



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-06581
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Stephanie Hess, Esquire, Department Counsel
For Applicant: Pro Se

February 20, 2009

Decision

LYNCH, Noreen, Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on November 9, 2007. On September 18, 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 September 24, 2008. He requested a hearing before an Administrative Judge. I received the case assignment on December 5, 2008. DOHA issued a notice of hearing on January 13, 2009, and I convened the hearing as scheduled on February 2, 2009. The government offered Exhibits (Ex.) 1-2, which were received without objection. Applicant testified on his own behalf and presented the testimony of three witnesses. He submitted Exhibits (AE) A-C

which were admitted into the record. DOHA received the transcript of the hearing (Tr.) on February 10, 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 Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a through 1.d of the SOR. He also admitted the allegation in ¶ 2.a. He provided additional information to support his request for eligibility for a security clearance.

Applicant is a 44-year-old employee of a defense contractor. He graduated from high school in 1983 and attended some college classes in 1984. He is twice divorced and remarried in 2004. He has four children and eight grandchildren. He has worked in a professional capacity in the project design field for his entire career. He has been with his current employer for 16 years (GE 1).

Applicant has suffered from bipolar disorder since he was a child. The disorder did not manifest itself until approximately 1998. Applicant was going through a divorce at the time. During counseling, it was suggested that he might have bipolar disorder. He sought medical guidance and was put on the drug lithium. He cycles between manic and depressive phases every month. He is diagnosed as Bipolar II (AE C). He takes various prescribed medications (Tr. 14).

Applicant is a highly creative designer working on projects for defense contractors. About five years ago, he was feeling very stressed with the projects at work. He was experiencing side effects from some of the medications. He was highly agitated and believed he could not function in a calm manner. He felt anxious and had panic attacks. At that time, he spoke to his psychiatrist, and after reading literature in the area, he decided to try smoking marijuana to alleviate some of the great stress that he was experiencing. The marijuana did alleviate the symptoms (Tr. 15).

One medication that Applicant uses causes anxiety and the other prescribed medication to alleviate that side effect increases a rapid cycling in his disorder. Applicant stressed that using marijuana is not the best solution for his problem but it is a solution for him. It allows him to relax. The prescribed medication (Lorazepam) for high anxiety leaves him with adverse side effects (Tr. 33).

Applicant uses marijuana in his home. After work if he feels anxious and wants to relax, he will smoke marijuana. His wife sometimes uses it as well. His wife provides the marijuana and Applicant does not know her source. At the hearing, Applicant explained he still uses marijuana. His last use was two days before the hearing. He was candid in his remarks that he will continue to use it. However, he acknowledged that it is not the appropriate way to handle the situation. Applicant wants to find a "substitute legal medication" to help him manage his disorder rather than use marijuana.

Applicant's employer described Applicant as a very trustworthy individual. He has personally known Applicant since 2002. He believes Applicant is a good father, husband and good person. He is aware of Applicant's condition and his use of marijuana. He socializes with Applicant and his wife. His employer has never seen any negative effects from Applicant's bipolar condition. He stated it would be helpful for the company if Applicant received a security clearance (Tr. 41). He recommends Applicant for a security clearance.

Applicant's project manager testified in Applicant's behalf. He explained that Applicant approached him after he completed his security application and advised him that he was using marijuana for his bipolar condition. His project manager initially had concerns and discussed them with Applicant. The project manager complimented Applicant on his technical expertise as well as his effectiveness with clients and other department heads in the company. Applicant has a good relationship with customers, architects, design teams, and his colleagues (Tr. 49). He praises him as trustworthy and recommends Applicant for a security clearance.

Applicant's step-son describes him as a good person. His step-son has four young children and often allows them to spend time with Applicant at the family home. He knows that Applicant uses marijuana but has not seen any use. He also works in the same company with Applicant and has no reservations about him professionally or personally.

Applicant's employer has a drug policy for its employees (Tr. 35). The company has random drug testing. Applicant discussed his marijuana use with his direct supervisor. Applicant answered "yes" to section 24 on his security clearance application (illegal drug use) and noted in detail his bipolar condition and his use of marijuana (GE 1). Applicant also described his marijuana use in his June 2008 interrogatories (Ge 2).

