



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



In the matter of:)
)
) ISCR Case No. 10-00282
)
Applicant for Security Clearance)

Appearances

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

February 11, 2011

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline H, Drug Involvement, Guideline E, Personal Conduct, and Guideline J, Criminal Conduct. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On October 6, 2010, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, Drug Involvement, Guideline E, Personal Conduct, and Guideline J, Criminal Conduct. DOHA acted 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 after September 1, 2006.

Applicant answered the SOR on October 21, 2010, and elected to have his case decided on the written record. Department Counsel submitted the Government's File of Relevant Material (FORM) on December 7, 2010. The FORM was mailed to Applicant, and he received it on December 15, 2010. Applicant was given an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant submitted an undated two-page reply. The case was assigned to me on January 18, 2011.

Findings of Fact

In Applicant's answer to the SOR, he admitted all the allegations stated in the SOR. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 27 years old. He is married and has no children. Since April 2009, he has worked for a defense contractor. He is a high school graduate with some college. He became eligible for an interim security clearance on May 14, 2009.¹

Applicant's admitted conduct raised in the SOR includes: (1) using marijuana between 1996 and September 2009, including while holding an interim security clearance as of May 14, 2009; being charged with possession of marijuana and possession of drug paraphernalia on two occasions; receiving a diagnosis of cannabis abuse in remission while receiving treatment from August 2009 to April 2010 (See SOR ¶¶ 1.a – 1.d; 3.a); (2) providing false information about his past drug arrests and drug use when completing his security clearance questionnaire, when he was interviewed by a Department of Defense (DoD) investigator, and when he answered DOHA interrogatories (See SOR ¶¶ 2.a – 2.e.).²

Applicant admits to twice-a-month marijuana use between 1998 and 2005. He used recreationally at parties with friends. He gave differing dates when he quit using marijuana prior to 2009. In June 2008, Applicant was stopped by local police. During the course of the stop, Applicant told the officer he had marijuana in the car. A search was conducted and over 4 grams of marijuana was discovered. Drug paraphernalia was also discovered. Applicant was arrested for possession of marijuana and drug paraphernalia. The charges were ultimately dismissed after Applicant successfully completed a drug diversion program in June 2010.³

In February 2009, Applicant was stopped by local police for following another vehicle too closely. The arresting officer also had a drug dog who alerted on Applicant's

¹ Items 1, 13.

² Items 4, 5.

³ Items 6, 10-11.

vehicle. Although no drugs were found, a wrapper that smelled of marijuana was found. Applicant was cited for possession of drug paraphernalia and paid a fine.⁴

As part of his court ordered substance abuse program from his 2008 drug arrest, Applicant received substance abuse treatment from August 2009 to April 2010. He was evaluated by a licensed clinical social worker. That evaluation diagnosed him as a cannabis abuser in full remission. The evaluator also noted his last use of marijuana was in September 2009.⁵

Applicant completed a security clearance questionnaire on May 12, 2009. In that questionnaire, he was asked about whether he was charged with any prior drug or alcohol offense. He failed to list the 2008 arrest for possession of marijuana and drug paraphernalia. He claimed that he was unaware he was arrested for the drug-related offenses at the time. The local police report specifically stated that he was informed he was being arrested for those drug-related charges. On the same questionnaire, Applicant was asked about the extent of his previous drug use. He failed to list any drug use after July 2003. Applicant used marijuana on a number of occasions through September 2009. He held an interim security clearance at the time of his last use.⁶

In October 2009, Applicant met with a DoD investigator and stated *inter alia*, he was not arrested for drug possession and drug paraphernalia possession in June 2008 and he did not learn of the drug charges until June 2009. He also told the investigator the drugs found in his car in June 2008 did not belong to him. The local police report reflected that Applicant told the officer, "I have a little marijuana in the car". He also told the investigator that his last use of marijuana was in 2004. Applicant also answered interrogatories from DOHA asking about his last use of marijuana and he claimed in those answers his last use was in "2004 – 2006 unrecalled". Medical records from Applicant's treatment show that his last use was in September 2009.⁷

Applicant acknowledges that he made many mistakes, but that he intends to learn from his mistakes and move on with his life. He asks for a second chance to undergo counseling and show that he deserves a security clearance.⁸

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief

⁴ Item 12.

