



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



In the matter of:)
)
) ISCR Case No. 10-01237
)
Applicant for Security Clearance)

Appearances

For Government: Tovah A. Minster, Esq., Department Counsel
For Applicant: *Pro se*

April 22, 2011

Decision

COACHER, Robert E., Administrative Judge:

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

Statement of the Case

On October 27, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, Drug Involvement and Guideline E, Personal 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 November 12, 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 30, 2010. The FORM was mailed to Applicant, and he received it on January 11, 2011. Applicant was given an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not submit a reply. The case was assigned to me on February 24, 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 32 years old. He is married, but separated, and has three children. Since April 2007, he has worked for a defense contractor. He is a high school graduate with some college. He served in the Navy from June 1997 to June 2007 and was honorably discharged in the pay grade of E-5. He has held a top secret security clearance since April 23, 1998, and sensitive compartmented information (SCI) access since July 22, 1998.¹

Applicant's admitted conduct raised in the SOR includes: (1) using marijuana between 1996 and December 2007, including while holding a top security clearance and SCI access (See SOR ¶¶ 1.a – 1.c); (2) being denied access to SCI in August 2008 by the National Security Agency; providing false information about his past drug use when completing his security clearance questionnaires in June 2007, May 2003, and December 1997, and when he was interviewed by a Department of Defense (DoD) investigator on November 2, 2009, July 7, 2008, and October 17, 2007; (See SOR ¶¶ 2.a - 2.j); and (3) using marijuana after signing a workplace policy prohibiting drug use (See SOR ¶ 2.k).²

Applicant first used marijuana one time in 1996. From 1998 to 2000, he used it on two occasions; from 2000 to 2003, he used it one time; from 2003 to 2007, he used it one time every three months. His last use was in November 2007. He used marijuana while in the Navy, fully aware of its zero tolerance policy for illegal drugs. He also used it while holding a top secret clearance with SCI access. He used marijuana after signing a National Security Agency (NSA) policy in October 2007, prohibiting illegal drug use.³

The marijuana was always supplied by his wife. Although he did not really like marijuana, he used it because his wife enjoyed smoking it. He also thought it might help

¹ Items 5, 8, 11.

² Item 4.

³ Items 4, 11.

ease the marital tension between he and his wife. He no longer associates with his wife except for child visitation purposes.⁴

Applicant completed security clearance questionnaires on June 5, 2007, May 9, 2003, and December 8, 1997. He falsified the questions relating to past drug use on each questionnaire when he denied any such use. He was also interviewed by investigators concerning his security clearance on November 2, 2009, July 7, 2008, and October 17, 2007, and asked about his prior drug use. He intentionally denied any use or underreported his use during these interviews. He only admitted his drug use after two interviews with NSA in 2008. He provided this false information because he feared admitting to his drug use would have a negative impact on his security clearance.⁵

Applicant provided no information about his Navy career or work performance information from his current employer. No evidence of drug counseling or treatment was contained in the record.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.

⁴ Item 11.

⁵ Items 5-6, 8-11.

⁶ Items 4-11.

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 Drug Involvement security concern:

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; and
- (g) any illegal drug use after being granted a security clearance.

Appellant used marijuana on a number of occasions including while holding a security clearance with SCI access. I find both 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; 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 short period of abstinence is insufficient to demonstrate Applicant's intent not to use illegal drugs in the future. This is particularly so since his history shows he used marijuana over an extended period of time knowing full-well his use while in the Navy, and while holding a security clearance, was prohibited. His actions cast doubt on his current reliability, trustworthiness, and good judgment. It is too soon to tell whether his use will recur. Although he no longer associates with his wife, who supplied the marijuana, this is not enough to show a demonstrated intent not to use marijuana in the future. Neither AG ¶ 26(a) nor (b) applies.

Guideline E, Personal Conduct

AG ¶ 15 expresses the Personal Conduct security concern:

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 applications and to DoD investigators. His explanation for falsifying, that he was afraid of the consequences of his drug use, confirmed his deliberate action. AG ¶¶ 16(a) and (b) apply to SOR ¶¶ 2.b - 2.j. Applicant's use of marijuana while holding a security clearance with SCI access that was denied by NSA created a vulnerability to his personal standing. Additionally, his use of marijuana in violation of the NSA policy prohibiting such use also created a vulnerability to his personal standing. AG ¶ 16(e) applies to SOR ¶¶ 2.a and 2.k.

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, particularly because of the multiple falsifications. Nothing about Applicant's actions reduced his vulnerability to exploitation, manipulation or duress. AG ¶¶ 17(c) and (e) 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 considered Applicant's honorable service to his country. However, I also considered that he used marijuana on multiple occasions, most recently while holding a security clearance with SCI access, 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 and Guideline E, Personal 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.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-2.k:	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