



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



In the matter of:)
)
) ISCR Case No. 09-03350
)
)
Applicant for Security Clearance)

Appearances

For Government: Eric Borgstrom, Esquire, Department Counsel
For Applicant: Alan V. Edmunds, Esquire

July 14, 2010

Decision

RICCIARDELLO, Carol G., Administrative Judge:

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

On February 26, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing the security concerns under Guidelines E and H. 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 for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on March 17, 2010, and requested a hearing before an administrative judge. The case was assigned to me on April 5, 2010. DOHA issued a Notice of Hearing on April 9, 2010. I convened the hearing as

scheduled on May 25, 2010. The Government offered Exhibits (GE) 1 through 3. Applicant did not object and they were admitted. Applicant testified and offered Exhibits (AE) A through W, which were admitted without objection. DOHA received the hearing transcript (Tr.) on June 16, 2010.

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 37 years old. He has worked for a defense contractor since 2004. He graduated from college earning a bachelor's degree in 1995 and a master's degree in 1996. He married in 1998. He has three children, one under the age of five, a two-and-a-half year old, and a 19-month-old.¹

Applicant completed a security clearance application (SCA) on April 20, 2004. On his application he disclosed that he had used marijuana 16 times from September 1, 1995 to March 31, 2003. In response to question 28, asking if he had ever used a controlled substance while possessing a security clearance, he answered "no." At his hearing he admitted he used marijuana from 1994 to 2003.² He did not use marijuana or any illegal drugs from 2003 until 2008, because "it was not permitted" while holding a clearance.³

In January 2008, Applicant was on family leave for twelve weeks after his wife gave birth to their third child. She accepted a job in the U.S. Virgin Islands and Applicant accompanied her with the children. He cared for the children while she worked. A friend and his family visited them there for a week. The friend was interested in using marijuana. Applicant stated he did not recall which of the two actually purchased the marijuana. He stated he was unaware at the time of what the status of his security clearance was because he was on family leave. He understood that although he was on family leave that he was going to return to his job and he would still have a security clearance upon his return. He was never advised his clearance was suspended or in abeyance while he was on family leave.⁴ He stated that although he was on medical leave and not actively employed, he was aware of his duties regarding holding a security clearance. He stated: "It's always in the back of my mind that I can never disclose what I know. I'm mean, your (sic) always conscious in some regards of a

¹ Tr. 38, 54, 56, 73.

² Applicant credibly testified that he was providing a broad time period to ensure he included all of his use. I find the discrepancy is immaterial.

³ Tr. 38-41, 55-58, 69.

⁴ Tr. 44-46, 59-63, 66-69.

clearance that you have to—you can't talk about things.”⁵ He stated he used marijuana twice while on family leave in the U.S. Virgin Islands.⁶

Applicant stated in interrogatories regarding the purchasing of marijuana that: “I did not volunteer to buy [marijuana]. We were daring each other to see who would. A seller walked by and asked if we wanted anything and we said yes. I walked away with him and noticed [my friend] did not follow.”⁷ He stated further: “I purchased 3 joints worth about \$20 in St. Thomas on Coki beach.”⁸

Applicant was granted a Secret security clearance sometime in late 2004 or 2005. On December 15, 2008, Applicant completed another SCA, so he could upgrade his Secret security clearance to a Top Secret security clearance. In response to Question 24(a), he disclosed that he had illegally used a controlled substance in the last seven years. In response to Question 24(b), he disclosed that he illegally used a controlled substance while holding a security clearance. The substance was marijuana. In the comment section he indicated he used marijuana “3-4 times” and stated: “I was on leave in St. Thomas, USVI.” On December 24, 2008, nine days after completing the SCA for a Top Secret security clearance, Applicant used marijuana with his brother-in-law while at a family party. His wife and children were at the party, but not present when he used the marijuana. This was the last time he used an illegal drug.⁹

