



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



In the matter of:)	
)	
-----)	ISCR Case No. 09-08292
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

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

September 27, 2010

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) enumerating security concerns arising under Guideline H (Drug Involvement).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).

In a March 31, 2010, response, Applicant admitted the four allegations set forth in the SOR and requested a determination based on the written record. On June 9, 2010, the Government submitted a brief prefacing its File of Relevant Material (FORM), in which it argued that Applicant's access to classified information is not clearly

¹ The SOR is found at Item 1 of the File of Relevant Material. It is undated, but Item 4 (Applicant's Answer to the SOR) shows a date stamp of March 24, 2010, on the face of the SOR. It appears the original was date stamped, but the file copy was not similarly stamped. On Item 4, Applicant apparently wrote in the March 31, 2010, in the blank date block in responding to the SOR. Inasmuch as his response was received by DOHA on April 5, 2010, it can be concluded that his Answer was dated March 31, 2010.

consistent with the national interest. Applicant received the FORM on June 25, 2010. He did not respond to the FORM. DOHA assigned the case to me on September 21, 2010. Based on a full review of the submissions and exhibits, I find Applicant failed to meet his burden of mitigating security concerns related to drug involvement. Clearance denied.

Findings of Fact

Applicant is a 24-year-old employee of a defense contractor, for which he has worked since 2007. He completed high school in 2004 and received an associate's degree in 2006. He is single and has no children.

Applicant has used marijuana since October 2004, a few months after he completed secondary school. He continued to use marijuana after he completed a security clearance application in September 2009. In his Personal Subject Interview, he indicated that "[h]is drug use is a pattern, as he does not intend to quit using marijuana."² He later stated that "[s]ince my interview, I have stopped my consumption of the substance due to a surgery I recently had. My doctors advised me that it would not be a good idea for my recovery process."³ Most recently, in his 2010 Answer to the SOR, he answered the allegation at SOR ¶ 1.d ("You do not intend to quit using marijuana") by writing "I admit for medical purposes."⁴ In that same document, he admitted that he continued using marijuana after he completed his September 2009 security clearance application.

Applicant's use of marijuana has varied from once a week to once a month. He purchases marijuana from friends. He usually smokes the drug with a pipe. He has never sold, distributed, or manufactured illegal drugs. He has never been diagnosed as being a drug abuser or drug dependent. Applicant has never been arrested for his marijuana involvement. He has never failed a drug test.

In response to the SOR, Applicant provided no additional information. He did not respond to the FORM. There is no explanation as to what "medical purposes" his marijuana use serves, nor is there any indication of what surgery led to his doctor's warning that continued marijuana use might impede his recovery. There is no indication marijuana has ever been prescribed by a medical practitioner. Applicant did not give a reason why he has no intention to cease using the illegal substance.

² Item 6 (Applicant's Responses to Interrogatories, dated Jan. 28, 2010) at 3.

³ *Id.*, at 4.

⁴ Item 4 (Answer to the SOR, dated Mar. 31, 2010).

The Government noted that Applicant's intent to continue using marijuana is sufficient to trigger the statutory prohibition in 50 U.S.C. § 435c(b) against granting or renewing security clearances to current unlawful users of controlled substances.⁵

Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions. 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. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all 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.

The Government must present evidence to establish controverted facts alleged in the SOR. 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. . . ." ⁶ The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant.⁷

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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

⁵ See Section 1072 of the National Defense Authorization Act 2008 (PL 110-181). Section 1072 indicates that it amends 50 U.S.C. § 435b, but it is actually codified at 50 U.S.C. § 435c(b). This amendment provides that "[A]fter January 1, 2008, the head of the Federal agency may not grant or renew a security clearance for a covered person who is an unlawful user of a controlled substance or an addict (as defined in section 102(1) of the Controlled Substances Act (21 U.S.C. § 802)." In that amendment, a "covered person" is defined as "an officer or employee of a contractor of a Federal agency."

⁶ See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

⁷ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

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). “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁸ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁹

Based upon consideration of the evidence, Guideline H (Drug Involvement) is the most pertinent to this case. Conditions pertaining to this AG that could raise a security concern and may be disqualifying, as well as those which would mitigate such concerns, are set forth and discussed below.

Analysis

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.¹⁰ “Drugs” are defined as mood and behavior altering substances, and include 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 inhalants and other substances.¹¹ “Drug abuse” is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.¹²

Applicant admitted he has used marijuana, a controlled substance, since about October 2004. He admitted that he has purchased the drug. He also admitted that he does not intend to stop using marijuana. Consequently, Drug Involvement Disqualifying Condition AG ¶ 25(a) (any drug abuse), AG ¶ 25(c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia), and AG ¶ 25(h) (expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use) apply. With disqualifying conditions raised, it is Applicant’s burden to provide evidence that would mitigate the security concerns thus raised.

Applicant’s abuse of marijuana has been regular, on-going, and recent. While he cites to “medical purposes” for his drug abuse, he failed to describe what those

⁸ *Id.*

⁹ *Id.*

¹⁰ AG ¶ 24.

¹¹ *Id.* at ¶ 24(a)(1-2).

¹² *Id.* at ¶ 24(b).

purposes are or what, if any, medical necessity has been determined by a physician. There is no evidence that his drug use was or has been prescribed by a physician. Based on these facts, neither Drug Involvement Mitigating Condition AG ¶ 26(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), nor AG ¶ 26(c) (abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended) applies.

Applicant does not intend to quit using marijuana, obviating application of AG ¶ 26(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).

There is no evidence that Applicant is in need of, ever considered, or has undergone a prescribed drug treatment program. Therefore, ¶ 26(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) does not apply.

Applicant has used marijuana, an illegal drug, since October 2004. That use continues to date. He does not intend to quit using the illegal drug. Continued illegal drug use is sufficient to invoke 50 U.S.C. § 435c(b). Applicant's on-going illegal drug use, his intent regarding his future marijuana abuse, and the scant facts presented also leave drug involvement security concerns unmitigated under the AG.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the circumstances. An 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 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, as well as the “whole-person” factors. There are few relevant facts noted in the FORM. Applicant is an educated young man. He has been steadily employed for three years. Applicant had some form of surgery in 2009, but the nature of the procedure was not disclosed. He has used marijuana with varying frequency for six years and does not intend to stop using it.

Applicant’s current unlawful use of a controlled substance is sufficient to trigger application of 50 U.S.C. § 435c(b). Additionally, his past and current drug use, his on-going drug purchases, his continued use of marijuana after completing a security clearance application, and his intent to continue using the illegal drug sustain drug involvement security concerns. In these cases, the burden is placed squarely on the Applicant. Applicant failed to provide evidence of mitigation. Drug involvement security concerns remain unmitigated. Clearance is denied.

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
Subparagraph 1.a - 1.d:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant a security clearance. Clearance denied.

ARTHUR E. MARSHALL, JR.
Administrative Judge