



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



In the matter of:)
)
) ISCR Case No. 09-02480
)
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esquire, Department Counsel
For Applicant: *Pro Se*

October 30, 2009

Decision

DAM, Shari, Administrative Judge:

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

On September 15, 2008, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On July 6, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under the guidelines for Drug Involvement and Personal Conduct. 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.

On August 18, 2009, Applicant answered the SOR in writing and elected to have the case decided on the written record in lieu of a hearing. On September 2, 2009, Department Counsel prepared a File of Relevant Material (FORM), containing six Items, and mailed Applicant a complete copy the following day. Applicant received the FORM on September 11, 2009, and had 30 days from its receipt to file objections and submit additional information. Applicant timely submitted a Response (AR.), to which Department Counsel had no objection. On October 9, 2009, DOHA assigned the case to me.

Findings of Fact

In his Answer, Applicant admitted all factual allegations contained in the SOR. Those admissions are incorporated into the findings herein.

Applicant is 42 years old. He has two children from previous relationships, and four young children and a step-son with his current wife. In June 2008, he began working as a first class engineer for a defense contractor. In September 2008, he submitted an e-QIP. (Item 4.) From 2006 to the present, he has held part-time positions, in addition to working full-time positions. In January 2006, he started online college courses. In January 2008, he earned an associate's degree in business administration. (Item 5.)

In response to Section 24: *Your Use of Illegal Drugs and Drug Activity* on the e-QIP, Applicant did not disclose that he either illegally used or purchased marijuana within the last 7 years. On October 23, 2008, a government investigator interviewed Applicant about answers in his e-QIP. Applicant admitted that he illegally smoked marijuana, on a monthly basis for most of his adult life until August 2007. He purchased it five or six times a year from some of his associates. He used it recreationally because it relaxed him. He never used it at work. He stopped using marijuana because he realized that it could affect his career possibilities. He does not think he is addicted to marijuana and does not intend to use it in the future. He has not participated in any form of substance rehabilitation. He no longer allows friends or relatives to use marijuana in his presence. (Item 6 at 3, 12, 13.)

During that October 2008 interview, Applicant admitted that he did not disclose his marijuana use on the e-QIP because he knew it would affect his employment. He regretted his mistake. (Item 6 at 3.)

In his August 2009 Answer to the SOR, Applicant acknowledged that he exercised poor judgment in illegally using marijuana over the course of his life and asserted that he will never use illegal drugs again. He stated, "I have acquired my third class license and my associates [sic] degree in order to better my chances of providing my family with a comfortable living. I used poor judgment in my past, but it is behind me." (Item 4.)

In response to the FORM, Applicant asserted that his marijuana use is in his past and not in his present life. He will sign a statement of his intention never to use it again and if he does it would mean an automatic revocation of his security clearance. His family is his “main priority and a drug free environment is the only acceptable environment for them [his five young children].”(AR.)

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 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 “Any 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.

Directive ¶ E3.1.14 requires the government to 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 clearance decision.” 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.”

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 an 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.

Analysis

Guideline H, Drug Involvement

The security concern pertaining to 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. (a) Drugs are defined as mood and behavior altering substances, and include: (1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and; (2) inhalants and other similar substances; (b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

This guideline notes several conditions that could raise security concerns. Based on Applicant's admissions that he regularly used and purchased marijuana for most of his adult life up to August 2007, the government raised a disqualifying condition under AG ¶ 25(a), "any drug abuse (see above definition)."

After the government raised a potential disqualifying condition, the burden shifted to Applicant to rebut and prove mitigation of the resulting security concerns. AG ¶ 26 includes examples of conditions that could mitigate the security concern arising from illegal drug use:

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

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

AG ¶ 25(a) does not apply because Applicant regularly used illegal drugs over the course of his adult life up to August 2007. Given the frequency and long history of the marijuana use, his behavior casts doubt on his current trustworthiness and good judgment. Applicant stated that he does not intend to use illegal drugs in the future and that he would sign a statement of intent with an automatic revocation of his clearance for any violation. He told his friends and relatives not to smoke marijuana in his presence. Those claims, albeit unsubstantiated, warrant a limited application of AG ¶¶ 25(b)(1), (2), and (4). Applicant's uncorroborated assertions that he has not used marijuana for two years, is not sufficient evidence to establish an appropriate period of abstinence in view of his many years of regular use. The record does not contain any evidence to support the application of AG ¶ 25(c). Applicant has not participated in any substance abuse treatment, which is necessary to trigger the application of AG ¶ 25(d).

Guideline E, Personal Conduct

The security concern pertaining to the guideline 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. 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.

The government alleged in ¶ 2 of the SOR that Applicant's long history of marijuana use and his deliberate failure to disclose that history in his e-QIP may raise a disqualification under AG ¶ 15.

AG ¶ 16 sets out seven conditions that could raise security concerns and be disqualifying. Two of them are applicable:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and

(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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Applicant admitted that he intentionally failed to disclose on the e-QIP his long-term illegal use and purchase of marijuana because he was afraid to lose his employment. That evidence raised a potential disqualification under AG ¶ 16(a). That long-term use also raises a potential for exploitation because such information, if known in his community, could affect his reputation, as noted under AG ¶ 16(e)(1).

AG ¶ 17 includes six conditions that could mitigate security concerns arising under this guideline:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

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

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant did not provide sufficient evidence to trigger the application of any of the mitigating conditions listed under AG ¶ 17. He did not make an attempt to disclose the information prior to being interviewed about it, as required under AG ¶ 17(a). His history of illegal drug use is serious and not minor. It is relatively recent and long-standing. His trustworthiness and judgment are in question. Hence, AG ¶ 17(c) does not apply. Although he recently acknowledged the problem, he has not received any counseling for the problem or taken other steps to alleviate the possibility of a recurrence. AG ¶ 17(d) does not apply. There is insufficient evidence to support the application of AG ¶¶ 17(b), (e), or (g). AG ¶ 17(f) is not relevant.

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.

According to 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 is a 42-year-old married man and father of five young children, who has illegally used and purchased marijuana most of his adult life until August 2007, when he realized that his drug usage could effect his employment. While his candid admissions during his interview of his illegal drug use are noteworthy, his assertion that he has no intention to illegally use marijuana in the future is not persuasive. Other than his personal assurances, he did not provide any independent evidence to corroborate his assertions that he has not used it since August 2007, or that he has gained significant insight or personal skills that will prevent future illegal behavior. His long-term use raises concerns about his reliability, judgment, and ability to comply with rules and regulations. An equal security concern is Applicant's intentional failure to divulge his drug use on the e-QIP application. He readily admitted that he was concerned that his drug use would affect his employment. The government imposes a special trust in one who holds a security clearance and relies on a person to

be honest and truthful regardless of the consequences. Applicant failed to do so to protect his employment. His actions raise security concerns.

Overall, the record evidence leaves me with questions as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant did not mitigate the security concerns arising from his 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 and 1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a and 2.b:	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.

SHARI DAM
Administrative Judge