



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



In the matter of:)	
)	
-----, -----)	ISCR Case No. 09-04989
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Fahryn E. Hoffman, Esquire, Department Counsel
For Applicant: *Pro se*

November 5, 2010

Decision

WHITE, David M., Administrative Judge:

Applicant used marijuana from about 1974 until 1988, when he stopped in connection with treatment in Alcoholics Anonymous. He resumed regular recreational marijuana use in 2004, and expressed his intent to continue using it several times during the security clearance application process. He says he stopped using marijuana recently, but that caused him to relapse into alcohol use. He used marijuana with his daughter, and does not want his employers to know about his drug use. Based upon a review of the case file, pleadings, testimony, and exhibits, eligibility for access to classified information is denied.

Applicant submitted a security clearance application (SF 86) on May 6, 2009. On November 4, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guidelines H (Drug Involvement), J (Criminal Conduct), and E (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 *Adjudicative Guidelines for Determining Eligibility for*

Access to Classified Information that went into effect within the Department of Defense on September 1, 2006.

Applicant acknowledged receipt of the SOR on November 10, 2009. He answered the SOR in writing on November 30, 2009, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on February 11, 2010, and the case was assigned to me on May 13, 2010. DOHA issued a Notice of Hearing on July 9, 2010, and I convened the hearing as scheduled on August 18, 2010. The Government offered exhibits (GE) 1 and 2, which were admitted without objection. Applicant offered no documentary evidence, and testified on his own behalf. I granted Applicant's request to leave the record open until September 7, 2010, for submission of additional evidence. DOHA received the transcript of the hearing (Tr.) on August 20, 2010. Applicant did not submit any additional evidence before the deadline, nor did he request an extension of time to do so.

Findings of Fact

Applicant is a 56-year-old employee of a major defense contractor, where he has worked since 1981 under various corporate structures. He has no military service, and this is his first application for a security clearance. He is married with two adult daughters and two adult stepsons.¹ In his response to the SOR, he formally admitted all of the factual allegations except SOR ¶ 1.c, which he denied. Applicant's admissions, including his statements in response to DOHA interrogatories,² are incorporated in the following findings.

Applicant began using marijuana in approximately 1974, while he was in college.³ He continued smoking marijuana, including recreational use with his first wife, until 1988 when he entered Alcoholics Anonymous (AA). He has abstained from alcohol use since then, with a few recent relapses, but resumed smoking marijuana in 2004 when an old friend offered him some. Following that incident, Applicant gradually increased his use of marijuana from monthly to every weekend and several week nights per month. He occasionally bought marijuana and possessed it for his own use. His last purchase was around September or October 2009. His last use of marijuana was in October 2009, shortly before his receipt of the SOR. He stopped using marijuana at that point because his clearance was denied as a result of his previous actions and statements that he intended to continue using it.⁴

¹GE 1.

²GE 2.

³Tr. 33-34. I granted Department Counsel's motion to amend the SOR to conform to the evidence by changing the originally alleged "1970" to "1974."

⁴GE 2; Tr. 24, 39-44.

Applicant's first wife was diagnosed with cancer during late 2006, and she passed away in January 2007. This was a particularly stressful period for Applicant, and his marijuana use increased to help him sleep. His younger daughter graduated from high school during the spring of 2007, and had turned 18 the previous October. During the summer of 2007, Applicant became aware of his daughter's marijuana use, and told her that he also used marijuana in an attempt to create an additional bond with her. He described her as a marijuana activist who continues to use and favors legalization. He used marijuana with her and several of her friends about 10 or 12 times over the next year or two. Applicant remarried in October 2008. He smoked marijuana with his current wife several times, but she did not like inhaling the smoke and preferred to drink alcohol. He also smoked marijuana once or twice a month with his now-24-year-old stepson starting in December 2008.⁵

When Applicant completed his May 2009 SF 86, he answered "Yes" to the questions inquiring about illegal drug use and possession. He described his dates of marijuana use as from March 2006 (estimated) to May 2009. He described: "Occasional weekend recreational use and to help with sleeping difficulties after my first wife died. I have possessed very small quantities (less than 7 grams) of marijuana for my own personal use. Stopped use with current job." During his hearing, he was troubled that he had estimated March 2006, rather than 2004, as the date he resumed marijuana use. He credibly testified that he had no intention to conceal his actions, of which there is no other evidence. He also admitted that his last statement about stopping use was not correct, and he continued his regular marijuana use after submitting the SF 86.⁶

During his June 2009 interview with an investigator from the Office of Personnel Management (OPM), Applicant disclosed that he had last used marijuana one week before, and planned on continued "occasional use." He said he usually used it with friends on the weekends, did not feel that he had a substance abuse problem, and intended to continue such use.⁷ On August 24, 2009, he responded to DOHA interrogatories concerning his drug use, which included an affirmation of the contents of the OPM summary of the foregoing interview. He stated that he had not decided to stop using illegal drugs, had last used the previous weekend, and intended to continue occasional weekend use of marijuana.⁸

Applicant testified that if it would not impact his career, professional life, or job, he would probably continue to use marijuana because alcohol use is bad for him as an alcoholic and should not be consumed with his arthritis medicine.⁹ He resumed

⁵AR; GE 1; GE 2; Tr. 25, 45-49, 51, 72-73.

⁶GE 1; GE 2; Tr. 56-57.

⁷GE 2 at 50.

⁸GE 2.

⁹Tr. 60, 92-93.

attendance at AA in May or June 2010 because he had relapsed into alcohol use after he stopped smoking marijuana. He felt the program was helping him to avoid further alcohol relapses. He is not seeking treatment for marijuana abuse or dependence, nor has he ever done so.¹⁰ Applicant was specifically advised of the option to submit a signed statement of intent not to use drugs in the future, with automatic revocation of clearance for any violation, and indicated that he wanted to prepare and submit such a statement in evidence. Department Counsel offered to provide a sample, and otherwise assist Applicant with understanding the proper contents of such a signed statement.¹¹ As noted above, Applicant submitted no documentary evidence during the period the record remained open after the hearing at his request. Applicant continues to see the friends with whom he smoked marijuana in the past. Many of these friends, as well as his daughter and his stepson, continue to use it in his presence.¹²

Many members of Applicant's family know about his drug use, but nobody with whom he works knows about it, specifically including his supervisor and his security manager. Although he evaded acknowledging a formal company policy against drug abuse, Applicant said he tries hard to present a clean-cut persona at work, and cares a lot about what other people think of him. He thinks those he works with would think less of him if they knew about his drug use, and it would adversely affect their trust or confidence in him as a representative of the company to their Government customers.¹³

Applicant submitted no other evidence concerning his character, or performance evaluations concerning his work. He was credible in his honest admissions about his history of drug use, and clear that the only reason he stopped using marijuana was because that conduct was causing his security clearance to be denied.

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 (DCs) and mitigating conditions (MCs), 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, these guidelines are applied in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable

¹⁰Tr. 55-56, 68-70.

¹¹Tr. 76-79.

¹²Tr. 51-52, 61-63.

¹³Tr. 48-54, 63, 66-67, 73-76.

guidelines in the context 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 the 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, “[t]he 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Section 7 of Executive Order 10865 provides: “[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

A person applying for access to classified information seeks to enter 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.

Analysis

Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to alcohol consumption:

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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. The DCs raised by the facts in this case are:

(a) any drug abuse (see above definition);

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

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

Applicant admitted to illegally using marijuana on a regular basis from 1974 to 1988, and again from 2004 to October 2009. Throughout this period he also purchased and possessed the marijuana that he used. He apparently recognized the security implications of this conduct when he stated on his SF 86, "Stopped use with current job." He told the OPM investigator in June 2009 that he intended to continue using marijuana, and confirmed that intention under oath on August 24, 2009, in response to DOHA interrogatories. He was also clear that he would continue using marijuana if it would not prevent him from obtaining a security clearance, and he only stopped in order to avoid denial of his clearance. Because he conceals his drug use from his security manager, supervisor, and all coworkers, Applicant failed to clearly and convincingly commit to discontinue drug use should he receive a security clearance under present circumstances.

AG ¶ 26 provides conditions that could mitigate security concerns. The MCs with potential application under the facts in this case are:

(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; 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.

Applicant's known illegal drug use continued until as recently as one year ago, was quite frequent, and did not happen under circumstances that would indicate it was unlikely to recur or does not cast doubt on his current reliability, trustworthiness, or good judgment. The existence of criminal laws prohibiting, and a company culture (if not formal policy) prohibiting such conduct failed to deter him from regular use of marijuana. No mitigation under AG ¶ 26(a) was established.

Applicant did not demonstrate an intent not to abuse drugs in the future, and the balance of evidence strongly indicates that he would resume drug use and continue to hide it from his supervisor and security personnel should he be granted a security clearance. Given his history of drug use that continued for many months after submission of his SF 86, and despite obvious concerns from OPM and DOHA investigators, his recent abstinence is of insufficient duration to demonstrate that resumption of such conduct is unlikely. He only stopped because the conduct made him ineligible for a security clearance, and said he would continue were it not having such an effect. He continues to associate with his drug-using friends and contacts, and has not changed or avoided the environment in which the drugs were and are used. Despite his expressed desire to submit a signed statement of intent not to use drugs in the future, he failed to do so. He accordingly failed to establish mitigation under AG ¶ 26(b).

Applicant's marijuana use did not involve a prescription drug, so AG ¶ 26(c) has no application. Finally, he has not entered or completed a drug treatment program, and has no intention of doing so. AG ¶ 26(d) therefore supplies no mitigation.

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct:

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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The condition supported by this record is ¶ 31(a) "a single serious crime or multiple lesser offenses." Applicant admitted purchasing, possessing, and using marijuana on a great number of occasions over a long period of time, and that such conduct violates both federal and local criminal laws.

AG ¶ 32 provides conditions that could mitigate criminal conduct security concerns. These are:

(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;

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense; and

(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.

For the same reasons that Applicant failed to establish mitigation under AG ¶ 26(a), discussed above, he failed to meet his burden with respect AG ¶ 32(a). He said he used marijuana to help deal with the stress of his first wife's sudden illness and death from cancer, but he had resumed regular marijuana use at least three years before that took place. There was no other evidence of coercion or pressure to use marijuana. He simply liked doing it. Mitigation under AG ¶ 32(b) was not proven. Applicant admitted all of these offenses, so AG ¶ 32(c) does not apply. If Applicant's claims to have abstained from marijuana use for almost a year are true, then he has begun to demonstrate some evidence of rehabilitation. His relapses into alcoholism in response to that drug abstinence raise potential concerns over whether such rehabilitation could be considered successful, however, and his absence of any remorse about his conduct further diminishes the mitigating effect. He offered no evidence concerning his employment record or constructive community involvement. Accordingly, Applicant failed to establish mitigation under AG ¶ 32(d).

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.

AG ¶ 16 describes the DCs under this guideline. The specific Guideline E concerns raised by the SOR allegations are:

(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. . .; and

(g) association with persons involved in criminal activity.

Applicant admitted frequent and regular marijuana use during five of the past six years, including about a dozen instances of smoking it with his daughter and her friends since the summer of 2007. He has concealed this marijuana use from his supervisors and coworkers because he greatly values their high opinion of him as a clean-cut individual, and knows that they would think much less of him if they knew of this conduct. These facts establish substantial concerns under AG ¶¶ 16(e) and (g). Also raised are the judgment, reliability, and trustworthiness issues the Appeal Board found to be inherent under AG ¶ 15 in ISCR Case No. 06-20964 (App. Bd. Apr. 10, 2008). Applicant's choice to engage in illegal drug use with his 18-year-old daughter and her friends, and expressed opinion that he feels no moral compulsion to obey laws prohibiting marijuana use, show very questionable judgment and an unwillingness to comply with rules and regulations he does not like. Security concerns are accordingly raised, and shift the burden to him to establish mitigation.

AG ¶ 17 provides personal conduct MCs. The only MCs with potential applicability to the foregoing security concerns are:

(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.

Minimal, if any, mitigation under AG ¶ 17(c) was established, for the reasons discussed above concerning AG ¶¶ 26(a) and 32(a). AG ¶ 17(d) was not established because he continues to deny the wrongfulness of his marijuana purchase, possession, and use, and failed to establish that recurrence is unlikely as discussed above. His

ongoing concealment of his extensive drug use from supervisors, security personnel, and coworkers, creates substantial and continuing vulnerability to exploitation, manipulation, and duress. AG ¶ 17(e) was therefore not established. Finally, he continues his association with drug-using friends and relatives, who still engage in this illegal activity in his presence. No mitigation under AG ¶ 17(g) was proven.

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 the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant's most recent five-year period of regular marijuana use involved voluntary and knowing behavior by a mature and accountable individual. The illegal drug use continued for many months after he applied for his clearance, despite his knowledge that such conduct was prohibited. Applicant only stopped because he finally came to believe he would not receive a clearance while he continued such conduct, and said that he would resume it if not for such a consequence. Applicant expressed no remorse for his illegal conduct, or for encouraging and engaging in such activities with his daughter and other young people. Rehabilitation or permanent behavioral changes were not demonstrated. He has hidden this conduct from everyone at work because it would adversely affect his cherished reputation, making him susceptible to coercion and duress. Recurrence of such activity is made more likely should he receive a clearance, since his only motive for stopping would be removed and he expressed his intention to continue drug use were it not such an impediment.

Overall, the record evidence creates substantial doubt as to Applicant's present eligibility and suitability for a security clearance. He did not meet his burden to mitigate the security concerns arising from his drug involvement, criminal conduct, and personal conduct.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a through 1.c:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.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 interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

DAVID M. WHITE
Administrative Judge