



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



In the matter of:)	
)	
-----)	ISCR Case No. 10-03213
)	
Applicant for Security Clearance)	

Appearances

For Government: Eric Borgstrom, Esquire, Department Counsel
For Applicant: *Pro se*

April 12, 2011

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

On November 23, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) enumerating security concerns under Guideline H (Drug Involvement) and Guideline E (Personal Conduct). The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

In a December 17, 2010, response, Applicant admitted the allegations raised under Guideline H and Guideline E, and requested a decision without hearing. The parties proposed a hearing date of March 30, 2011. A notice setting the hearing date for March 20, 2011, was issued on March 16, 2011. I convened the hearing as scheduled.

Applicant testified, called one witness, and offered six documents, which were accepted into the record without objection as exhibits (Exs.) A through F. He was given until April 6, 2011, to submit any additional documents for consideration. Department Counsel offered nine documents, which were admitted as exhibits (Exs.) 1-9 without objection. On April 7, 2011, the transcript (Tr.) of the proceeding was received. Also on

April 7, 2011, Department Counsel forwarded three additional documents timely received from Applicant. Lacking objections to those documents, they were accepted into the record as Exs. G through I and the record was closed. Based on a thorough review of the testimony, submissions, and exhibits, I find Applicant failed to meet his burden of mitigating the security concerns raised in the SOR. Clearance is denied.

Findings of Fact

Applicant is a 41-year-old lead architect who has worked for the same defense contractor for nine years. Applicant earned a high school diploma and completed a bachelor's degree. He married in 2000. He has no children.

As a college upperclassman, Applicant tried marijuana about six to ten times between 1990 and 1991, and contributed money toward its purchase. After college, he concentrated on employment and held multiple positions before starting work with his present employer. He was granted a secret clearance in 2003.¹ In 2006, Applicant and his wife had a party in their home. His wife's cousin attended the party and was in the basement when he produced a marijuana cigarette. Applicant, who was inebriated at the time, accepted the marijuana cigarette, had one inhalation, and passed it back. Applicant knew that marijuana use was illegal and against DoD policy for those who possess a security clearance.² He attributes his lapse to alcohol and poor judgment. He no longer associates with his wife's cousin.³ In 2007, he was in a room in his home where someone was using marijuana, but he did not directly ingest the drug.⁴

In about fall of 2008, Applicant was granted a top secret clearance.⁵ At the time, he had recently been doing internet research on cluster headaches, a condition from which he suffered. His cluster headaches would occur "pretty much like clockwork" about every two-and-a-half years, and would last for about six weeks of increasing severity until they would clear and he would start another headache-free cycle.⁶ Such headaches would build to a climax, during which they would become highly debilitating. At their peak, they affect his ability to function normally, and often require Applicant to take time off from work.⁷ Applicant discovered that marijuana was listed on a number of internet websites as a possible treatment.⁸ He did not check with his office or his

¹ Tr. 41.

² Tr. 43-44. Applicant is unaware whether his employer has an anti-drug policy.

³ Tr. 25.

⁴ Tr. 40-41.

⁵ Tr. 25.

⁶ Tr. 26, 32; Ex. E (Wikipedia entry *Cluster Headache*, dated Mar. 29, 2011) and Ex. I (American Headache Society, *Treatment of Cluster Headache*, undated).

⁷ Tr. 26, 29. Applicant noted that they can be "about as unbearable a pain as [he] can imagine."

⁸ Tr. 26-27.

security officer about whether trying marijuana for self-prescribed medical reasons would create a security concern.⁹ A professional acquaintance advised him that such an inquiry might lead to issues such as those noted in the SOR.¹⁰ Moreover, Applicant did not check with his medical provider about its efficacy, whether he would be a candidate for marijuana therapy, or explore prescription alternatives such as Marinol, a synthetic cannabinoid.¹¹ He did not pursue the issue of medical marijuana or a related alternative with his doctor because his physician “isn’t anybody I trust, a person I trust for any medical advice, oddly.”¹² He did not inquire about the medical use of marijuana or a cannabinoid pharmaceutical with any qualified medical providers or headache specialists.¹³ There is no evidence that he sought pain management through a legitimate pain clinic or other qualified resource.

In October 2008, a few weeks after being granted a top secret clearance, Applicant was on a business trip in a city where, through acquaintances and co-workers, he thought he could get marijuana.¹⁴ He did not buy marijuana. Rather, he was given some of the drug by a co-worker or acquaintance who had acquired the marijuana through a medical source.¹⁵ Based on his internet research, he used the marijuana, “felt the expected effects of marijuana, and then had a terrible headache the next day.”¹⁶ He did not inform his security officer about his marijuana use when he returned to his office. He later noted it on his Sensitive Compartmented Information (SCI) access application form, which was ultimately denied in May 2009.¹⁷

Concerning the marijuana experiment as an approach to managing his medical condition, Applicant noted, “it didn’t work, so mostly, the worst case scenario of the situation is I didn’t find anything that was going to help the condition and I’ve just violated something that I said I wouldn’t do as part of my security clearance.”¹⁸ He also

⁹ Tr. 33-34.

