud of the mechanical work he did on one aircraft that enabled it to break numerous performance records. (Tr. 42; AE D) He submitted several job performance evaluations and letters of recommendation, all of which give him high ratings. (AE A through C)

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(a), the entire process is a conscientious scrutiny of a number of variables known as

¹This federal employer is seeking to re-employ him and has sponsored him for a security clearance.

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.

Directive ¶ E3.1.14, requires the Government to 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion to obtain a favorable clearance decision.” Section 7 of Executive Order 10865 provides that any determination adverse to an applicant shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

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

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.

(a) 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;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

AG ¶ 25 sets forth conditions that could raise a drug involvement security concern and be disqualifying. They include:

(a) any drug abuse (see above definition);

(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.

Applicant admitted that he purchased and used marijuana from September 1967 until September 1982, and from December 2000 to January 2008. He tested positive for marijuana use after damaging an aircraft in 2004. That evidence established facts that raise security concerns under AG ¶ 25(a), AG ¶ 25(b), and AG ¶ 25(c). He used the marijuana after receiving a security clearance, warranting the application of AG ¶ 25(g).

After the Government raised these security concerns, the burden shifted to Applicant to rebut or produce evidence to prove mitigation. AG ¶ 26 provides four potential mitigating conditions:

(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.

After considering the record evidence, none of the mitigating conditions applies to this case. AG ¶ 26(a) does not apply because Applicant used marijuana with varying frequency since 1967, with his last use occurring one year ago. Hence, his behavior was sufficiently recent and frequent over the years to cast ongoing doubt about his judgment.

Applicant indicated that he generally used marijuana while home alone. Hence, AG ¶ 26(b) (1) and (2) do not apply. Applicant's assertion that he has not used marijuana since February of 2008 is not sufficient to trigger the application of AG ¶ 26(b)(3), given his long history of using marijuana. Although Applicant testified that he would no longer use it, he did not sign a formal statement of intent authorizing an automatic revocation of a clearance should it be determined that he uses marijuana in the future; hence AG ¶ 26(b)(4) as no application.

The record evidence does not support the application of AG ¶ 26(c) or AG ¶ 26 (d). Initially, Applicant began using marijuana for recreational purposes and later for medical purposes, albeit without an authorized medical prescription. He did not complete a prescribed drug treatment program as contemplated under the guidelines.

In addition to the normal concerns under Guideline H, at issue here is whether Applicant is disqualified, as a matter of law, from security clearance eligibility due to his illegal drug use. The pertinent law is now 50 U.S.C. § 435c, which provides, in relevant part, as follows: "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. This prohibition uses language that is nearly identical to the previous prohibition in 10 U.S.C. § 986.²

As a starting point, 50 U.S.C. § 435c applies to Applicant because he is an employee of a federal contractor.³ Second, there is no evidence to prove that Applicant is an addict. Third, there is ample evidence to prove that Applicant **was** an unlawful user of a controlled substance, as the record evidence shows that Applicant smoked marijuana on a fairly regular basis for more than 20 years and did so until early 2008. But, there is insufficient evidence to prove that Applicant **is** currently an unlawful user. (Emphasis added).

The statutory prohibition in 50 U.S.C. § 435c(b), like its predecessor in 10 U.S.C. § 986(c)(2), uses the present tense, not the past tense. A plain-meaning reading of the statute cannot be stretched to apply Applicant’s marijuana use that took place about one year ago in January and February 2008. To read it otherwise would result in a mandatory disqualification of a person who engaged in drug abuse three years ago or perhaps at any time in the past, a result inconsistent with the plain meaning of the statute. This interpretation of 50 U.S.C. § 435c (b) is consistent with Appeal Board case law from 2003 and 2005 when it interpreted 10 U.S.C. § 986(c) (2) in the same way.⁴ Hence, the current federal statute pertaining to substance abuse does not apply to this case.

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.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

² 10 U.S.C. § 986(c) (2) (2008) (“The person is an unlawful user of, or is addicted to, a controlled substance” as defined by federal law.).

³ 50 U.S.C. § 435(a) (2) (defining a covered person under the statute).

⁴ See ISCR Case No. 03-25009 (App. Bd. Jun. 28, 2005) (10 U.S.C. § 986(c)(2) uses the present tense, not the past tense, when referring to unlawful use of, or addiction to, controlled substances, consequently, the Administrative Judge erred by concluding that Congress intended that persons who had been addicted to, or dependent on, controlled substances in the past to be forever barred from being granted a clearance); ISCR Case No. 01-20314 (App. Bd. Sep. 29, 2003) (Administrative Judge erred by applying 10 U.S.C. § 986(c)(2) to an applicant who last used marijuana about two years before the hearing).

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; and,

(b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

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

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group; and

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment.

Applicant candidly admitted that he repeatedly smoked marijuana while vacationing in a country in which it is not illegal, but is illegal in the United States, raising a potential for exploitation and concern under AG ¶ 16(e). He further admitted that he did so while holding a security clearance and in violation of Federal contractor's rules and regulations, establishing a disqualification under AG ¶ 16(f).

AG ¶ 17 provides seven conditions that could mitigate security concerns raised under the personal conduct guideline:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is

unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and,

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

After reviewing the above mitigating conditions and record evidence, I considered one of them to be partially raised. Applicant acknowledged his long term marijuana use and the underlying reasons for doing so. But, he has not obtained counseling or taken any other steps to insure that he does not use marijuana in the future. Hence, AG ¶ 17(d) has very limited application.

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 following 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.

According to AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must include 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, including Applicant's candid testimony. He is an intelligent and successful 58-year-old man, who has a very impressive history of employment accomplishments and a strong patriotic disposition. He began purchasing and using marijuana after he enlisted in the U.S. Marine Corps in 1967 and continued using it while in Viet Nam, and subsequent to his honorable discharge. He ceased using it in 1982 when he started employment with a Federal contractor. He resumed using it in December 2000 after learning he had an incurable disease, while holding a security clearance. He continued using it during and after a course of treatment for the disease previously presumed to be fatal. He openly and honestly, discussed his marijuana history with the Government investigator and during this hearing. Although he appears ready to stop smoking marijuana and asserts that he has not smoked for one year, he did not present any independent evidence to support his assertions. Given his history of frequent marijuana abuse, spanning at least twenty years, and an acknowledgement of his prior addiction, he needs to establish a sufficient track record of rehabilitation and good judgment, corroborated by independent and professional evidence, to persuade me that he has sufficiently addressed the underlying issues related to his long-term marijuana use. There is no evidence of other misconduct or adverse information in his record of concern.

Overall, the record evidence leaves me with questions as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant did not mitigate the security concerns arising under drug involvement and personal conduct guidelines.

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
Subparagraphs 1.a through 1f:	Against Applicant
Paragraph 2, Guideline E	AGAINST APPLICANT
Subparagraphs 2.a through 2.c:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly not consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

SHARI DAM, Administrative Judge