



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



In the matter of:)	
)	
)	ISCR Case No. 08-07101
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

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

September 11, 2009

Decision

HOGAN, Erin C., Administrative Judge:

Applicant submitted an electronic questionnaires for investigations processing (e-QIP) on November 27, 2006. On April 30, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline E, Personal Conduct, and Guideline H, Drug Involvement. 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.

On May 9, 2009, Applicant answered the SOR and requested his case be decided on the written record. Department Counsel prepared a File of Relevant Material (FORM) on June 17, 2009. The FORM was forwarded to Applicant on June 18, 2009. Applicant received the FORM on June 24, 2009. He had 30 days to submit a response to the FORM. He did not submit a response. On August 14, 2009, the FORM was forwarded to the hearing office and was assigned to me on August 19, 2009. Based

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

Findings of Fact

In his answer to the SOR, Applicant admits all of the allegations in SOR ¶¶ 1.a – 1.c, 1.f, and 2.a – 2.c. He denies the allegations in SOR ¶¶ 1.d and 1.e. (Item 3)

Applicant is a 31-year-old mechanical engineer with a Department of Defense contractor. He seeks to maintain his security clearance. He has held a security clearance since August 2001. He received his undergraduate degree in August 2000. He received a master's degree in June 2003. He is single and has no children. (Item 4)

On April 1, 2002, Applicant provided a signed, sworn statement to an investigator conducting his background investigation. In the statement, he summarized his past illegal marijuana use. He listed marijuana use once in May 1995, two times in June 1999, once in June 2000, once in August 2001, and March 2002. He smoked marijuana in social settings with either friends from college or his roommates. (Item 7 at 5-6) At the end of his statement, Applicant made the following statement with regard to future marijuana use:

....I will never use marijuana again. I don't like it and it makes no sense. I wanted to try marijuana before because of curiosity. But, I know I don't like it, I won't try marijuana or any other drug again. (Item 7 at 6)

After this investigation, Applicant was granted a security clearance. (I conclude this based on the fact that Applicant indicated he has held a security clearance since August 2001 in response to section 26(a) on his e-QIP application, dated November 27, 2006. He also admits that he was granted a security clearance in November 2001 in his response to the SOR.)

In September 2006, Applicant signed a statement as part of his employment agreement that he would not use illegal drugs. In October 2006, he smoked marijuana with a friend. Applicant felt uncomfortable about violating the no illegal drug use policy. He self-reported his illegal marijuana usage to his company's security office. (Item 6 at 3)

There is some confusion in the record as to when Applicant self-reported his illegal marijuana use to his security office. His e-QIP application signed by Applicant on November 27, 2006, refers to self-reporting his marijuana use in October 2006. (Item 4, section 24) In his response to the SOR, Applicant provided a copy of a memorandum summarizing Applicant's self-reporting of illegal marijuana use. The memorandum is dated October 25, 2007. The memorandum refers to the subject of "Illegal Substance Sept 07." The body of the memorandum is a statement by Applicant where he admits to using marijuana in September 2006. (Item 3 at 6) I conclude the memorandum is incorrectly dated. It should have been dated October 25, 2006, considering Applicant

attached this memorandum to the e-QIP application that he completed in November 2006. Based on the record evidence Applicant used marijuana on one occasion between September 2006 and October 2006.

On June 11, 2007, Applicant was interviewed by an investigator in conjunction with another security clearance background investigation. The investigator prepared an unsworn summary of Applicant's interview. Applicant admitted to using marijuana from May 1995 to October 2006. He used marijuana for the first time at age 16 in May 1995. He did not use marijuana again until the fall of 1999. From 1999 until he graduated in June 2000, Applicant used marijuana on approximately 10 to 15 occasions while a college student. After graduating from college, the unsworn summary claims Applicant said he did not use marijuana because it was not accessible to him. Applicant told the investigator that his future intent with regard to marijuana use was to not use marijuana or any illegal drugs because he does not want to jeopardize his career. (Item 6 at 3)

In response to interrogatories, notarized by Applicant on September 10, 2008, Applicant states that his last use of illegal drugs was in September 2007. (Item 5, section 1.d) He also admits to using marijuana in September 2007 in his response to the SOR. (Item 3, SOR ¶ 2.a)

No evidence was submitted pertaining to Applicant's duty performance or other whole person factors.

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 overarching 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.

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 that 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 disqualifying conditions that could raise security concerns. I find Drug Involvement Disqualifying Condition (DI DC) ¶ 25(a) (any drug abuse) applies to Applicant’s case. He illegally used marijuana from May 1995 to at least September 2007. While the record evidence does not indicate Applicant was a habitual user, his marijuana use cannot be considered a one-time experimental event. He used marijuana on several occasions while in high school and college. He used marijuana on at least three occasions after graduating from college (i.e. March 2002, September/October 2006, and September 2007)

Applicant admits that he used marijuana after being granted a security clearance in November 2001. DI DC ¶ 25(g) (any illegal drug use after being granted a security clearance) applies.

