



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:	)	
	)	
-----	)	ISCR Case No. 08-05561
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Jennifer Goldstein, Esquire, Department Counsel  
*For Applicant: Pro Se*

September 14, 2009

Decision

MOGUL, Martin H., Administrative Judge:

On February 20, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline H 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 responded to the SOR (RSOR) in writing on March 10, 2009, and requested a hearing before an Administrative Judge. I received the case assignment on April 20, 2009. DOHA issued a Notice of Hearing on May 14, 2009, and I convened the hearing on July 21, 2009, in Honolulu, Hawaii. The Government offered Exhibits 1 through 4, which were received and entered into evidence without objection. Applicant testified on his own behalf, and he submitted Exhibit A, which was received without objection. DOHA received the transcript of the hearing (Tr) on August 5, 2009. 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 RSOR Applicant admitted SOR allegations 1.a. and 1.b., and he denied 1.c. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 41 years old. He is not married. He received a Master's degree in 2002, in Urban and Regional Planning. Applicant works for a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

#### **Paragraph 1 (Guideline H - Drug Involvement)**

The SOR lists 3 allegations regarding illegal drug involvement under Adjudicative Guideline H. All of the allegations will be discussed in the same order as they were listed in the SOR:

1.a. The SOR alleges that Applicant used marijuana with varying frequency, from approximately 1985 to at least July 2007.

Applicant testified that the dates of his marijuana usage, that are alleged in the SOR, are correct. He stopped using marijuana primarily when he transitioned to working on Department of Defense projects. He conceded that during his usage, he knew using marijuana was illegal.

Applicant began using marijuana in 1985, when he was in junior high school. He indicated that his usage increased and when he was an undergraduate college student, he estimated that he used marijuana once a week (Tr at 37). Applicant further testified "I hadn't really used it that much since graduate school in 2002." He estimated that from 2002 until 2007, he used marijuana approximately "every couple of months, you know, kind of at a party type of thing." (Tr at 23-24).

Applicant has worked for his current employer for six years, and clearly he used marijuana for four of those years. When he was asked what was his company's policy regarding his drug usage, he stated "There's a chance I could be terminated [for drug usage]."

1.b. The SOR alleges that Applicant purchased marijuana. During his testimony, Applicant could not recall much of the specifics regarding his marijuana purchases, but he did estimate that his last purchase of marijuana occurred in 2004 or 2005 (Tr at 25).

Upon cross examination he stated that he started purchasing it, at times with friends, and at times alone, when he was in high school (Tr at 36-37).

1.c. The SOR alleges that Applicant may use marijuana in the future. As reviewed above, Applicant denied this allegation in his RSOR. At the hearing, Applicant testified that he does not intend to use marijuana “certainly not while I have my security clearance.” (Tr at 26).

When asked by Department Counsel whether Applicant would state unequivocally that he would never use marijuana again, and “is the potential out there for [Applicant] to use marijuana in the future?” Applicant replied, “Anything is possible . . . I mean, I don’t necessarily think that people can make statements that are that open to future events.” (Tr at 42-43).

Finally, Applicant conceded that during the years of his marijuana usage, he made a decision and did abstain from marijuana usage on two separate periods of time. When asked why he began using marijuana again after his abstention, he testified “Well, you know, you have weaknesses of moments, you know, weak moments. Just like people that are alcoholics, you know, they make a commitment to stop, but occasionally they fall off the wagon, as they say.” (Tr at 47).

### **Mitigation**

Applicant submitted a letter from a Vice President of Applicant’s current employer (Exhibit A). He wrote, “In performance of our government projects [Applicant] has always represented the company professionally and his work standards and product quality are consistently at the higher standards of our industry.” However, during his testimony, Applicant conceded that this individual knew of his marijuana usage during college, “but I haven’t gone into full details of this case with him.” (Tr at 45). Because this individual was unaware that Applicant continued to use marijuana for at least four years while he was employed by his company, I cannot not give much weight to this recommendation.

Applicant did submit a cover letter as part of Exhibit A in which he wrote, “I accept an automatic revocation of clearance for any violation related to future drug use.”

### **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 commonsense 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**

With respect to Guideline H, the Government has established its case. Applicant's improper and illegal drug abuse, including the possession, and the use of marijuana, and his four years of continued use after he went to work for his current employer, is of great concern, especially in light of his desire to have access to the nation's secrets. Applicant's overall conduct pertaining to his illegal substance abuse clearly falls within Drug Involvement Disqualifying Condition (DC) 25. (a) (any drug abuse) and 25. (c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution).

Applicant did write that he accepted an automatic revocation of clearance for any violation related to future drug use. However, I can not conclude at this time that Applicant's conduct comes within any Mitigating Condition (MC). Based on the Applicant's many years of knowingly using an illegal substance, especially during his current employment, his lack of candor regarding the recency of his drug involvement to the Vice President of his company who submitted a character letter on Applicant's behalf, his history of abstaining from marijuana usage for periods of time and subsequently reusing the drug, and his equivocal statement of his unwillingness to use marijuana again, I find that it is simply too soon to conclude that Applicant will not use illegal substances in the future.

In this case, the Government has met its initial burden of proving by substantial evidence that Applicant has used illegal drugs for many years under Guideline H. Applicant, on the other hand, has failed to introduced significant, persuasive evidence in rebuttal, explanation or mitigation, which is sufficient to overcome the Government's case against him. Accordingly, Paragraph 1, Guideline H of the SOR is concluded against Applicant.

### **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 have considered the potentially disqualifying and mitigating conditions under Guideline H, in light of all the facts and circumstances surrounding this case. Based on all of the reasons cited above as to why no MC applies, and the lack of weight I have given to his employer's character letter, I find that the record evidence leaves me with serious questions and doubts as to Applicant's eligibility and suitability for a security clearance under the whole person concept. For all these reasons, I conclude Applicant has not mitigated the 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, 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 the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Martin H. Mogul  
Administrative Judge