



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



In the matter of:)	
)	
SSN:)	ISCR Case No. 09-01718
)	
Applicant for Security Clearance)	

Appearances

For Government: Jennifer I. Goldstein, Esquire, Department Counsel
For Applicant: *Pro se*

January 29, 2010

Decision

MASON, Paul J., Administrative Judge:

Based upon a review of the case file, pleadings, and exhibits, Applicant's eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted his Security Clearance Application (SCA, Item 4), on November 6, 2008. On December 16, 2008, Applicant was interviewed by an investigator from the Office of Personnel Management (OPM) regarding his drug use.

On July 10, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under drug involvement (Guideline H). The action was taken pursuant to 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 adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and made effective within the Department of Defense for SORs issued on or after September 1, 2006.

Applicant requested a decision be made on the record in lieu of a hearing. A copy of the government's File of Relevant Material (FORM, the government's evidence in support of the allegations of the SOR) was sent to Applicant on September 28, 2009. Applicant received the FORM on November 2, 2009. His response was due by December 2, 2009. No response was received by DOHA. The case file was assigned to me on January 11, 2010.

Findings of Fact

In Applicant's answer to the SOR, dated August 7, 2009, he admitted using marijuana, but denied the factual allegation of marijuana use between 1991 and November 2008. Instead, he claimed that he was in the military with a security clearance until 1994, and he had to take regular drug tests. In an attachment to his answer, Applicant explained he used marijuana about four times since 2005, not 1991 as indicated in the SOR. He stated, "if my rare and infrequent use of marijuana is enough to prevent me from receiving a security clearance, then so be it" (Item 4).

Applicant is 40 years old. He has been married since July 2003. He has two children from a previous marriage, and one stepchild (Item 4). He received a Master's degree in Business Administration in December 1996. He has been employed by a defense contractor since February 1998. From April 1990 to April 1994, Applicant served in the United States Army as a linguist (*Id.*).

Applicant admitted using marijuana in recent years. The problem with his history of marijuana use is that he provided three versions of use that differ in frequency and/or length of use.

Applicant completed his security clearance questionnaire (SCA, Item 4) on November 6, 2008. In response to the section 24 module (Your Use of Illegal Drugs and Drug Activity) of the SCA, he answered "yes" to question 24.a., that he used drugs since the age of 16 or in the last 7 years (*Id.* at 28). On the next page of the SCA in the space provided for "Additional Comments" of the section 24 module, Applicant estimated he used marijuana four times from October 1991 to the present. At the conclusion of the section, Applicant noted he used marijuana in the past at concerts and parties. He never purchased or sold the drug. He never was a consistent smoker of marijuana, and estimated he used the drug about four times in seven years. If he used marijuana four times in the past seven years, the date he started using marijuana would be 2001, and not 1991, as he indicated in the section. I find that he meant to enter the year "2001," which begins the seven-year period of drug use he referred to in the "Additional Comments" area of the module.

Appellant provided a different picture of his marijuana history when he was interviewed in December 2008 by an investigator of the Office of Personnel Management (OPM) (Item 5). In that interview, he stated that during two recreational trips with approximately 10 to 20 friends in July 2007 and July 2008, lasting four days each, Applicant used marijuana. Each day for four days, he ingested four or five puffs

from a ½ joint of marijuana that was passed among the recreationists (*Id.*). Applicant recalled using marijuana when he took five to seven puffs between 9:00 P.M. and 12:00 A.M. at a concert on June 15, 2008. Applicant also remembered using marijuana on one occasion in 2005.

Later in the same December 2008 interview, Applicant stated that he only smoked marijuana during special events (*Id.*), and that he never purchased the drug. He stated he enjoyed smoking marijuana, but was not dependent (*Id.*). He stated he would smoke the drug in the future in similar situations if provided freely to him. Applicant indicated he would stop using marijuana if that was a condition for receiving a security clearance or job (*Id.*). Applicant did not believe he could be blackmailed or coerced by his marijuana use because his camping friends know about his marijuana use (*Id.*).

