



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



In the matter of:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 09-05349

Appearances

For Government: Paul M. Delaney, Esquire, Department Counsel

For Applicant: *Pro se*

June 4, 2010

Decision

MOGUL, Martin H., Administrative Judge:

On November 23, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline H for Applicant. (Item 1.) 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) promulgated by the President on December 29, 2005, and effective within the Department of Defense on September 1, 2006.

On December 8, 2009, Applicant replied to the SOR (RSOR) in writing (Item 4), and he requested that his case be decided on the written record in lieu of a hearing. On January 12, 2010, Department Counsel issued the Department's written case. A complete copy of the file of relevant material (FORM) was provided to Applicant. In the FORM, Department Counsel offered six documentary exhibits. (Items 1-6.) Applicant was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. A response was due on February 18, 2010. Applicant submitted timely an additional one page document, which has been marked as Item A,

and entered into evidence without objection. The case was assigned to this Administrative Judge on March 11, 2010.

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

Findings of Fact

In his RSOR, Applicant admitted SOR allegations 1.a. and 1.b. The admitted allegations are incorporated herein as a finding of fact.

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted additional document, and the FORM, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 31 years old. He is married and has no children. Applicant is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Guideline H - Drug Involvement

The SOR lists two allegations (1.a. and 1.b.) under Adjudicative Guideline H. The allegations will be reviewed in the order that they were listed on the SOR.

1.a. The SOR alleges, and Applicant has admitted in his RSOR (Item 4), that Applicant "used marijuana, with varying frequency, from approximately 2003 until at least April 2009."

When Applicant completed a Security Clearance Application (SCA) on September 15, 2009, he indicated that he had used marijuana from April 2002 to April 2009. (Item 5.) He identified his usage as "Recreational use, I've used it on and off in social environments for the past 7 years. I would estimate that the number of times I used it is less than 100." Under Additional comments he added, "I have recently quite [sic] using, but I did make an exception when I was on my honeymoon and we visited Amsterdam in April 2009."

During an interview with a Department of Defense investigator on June 24, 2009, (Item 6), Applicant stated that he first used marijuana when he was 15 years old in approximately 1993, and he began using it around 3 times a month. Applicant had a brief six month abstention period in 1996. Thereafter he used marijuana approximately monthly until 2004, and then about bi-monthly until the spring of 2008. He also informed the investigator that his most recent marijuana usage included a time in the fall of 2008 before a football game, in spring 2009 at his bachelor party, and in April 2009 while he was on his honeymoon.

In the interview, Applicant also stated that he does still see his friends, with whom he used to use marijuana, about four times a year. However, he explained that

he now has the intention to stop using marijuana, as he needs to grow up since he is now married and plans to have children.

In his SCA, Applicant indicted that he has been employed by his current employer since July 2006. (Item 5.) Therefore, an additional concern is that Applicant was using marijuana on numerous occasions after he began in his current employment.

1.b. The SOR alleges, and Applicant admitted in his RSOR (Item 4), that Applicant “purchased marijuana.” Applicant further stated in Item 4 that the “purchase of marijuana occurred over six years ago in college.” In Item 6, he described his purchase as giving money to friends who would then purchase the marijuana from an unknown person.

In his post FORM submission (Item A), dated January 25, 2010, Applicant wrote that “there were other long periods of abstention” from marijuana, although he did not list any of these periods. He also wrote that he felt it was wrong to consider his drug usage “prior to 2002 as this is outside of the scope of the 7 year evaluation.” However, in considering the potential for Applicant’s future drug usage, I find his entire drug use history to be relevant and worthy of consideration.

Finally, Applicant did not submit documentation or other evidence from any other individual, who knows Applicant, has worked with him, or has any other relevant evidence about his character. Nor was any documentation offered about Applicant’s current or past employment, or anything else that could potentially give me insight about his honesty, credibility or trustworthiness. Therefore, this decision had to be based entirely on Applicant’s written statements, since he did not appear before me at a hearing.

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 over-arching adjudicative goal is a fair, impartial and common sense 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 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

The security concern relating to the guideline for 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 judgement and because it raises questions about a person’s ability or willingness to comply with laws, rules and regulations.

With respect to Guideline H, the Government has established its case. Applicant’s improper and illegal drug abuse, specifically the use of marijuana for many years, is of great concern, especially in light of his desire to have access to the nation’s secrets. Applicant’s overall conduct pertaining to his illegal substance abuse clearly falls within Drug Involvement ¶ 25 (a) “any drug abuse” and (c) “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.” It also is disturbing that Applicant has used marijuana during the period that he has been working for his current employer since July 2006.

In reviewing the mitigating conditions, I conclude that ¶ 26(a) “the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur again” has not been established in this case, because Applicant used marijuana from 1995 to 2009, as frequently as three times a month, for many years, he continued using marijuana after he became employed at his current employer, and he still associates with friends with whom he used marijuana. I also find that (b) “a demonstrated intent not to abuse any drugs in the future” is not applicable, as there has been no independent evidence introduced to establish Applicant’s veracity or credibility regarding his intent not to abuse drugs in the future.

In this case, the Government has met its initial burden of proving that Applicant has used illegal drugs for many years under Guideline H. Applicant, on the other hand, has not introduced persuasive evidence in rebuttal, explanation or mitigation sufficient to overcome the Government’s case against him. Applicant did indicate that he did not intend to use any illegal substance in the future. However, his long drug usage, the lack of any independent evidence as to Applicant’s character, plus the absence of Applicant’s testimony, made his stated intention less than credible or persuasive. Accordingly, Guideline H of the SOR is concluded against Applicant.

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. Based on all of the reasons cited above as to why the disqualifying conditions apply and the mitigating conditions do not apply, together with the lack of any independent evidence of Applicant’s credibility, I find that the record evidence leaves me with significant questions and doubts as to Applicant’s eligibility and suitability for a security clearance under the whole-person concept. For all these reasons, I conclude Applicant has not mitigated the security concerns.

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
Subparagraph 1.a.:	Against Applicant
Subparagraph 1.b.:	Against Applicant

Conclusion

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

Martin H. Mogul
Administrative Judge