On two occasions, Applicant stated that he did not intend to use illegal marijuana in the future, only to revert to marijuana use. On April 1, 2002, he stated that he no longer intended to use marijuana, only to use marijuana again on one occasion in September/October 2006. On June 11, 2007, he told an investigator conducting his background investigation that he did not intend to use marijuana in the future. Three months later in September 2007, he used marijuana. His failure to follow through with his intentions to refrain from illegal drug use raises DI DC ¶ 25(h) (expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use).

The guideline also includes examples of conditions that could mitigate security concerns arising from drug involvement. Drug Involvement Mitigating Condition (DI MC) ¶ 26(a) (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) does not apply. Applicant used marijuana on numerous occasions after being granted a security clearance. He expressed an intent to refrain from further marijuana use on two occasions, only to decide to use marijuana despite his expressed intentions. While Applicant self-disclosed his September 2006 marijuana use to his security office, he used marijuana again in September 2007 as evidenced by his answer to interrogatories on September 10, 2008, and his admission to SOR ¶ 2.a. Applicant's continued use of marijuana after expressing an intent to refrain from further use raises questions about his reliability, trustworthiness, and reliability.

The second mitigating condition that potentially applies is FC MC ¶ 26(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.) Although Applicant states he does not intend to use marijuana ever again, he has made this assertion several times over the past seven years. However, he seems to use marijuana if he socializes with a friend who happens to have marijuana. I cannot conclude Applicant no longer associates with friends who use marijuana. Although he has not used marijuana for close to two years, I cannot conclude that an appropriate period of abstinence has occurred because of Applicant's history of continued marijuana use contrary to his expressed intentions not to use marijuana in the future.

Applicant has not met his burden to mitigate the security concerns raised under Guideline H, Drug Involvement.

Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶15:

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.

There are specific disqualifying conditions which may be raised. Applicant's statement to an authorized investigator for the Department of Defense on June 11, 2007, that he did not use marijuana after college graduation in June 2000 to October 2006 when he, in fact, used marijuana in August 2001 and March 2002 (SOR ¶ 1.f) raises Personal Conduct Disqualifying Condition (PC DC) ¶ 16(b) (deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority or other official government representative). However, Applicant previously disclosed his August 2001 and March 2002 marijuana use in a signed, sworn statement, dated April 1, 2002. Considering that he previously disclosed his post-college drug use to the government prior to his June 11, 2007, interview, I conclude that his falsification was not material. Personal Conduct Mitigating Condition (PC MC) ¶ 17 (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) applies with respect to the allegation in SOR ¶ 1.f.

PC DC ¶ 16(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) applies. Applicant's concealment of his marijuana use, in particular, while holding a security clearance made him vulnerable to exploitation, manipulation or duress.

PC DC ¶ 16(f) (violation of a written or recorded commitment made by the individual to the employer as a condition of employment) applies. Applicant was aware of his employer's policy of no illegal drug use. In September 2006, he signed a statement notifying his employer that he would not use illegal drugs. He used marijuana approximately one month later. He also admits to using marijuana in September 2007.

The personal conduct concern may be mitigated. The following Personal Conduct Mitigating Conditions (PC MC) potentially apply to Applicant's case:

PC MC ¶ 17(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) does not apply. While Applicant should be commended for self-disclosing his illegal marijuana use in October 2006, it was not the first time that he used illegal drugs while holding a security clearance. In fact he admits to using marijuana in September 2007, close to one year after his self disclosure. He continued to use marijuana after making statements in 2002 and 2007 that he no longer intended to use illegal drugs. Given his past conduct of reverting back to marijuana use despite expressing intentions to the contrary, his reliability, trustworthiness, and good judgment remain in question.

PC MC ¶ 17(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) does not apply. Applicant self disclosed his October 2006 illegal drug use to his security office. However, he used marijuana approximately one year later in September 2007. His continued use of marijuana while holding a security clearance demonstrates unreliable and untrustworthy behavior.

PC MC ¶ 17(e) (the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress) applies. While Applicant's marijuana use while holding a security clearance made him vulnerable to exploitation, manipulation, or duress, he is no longer vulnerable because he fully disclosed his past marijuana use during his security investigation.

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 relevant 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has history of recreational marijuana use over a period of eight years. He used marijuana on several occasions after having been granted a security clearance and after expressing his intentions to refrain from further illegal drug use. Applicant has not mitigated the security concerns raised under 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 E:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.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 interests to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

ERIN C. HOGAN
Administrative Judge