¹⁰ Tr. 35.

¹¹ Tr. 34, 45, 49-50.

¹² Tr. 45.

¹³ Tr. 45-46 Applicant has not consulted any medical physicians who specialize in headaches. His initial diagnosis for cluster headaches predates the facts at issue and he has accepted the condition as “a fact of life sort of thing.” His wife indicates that he first sought treatment for the headaches in the early 2000s. Ex. C (Letter, dated Mar. 28, 2011).

¹⁴ Tr. 27, 33. Also in 2008, Applicant attended a function where marijuana was being used, but he did not ingest the drug. Tr. 42-43.

¹⁵ Tr. 26.

¹⁶ *Id.*

¹⁷ Tr. 36, 41-42, 50. Applicant also disclosed the drug use on his September 2009 security clearance application. See Ex. 1 (Security clearance application, dated Sep. 24, 2009).

¹⁸ Tr. 27-28.

stated that his decision to try marijuana “wasn’t a rash decision. It wasn’t a situation where I was drinking and thought it would be fun. It was a decision where I looked at alternatives. I looked at . . . risk factors. . . .”¹⁹ Regarding subsequent internet queries about the efficacy of marijuana for cluster headaches, Applicant concluded that marijuana “is only a good treatment according to people who are trying to use marijuana to treat everything. So its not exactly legit.”²⁰

At the time he tried marijuana for his headaches, Applicant had a prescription for Imitrex, a prescription drug prescribed by his general practitioner for his headaches.²¹ He does not like the medication because of potential cardiovascular side effects. However, although he has not been poised for a recurrence of cluster headaches since the cycle coinciding near his 2008 marijuana use, Applicant testified that he has found a newer, injectable form of the medication to be sufficiently effective.²² He has not tried any other medications known to target intense headaches.²³ Citing to his recent acquisition of a pilot’s license and his work, Applicant stated that illegal drug use makes “it very prohibitive for [him] to have any kind of drugs, illegal, especially.”²⁴

Applicant has no intent to use marijuana or any other illegal drugs in the future. He no longer socializes with those who use drugs.²⁵ He annually attends a work-related conference where he has seen drug activity.²⁶ Applicant signed a statement of intent with automatic revocation of security clearance for any future violation.²⁷ He is successful at his job. His former supervisor stated that Applicant is trustworthy, and noted that Applicant is a hard worker and very reliable.²⁸ He confirmed that Applicant’s cluster headaches had impacted Applicant’s ability to work when they occur.²⁹ Applicant’s regional director described Applicant as “popular, influential, and effective” at work³⁰

¹⁹ Tr. 30.

²⁰ Tr. 28-29.

²¹ Tr. 44.

²² *Id.* See also Tr. 62-64.

²³ Tr. 63-64. See also Ex. I, *supra*, note 6.

²⁴ Tr. 29.

²⁵ Tr. 50.

²⁶ Tr. 42-43.

²⁷ Ex. D (Letter, dated Mar. 30, 2011).

²⁸ Tr. 53-55.

²⁹ Tr. 56.

³⁰ Ex. G (Letter, dated Apr. 5, 2011).

Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions. 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. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all 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.

The Government must present evidence to establish controverted facts alleged in the SOR. 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..."³¹ The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant.³²

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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 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). "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."³³ Any

³¹ See *also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

³² ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

³³ *Id.*

reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.³⁴

Based upon consideration of the evidence, Guideline H (Drug Involvement) and Guideline E (Personal Conduct) are the most pertinent to this case. Conditions pertaining to these AGs that could raise a security concern and may be disqualifying, and those which would mitigate such concerns, are discussed below.

Analysis

Guideline H – 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.³⁵ "Drugs" are defined as mood and behavior altering substances, and include 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 inhalants and other substances.³⁶ "Drug abuse" is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.³⁷

Applicant admitted he used marijuana, an illegal drug, in the early 1990s. He also admitted that he contributed money toward the purchase of marijuana during that time. He admitted he used the drug in 2006 and 2008, after he was granted a security clearance. Drug Involvement Disqualifying Conditions AG ¶ 25(a) (any drug abuse), AG ¶ 25(c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia purchase of illegal drugs), and AG ¶ 25(g) (any illegal drug use after being granted a security clearance) apply. With disqualifying conditions raised, the burden shifts to Applicant to mitigate related security concerns.

Applicant's drug use did not end in the early 1990s. After receiving a security clearance, he again abused the drug in 2006 and in October 2008. He failed to immediately report these incidents to his security officer or his employer. While he is now contrite over his more recent use of marijuana, he justifies his latest use of marijuana as a form of internet-based, self-prescribed, medical inquiry without showing any attempts to consult a qualified and trusted medical specialist. To date, he maintains that he took a calculated risk. There is insufficient evidence to establish Drug Involvement Mitigating Condition AG ¶ 26(a) (the behavior happened so long ago, was

³⁴ *Id.*

³⁵ AG ¶ 24.