At the hearing, Applicant explained that his psychiatrist knows of his marijuana use but has not prescribed it for Applicant (Tr. 22). His doctor sees him on a regular basis and monitors his medications (Depakote, Lexapro, and Lamicle). Applicant's physician does not believe that Applicant's bipolar disorder impairs his judgment or would affect his ability to hold a security clearance (Tr. 30).

Applicant's evaluations are excellent. He receives the high ratings in all areas. His leadership and key role in implementation of projects is highlighted. He is passionate about his work and has a wide range of talents and abilities. (AE B).

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^a 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 every other day from October 2005 through June 2008.

Under AG ¶ 25(g) "any illegal drug use after being granted a security clearance" is a disqualifying condition. Applicant used marijuana after submitting his security clearance application in 2007. He also expressed his intent to continue using the illegal drug. Under AG ¶ 25(h) "expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use" is a disqualifying condition.

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 Athe 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.^a Applicant's use of marijuana is ongoing. He was candid at the hearing that he will continue to use it to help manage his bipolar condition. I do not find that this mitigating condition applies.

Under AG ¶ 26(b), it may be mitigating where there is Aa 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.

The Bond Amendment, 50 USC Section 435b, prohibits all Federal agencies from granting or renewing a security clearance for any person who is an unlawful user of a controlled substance or is an addict. The Department of Defense (DoD) issued interim guidance defining an unlawful user of a controlled substance as a "person who uses a controlled substance and has lost the power of self-control with reference is the use of

the controlled substance, and any person who is a current user of the controlled substance in a manner other than as prescribed by a licensed physician.” Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct. An “addict” of a controlled substance is defined as “an individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare; or is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction. (Memorandum, Subject: Interim Guidance for the Implementation of Public Law 110-181, Section 3002 (the Bond Amendment) Regarding Adjudication of Security Clearances, date June 20, 2008).

In this case, Applicant could be an “unlawful user”. It is not clear if he has lost the power of self-control of marijuana since he sees it as a means to resolve his bipolar anxiety. He wants a legal means to relieve the anxiety but he did not present information to carry his burden of proving that he is not an unlawful user. His efforts to find a legal means are not sufficient and could indicate his lack of self-control as to marijuana.

Applicant is at least an “addict” in that he habitually uses marijuana and his use can endanger public morals, health, safety, or welfare, even though he only uses at home the marijuana supplied by his wife.

Under the Bond Amendment, Applicant is an unlawful user or addict and has not met his burden of proof in this case. He did not present sufficient information to mitigate the application of the Amendment and is barred from a security clearance for those reasons.

Under AG ¶ 26(b), it may be mitigating where Aa 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.

Under the guideline, AG ¶ 16, describes conditions that could raise a security concern and may be disqualifying. Applicant disclosed his use of marijuana on his security clearance application. He explained that he used it to reduce anxiety and eliminate side effects of his prescription drugs on his security questionnaire. He answered his June 2008 interrogatories in detail and explained the frequency of use. He did not fail to provide any truthful answers not attempt to deceive the Government. He believes his limited use of the illegal drug does is consistent with his respectable and stable family lifestyle. He has spoken to his employer concerning the use. He also spoke to his psychiatrist about the use of marijuana. However, he does not have a prescription for marijuana. He clearly intends to continue the illegal use of marijuana due to his bipolar condition. His behavior and personal conduct are disqualifying as they raise questions about his judgment and reliability and a willingness to comply with the law.

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) 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©, 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 and conclude that they are not sufficient to overcome the government's case. Applicant is a mature, well-educated professional. He served in a professional capacity for his entire career. He is an exemplary employee and has been with his employer for 16 years. He is highly recommended for a security clearance.

Applicant was candid and forthright at the hearing. He suffers from a bipolar disorder that causes him anxiety. He takes prescribed medication for this disorder. However, he uses marijuana now to help ease the side effects of his multitude of prescribed medications and to calm him. He uses marijuana at home with his wife. He does not deny or dispute the government's concern. His continued use of marijuana,

regardless of the motivation for the use, is prohibited by law. In addition, under the Bond Amendment, Applicant is precluded from a security clearance if he is a current user.

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
Subparagraph 1.d:	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