



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



In the matter of:)	
)	
)	ISCR Case No. 08-10711
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Caroline H. Jeffreys, Esq., Department Counsel
For Applicant: *Pro se*

September 7, 2010

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated Personal Conduct concerns, but he has not mitigated Drug Involvement security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On April 19, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines H (Drug Involvement) and E (Personal Conduct). The action was taken under Executive Order (EO) 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).

Applicant answered the SOR on May 5, 2010, and requested a hearing before an administrative judge. The case was assigned to me on July 12, 2010. DOHA issued a notice of hearing on July 28, 2010, and the hearing was convened as scheduled on August 19, 2010. The Government offered Exhibits (GE) 1 through 5, which were

received without objection. Applicant testified, called two witnesses, and submitted Exhibits (AE) A through J, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on August 27, 2010.

Findings of Fact

Applicant is a 26-year-old employee of a defense contractor. He served in the United States military from 2003 until he was honorably discharged in 2007. He seeks to retain his security clearance. He has an associate's degree from a community college. He attends a university in pursuit of a bachelor's degree. He is divorced and has no children.¹

Applicant had a Top Secret (TS) security clearance and was eligible for access to Sensitive Compartmented Information (SCI) while he was in the military. There is no evidence that he has ever had a security violation. Applicant started working for his current employer while he was on terminal leave before his discharge from the military. He has held a security clearance during his entire tenure at his current employment. The level of his security clearance as a civilian employee is not completely clear, but it was at least a Secret clearance.²

Applicant smoked marijuana on about seven occasions from May 2007, which was after he was discharged from the military, until April 2008. He held a security clearance during each occasion that he smoked marijuana. He smoked marijuana on two occasions with a classmate from the community college he was attending. The classmate offered him the marijuana. He smoked marijuana on occasions at concerts when the marijuana was passed around by concert attendees. He also smoked marijuana on one occasion when it was offered to him by his brother. Applicant admitted he exhibited poor judgment by smoking marijuana. He stated that he was exercising his newfound freedom from the military.³

Applicant decided to quit smoking marijuana. He has not used illegal drugs since April 2008. He attended several Narcotics Anonymous (NA) sessions. In April 2008, he notified his security officer about his drug use so that the information could be forwarded to the Department of Defense. He fully discussed his marijuana use in an interview with an investigator from the Office of Personnel Management (OPM) in August 2008.⁴

Applicant no longer associates with the community college classmate. He rarely attends concerts, and if he does attend one, he avoids anyone who appears to be using drugs. His brother lives in another state, and Applicant does not see him often. Applicant told his brother that he no longer uses illegal drugs, and that his brother

¹ Tr. at 26, 29, 35; GE 1, 3; AE F.

² Tr. at 26-28; GE 1, 3; AE H-J.

³ Tr. at 29-32; Applicant's response to SOR; GE 5; AE B.

⁴ Tr. at 14, 26, 31; GE 5; AE B.

should also abstain and not use any drugs around him. Applicant received a substance abuse evaluation and was given a drug test in June 2010. The results of the evaluation “indicated a low probability of Substance Dependence Disorder,” and the drug test was negative. He was not recommended for further treatment. Applicant credibly testified that he did not intend to use illegal drugs again. He deeply regretted the poor decisions he made when he smoked marijuana. He submitted a signed statement of intent not to use illegal drugs, with automatic revocation of his clearance for any violation.⁵

Applicant received a medal while in the military recognizing his meritorious service. Two witnesses testified on Applicant’s behalf and praised his job performance, technical ability, honesty, responsibility, reliability, professionalism, and trustworthiness. His most recent performance evaluation reflects superior job performance and shows that Applicant is a valued and trusted employee.⁶

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used 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, administrative judges apply the 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 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 the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

⁵ Tr. at 16, 32-36; AE A, B.

⁶ Tr. at 37-43; AE D, E, G.

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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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

The security concern for Drug Involvement is set out in AG ¶ 24:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. Three are potentially applicable in this case:

- (a) any drug abuse;⁷
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (g) any illegal drug use after being granted a security clearance.

Applicant smoked marijuana while holding a security clearance. He had to possess marijuana in order to smoke it. The evidence is sufficient to raise all the above disqualifying conditions.

SOR ¶¶ 1. a and 1.b allege the same illegal drug use, except SOR ¶ 1.b alleges that the marijuana use occurred after Applicant “had been granted SCI eligibility” in 2006 and “given access to Top Secret” in February 2008. When two allegations under the same guideline allege the same conduct, at least one must be concluded for the applicant. SOR ¶ 1.a is concluded for Applicant.

⁷ Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

Two Drug Involvement mitigating conditions under AG ¶ 26 are potentially applicable:

(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 used marijuana while holding a security clearance on seven occasions between May 2007 and April 2008. He has not used illegal drugs since April 2008. He no longer associates with any drug-using associates except his brother, who he rarely sees. He attended several Narcotics Anonymous sessions, and he notified his security officer about his drug use. He credibly testified that he will not use illegal drugs in the future. I find that illegal drug use is unlikely to recur. Applicant signed a statement of intent not to abuse any drugs in the future, with automatic revocation of clearance for any violation. AG ¶ 26(b) is applicable.

There is no bright-line rule as to whether conduct is recent. Applicant has not used illegal drugs since April 2008. However, he served in the military for four years and knew that illegal drug use was inconsistent with holding a security clearance. Applicant's drug use continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 26(a) is partially applicable.

In sum, I conclude that security concerns remain despite the presence of some mitigation.

Guideline E, Personal Conduct

The security concern for Personal Conduct is set out in AG ¶ 15:

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying condition is potentially applicable:

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant used marijuana while holding a security clearance. That conduct created a vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant stopped using marijuana in April 2008 and informed his security officer about his marijuana use. He has taken positive steps to reduce his vulnerability to exploitation, manipulation, and duress. AG ¶ 17(e) is applicable. Personal Conduct security concerns have been mitigated.

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 Applicant's honorable military service as well as his superior job performance and the reputation he has earned at his current job. I found him to be a credible witness. However, even if Applicant never uses illegal drugs again, his illegal drug use while holding a security clearance, knowing it was illegal and counter to DoD policy, raises doubts about his current judgment, reliability, and trustworthiness. Two plus years of abstinence is not yet long enough to mitigate his incidents of extremely poor judgment, disregard for the law, and violation of the trust instilled in him while holding a security clearance.

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 mitigated Personal Conduct concerns, but he has not mitigated Drug Involvement 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:	For Applicant
Subparagraph 1.b:	Against Applicant
Paragraph 2, Guideline E:	For APPLICANT
Subparagraph 2.a:	For 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 continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge