



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



In the matter of:)
)
) ISCR Case No. 08-09431
)
)
Applicant for Security Clearance)

Appearances

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

October 27, 2009

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the government's security concerns under Guideline H, Drug Involvement, and Guideline E, Personal Conduct. Applicant's eligibility for a security clearance is denied.

On April 27, 2009, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H and E. 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 May 13, 2009 and did not request a hearing. On June 17, 2009, Department Counsel requested a hearing in the case before an administrative judge. The case was assigned to me on June 27, 2009. DOHA issued

a Notice of Hearing on August 6, 2009. I convened the hearing as scheduled on September 23, 2009. The government offered Exhibits (GE) 1 and 2. Applicant did not object and they were admitted. Applicant offered Exhibit (AE) A which was admitted without objection. Applicant and one witness testified on his behalf. The record was held open until September 30, 2009, to allow Applicant to submit additional documents. None were submitted. DOHA received the transcript of the hearing (Tr.) on September 30, 2009.

Findings of Fact

Applicant admitted all of the allegations in the SOR. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 31 years old and works as a multi-media specialist. He has worked for a federal contractor since 1998, and has never held a security clearance. He graduated from high school in 1996. He is not married.¹

Applicant began using marijuana in January 1994. He used marijuana approximately monthly from 1994 to 1996. He used it approximately five times a week from 1997 to 2001. He used it approximately three times a week from 2001 to November 2002. He used it approximately once a month, or less, from December 2002 to August 2007. From August 2007 to August 2008, he used it approximately six to twelve times during the year. From August 2008 to September 2009, Applicant used marijuana about six to twelve times during the year. His last use of marijuana was while camping with his friends, two weeks before his hearing.²

Applicant stated he knew drug use was illegal and he knows there is a prohibition of drug use by government contractors. He stated he imagined it was against his company's policy too. He does not use drugs at his home, because his girlfriend, who lives with him, has a seven-year-old daughter and he does not want to expose her to drugs. His girlfriend does not use marijuana.³

Applicant indicated that his future use of marijuana was dependant upon whether he was granted a security clearance. If he was granted a security clearance, he would abstain. He stated "I would stop, if I [was] to possess a clearance, I would stop, because I would not want to jeopardize my clearance."⁴ He went on to say "It would all depend on my clearance."⁵ Regarding his general intention to use marijuana in the future he stated he may use it at a party, if it is available. He explained that his use of marijuana

¹ Tr. 19-20, 22.

² Tr. 24-32.

³ Tr. 31-34.

⁴ Tr. 32.

⁵ Tr. 33.

is not an everyday occurrence. If he was in the right environment, he could see himself using it again. He could not definitively confirm whether he would use it in the future.⁶

Applicant's last use of marijuana, two weeks ago, was with his "life-long friends."⁷ He associates with these friends a couple of times a week. He stated he was with "his buddies" and was "hanging out", "having some beers", and "having a good time," when they used it. He admitted his friends use marijuana on occasion.⁸

Applicant admitted that he has purchased marijuana in the past and then provided it to a friend. He stated in the past he has "picked up" marijuana for a friend. He did not profit from the purchase and transfer of marijuana to his friend. He admitted he had operated a vehicle after using marijuana. He believes marijuana should be legalized.⁹

Applicant stated he has used marijuana when he was working at a second job, but not before going to work at his primary job with the federal contractor.¹⁰

Applicant experimented with other illegal drugs in the past. Between 1995 and 1998, he snorted cocaine once. He snorted heroine once after he completed high school. He also has used prescription drugs that were not prescribed to him, such as Percocet. He estimated that he last used the prescription drug two to three years ago, and he used it about 12 times. It was given to him by friends.¹¹

Applicant stated when he completed his security clearance application (SCA) he completed the question on the application that asked about his past drug use. He thought perhaps his drug use would prohibit him from obtaining a security clearance. When he was interviewed in August 2008, he also became aware that drug use might be an issue.¹²

Applicant is aware that drug use is illegal, but considers it similar to speeding. He does not feel his use of marijuana would ever be used to compromise him and it never prevented him from doing a good job. He stated he is able to function under stress and is a good problem-solver. He believes his employer is aware of his drug use. Some people at work and those that work in the security division advised him that he should

⁶ Tr. 32-34, 44.

⁷ Tr. 46.

⁸ Tr. 31, 46-47.