Applicant does not intend to use any illegal drug in the future. He completed a “statement of intent” never to use illegal drugs again and indicated he will not be involved with anyone who uses illegal drugs. He documented that if he should violate his intention he consents to an automatic revocation of his security clearance.¹⁰ Applicant recognizes he used poor judgment when he used marijuana while holding a security clearance.¹¹

Applicant no longer associates with others from his past with whom he previously used marijuana. He still associates with his brother-in-law and his friend with whom he used it in the Virgin Islands. He has told these two people that they cannot use drugs around him or his children. His friend has also stopped using illegal drugs.¹²

⁵ Tr. 60.

⁶ Tr. 62.

⁷ GE 3.

⁸ Tr. 79-83.

⁹ Tr. 41-42, 63-66, 74, 77-79.

¹⁰ Tr. 43-44; AE V.

¹¹ Tr. 74.

¹² Tr. 40-41, 52-54.

Applicant was involved in an incident at a concert in 2001.¹³ He had been drinking and had an altercation with a security guard. The security guard made offensive comments. Applicant was charged with assault. The charge was reduced to disturbing the peace. He paid a fine and apologized. Applicant has not been charged with any other criminal violations since then.¹⁴

Applicant's former supervisor, who is now his coworker, testified on his behalf. He has no reservations about Applicant continuing to hold a security clearance. Applicant and his team received an award for their good work. He confirmed that drug use is prohibited by the company, on or off duty.¹⁵

A coworker testified on Applicant's behalf. He has been a friend and colleague of Applicant's for several years. He is aware of Applicant's past substance abuse. He has no concerns about Applicant holding a security clearance.¹⁶

I have considered the numerous personal and professional letters of recommendation, performance evaluations and appraisals, performance assessments, and drug screen results.¹⁷ Applicant is described as follows:

- Loyal, honest, trustworthy, dedicated, and diligent.
- Hard working, high level of integrity, dependable, strong sense of character.
- He is a very bright and personable.
- He is recommended for a security clearance and is not considered a security risk.
- He is passionate about his work.

Applicant's performance evaluations and appraisals indicate he "consistently meets, sometimes exceeds and seldom falls short of expectations" and he "consistently exceeds expectations and desired results." He also was given a grade of "outstanding" in different categories on his evaluations.

I have considered the psychological evaluation completed by a licensed psychologist. The evaluation concluded Applicant is not a habitual drug user and that he is aware of his poor judgment in purchasing and using marijuana and that he has no plans to do the same in the future.¹⁸

¹³ The SOR alleges the date as 2003. I have sua sponte amended the date to 2001.

¹⁴ Tr. 47-51, 55, 84-85.

¹⁵ Tr. 26-36; AE G.

¹⁶ Tr. 18-24; AE E.

¹⁷ AE A-U.

¹⁸ Tr. 52-53; AE I.

Policies

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

I have considered the disqualifying conditions under drug involvement AG ¶ 25 and conclude the following have been raised:

- (a) any drug abuse;
- (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 used marijuana from 1994 to 2003 and while on leave and holding a security clearance. He and his friend purchased marijuana while in the U.S. Virgin Islands. After completing an updated SCA to obtain a Top Secret security clearance, he again used marijuana. I find all of the above disqualifying conditions apply.

I have considered all of the mitigating conditions under drug involvement AG ¶ 26. The following two are potentially applicable:

- (a) the behavior happened so long ago, was so infrequent or happened under circumstances that it is unlikely to recur or does not cast doubt on the individual's 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 are used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant used marijuana from 1994 to 2003 with varying frequency, when he was younger and prior to obtaining a security clearance. He stopped when he obtained his security clearance. He later resumed his use in 2008 while on family leave and again shortly after he completed his SCA for a Top Secret security clearance. It has been approximately 18 months since his last use of marijuana. Applicant signed a statement of intent with automatic revocation of his clearance for any violation if he should use illegal drugs in the future. He has instructed those with whom he associates that they should not use drugs in his presence. There is no indication that Applicant is drug dependent or in need of drug rehabilitation. I find AG ¶ 26(b) applies.