³⁶ *Id.* at ¶ 24(a)(1-2).

³⁷ *Id.* at ¶ 24(b).

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).

Since October 2008, Applicant has ended his social relationships with those who use drugs, including a relative. However, it appears that he still attends an annual work-related event where drug activity is known to occur. Therefore, AG ¶ 26(b)(1) (disassociation from drug-using associates and contacts) applies, but AG ¶ 26(b)(2) (changing or avoiding the environment where drugs were used) does not. In addition, he signed a statement of intent in compliance with AG ¶ 26(b)(4) (a signed statement of intent with automatic revocation of clearance for any violation), thus raising that mitigating condition.

Applicant has been drug-free for about two-and-a-half years, a period not significantly longer than between his use of marijuana sometime in 2006 and late 2008. Consequently, insufficient time has passed to establish a meaningful demonstration of abstinence. AG ¶ 26(b)(3) (an appropriate period of abstinence) does not apply.

Applicant admitted that he illegally used marijuana, a controlled substance, in the early 1990s, 2006, and in late 2008. The last two incidents were after he was granted a security clearance. He failed to inform his security officer or employer of his drug abuse within a reasonable time after each incident. Notable, but of less significance, is the fact that while he is now drug-free, he works in an environment where associates apparently use or have access to marijuana. Furthermore, insufficient time has passed to demonstrate his resolve to remain drug free. In light of the totality of the facts and Applicant's statements, drug involvement security concerns remain unmitigated. Accordingly, Guideline H of the SOR is concluded against Applicant.

Guideline E – Personal Conduct

Security concerns arise from matters of personal conduct because “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.”³⁸ In addition, “any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process” is of special interest.³⁹

The single allegation raised under this guideline references Applicant's past illegal drugs as the basis for his denial of SCI access. That underlying drug use was thoroughly and explicitly considered under Guideline H, above. Therefore, AG ¶ 16(d) (credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person

³⁸ AG ¶ 15.

³⁹ *Id.*

may not properly safeguard protected information) does not apply. Given the nature and content of the allegation, as well as Applicant's open acknowledgment of the facts, none of the other disqualifying conditions apply. As noted above, Applicant's drug involvement has already raised significant security concerns that remain unmitigated and are further discussed under the whole-personal analysis below.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2 (a). Under AG ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based on 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, as well as the "whole-person" factors. Multiple facts speak in Applicant's favor. He is a mature and bright man who is a valued employee. He has worked for the same employer for nearly a decade. He has a high school diploma and completed a bachelor's degree. He is married. Applicant suffers from cluster headaches, a condition that causes intermittent periods of intense and debilitating pain.

Applicant has worked in the defense contracting industry for nearly a decade. While every sympathy is with Applicant with regard to his medical condition, it does not excuse his recreational and illegal use of marijuana at a party in 2006, as a mature and educated man who was granted a security clearance only three years earlier. While a one-time breach of this type is not necessarily cause for the automatic revocation of a security clearance, these facts are particularly worrisome because he repeated his mistake in 2008.

Applicant suffers from cluster headaches, a condition so debilitating that every two-and-a-half years he experiences a six-week period of increasingly painful headaches. The headaches become so severe that he is limited in his functioning and is often unable to work for one or more of those weeks. Rather than seek the help of a qualified headache specialist or seek relief through a pain management medical practice, he chose to rely on a general practitioner for whom he holds little trust to manage his condition. To compensate for his own lack of medical qualifications and in search of better treatment options, he relied on the internet to research cluster headaches. He discovered that marijuana might have some use in either the prevention or management of cluster headaches. Rather than consult his regular doctor, a specialist, or consider alternative therapies, Applicant considered marijuana to be a potential option.

At the time Applicant chose to illegally use marijuana to address his cluster headaches in late 2008, he was about to complete an application for SCI access. He had answered questions about past drug use on security-related applications before.

He knew that marijuana was illegal. He knew that the use of illegal and controlled substances was incompatible with the maintenance of both the security clearance and SCI access. Just as he eschewed consulting a trusted medical specialist, he purposefully chose to eschew the obvious first step for a professional in his position – consulting his security officer or superior about his contemplation of illegally using non-prescribed marijuana. He admits that he considered the “risk factors” before he used marijuana for purportedly medicinal purposes, but proceeded with trying the drug for medicinal purposes. Consequently, when he abused marijuana in October 2008, he knowingly disregarded the illegality of his act; he proceeded without medical authorization to use a controlled substance, and breached his duties and responsibilities to the U.S. Government. There is no evidence that his security officer was immediately advised of his marijuana use. There is only the evidence that he disclosed the use on subsequent applications related to SCI access and his security clearance.

Given both Applicant’s pattern of intermittent drug use and his reckless behavior, less than three years of renewed abstinence is insufficient to mitigate drug involvement security concerns. Drug involvement security concerns remain unmitigated.

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–1c:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant a security clearance. Clearance is denied.

ARTHUR E. MARSHALL, JR.
Administrative Judge