⁵ Item 8.

⁶ Items 4, 5, 12; Applicant's FORM Response.

⁷ Items 5-7; 10.

⁸ Applicant's FORM Response.

introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used 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.

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 applicant or proven by Department Counsel, and has the ultimate burden of persuasion to obtain 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 that an applicant may deliberately or inadvertently fail to 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 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.

I have considered all of the evidence in this case and the disqualifying conditions under Drug Involvement AG ¶ 25 and especially considered the following:

- (a) any drug abuse;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (g) any illegal drug use after being granted a security clearance.

Appellant used marijuana and possessed drug paraphernalia on a number of occasions including while holding a security clearance. I find that all the above disqualifying conditions apply.

I have considered all of the evidence in this case and the mitigating conditions under Drug Involvement AG ¶ 26 and especially considered the following:

- (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; 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 gave differing dates regarding when he stopped using marijuana, however all those dates preceded 2009. His medical records document his last use was in September 2009. Applicant's short period of

abstinence is insufficient to demonstrate Applicant's intent not to use in the future. This is particularly so since his history shows he used marijuana over an extended period of time. Additionally, his use is recent and it is too soon to tell whether his use will recur. Neither AG ¶ 26(a) nor (b) applies.

Applicant was treated in a court-ordered drug treatment program. He was diagnosed as a cannabis abuser in remission. He successfully completed the program, but there is no record evidence showing his prognosis other than a comment that progress toward his goals was "good." AG ¶ 26(d) partially applies.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern for 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case. The following disqualifying conditions are potentially applicable:

- (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire;
- (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative; and
- (e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

I find that Applicant intentionally gave false information on his security clearance application, to a DoD investigator, and in answering DOHA interrogatories. His explanation that he was unaware of the 2008 marijuana arrest is unpersuasive in light of the information contained in the related police report. AG ¶¶ 16(a) and (b) apply to SOR

¶¶ 2.a - 2.d. Applicant's use of marijuana while holding a security clearance created a vulnerability to his personal standing. AG ¶ 16(e) applies to SOR ¶ 3.e.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and especially considered the following:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation or duress.

I considered all of the facts and circumstances surrounding Appellant's drug use while holding a security clearance and his false statements. Neither are minor offenses and both cast doubt on Applicant's trustworthiness. Nothing about Applicant's actions reduced his vulnerability to exploitation, manipulation or duress. AG ¶¶ 17(c) and (e) do not apply.

Guideline J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying in this case. The following are potentially applicable:

(a) a single serious crime or multiple lesser offenses; and

(c) allegation or admission of criminal conduct.

Applicant was found guilty of one marijuana and two drug paraphernalia offenses. I find the above disqualifying conditions apply

I have also considered all of the mitigating conditions for Criminal Conduct under AG ¶ 32 and especially considered the following:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur

and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Sufficient time has not passed to show that Applicant's drug use is behind him. Although he did successfully complete a drug treatment program, it is too early to tell whether Applicant will maintain his drug abstinence and therefore refrain from future criminal activity. AG ¶¶ 32(a) and (d) do 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 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. I have considered Applicant's expressed contrition and his desire for a second chance. However, I also considered that he used marijuana on multiple occasions, most recently while holding a security clearance, and that he gave false information about his past drug use on multiple occasions. Applicant failed to provide sufficient evidence to mitigate the security concerns.

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 failed to mitigate the security concerns arising under Guideline H, Drug Involvement, Guideline E, Personal Conduct, and Guideline J Criminal 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, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a-1.e:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-2.e:	Against Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraph 3.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.

Robert E. Coacher
Administrative Judge