



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



In the matter of:)
)
) ISCR Case No. 10-00763
)
Applicant for Security Clearance)

Appearances

For Government: Daniel Crowley, Esq., Department Counsel
For Applicant: *Pro se*

May 4, 2011

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline H, Drug Involvement. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On April 19, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, Drug Involvement. DOHA acted under Executive Order (EO) 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) implemented by the Department of Defense on September 1, 2006.

Applicant answered the SOR on September 21, 2010, and requested a hearing before an administrative judge. The case was assigned to me on January 18, 2011. DOHA issued a notice of hearing on January 24, 2011, and the hearing was convened

as scheduled on February 16, 2011. The Government offered exhibits (GE) 1 and 2, which were admitted into evidence without objection. Department Counsel's exhibit index is marked as Hearing Exhibit (HE) I. Applicant testified and offered exhibit (AE) A that was admitted into evidence. DOHA received the hearing transcript (Tr.) on February 25, 2011.

Findings of Fact

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

Applicant is 30 years old. He recently married and has no children. He has a high school diploma and some college. Since October 2009, he has worked for a defense contractor as an information technology (IT) specialist. He has no military service and has not previously held a security clearance.¹

Applicant's admitted conduct raised in the SOR includes: using marijuana on numerous occasions from January 2002 through September 2009; and obtaining a prescription in California to use marijuana from December 2006 to June 2008 (See SOR ¶¶ 1.a – 1.b).

Applicant first began using marijuana in about 2002. He used marijuana about once a week. He would smoke it in a pipe. He usually smoked it at home when he was alone. Sometimes he would smoke with his fiancée, who is now his wife. He used marijuana to relax after work. He obtained the marijuana from his friend.²

From December 2006 to June 2008, Applicant lived in California, a state that allows legal marijuana use for medical purposes. He obtained a prescription for medical marijuana to relieve his stress due to "personal grief not related to violence or drug use." Even though he had a valid prescription to use marijuana under California law, he also knew marijuana use violated federal law and was against Department of Defense (DOD) policy. Applicant also suffers from depression and takes Zoloft for that condition. Zoloft has some side effects that concerned Applicant. Using marijuana to replace Zoloft seemed to help with his depression without the side effects. He also found that using marijuana helped him with a staph infection.³

Applicant decided to stop using marijuana in September 2009, before obtaining his current job. According to him, he has not used marijuana since that time. He also

¹ Tr. at 6, 7, 25; GE 1.

² Tr. at 21; GE 2.

³ Tr. at 27-28; GE 2.

disassociated with his marijuana provider. He was not diagnosed as either a drug abuser or drug dependant and has not been through any drug treatment program.⁴

Applicant testified that he intends to abstain from marijuana use as long as it violates federal law and DOD policy. However, he does not believe marijuana is necessarily bad. He produced some evidence where he characterized the “top 5 myths about marijuana”, and listed notable users of marijuana.⁵

He presented statements from his father, wife, and coworkers that described him as honest, reliable and trustworthy. He also offered evidence of the medical impact of using marijuana.⁶

Policies

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

⁴ Tr. at 22, 28; GE 2.

⁵ Tr. at 27; AE A.

⁶ AE A.

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.

Appellant used marijuana on a number of occasions. I find the above disqualifying condition applies.

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; and

(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.

Applicant's use of drugs was frequent and recent (last use September 2009). The period of abstinence is insufficient to demonstrate Applicant's intent not to use in the future. Additionally, even though he disassociated from his marijuana using friends and stated that he intends to abstain from using marijuana, not enough time has passed to know whether Applicant's stated intent are just words rather than demonstrated actions. Moreover, he does not seem to possess a full commitment to non-use of marijuana. This is apparent by his references to myths about marijuana use and notable people who have used marijuana. AG ¶ 26(a) does not apply, and AG ¶ 26(b) partially applies.

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 considered the Applicant's supportive character evidence. I also considered Applicant's statement of intent not to use drugs in the future. However, I also weighed that he used marijuana on numerous occasions, and as recently as September 2009. He also demonstrated a lack of commitment toward non-use of marijuana. 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.

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.b:	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