



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-11403
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Robert E. Coacher, Esquire, Department Counsel
For Applicant: *Pro se*

July 29, 2010

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant used marijuana, at times daily, from June 1997 to at least August 2008. He continued to smoke and purchase the illegal drug despite being arrested on three occasions for possession of marijuana and drug paraphernalia. He denies any intent to use marijuana in the future, but the evidence is insufficient to demonstrate that his illegal drug use is behind him. Clearance denied.

Statement of the Case

On April 9, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline H, Drug Involvement, and Guideline J, Criminal Conduct, that provided the basis for its preliminary decision to deny him a security clearance and refer the matter to an administrative judge. 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

adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant submitted an undated Answer, which was received by DOHA on June 16, 2009. He requested a decision without a hearing. On July 20, 2009, the Government submitted a File of Relevant Material (FORM) consisting of seven exhibits (Items 1-7). DOHA forwarded a copy of the FORM to Applicant and instructed him to respond within 30 days of receipt. Applicant received the FORM on November 2, 2009. DOHA received no response from Applicant by December 2, 2009, the due date, and on February 2, 2010, the case was assigned to me to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for him. Based upon a review of the Government's FORM, eligibility for access to classified information is denied.

Findings of Fact

The SOR alleges under Guideline H, Drug Involvement, that Applicant used marijuana from about June 1997 to at least August 2008 (SOR 1.a), and that he had purchased marijuana (SOR 1.b). Under Guideline J, Criminal Conduct, Applicant is alleged to have been arrested on marijuana possession and drug paraphernalia possession charges in February 2005 (SOR 2.a), July 2004 (SOR 2.b), and June 2003 (SOR 2.c), and found guilty of the 2005 drug paraphernalia possession and 2003 marijuana possession charges.¹ Applicant admits the allegations. After considering the evidence of record, I make the following findings of fact:

Applicant is a 27-year-old data quality engineering analyst, who has worked for a defense contractor since March 2008. He has a bachelor of science degree in mathematics and seeks his first security clearance. (Item 4.)

Applicant used marijuana with varying frequency, at times daily, from June 1997 to at least August 2008. He began using marijuana at age 14 because "everyone" at his school was using it. Applicant smoked the illegal drug with friends, to include in his home. Applicant purchased marijuana on occasion. Other times, he obtained the drug from his friends at no cost to him. He continued to smoke the drug while in college from August 2001 to August 2007, despite three arrests for possession of marijuana and drug paraphernalia. He stopped using marijuana at times because he was arrested, only to resume smoking the drug. (Items 4, 5.)

In early June 2003, Applicant was stopped for driving under the influence.² The police found less than one gram of marijuana in a bowl in his vehicle, and Applicant was arrested and charged with possession of marijuana and with possession of drug

¹The SOR alleges that Applicant was found guilty of the February 2005 paraphernalia charge. The court record indicates that he was convicted of the marijuana possession charge, and the paraphernalia possession charge was not prosecuted.

²There is no evidence that Applicant was charged with an alcohol-related offense.

paraphernalia. (Items 4, 6.) In August 2003, he pleaded guilty to marijuana possession. He was awarded unsupervised probation before judgment; fines and costs totaling \$100; and 30 days in jail, with 29 days suspended and credit for one day served. The paraphernalia possession charge was dismissed. (Item 6.) Applicant completed his probation on August 4, 2004. (Items 4, 5, 6.) Although not reflected in the district court records, Applicant apparently also had to complete two days of community service. (Item 5.)

In early July 2004, Applicant was charged with possession of marijuana and possession of drug paraphernalia after some marijuana was found in his car. The charges were not prosecuted after the arresting officer failed to appear in court in November 2004. (Item 4, 5, 6.)

In early February 2005, while in college visiting a friend, Applicant was arrested along with his friend by campus police. Applicant was charged with possession of drug paraphernalia and with possession of marijuana. In late April 2005, he was found guilty of marijuana possession and sentenced to probation until October 7, 2006; to 15 days in jail (suspended); and to \$55 in costs (suspended). The drug paraphernalia charge was not prosecuted. (Items 4, 5, 6, 7.) The university placed him on probationary status, barred him from student housing for three years, and required him to undergo drug testing and to complete 100 hours of community service. Applicant completed the terms of his sentence in 2006. (Item 5.)

In March 2008, Applicant started his professional career with his current employer. (Item 4.) Applicant continued to smoke marijuana until at least August 2008. (Items 4, 5.) On September 16, 2008, Applicant applied for a security clearance for his defense contractor employment. He indicated on his application that he used marijuana "countless" times from about June 1997 to August 2008. (Item 4.) During an October 16, 2008, interview with an authorized investigator for the Government, Applicant admitted that he had used marijuana in the past between June 1996 and August 2008, at times daily. Applicant denied any intent to use marijuana in the future, or that he had a problem with marijuana. He discussed his three arrests on drug charges, and admitted that small amounts of marijuana had been found in his car and some paraphernalia had been found in his car in the 2003 and 2004 incidents. Concerning the 2005 arrest, Applicant indicated that he pleaded guilty to possession of marijuana, and to possession of drug paraphernalia. (Item 5.) But court records indicate that he was found guilty of marijuana possession after he had pleaded not guilty. (Item 6.)

In response to DOHA interrogatories in January 2009, and in response to the SOR in June 2009, Applicant had an opportunity to update the record concerning his drug involvement and any changes in his lifestyle to ensure against a relapse. (Item 3, 5.) He provided no information.

