



**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. 09-08515

Appearances

For Government: Pamela C. Benson, Esquire, Department Counsel
For Applicant: *Pro se*

September 23, 2010

Decision

HOWE, Philip S., Administrative Judge:

On September 1, 2009, Applicant submitted his Security Clearance Application (SF 86). On February 22, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H (Drug Involvement). 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 on September 1, 2006.

Applicant acknowledged receipt of the SOR on February 28, 2010. He answered the SOR in an undated writing and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on April 1, 2010, and I received the case assignment on April 6, 2010. DOHA issued a Notice of Hearing on April 13, 2010, setting the hearing for May 7, 2010. Amended Notices of Hearing were issued on April 26, and 27 changing the date. I convened the hearing as rescheduled on May 4, 2010.

The Government offered Exhibits 1 and 2, which were received into evidence without objection. Applicant testified and submitted Exhibits A through G. Exhibits A to D, F and G were admitted without objection. The Department Counsel objected to Exhibit E, a forensic drug test from a private company retained by Applicant, on the grounds of a lack of foundation, reliability, and lack of adherence to DoD standards. I gave Applicant two weeks, until May 18th, to lay a foundation for Exhibit E's admission into the record. At the end of that time he was not able to do so. Then I upheld the objection and did not admit Exhibit E. (Tr. 14-20)

DOHA received the transcript of the hearing (Tr.) on May 14, 2010. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in the SOR, with explanations about his future use of marijuana. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is 41 years old, married, and has three children. He works for a defense contractor as a salesman for computer software. He earns \$90,000 annually. He has not had a security clearance previously and does not need one to retain his current job. (Tr. 21-24, 40, 41)

Applicant admitted using marijuana from 1987 to 1991 about 10 times. He was in college at the time. He discontinued his use from 1991 to 1999, but then resumed using marijuana with three friends from high school on a periodic basis. He would take three or four "hits" while socializing with these friends. The marijuana made him feel "good", then hungry, and finally sleepy. He asserted that he used the marijuana only five to seven times during the 1999 to March 2009 time period. One of his friends would acquire the marijuana and share it with the other three people. Applicant denied ever purchasing the marijuana. Applicant told the government investigator on October 29, 2009, when questioned about his marijuana use that "He anticipated that his use of marijuana would follow this same pattern in the future, and expected that he would continue to use marijuana every two years or so." His wife and fellow marijuana users are aware of his illegal drug use. Later, in November 2009, Applicant changed his position and asserted he would no longer use marijuana "because it is illegal to do so and I am a law abiding citizen of the United States." He wanted to provide moral leadership to his three daughters. He also claimed not to have used marijuana since March 2009. He has not had any treatment for his marijuana use. He will not allow his three high school friends to use marijuana in his presence in the future. (Tr. 26-32; Exhibits 2, A, B, C, G; Answer)

Applicant's supervisor testified on his behalf. His supervisor stated Applicant meets or exceeds all his job requirements. Applicant entertained his supervisor in his home, impressing him with his family values. He recommended Applicant receive a

security clearance. The supervisor has a Top Secret security clearance himself. A security clearance for Applicant would make it more convenient for him to access secured government sites as he sold military-directed software. The president of Applicant's employer submitted a favorable character statement for him. A military customer of Applicant's submitted a written statement for Applicant about the professional manner in which their business is conducted. He also commented favorably on Applicant's strong character and high integrity. (Tr. 34-40; Exhibits B and F)

Applicant submitted a signed and notarized statement certifying that he will not abuse any drugs in the future. The statement proceeds as follows, "If I am found to have abused any drugs, I will immediately and voluntarily be revoked of my security clearance as granted by the Department of Defense." Applicant intended this statement to comply with AG ¶ 26 (b) (4). (Exhibit D)

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 an applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 illegal drugs:

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 three conditions that could raise a security concern and may be disqualifying:

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

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

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

Applicant admitted that he used marijuana from 1987 to 1991, limiting its use to 10 incidents. He also admitted to resuming marijuana usage from 1999 to March 2009, when he was married and a parent. He was 31 to 41 years old when he used marijuana with three of his high school friends, five to seven times over the past 10 years. He possessed the marijuana, but did not purchase it. In October 2009, he told a government investigator that he intended to use marijuana in the future. All three disqualifying conditions apply.

AG ¶ 26 provides four conditions that could mitigate security concerns. One condition might apply:

(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;

(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.

Applicant's actions are recent and continuous. He smoked marijuana with his high school friends with whom he has socialized for many years. That social relationship will continue. The use of marijuana as an adult displays a serious lack of judgment and casts doubt on that person's current reliability and trustworthiness. His trustworthiness is especially doubtful in view of his statement about future marijuana use to the investigator in October 2009 and his change of that position in November 2009. AG ¶ 26 (a) does not apply.

Applicant has not had an appropriate period of abstinence since his last admitted marijuana use in March 2009. AG ¶ 26 (b) (3) does not apply. His continued association with his high school marijuana-using friends makes AG ¶¶ 26 (b) (1) and (2) inoperative.

Applicant relies on AG ¶ 26 (b) (4) and his signed statement of intent not to use drugs in the future and to voluntarily allow his hoped-for security clearance to be immediately revoked if he were ever found to have used illegal drugs again. The mere making of this writing is not sufficiently persuasive to overcome his past continuous marijuana use. This statement cannot be relied upon because of Applicant's shifting position on his future marijuana use. Applicant is not credible based on his history of illegal drug use. Therefore, AG ¶ 26 (b) (4) does not apply to overcome the disqualifying factors.

There is no evidence from Applicant about a serious illness leading to abuse of prescription drugs. That scenario is not the issue here. AG ¶ 26 (c) does not apply.

Applicant has not had any drug treatment program participation at any time in his life. Therefore, he could not submit any evidence of the satisfactory completion of such treatment. His drug use is recent and frequent. He used marijuana for 10 years with high school friends with whom he still associates. These actions cast doubt on his current reliability, trustworthiness, and judgment. AG ¶ 26 (d) does not apply.

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 an 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.

AG ¶ 2(c) requires each case be judged on its own merits. 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. Applicant has a lengthy history of illegal marijuana use as an adult and parent. He admits that use. His friends obtained

the marijuana and Applicant used it with them from 1999 to 2009. Applicant also had a pattern of marijuana use while in college from 1987 to 1991. He has not had any treatment or counseling about marijuana use. He told the government investigator on October 29, 2009, he expected to use marijuana every two years in the future, following the same pattern. Applicant later changed that statement in his SOR Answer to be his declaration he would not use marijuana in the future when he realized that his security clearance was in jeopardy. He claimed the last use was March 2009 but provided no independent support for that assertion.

Applicant did not present evidence of any professional evaluation and random drug testing concerning his illegal drug use. His alleged period of abstinence is approximately a 14 months. When contrasted with his prolonged history of use, that unverified abstinence is insufficient to persuade me that he has ceased using illegal drugs and will not do so in the future. He provided no evidence of permanent behavioral changes or participation in professionally objective treatment programs to corroborate his claims of abstinence. The potential for pressure, coercion, exploitation, or duress exist because of his past use. The likelihood of continuation or recurrence is high because of his past history of marijuana use and his post-interview assertions about his future plans not to use marijuana, which he then changed. They are not credible. The entire sequence of events shows Applicant displayed an over-all lack of good judgment.

Overall, the record evidence leaves me with substantial questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant did not mitigate the security concerns arising from his drug involvement. I conclude the "whole-person" concept against Applicant.

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:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	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.

PHILIP S. HOWE
Administrative Judge