



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



In the matter of:

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)	
)	ISCR Case No. 08-09152
)	
Applicant for Security Clearance)	

Appearances

For Government: Paul M. DeLaney, Esquire, Department Counsel
For Applicant: *Pro se*

November 30, 2010

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the written record in this case, I conclude that Applicant failed to rebut or mitigate the Government’s security concerns under Guideline H, Drug Involvement. His eligibility for a security clearance is denied.

Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) on April 2, 2008. On November 6, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, Drug Involvement. DOHA acted 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 adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

In his Answer to the SOR, dated December 15, 2009, Applicant requested a decision on the record in lieu of a hearing. The government compiled its File of Relevant

Material (FORM) on February 10, 2010. The FORM contained documents identified as Items 1 through 9. On February 16, 2010, DOHA forwarded a copy of the FORM to Applicant, with instructions to submit any additional information and/or objections within 30 days of receipt. Applicant received the file on June 24, 2010. He did not provide additional information in response to the FORM. On October 20, 2010, the case was assigned to me for a decision.

Findings of Fact

The SOR contains two allegations of disqualifying conduct under Guideline H, Drug Involvement (SOR ¶¶ 1.a. and 1.b.). SOR ¶ 1.a. alleges: "You used marijuana, with varying frequency, from about 1999 to at least 2008." SOR ¶ 1.b. alleges: "You used marijuana after being granted a DoD security clearance in October 2001." In his Answer to the SOR, Applicant admitted the two Guideline H allegations and provided additional information. Applicant's admissions are entered as findings of fact. (Item 1; Item 4.)

Applicant is 29 years old, never married, and has no children. In 2003, he received a Bachelor of Science degree in business. Since December 2007, he has been employed as an information architect by a government contractor. In October 2001, he was awarded a security clearance. (Item 5; Item 9.)

On April 2, 2008, Applicant completed an e-QIP. Section 24a on the e-QIP asks the following question: "Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used a controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?" (Item 5; emphasis in original.)

Applicant answered "Yes" to Question 24a and provided additional information. He stated that he used marijuana illegally approximately 20 times from June 2000 to April 2008. (Item 5 at 37.)

On October 11, 2000, Applicant completed a security clearance application (SF-86). Question 27 on the SF-86 asked the following question: Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?" (Item 6 at 10.)

Applicant answered "Yes" to Question 27 and provided additional information. He stated that he used marijuana two times between June 1 and August 15, 1999. (Item 6 at 10.)

Applicant was interviewed about his illegal drug use by an authorized investigator from the U.S. Office of Personnel Management (OPM) on June 6, 2008.¹ In the personal subject interview, as summarized by the investigator, Applicant stated that he began to use marijuana in 2000 while he was a college student. He reported that he took approximately five puffs on a marijuana pipe once a semester from June 2000 until May 2003. Applicant told the investigator that he did not use any illegal drugs between June 2003 and July 2006. Then, in July 2006, Applicant was fired from a job and began to use marijuana again. He used marijuana approximately once a week while alone in his apartment between July and November 2006. He then stopped using marijuana for about seven months. He began his weekly marijuana use again after he was laid off from a job in October 2007. Applicant told the investigator that between November 2007 and the date of his personal subject interview on June 6, 2008, he took five puffs of marijuana from a pipe once every six months. He claimed that his marijuana use did not affect his speech or coordination or impair his judgment or reliability. He told the investigator that he currently used marijuana when he was bored. (Item 7 at 4.)

In his answer to the SOR, Applicant stated that while his security clearance was “technically in effect” when he used marijuana, he did not have contact with “sensitive materials at any time while using marijuana.” He also noted: “One error in this finding is that my involvement with marijuana began around 2003, not in 1999, and it should be noted that it ceased in early 2008 – creating a nearly two year span to this point without the drug.” (Item 4 at 1.)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant an applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

When evaluating an applicant’s suitability for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, the administrative judge applies these guidelines 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

¹ On May 20, 2008, in response to DOHA interrogatories, Applicant confirmed the accuracy of the information in the investigator’s report and added the following information: “I have ceased using marijuana since prior to and in the 11 months to date since the interview.” (Item 7 at 2.)

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 in 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 classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual’s reliability and trustworthiness 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 ¶ 24(a) defines drugs as “mood and behavior altering substances.” The definition of drugs includes “(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.” AG ¶ 24(b) defines drug abuse as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.”

The record shows that Applicant admitted the illegal use of marijuana, with varying frequency, for approximately nine years, from 1999 to at least June 2008. Although Applicant asserted in his answer that his involvement with marijuana did not begin until 2003, he completed an SF-86 in 2000 and admitted marijuana use in 1999. Applicant's statement of 2003 initial marijuana use lacks credibility and is contradicted by his own statements on the SF-86 he completed in 2000. The record also establishes that Applicant used marijuana after being granted a DoD security clearance in October 2001.

The record also establishes that Applicant, who is now 29 years old, used marijuana in his college years. His marijuana use continued even after he graduated from college in 2003, and after he began his professional career. As recently as 2008, as a 27-year-old adult, he continued to use marijuana. This conduct casts doubt on his reliability, trustworthiness, and good judgment. It also raises security concerns about his ability or willingness to comply with laws, rules, and regulations. I conclude that Applicant's illegal drug use raises security concerns under AG ¶¶ 25(a) and 25(g). AG ¶ 25(a) reads: "any drug abuse [as defined at AG ¶ 24(b)]." AG ¶ 25(g) reads: "any illegal drug use after being granted a security clearance."

Two Guideline H mitigating conditions might apply to the facts of Applicant's case. If Applicant's drug use happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on his current reliability, trustworthiness, or good judgment, then AG ¶ 26(a) might be applicable in mitigation. If Applicant demonstrated an intent not to abuse any drugs in the future by disassociation from drug-using associates and contacts, changing or avoiding the environment where drugs were used, abstaining from drug use for an appropriate period, or signing a statement of intent with the automatic revocation of his security clearance for any violation, then AG ¶ 26(b) might be applicable.

From 1999 to 2008, Applicant's illegal drug use was on-going and frequent. The record shows that Applicant's illegal drug use continued up to the time he completed his e-QIP in April 2008 and was interviewed by an OPM investigator in June 2008. Applicant's illegal drug use was a long-term lifestyle choice. He used marijuana while entrusted with a security clearance.

Applicant provided no information to demonstrate an intent not to abuse drugs in the future. He failed to provide evidence that he had abstained from drug use for an appropriate period; that he had disassociated from those with whom he had used drugs in the past; or that he had changed his conduct to avoid environments where drugs are used. Moreover, he failed to provide a signed statement of intent with an automatic revocation of his security clearance for any future illegal drug use or abuse of prescription drugs. Absent evidence of demonstrated intent not to abuse any drugs in the future, I conclude that AG ¶¶ 26(a) and 26(b) do not apply in mitigation to the security concerns raised by the facts in Applicant's case.

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.

Joan Caton Anthony
Administrative Judge