As of September 2008, Applicant was involved in a committed relationship with his girlfriend, who lived with him. They shared their apartment with a male roommate. (Item 4.) The available record is silent as to whether or not Applicant's girlfriend has

ever used any illegal drugs, or whether she knows about his marijuana use. Nor is there any information about the roommate's involvement, if any, with illegal drugs or whether Applicant has changed his associates or activities to ensure a drug-free lifestyle. Applicant's mother apparently knows something about his illegal drug use or his arrests or both (Item 5), although the extent of her knowledge is unclear.

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to 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 to obtain 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 that the applicant may deliberately or inadvertently fail to safeguard 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

Drug Involvement

The security concern about 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.

Applicant smoked marijuana in various quantities between June 1997 and August 2008. While there were periods of abstention, especially after his arrests, he abused the drug as frequently as daily at other times. Applicant also purchased the drug, and he was arrested on three occasions after he was caught with the drug or drug paraphernalia or both. AG ¶ 25(a), “any drug abuse,” and AG ¶ 25(c), “illegal drug possession, cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia,” apply.

Although there is no evidence that Applicant has used any illegal drug since August 2008, AG ¶ 26(a), “the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is likely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment,” cannot reasonably apply to marijuana abuse that occurred over ten years and was as frequent as daily.

Given Applicant’s admission to having smoked marijuana “countless” times, I accept as credible his assertions in October 2008 that he had not smoked marijuana since sometime in August 2008, and that he did not intend any future use. But it is unclear whether he has managed to sustain his commitment to abstinence, or whether he has avoided the friends with whom he had smoked marijuana, or situations potentially conducive to drug use. Applicant provided no new detail about his drug involvement or efforts to abstain when he answered DOHA interrogatories in January 2009, or the SOR in June 2009. He filed no response to the FORM. AG ¶ 26(b) requires an applicant to demonstrate his or her commitment to maintain a drug-free lifestyle. Under AG ¶ 26(b), “a demonstrated intent not to abuse any illegal drugs in the future” can be shown by:

- (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.

The information of record falls considerably short of establishing “a demonstrated intent not to abuse any drugs in the future” under AG ¶ 26(b). There is no evidence that Applicant has completed a drug treatment program, so AG ¶ 26(d) is not pertinent. As of October 2008, he did not believe that he had a problem with marijuana.

Criminal Conduct

The security concern about criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules and regulations.

Applicant was arrested and charged with possession of marijuana and possession of drug paraphernalia in June 2003, July 2004, and February 2005. He admits that marijuana and drug paraphernalia were in his vehicle in June 2003 and July 2004, so AG ¶ 31(c), “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted,” applies, despite the court’s decision to award him probation before judgment for the 2003 marijuana possession charge, and the state’s decision not to prosecute the paraphernalia possession charge in 2003 and marijuana possession and paraphernalia possession charges in 2004. AG ¶ 31(c) also applies because of the guilty finding on the February 2005 marijuana possession charge. Furthermore, three illegal drug offenses within three years implicate AG ¶ 31(a), “a single serious crime or multiple lesser offenses.”

Although Applicant has not been arrested for marijuana possession since February 2005, he continued to smoke the drug, and therefore had physical custody of the illegal drug on the occasions of usage, until at least August 2008. AG ¶ 32(a), “so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment,” does not apply to drug involvement that was obviously a significant part of Applicant’s socialization or recreational activities for over ten years. There is no indication that Applicant was pressured into using and possessing marijuana, so AG ¶ 32(b), “the person was pressured or coerced into committing the act and those pressures are no longer present in the person’s life,” is not pertinent. AG ¶ 32(c), “evidence that the person did not commit the offense,” applies, if at all, to the 2005 possession of drug paraphernalia. The details of his arrest, as disclosed during his subject interview of October 2008, do not include an admission to possession of any paraphernalia, apart from a statement that he pleaded guilty to the charge. The court records indicate that he pleaded “not guilty” to the marijuana possession charge. The drug paraphernalia charge was not prosecuted after an “other plea” was entered for that offense.

Applicant demonstrated some reform around September 2008 when he resolved to stop using marijuana out of concern for his employment. But in the absence of evidence proving Applicant has successfully put his illegal drug abuse behind him, and

that his present activities, associates, and circumstances are consistent with a drug-free lifestyle, I am unable to apply AG ¶ 32(d), “there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.”

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 his conduct and all relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(a).³ 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.

Marijuana played a significant part in Applicant’s recreational or social activities for over ten years. He smoked the drug in his home, and with his friends. He likely also smoked the drug in his vehicle at least twice. The police found marijuana and paraphernalia in his car on two occasions, including in 2003 when he was stopped for driving under the influence. He continued his marijuana involvement even after he was found guilty in court and sanctioned by the university for his drug use in 2005. Applicant’s blatant disregard for the laws prohibiting the use of marijuana is inconsistent with the judgment and reliability that must be demanded of those persons granted access to classified information. His candor about his drug involvement is a factor in his favor, but based on the evidence before me, I am unable to conclude that it is clearly consistent with the national interest to grant Applicant a security clearance at this time.

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:	Against Applicant
Subparagraph 1.b:	Against Applicant

³The adjudicative process factors identified in AG ¶ 2(a) are as follows:

(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.

Paragraph 2, Guideline J: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: 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.

Elizabeth M. Matchinski
Administrative Judge