⁹ Tr. 35-38.

¹⁰ Tr. 38-40.

¹¹ Tr. 35-36, 40-44; I have not considered for disqualifying purposes Applicant's other illegal drug use that was not alleged, but have considered it when analyzing the "whole person."

¹² Tr. 20-24, 47-50.

stop using drugs. He believes the main problem with his drug use is if were to be stopped by the police with marijuana in his possession.¹³

Applicant has participated in drug rehabilitation and does not believe he is addicted to marijuana. He does not consider his drug use a problem. He believes drug use is common and he only knows a “handful of people”¹⁴ that have never used marijuana. He considers himself a man of high integrity. He understands he has no excuse for breaking the law. He is dedicated to his craft and describes himself as focused on pride, honor and integrity. He pays his bill on time. He owns his own house, truck, and motorcycle. He emphasized that he answered all of the drug questions on his SCA honestly, explaining his past drug use.¹⁵

A character witness, who testified on behalf of Applicant, has known him for nine to ten years. At one time he was Applicant’s supervisor. He holds a security clearance and trusts Applicant. He does not believe Applicant can be coerced into doing anything he does not want to do. He believes Applicant is honest. He was aware of Applicant’s drug use in the past, but was unaware of the extent of it. He confirmed that illegal drug use is a violation of their employer’s policy. He has not observed Applicant use illegal drugs.¹⁶ A character letter Applicant provided stated that he has demonstrated an ability to be placed in positions of trust and responsibility. He is considered a great problem-solver. He is also a valued and trusted asset who has the ability to secure confidential information.¹⁷

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

¹³ Tr. 47-52.

¹⁴ Tr. 55.

¹⁵ Tr. 55-63.

¹⁶ Tr. 67-75.

¹⁷ AE A.

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, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and 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

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.

I have considered all of the evidence in this case and the disqualifying conditions under Drug Involvement AG ¶ 25, and especially considered the following:

(a) any drug abuse;

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia, and

(h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

Applicant used illegal drugs from 1994 through September 2009, and most recently two weeks before his hearing. He has purchased illegal drugs in the past for his own use and for others. He may use illegal drugs in the future, depending on the circumstances of his environment. He will not use illegal drugs if he is granted a security clearance. I find all of the above disqualifying conditions apply.

I have considered all of the evidence in this case and the mitigating conditions under Drug Involvement AG ¶ 26, and especially considered the following:

(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; and

(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; (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant has used marijuana, an illegal substance, from 1994 through September 2009. His last use was with "life-long friends." He continues to associate with friends who use illegal drugs. He stated that his continuance of drug use is contingent upon obtaining a security clearance He has shown an unwillingness to abide by the law. His illegal drug use is recent and frequent, and based on his admissions, likely to recur. He has not demonstrated an intent not to use illegal drugs in the future. He has not abstained from illegal drug use and did not offer a signed statement of his intention to refrain from drug use, subject to automatic revocation of a clearance for any violation. The burden shifted to Applicant to mitigate the security concerns raised by his illegal drug use. He did not provide sufficient evidence meet his burden. Applicant's drug use casts doubts on his current reliability, trustworthiness, and good judgment. I find mitigating conditions (a) and (b) do not apply.

Guideline E, 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I have specifically considered the following:

(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.

Applicant used marijuana two weeks prior to his hearing and after he had submitted a SCA. I find that his behavior and conduct demonstrate questionable judgment, untrustworthiness, unreliability, and an unwillingness to comply with rules and regulations. I find that the above disqualifying condition applies.

The guideline also includes examples of conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17, and especially considered the following:

(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.

When Applicant submitted a SCA, he was aware that drug abuse was a security concern. Despite that knowledge, he continued to use illegal drugs while his SCA was pending. I find that his behavior casts doubts on his reliability, trustworthiness, and good judgment. Therefore, I find that mitigating condition (c) does not apply.

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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant's former supervisor and coworker consider him honest and trustworthy. Applicant has a long history of illegal drug use. He continued to use illegal drugs after he completed his SCA and two weeks prior to his hearing, which shows poor judgment. He has not demonstrated an intent not to use illegal drugs in the future nor has he disassociated himself from those with whom he uses drugs. I find the allegation in SOR ¶ 1.d is redundant with ¶ 1.a and 2.a. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the guidelines for 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 H:	AGAINST APPLICANT
Subparagraphs 1.a-1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge