



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



In the matter of:)	
)	
)	ISCR Case No. 08-09067
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro Se*

October 30, 2009

Decision

HEINY, Claude R., Administrative Judge:

Applicant used marijuana while holding a security clearance. Applicant has failed to rebut or mitigate the government’s security concerns under illegal drugs and personal conduct. Clearance is denied.

Statement of the Case

Applicant contests the Defense Department’s intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a

¹ 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.

Statement of Reasons (SOR) on March 12, 2009, detailing security concerns under illegal drugs and personal conduct.

On April 22, 2009, Applicant answered the SOR and elected to have the matter decided without a hearing. Department Counsel submitted the government's case in a File of Relevant Material (FORM), dated July 28, 2009. The FORM contained seven attachments. On August 6, 2009, Applicant received a copy of the FORM, along with notice of his opportunity to file objections and submit material to refute, extenuate, or mitigate the potentially disqualifying conditions.

Responses to the FORM are due 30 days after receipt of the FORM. Applicant's response was due on September 5, 2009. As of October 8, 2009, no response had been received. On October 9, 2009, I was assigned the case.

Findings of Fact

In Applicant's Answer to the SOR, he denied the factual allegations in SOR ¶ 2.a. He admitted the factual allegations in SOR ¶¶ 1.a through 1.d, indicating his illegal drug usage occurred in 1994. He also admitted the allegations set forth in SOR ¶¶ 1.e and 1.f. Applicant neither admitted nor denied the allegation in SOR ¶ 2.b, which related to SOR ¶ 1.f, an allegation he admitted. Applicant's admissions to the SOR allegations are incorporated herein. After a thorough review of the record, pleadings, and exhibits, I make the following findings of fact:

Applicant is a 31-year-old systems administrator who has worked for a defense contractor since November 2005, and is seeking to maintain a secret security clearance granted in August 2006. The company's CEO states Applicant is an outstanding member of the technical staff in both dedication and commitment to duty. (Item 5) In December 2005, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP).

Applicant used marijuana approximately 30 times during high school. (Item 5) He was 16 years old at the time. (Item 5) Applicant stopped using marijuana during his senior year in high school. He also admitted using PCP on one occasion and using Valium or Percocet on one occasion. (Item 5)

In March 2007, Applicant purchased some marijuana for \$20. (Item 6) In June 2007, he took the marijuana, along with a pipe in which to smoke it, on a camping trip. Applicant smoked it on the trip and offered it to others. A park ranger observed several individuals passing around what looked to be a cigarette. (Item 6) When confronted by the park ranger, Applicant admitted the marijuana was his. When asked if he had any additional marijuana, Applicant turned over a baggie containing approximately one ounce of marijuana. (Item 6) Applicant was taken to the park ranger station and received a ticket for possession of a controlled substance and possession of drug paraphernalia.

On February 11, 2008, Applicant entered the Superior Court Drug Diversion program, which required at least six months of participation. He was required to complete at least 12 psycho-educations groups, a minimum of one random drug screen per week, at least one monthly individual session, appear monthly before the Superior Court, pay \$200 court costs, and complete 18 consecutive weeks of negative drug screen results. (Item 5) Applicant paid the \$200 and provided a certificate of achievement for successfully completing the drug diversion program. The certificate of achievement was dated May 27, 2008, which is 15 weeks from entry into the program.

In a January 2008 security interview with an agent from the Office of Personnel Management (OPM), Applicant stated he had obtained the marijuana from a friend as a gift or "tip." Applicant stated he helped set up a friend's home computer network in March 2007. Applicant asserts the friend gave him a small amount of marijuana for his assistance. (Item 5) Applicant accepted the marijuana thinking the use of marijuana would help him and his wife relax following the February 2007 death of his brother-in-law killed in an automobile accident. When Applicant returned home, he did not tell his wife about the marijuana, placed it in his safe, and forgot about it.

In June 2007, Applicant and friends of his brother-in-law decided to go on a camping trip to remember his brother-in-law. Applicant decided to take the marijuana with him on the camping trip. He also brought a pipe with him to smoke the marijuana. Applicant told the park ranger he had purchased the ounce of marijuana three months earlier and said he was saving it for a special occasion. (item 6)

Applicant acknowledged his use of illegal drugs was an act of stupidity and he will not use illegal drugs again because they are illegal and because his family and career mean too much to him. (Item 5)

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 must be considered 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. 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

Drug Involvement

AG ¶ 24 articulates the security concern concerning drug involvement:

[u]se 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.

AG ¶ 25 describes eight drug involvement-related conditions that could raise a security concern and may be disqualifying:

- (a) any drug abuse;
- (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.

Three drug involvement disqualifying conditions could raise a security concern and may be disqualifying in this case: “any drug abuse,” “illegal drug possession,” and “any illegal drug use after being granted a security clearance.” AG ¶¶ 25(a), 25(c) and 25(g) apply. The other disqualifying conditions listed in AG ¶ 25 are not applicable. These disqualifying conditions apply because Applicant used marijuana, PCP, Percocet, and Valium. In August 2006, Applicant was granted a secret clearance. His last use of marijuana occurred in June 2007.

AG ¶ 26 provides for potentially applicable drug involvement 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.

Security concerns can be mitigated based on AG ¶ 26(a) by showing that the drug offenses happened so long ago, were so infrequent, or happened under such circumstances that they are unlikely to recur or do not cast doubt on the individual's current reliability, trustworthiness, or good judgment. There are no "bright line" rules for determining when conduct is "recent." The determination must be based "on a careful evaluation of the totality of the record within the parameters set by the directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation."²

Clearly Applicant's Percocet, Valium, PCP, and marijuana usage, which occurred more than 13 years ago, when Applicant was in high school, is not recent. During the last 13 years, Applicant used marijuana once. That use occurred in June 2007, which was approximately 28 months ago. His last usage was isolated, but is neither in the distant past nor is it very recent. AG ¶ 26(a) does not apply because his use of

² ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge's decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle changes and therapy. For the recency analysis the Appeal Board stated:

Compare ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) ("The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.") (citation format corrections added).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, considered the recency analysis of an administrative judge stating:

The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

marijuana while holding a security clearance casts doubt on his current reliability, trustworthiness, and good judgment.

His abstention from drug use for more than two years, and his recognition of the adverse impact on his life of drug abuse, provides some certitude that he will continue to abstain from drug use. However, because Applicant chose to have this matter handled administratively, I am unable to evaluate his demeanor, appearance, or form a positive determination as to his truthfulness. From the record, I am unable to find Applicant was sincere, open, and honest. Therefore, I cannot conclude with reasonable confidence that his illegal drug possession and use will not recur.

AG ¶ 26(b) lists ways Applicant can demonstrate his intent not to abuse illegal drugs in the future. During the past 13 years, he has used marijuana once. It has not been shown he associates with drug-using associates and contacts. He has abstained from drug abuse for more than two years. AG ¶ 26(b) partially applies.

AG ¶¶ 26(c) and 26(d) are not applicable because Applicant did not abuse prescription drugs. The marijuana, PCP, and Percocet or Valium were never prescribed for him. He did not satisfactorily complete a prescribed drug treatment program, including rehabilitation and aftercare requirements. He did successfully complete the drug diversion program even though it required 18 weeks of drug screenings and he completed the program in 15 weeks.

Applicant ended his drug abuse in June 2007, and understands the adverse results from drug abuse. However, Applicant's marijuana use after having obtained a secret security clearance shows questionable judgment to which none of the mitigating conditions are sufficient to mitigate.

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 government asserts Applicant lied when he told an OPM investigator he had been given the marijuana and failed to disclose he had purchased it. It is not important to determine whether he purchased the marijuana or if it was given to him. What is important is Applicant possessed the marijuana for three months, saving it for use on a special occasion. Possessing the marijuana for three months waiting for the proper occasion shows questionable judgment and failure to comply with laws making

marijuana possession illegal. I find against Applicant for his possession of marijuana and not for telling conflicting stories about how he obtained it.

With respect to the personal conduct concerns involving Applicant's marijuana use after being granted a clearance (SOR ¶ 1.f), the pertinent disqualifying condition is AG ¶ 16(d)(3), a pattern of rule violations and AG ¶ 16(e)(1), which states, "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." Certainly, Applicant's marijuana use while holding a security clearance violates important civil and criminal rules in our society, and is conduct a person might wish to conceal, as it adversely affects a person's professional and community standing.

AG ¶ 17 provides seven conditions that could mitigate security concerns in this case:

(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.

From the record as presented, none of the mitigating conditions apply. There is no showing Applicant has made any disclosure, which would eliminate vulnerability to exploitation, manipulation or duress. It is noted the personal conduct concerns related to his illegal drug use and use while holding a clearance are well known to the government. However, his marijuana use after having obtained a secret security clearance shows questionable judgment. His use while holding a clearance cannot be mitigated at this time because it is too serious and too recent.

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. There is some evidence supporting approval of Applicant's clearance. Applicant first used marijuana and other illegal drugs in high school when he was relatively young and immature. He did not use illegal drugs for more than 13 years, which shows he has the ability to abstain from marijuana use for lengthy periods of time. Applicant's most recent marijuana use occurred more than two years ago. His most recent use was a single event.

There is no evidence of disloyalty or that he would intentionally violate national security. Applicant contributes to his company and the Department of Defense. His character and good work performance show some responsibility, rehabilitation and mitigation. His supervisors evidently support him or he would not have been able to retain his employment after his security clearance was called into question. The company's CEO lauds his dedication, commitment to duty, high moral and ethical values, and strong loyalty. Because Applicant chose to have this matter handled administratively, I am unable to evaluate his demeanor, appearance, or form a positive determination as to his truthfulness.

The evidence against approval of Applicant's clearance is more substantial. His decision to possess and use marijuana while holding a security clearance was knowledgeable, voluntary, and intentional. He was sufficiently mature to be fully responsible for his conduct. This offense shows a serious lack of judgment and a failure to abide by the law. His misconduct raises a serious security concern, and a security clearance is not warranted at this time. I am satisfied that if he continues to abstain from drug use, and avoids future offenses he will eventually have future potential for access to classified information.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"³ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the government's case. For the reasons stated, I conclude he is not currently eligible for access to classified information.

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, illegal drugs: AGAINST APPLICANT

 Subparagraphs 1.a- 1.e: For Applicant
 Subparagraph 1.f: Against Applicant

Paragraph 2, personal conduct: AGAINST APPLICANT

 Subparagraph 2.a: For Applicant
 Subparagraph 2.b: 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.

CLAUDE R. HEINY II
Administrative Judge

³See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).