



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



In the matter of:)
)
) ISCR Case No. 08-07283
)
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: *Pro Se*

February 26, 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 2, 2008, Applicant submitted his Security Clearance Application (SF 86). On September 19, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under 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.

Applicant answered the SOR in writing on October 2, 2008, and requested a hearing before an administrative judge. On December 5, 2008, DOHA assigned the case to me and issued a Notice of Hearing on January 7, 2009. The case was heard on January 28, 2009, as scheduled. Department Counsel offered Government exhibits (GE) 1 through 7 into evidence without objection. Applicant testified and offered exhibits (AE) A through D into evidence without objection. DOHA received the hearing transcript (Tr.) on February 9, 2009.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations contained in Paragraph 1 of the SOR, and offered explanations in support of his request for eligibility for a security clearance. His admissions are incorporated into the following findings:

Applicant is a 57-year-old married man, who served in the military for more than thirty years. In November 1972, he enlisted in the Army's active reserve. He subsequently attended Officer Candidate School (OCS) and in May 1976 he was commissioned as a second lieutenant. From October 1978 to March 1987, he was in the Individual Ready Reserve (IRR), where he performed minimal Active duty. In March 1987, he went on full-time active duty as a Captain. At one point, he was deployed for seven months to Operation Desert Shield/Desert Storm.

While in the Army, Applicant served as an operations officer, involved in various long-range planning projects. He was also a combat engineer, a professor of military science and manager of facilities construction. (GE 7) He received various commendations and awards, such as a Legion of Merit, Korea Defense Service Medal, and Army Commendation medal. (*Id.*) While in the Army, he held a Top Secret SCI security clearance. He earned an Associate's degree in Criminal Justice, a Bachelor's degree in Communication, and a Master's in Public Administration while in the Army. In April 2005, Applicant retired from the Army Reserves as a lieutenant colonel with an honorable discharge

While serving in the Reserves from 1972 to 1987, Applicant worked as a policeman, sold insurance, was an operations manager for a corporation, and held other positions. Since retiring in April 2005, he has worked as a part-time consultant, performing quality assurance duties, for a federal contractor that works with the Army Corps of Engineers. Although he previously had access to classified information while in the Army, he does not generally work with it now. He has held a security clearance since 1976 and currently holds a Secret security clearance. (Tr. 7; 30)

Applicant began using marijuana recreationally in 1969 while in college and at times attempted to cultivate it. From that time up to approximately 1987, he used it 40 to 50 times. (Answer; Tr. 29) In August 1983, he was arrested for possessing marijuana. The charge was later dismissed. In 1988, he tested positive for marijuana, although he

denied consuming it. A few days later, he was again tested and the results were negative. He admitted that he had been at a party where people had been smoking it.

Applicant did not smoke marijuana from 1987 until after he retired in April 2005, when he resumed using it in May or June of 2005. Since then, he has used marijuana at least ten times, including in May and July of 2008 with family and friends, despite having submitted a SF 86 in January 2008. (Tr. 30-33). When asked why he used it after completing that SF 86, he stated, "Well, I guess maybe we are splitting hairs. But I am not a full-time employee of a defense contractor of the U.S. Government." (Tr. 38)

Although Applicant acknowledges that consuming marijuana is illegal, he does not believe occasionally using it is a "bad thing." (Answer; Tr. 31-33) He vows that he would not use it while employed by the federal government, but cannot honestly state that he will never use it again in the future if not employed by the government. (Tr. 38-39) He was very candid and honest in describing his previous drug use and the possibility of use in the future. He has never received any type of treatment for substance abuse. (Tr. 39). He insisted that he never used marijuana while on Active duty, but admitted that he used it while holding a security clearance. (Answer)

Applicant submitted four letters of character reference. Two Lieutenant Colonels commend Applicant for his work and consider him to be very trustworthy. (AE A; B) A retired Sergeant Major, who has known Applicant for 20 years and served with him, has no questions about his loyalty to the United States. (AE C) A retired Major General considers Applicant to have an exceptional character and integrity. He has known Applicant for 10 years. (AE D) None of the four character witnesses indicated that they are aware of Applicant's past marijuana usage or potential for use in the future.

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 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 as to obtaining a favorable security decision.” 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.”

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 used marijuana from 1969 until 1987, and again from May 2005 up to July 2008. That evidence established facts that raise significant security concerns under AG ¶ 25(a) and AG ¶ 25(c).

After the Government raised a security concern, the burden shifted to Applicant to rebut or produce evidence to prove mitigation. AG ¶ 26 provides the following 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 four mitigating conditions applies to this case. AG ¶ 26(a) does not apply because Applicant used marijuana recreationally for about 18 years, from 1969 to 1987, and then occasionally after May 2005, up to July 2008, less than six months ago. Hence, his behavior is sufficiently recent and frequent over the years, casting doubt on his current reliability, trustworthiness and good judgment.

AG ¶ 26(b)(1) and (2) do not apply because Applicant continues to associate with friends and family with whom he has used marijuana. Applicant's unsubstantiated assertion of six months of abstinence is not sufficient to trigger the application of AG ¶ 26(b)(3), given his history of using marijuana. AG ¶ 26(b)(4) is not applicable.

The record evidence does not support the application of AG ¶ 26(c) or AG ¶ 26(d). Applicant has used marijuana for recreational purposes and not as 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. § 986.¹

As a starting point, 50 U.S.C. § 435c applies to Applicant because he is an employee of a federal contractor.² 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

¹ 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.).

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

marijuana on a regular basis from 1969 until 1987, and occasionally from May 2005 until July 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 six months ago in July 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.³ Hence, the current federal statute pertaining to substance abuse does not apply to 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 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 forthright testimony. Applicant is an intelligent and successful 57-year old man, who has a military history of impressive accomplishments, a patriotic disposition, and solid

³ 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).

recommendations from his colleagues. However, that history is overshadowed by his history of marijuana use and a strong possibility that he may use it in the future.

Applicant began purchasing and using marijuana while in college in 1969. He used it until 1987, during which time he held a security clearance. He resumed using it after retiring from the Army in April 2005, and continued to periodically use it until July 2008, despite completing an SF 86 in January 2008. He knows marijuana is illegal, and strongly asserts that he will not use it again, while employed by the Government. He offers his past Army performance and patriotism as evidence of assurance. He claims that he has not used it for six months, but did not corroborate his statement with any drug screenings or a substance abuse assessment from an appropriate credentialed mental health professional. However, he candidly admitted that he may use it in the future, if and when he is no longer employed by the federal government.

Clearly, Applicant has a “blind spot” regarding his illegal drug use. While he appears committed to abstinence in view of his employment opportunity, he has not established a sufficient track record of rehabilitation to persuade me that he has addressed the underlying issues related to his marijuana use. His candid insistence on the possibility of using it in the future, demonstrates not only poor judgment, but also a lack of respect and adherence to rules and regulations.

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.

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 1h:	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