



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



In the matter of:)	
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-----)	ISCR Case No. 10-00268
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Kathryn D. MacKinnon, Esquire, Deputy Chief Department Counsel
For Applicant: *Pro se*

April 7, 2011

Decision

MOGUL, Martin H., Administrative Judge:

On June 29, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline H for Applicant. (Exhibit 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) effective within the Department of Defense for SORs issued after September 1, 2006.

On July 6, 2010, Applicant replied to the SOR (RSOR) in writing, and he requested that his case be decided on the written record in lieu of a hearing. On August 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 five documentary exhibits. (Exhibits 1-5.) Applicant was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. A response was due on December 31, 2010. Applicant did not submit any additional response. The case was assigned to this Administrative Judge on January

21, 2011. 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 allegation 1.a. The admitted allegation is incorporated herein as a finding of fact.

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

Applicant is 47 years old. He 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 one allegation (1.a.) under Adjudicative Guideline H. The SOR alleges, and Applicant has admitted, in his RSOR (Exhibit 3) that Applicant "used marijuana, with varying frequency, from about 1981 to at least August 2009," and while he characterized his use as "Low," he gave no indication that he intended to discontinue his marijuana usage.

When Applicant completed a Security Clearance Application (SCA) on August 10, 2009, he wrote that his marijuana use continued from January 2002 to the "present," and he also gave no indication that he intended to discontinue his marijuana usage on his SCA. (Exhibit 4.)

During an unsworn Personal Subject Interview (PSI) conducted on October 1, 2009, Applicant stated that he had used marijuana approximately 20 times, from 1981 to 2002, and he got high each time he used it. He also stated that he stopped using marijuana on June 2008, which is earlier than the date of August 2009 from his RSOR and his SCA, and that he has outgrown the use of marijuana. (Exhibit 5.)

I find that the RSOR, which is undated but was received on July 6, 2010, and his SCA, signed on August 10, 2009, are stronger and more persuasive evidence than his PSI, and therefore it is reasonable to determine that Applicant's last usage of marijuana was not earlier than August 2009. The only evidence of his intention to discontinue the use of marijuana is the unsworn PSI.

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 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, 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 used marijuana at least during the period that he completed the SCA.

I do not find credible his statement found only in his unsworn PSI that he intends to abstain from using marijuana in the future, especially when it was not made by Applicant in his RSOR or SCA. (Exhibits 3, 4, and 5.) There also has been no independent evidence submitted that would make his stated intentions more credible and convincing. Therefore, I conclude that ¶ 26(b) "a demonstrated intent not to abuse any drugs in the future" is not applicable nor mitigating.

In this case, the Government has met its initial burden of proving that Applicant has used illegal drugs under Guideline H. Applicant, on the other hand, has not introduced persuasive evidence in rebuttal, explanation, or mitigation which is sufficient to overcome the Government's case against him. 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. Also, since this case is an Administrative Determination, I have not had the opportunity to assess the credibility of the Applicant in person, nor has any independent evidence concerning Applicant's character been submitted. Based on all of the reasons cited above as to why the disqualifying conditions apply and no mitigating conditions are applicable, 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

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.

Martin H. Mogul
Administrative Judge