



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



In the matter of:)	
)	
)	ISCR Case No. 09-06214
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: James F. Duffy, Esq., Department Counsel
For Applicant: *Pro se*

August 3, 2010

Decision

HEINY, Claude R., Administrative Judge:

Applicant used marijuana between 1995 and April 2009. His last use occurred after he had submitted his security clearance application (SCA). Applicant has failed to rebut or mitigate the security concerns under drug involvement and personal conduct. Clearance is denied.

Statement of the Case

Applicant contests the Defense Department's intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) on March 23, 2010, detailing security concerns under drug involvement and personal conduct.

¹ 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).

On April 16, 2010, Applicant answered the SOR and elected to have the matter decided without a hearing. Department Counsel submitted the government's case in a File of Relevant Material (FORM), dated June 7, 2010. The FORM contained six attachments. On June 18, 2010, Applicant received a copy of the FORM, along with notice of his opportunity to file objections and submit material to refute, extenuate, or mitigate the potentially disqualifying conditions.

On July 7, 2010, Applicant responded to the FORM. Department Counsel did not object to the materials submitted. Applicant's response was admitted into the record. On July 16, 2010, I was assigned the case.

Findings of Fact

In Applicant's Answer to the SOR, he admits the factual allegations in the SOR. Applicant's admissions to the SOR allegations are incorporated herein. After a thorough review of the record, pleadings, and exhibits, I make the following findings of fact:

Applicant is a 32-year-old solutions architect who has worked for a defense contractor since September 2008, and he is seeking to obtain a security clearance. Applicant is married and a father of two. (Response to FORM) He is a homeowner who worked his way through high school and college. (*Id.*) Numerous relatives of his have served in the military. (*Id.*) During this process he was honest, candid, and cooperated completely. He realizes the errors of his past judgment, which he asserted will not be repeated. (*Id.*)

Applicant began using marijuana while in high school in 1995. From 2000 to 2008, Applicant smoked marijuana twice a month. He stopped using marijuana in 2008 after he obtained a job that required random drug testing. In April 2009, he again used marijuana, which occurred after his January 2009² submission of his Electronic Questionnaires for Investigations Processing (e-QIP). (Item 5)

During a May 2009 interview, Applicant stated if it were a choice between using marijuana and losing his job, he would quit smoking. (Item 6, page 3) He stated he would "like to commit to stopping, but there is always a possibility that he may do so again." (*Id.*) In November 2009, he further explained his intentions by stating (Item 6, page 4):

. . . I would only ever use again if I did not have responsibilities which required that I did not use; such as my job and security clearance. My intentions at this time are to never use again.

² Applicant dated his e-QIP three times with the date of "1/14/2008." From the answers provided in the e-QIP, (Section 11, questions 1 and 2, and Section 24, question 1), it is clear the form was signed in January 2009, and not January 2008. Additionally, in his answer to the SOR (Item 4), Applicant admitted the form was submitted on January 14, 2009.

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 must be considered 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, 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

Drug Involvement

Adjudicative guideline (AG) ¶ 24 articulates the security concerns relating 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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Those that are potentially applicable are:

(a) any drug abuse;

Applicant first used marijuana in high school in 1995. From 2000 to 2008, he used it once or twice a month. In 2008, he obtained his current job and completed a SCA. In April 2009, he last used marijuana. AG ¶¶ 25 (a) applies.

AG ¶ 26 provides conditions that could mitigate security concerns:

(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.

None of the mitigating factors apply. AG ¶ 26(a) Applicant's use of marijuana is recent, having occurred approximately 15 months ago. His marijuana use did not occur under unusual circumstances and his use casts doubt on his reliability, trustworthiness, and good judgment. There is no evidence Applicant no longer sees the individuals with whom he previously used marijuana.

There are no "bright line" rules for determining when conduct is "recent." The determination must be based "on a careful evaluation of the totality of the record within the parameters set by the directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation."³ Applicant's last marijuana use was 15 months ago and occurred after he obtained his current job, which he knew subjected him to random drug screenings. I find the period of abstinence insufficient for a favorable finding of mitigation.

AG ¶ 26(c) does not apply because prescription drugs were not abused. AG ¶ 26(d) does not apply because he has never received counseling related to drug usage. Nor is there a favorable prognosis by a duly qualified medical professional.

Personal Conduct

Adjudicative guideline (AG) ¶ 15 articulates the security concerns relating 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.

In January 2009, Applicant completed his e-QIP. In April 2009, he used marijuana with a friend. The Government must be able to repose a high degree of trust in those to whom it grants access to sensitive information. The DOHA Appeal Board has addressed the issue of an applicant using illegal drugs after submitting a SCA.⁴ Specifically, Appeal Board has found the general security concern raised by Guideline E it that "[c]onduct involving questionable judgment . . . or unwillingness to comply with

³ ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

⁴ ISCR Case No. 07-008852 (App. Bd. May 27, 2008).

rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information." Directive ¶ E2.15.

The Applicant used marijuana despite his employer's policy against such activity, and his use after submitting his SCA, raise serious questions about his judgment and his fitness for a clearance.

None of the mitigating conditions apply to Applicant's conduct.

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 the facts and circumstances surrounding this case. From 2000 to 2008, Applicant used marijuana once or twice a month. He stopped when he got his current job, but used again in April 2009. It is too soon to say marijuana is no longer a part of his life.

This decision should not be construed as a determination that Applicant cannot or will not attain the state of true reform and rehabilitation necessary to justify the award of a security clearance. The awarding of a security clearance is not a once in a lifetime occurrence, but is based on applying the factors, both disqualifying and mitigating, to the evidence presented. Under Applicant's current circumstances a clearance is not recommended, but should Applicant be afforded an opportunity to reapply for a security clearance in the future, he may well demonstrate persuasive evidence of his security worthiness.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated 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, Illegal Drug Usage: AGAINST APPLICANT

 Subparagraphs 1.a and 1.b: Against Applicant

Paragraph 2, Personal Conduct: AGAINST APPLICANT

 Subparagraph 2.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.

CLAUDE R. HEINY II
Administrative Judge