



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



In the matter of:)
)
) ISCR Case No. 10-03484
)
Applicant for Security Clearance)

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: *Pro se*

September 9, 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 March 22, 2011, 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 April 5, 2011, and requested an administrative determination. On May 3, 2011, Department Counsel exercised the Government's right to request a hearing under ¶ E3.1.7 of the Directive. The case was assigned to me on

May 19, 2011. DOHA issued a notice of hearing on May 31, 2011, and the hearing was convened as scheduled on June 28, 2011. The Government offered exhibits (GE) 1 through 9, which were admitted into evidence without objection. Department Counsel's exhibit index is marked as Hearing Exhibit (HE) I. Applicant testified but offered no documentary evidence. The record was held to allow Applicant to submit post-hearing evidence. Applicant timely submitted exhibit (AE) A, which was admitted into evidence without objection. Government Counsel's transmittal letter is marked HE II. DOHA received the hearing transcript (Tr.) on July 8, 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 34 years old. He is single, never married, and has no children. He has a bachelor's degree and a master's degree in aerospace engineering. Since 2004, he has worked for a defense contractor. 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 multiple occasions from 1995 through September 2009; being arrested in December 2009 for possession of drug paraphernalia and driving while impaired; being arrested in 2000 for possession of marijuana and Psilocybin; using Psilocybin in 2000; and being charged with drug paraphernalia possession in 1994. (See SOR ¶¶ 1.a – 1.e).

Applicant first began using marijuana in about 1994. He does not deny the charge of possession of drug paraphernalia, but he does not remember the incident. He graduated from high school and was entering college when he began using marijuana. He used marijuana about once a month during social events at college, such as fraternity parties and gatherings with friends. He purchased marijuana for his own use. He also used marijuana while attending graduate school, but his frequency of use dropped to about five times per year. While he was completing graduate school and began applying for jobs in the fall of 2003, he stopped using marijuana. He was hired by his current employer in 2004. He used marijuana again in 2009 while celebrating a friend's birthday. He claims that was his only use since stopping in 2003.²

In August 2000, when Applicant was a college senior, he attended a three-day festival with some friends. During this festival, he purchased both marijuana and Psilocybin. He used the marijuana by smoking it about five times during the festival. He had not yet used the Psilocybin before he was arrested. He was arrested and charged with possession of marijuana, Psilocybin, and drug paraphernalia by an undercover

¹ Tr. at 7, 8, 29-30; GE 1.

² Tr. at 39-42; GE 1, 3.

police officer. He pleaded guilty to the drug paraphernalia possession and the other charges were dismissed. He used Psilocybin about four or five times before 2000. He claims not to have used it again.³

Applicant's use in 2009 was the result of celebrating a friend's birthday. He and his girlfriend and some friends went into the city to celebrate. They frequented several bars and Applicant had several alcoholic beverages. At one bar, marijuana was produced by his friend and Applicant smoked some. Applicant's friend has a medical marijuana card and is able to obtain marijuana legally. The marijuana was smoked using a pipe that ended up in Applicant's possession. After the night of partying, Applicant was driving his girlfriend home when he was stopped for speeding. He was arrested for driving while impaired and possession of drug paraphernalia (the pipe). He pleaded guilty to the impaired driving charge and the other charges were dropped. He was sentenced to six months of supervised probation, which included attendance at drug and alcohol awareness classes. He completed his probation.⁴

Applicant admitted that his girlfriend smoked marijuana in the past, but claimed she does not smoke any longer. He also admitted that he has several friends who have medical marijuana cards. He occasionally associates with these friends. He also provided a written statement declaring his intent not to use drugs in the future. Although he was drug tested before his employment, he is not aware if his company has a drug testing policy other than for hiring. He was not diagnosed as either a drug abuser or drug dependant and has not been through any drug treatment program.⁵

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.

³ Tr. at 43-46; GE 3.

⁴ Tr. at 26-28; GE 2, 3.

⁵ Tr. at 54-56; GE 3.

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 considered the following relevant:

- (a) any drug abuse; and
- (c) illegal drug possession and possession of drug paraphernalia.

Applicant used marijuana and Psilocybin on a number of occasions. He also possessed both drugs, and possessed drug paraphernalia on multiple occasions. I find 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 considered the following relevant:

(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 December 2009). The period of abstinence is insufficient to demonstrate Applicant's intent not to use in the future. I am troubled by the fact that after he stopped using drugs in late 2003, he resumed use of marijuana in 2009 because he was with friends who could smoke marijuana legally. Additionally, he remains in contact with friends who have medical marijuana cards. He has not met his burden to establish his intent not to use marijuana in the future, despite his statement to the contrary. 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 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 December 2009 after an extended period of non-use. 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
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Subparagraphs 1.a-1.e:	Against Applicant
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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