Credibility Findings

Applicant's differing explanations about the frequency and duration of his marijuana use pose a credibility problem concerning which account to believe. I find that Applicant's account provided in the December 2008 OPM interview is the most complete and credible. Applicant's response to question 3. of Item 6 (interrogatory answers) reflects that he had a full opportunity to read the December 2008 interview and make corrections. The corrections he added and observations he made about the interview (in Item 6) substantiate my finding that he reviewed the December 2008 interview.

When he received the FORM in November 2009, he had another opportunity to read his December 2008 interview a second time. In supplying no additional corrections to the December 2008 interview, I find he agreed with the history of marijuana use he furnished to the investigator in December 2008. By indicating that he enjoyed using marijuana and that he would likely use the drug in the future except if drug use interferes with his chances of obtaining a security clearance or a job, I find Applicant really does not want to end his marijuana use.

Character Evidence

Applicant provided no independent evidence regarding his job performance or reputation in the community where he lives.

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 used in evaluating an applicant's eligibility for access to classified information. These guidelines are applied in conjunction with the variables listed in 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. Reasonable 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 for 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 is not restricted to normal duty hours. Rather, the relationship is an-around-the-clock responsibility between an applicant and the federal government. 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 as to potential, rather than actual, risk of compromise of classified information.

Analysis

Drug Involvement

Paragraph 24 of the Adjudicative Guidelines (AG) sets forth the security concern related to drug involvement:

Use of an illegal drug or misuse of 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 disqualifying conditions that apply are:

AG ¶ 25(a) (*any drug abuse*); and

AG ¶ 25(c) (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*); and

AG ¶ 25(h) (*expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use*).

Applicant admits using marijuana between 2005 and July 2008. He has presented three different accounts of drug use since he submitted his SCA in April 2008. The most credible account comes from his interview with the OPM in December 2008. He admitted using marijuana on one occasion in 2005, on four successive days in July 2007, on one occasion in June 2008, and on four successive days in July 2008. While he stated he had no intention of using the drug in the future, he described the circumstances under which he would likely use marijuana in the future. His drug use falls within the scope of AG ¶¶ 25(a), 25(c), and 25(h).

There are two mitigators under AG ¶ 26 that may apply:

AG ¶ 26(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

AG ¶ 26.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 are used, (3) an appropriate period of abstinence, and (4) a signed statement of intent with automatic revocation of clearance for any violation*).

AG ¶ 26(a) does not apply because Applicant's most recent drug use was less than two years ago. Applicant, who enjoys using marijuana but does not feel dependent on the drug, likes to attend special events, and will likely use marijuana if the drug is given to him during the event. Having described the circumstances in which he may use marijuana in the future, I am not confident that Applicant will stop using marijuana under any conditions.

Applicant smoked marijuana once in 2005. He also smoked the drug four times during a four-day trip with friends in July 2007 and a four-day trip in 2008. He enjoys attending special events and concerts. He has presented no evidence to suggest he has stopped associating with his drug using friends or frequenting environments where drugs are used. While Applicant has indicated he has no intention of using marijuana in the future, and will not use the drug if continued use jeopardizes his chances of receiving a security clearance, Applicant has not convinced me that he is committed to forgo all future drug use. Finally, Applicant has not established an appropriate period of abstinence from drug use. AG ¶ 26(b) does not apply. After weighing and balancing the entire record, Applicant has not met his burden of convincing me his drug involvement is no longer a security concern.

Whole Person Concept

I have examined the evidence utilizing the disqualifying and mitigating conditions of the drug involvement guideline. Even though I have resolved the guideline against Applicant, the case still must be weighed within the context of nine variables known as the whole person concept. In evaluating the relevance of an individual's conduct, the administrative judge should consider the following factors:

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 the participation was 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.

Applicant started using marijuana in 2005 when he was 35 years old. He used the drug occasionally between 2005 and July 2008. Applicant likes to use marijuana and he likes attending special events or concerts. He explained that he is likely to use the drug at a concert in the future if it is given to him. Though marijuana use has been decriminalized in the state where Applicant lives, the use of marijuana, except for medical reasons, is still a crime in the state. Applicant has offered insufficient evidence to persuade me that he will stop using marijuana to obtain a security clearance.

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 (Drug Involvement, Guideline H):	AGAINST APPLICANT
Subparagraph 1.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 national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Paul J. Mason
Administrative Judge