It has been a relatively short period of time since Applicant's last drug use. Applicant was a mature adult, husband, and father of three children, when he chose to use marijuana. He used marijuana after he was granted a security clearance. When he completed his SCA in December 2008, he indicated he had used marijuana while holding a security clearance. He was aware he had a security clearance and that when he returned to his job, he would continue to have a security clearance. Applicant's explanation was that he was "unaware that a security clearance remains active during periods of leave." Even if believed, his attitude shows a disregard for obeying the law and raises questions about his judgment. There is no question when he used marijuana in December 2008 that he was aware he had an active security clearance. Less than two weeks after completing his SCA for a Top Secret security clearance, he used marijuana again. His completion of the SCA should have been an overt reminder that using drugs while holding a security clearance is prohibited. It is one of the questions he was required to answer on the SCA. His intentional disregard for the seriousness and consequences of his conduct casts serious doubt on his current reliability, trustworthiness, and good judgment. I find mitigating condition AG ¶ 26(a) does 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.

I considered the disqualifying conditions under personal conduct AG ¶ 16 that could raise a security concern and conclude the following have been raised:

(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 while he held a Secret security clearance. Less than two weeks after completing a SCA for a Top Secret security clearance, he again used marijuana. This was after he admitted on the SCA that he used marijuana, but did not think his security clearance was active because he was on leave. He used marijuana with a friend and with his brother-in-law. Applicant pled guilty to an amended assault charge and was fined. I find the above disqualifying condition applies.

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

(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's confrontation with a security guard at a concert in 2001 was a minor incident. He apologized and paid the fine. I find the offense happened under unique circumstances and unlikely to recur. AG ¶ 17(c) applies to that offense.

Applicant's drug use was not minor or isolated. He used illegal drugs from 1994 to 2003. He ceased using them when he obtained a security clearance. He used them again during a period of time when he claims he did not believe his security clearance was active. He then used marijuana when he knew he had a security clearance and was attempting to have it upgraded. His conduct while holding a security clearance raises questions about his judgment, trustworthiness, and reliability. Even if he believed his security clearance was not valid while he was on leave, he chose to disobey the law by purchasing drugs and then using them. Although he has promised never to use illegal drugs again, he has told those with whom he used drugs that he no longer does, and he has taken steps to reduce his vulnerability, it does not negate or mitigate the seriousness of his conduct. Applicant made conscious decisions to violate the trust that was bestowed upon him when granted a security clearance. He irresponsibly violated the trust and privilege of holding a security clearance. I find that although AG ¶ 17(d) and (e) apply, they are not enough to overcome the consequences of Applicant's deliberate actions of using drugs while holding a security clearance. I find AG ¶ 17(c) does not apply to his drug use.

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. I have incorporated my comments under Guidelines D and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment. Applicant is a college graduate, a husband, and a father of three children. He has excelled at work and provided many character references that were considered. Applicant used marijuana in varying degrees from 1993 to 2004. When he received his security clearance he stopped using illegal drugs. He used them again while he was on leave and then again after completing a SCA to upgrade his security clearance. Applicant's actions cannot be attributed to youthful indiscretion. Rather, he was well aware that marijuana is illegal. He chose to buy it on a beach and use it with his friend. Even if he believed he did not have an active clearance, he chose to commit a criminal act. He made the same decision, weeks after completing his SCA. Applicant's judgment raises concerns about his reliability and whether he can be trusted to make good decisions in the future. 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

Paragraph 2, Guideline E:

AGAINST APPLICANT

Subparagraph 2.a:

Against Applicant

Subparagraph 2.b:

For Applicant

Conclusion

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

Carol G. Ricciardello
Administrative Judge