



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)	
)	
-----)	ISCR Case No. 08-09172
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Gina L. Marine, Esquire, Department Counsel
For Applicant: *Pro Se*

November 2, 2009

Decision

MOGUL, Martin H., Administrative Judge:

On April 23, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline H for Applicant (Item 1). 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 responded to the SOR (RSOR) in writing on May 13, 2009 (Item 3). He requested that his case be decided on the written record in lieu of a hearing.

On June 24, 2009, Department Counsel submitted the Department's written case. A complete copy of the file of relevant material (FORM) was provided to Applicant, and he was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. A response was due on July 30, 2009. Applicant

did not submit any additional evidence. The case was assigned to this Administrative Judge on September 9, 2009.

In the FORM, Department Counsel offered five documentary exhibits (Items 1-5). No documents were offered by Applicant. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

Findings of Fact

In his RSOR (Item 3) Applicant admitted SOR allegations 1.a., through 1.e., and he denied 1.f. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including the FORM, Applicant's RSOR and the other admitted documents, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 52 years old. He works for a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

(Guideline H - Drug Involvement)

The SOR lists six allegations, 1.a. through 1.f., regarding illegal drug involvement under Adjudicative Guideline H. As stated above, allegations 1.a. through 1.e. were admitted by Applicant in the RSOR. All of the allegations will be discussed in the same order as they were listed in the SOR:

1.a. The SOR alleges and Applicant has admitted that he used marijuana from approximately 1974 to 1992, and again from approximately 2000 to at least July 2008.

In the Report of Investigation (ROI), affirmed and adopted by Applicant in his Response to Interrogatories, dated December 16, 2008 (Item 5), it states that Applicant first used marijuana when he was 18 in 1974. He thereafter smoked marijuana alone, two or three times a week, in the amount of four or five grams a week, until 1992, when he was arrested for possession of marijuana (see 1.d., below). He stopped using marijuana from May 1992 until December 2000, when he began using it again because of peer pressure. Applicant admitted that since December 2000, he has used marijuana two or three times a week in the evening or on weekends, and he described being in a euphoric state when he was high from smoking marijuana.

1.b. The SOR alleges and Applicant has admitted that he purchased marijuana from approximately 1974 to 1992, and again from approximately 2000 to at least July 2008.

1.c. The SOR alleges and Applicant has admitted that he sold marijuana from approximately 1974 to 1992.

1.d. The SOR alleges and Applicant has admitted that in about June 1992, Applicant was arrested and charged with Possession of Marijuana. The charge was dismissed following his completion of an accelerated rehabilitation program and attendance at a drug and alcohol course (Item 7).

1.e. The SOR alleges and Applicant has admitted that he has used marijuana while possessing a security clearance, which was granted to Applicant in December 1981 (Item 4 at 22).

1.f. The SOR alleges that in July 2008, Applicant expressed an intent to continue to use marijuana in the future. In his RSOR, Applicant denied this allegation and wrote, “I have discontinued using marijuana.” However, in the ROI (Item 5), it states,

Subject [Applicant] plans to continue to smoke marijuana, but he plans to stop using marijuana within five years due to health reasons. Subject is aware smoking marijuana is illegal, but subject believes the law is unfair due to smoking marijuana should be legal as the effects of smoking marijuana are similar to that of alcohol.

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 (EO) 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

With respect to Guideline H, the Government has established its case. Applicant's improper and illegal drug abuse, including the possession, use, and purchase of marijuana for many years, including while possessing a security clearance, is of great concern, especially in light of his desire to have access to the nation's secrets. Applicant's overall conduct pertaining to his illegal substance abuse clearly falls within Drug Involvement Disqualifying Conditions (DC) 25. (a) “any drug abuse”, (c) “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution”, and (g) “any illegal drug use after being granted a security clearance.” Based on the totality of admitted evidence, including Applicant’s conflicting statements regarding his intention to use marijuana again, I also find that DC 25. (h) “failure to clearly and convincingly commit to discontinue drug use” is applicable.

Based on the Applicant’s many years and frequency of use of illegal substances, and the recency of his usage, considered with the fact that Applicant used marijuana while possessing a security clearance, I can not conclude at this time that Applicant’s conduct comes within any Mitigating Condition (MC).

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(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 have considered the potentially disqualifying and mitigating conditions under Guideline H, in light of all the facts and circumstances surrounding this case. Based on all of the reasons cited above, including the long history, frequency, and recency of Applicant's illegal drug usage and purchase, including during the period that he held a security clearance, I find that the record evidence leaves me with serious doubts as to Applicant's eligibility and suitability for a security clearance under the whole person concept. For these reasons, I conclude Applicant has failed to mitigate the security concerns.

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. -1.f.:	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.

Martin H. Mogul
Administrative Judge