



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
 )  
----- ) ISCR Case No. 10-04916  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Tovah A. Minster, Esquire, Department Counsel

For Applicant: *Pro se*

April 8, 2011

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**DECISION**

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ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP), on January 18, 2010. (Item 5.) On October 8, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant detailing the security concerns under Guideline H (Drug Involvement). The action was taken 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 for SORs issued after September 1, 2006.

Applicant submitted an Answer to the SOR on October 22, 2010, and requested a decision without a hearing. (Item 4.) Department Counsel submitted a File of Relevant Material (FORM) to Applicant on November 18, 2010. Applicant received the FORM on November 29, 2010, and was given 30 days to submit any additional information. He elected not to submit anything further. The case was assigned to me on January 21, 2011. Based upon a review of the pleadings and exhibits, eligibility for access to classified information is denied.

## **Findings of Fact**

Applicant is 35 and married. He is employed by a defense contractor and seeks to obtain a security clearance in connection with his employment.

### **Paragraph 1 (Guideline H - Drug Involvement)**

The Government alleges under Guideline H that Applicant is ineligible for clearance because he has used illegal drugs. Applicant admitted all of the allegations under this paragraph in the SOR. These admissions are deemed findings of fact.

Applicant admits he used marijuana. In an unsworn declaration regarding an interview taken on March 18, 2010, it was stated, "Subject [Applicant] stated that he has only used one type of illegal narcotic in his entire life. He indicated that this narcotic was marijuana and his usage has been about three or four times per year from approximately 2003 (exact date not recalled) to December 2009." (Item 6 at 3.) In his e-QIP Applicant states at Section 23 that he used marijuana, "Very infrequently come across someone in possession (e.g. at a concert) and have taken a few hits. Would have to say maybe 3-4 times a year, for the past 5 years or so." (Item 5 at 30.) Finally, in his Answer to the SOR Applicant states, "I admit to having used marijuana around 10 times total from the period of 2003 up to but not exceeding December 2009. I have not used it since 2009 and have been tested at least 8 times at random points over the course of 2010 by my employer and the required counseling I attended." (Item 4.) Based on the available evidence, I find it more likely that Applicant used marijuana at least 20 times between 2003 and December 2009. Applicant also admitted using marijuana after being granted a security clearance in 2002.

Applicant tested positive for marijuana in December 2009. He was required by his employer to receive counseling, which he did in January and February 2010. As stated above, his employer put him on an intense drug testing program. Applicant maintains that he stopped using marijuana in December 2009 and has no intention of using marijuana or any other illegal drug in the future. (Item 6.)

Applicant provided no evidence concerning the quality of his professional performance, the level of responsibility his duties entail, or his track record with respect to handling sensitive information and observation of security procedures. He submitted no character references or other evidence tending to establish good judgment, trustworthiness, or reliability. I was unable to evaluate his credibility, demeanor, or character in person since he elected to have his case decided without a hearing.

## **Policies**

Security clearance decisions are not made in a vacuum. When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and

mitigating conditions, which are to be used as appropriate 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 over-arching 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. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion as to obtaining 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. Security clearance decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to protect or 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.

Finally, as emphasized in Section 7 of Executive Order 10865, "Any determination under this order . . . shall be a determination 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

The security concern relating to the guideline for Drug Involvement is set out in AG ¶ 24:

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. Drugs are defined as mood and behavior altering substances, and include: (1) 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 (2) inhalants and other similar substances; Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

I have considered the disqualifying conditions under Drug Involvement AG ¶ 25 and find that the following conditions apply given the facts in this case:

- (a) any drug abuse;
- (b) testing positive for illegal drug use; and
- (g) any illegal drug use after being granted a security clearance.

The Applicant used marijuana on a consistent basis for seven years, ending a year before the record closed. He only stopped using marijuana because he was caught in a drug test conducted by his company. During the entire time he used marijuana he held a security clearance. All of the above disqualifying conditions apply to the facts in this case.

I have considered all of the mitigating conditions under Drug Involvement AG ¶ 26 and find that none of them apply to the facts in this case concerning Applicant's long-term marijuana use. AG ¶ 26(a) states that it may be mitigating where "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 reliability, trustworthiness, or good judgment." The Applicant's drug abuse was of long duration, and was relatively intense during that period. As stated, according to Applicant, it ended just a year ago. I find that, under the facts of this case, it is still too soon for this condition to apply.

Further, under AG ¶ 26(b), it may be mitigating where an applicant has "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 are used; (3) an appropriate period of abstinence; (4) a signed statement

of intent with automatic revocation of clearance for any violation.” The Applicant did not submit any evidence showing a demonstrated intent not to use drugs in the future. He did not submit a signed statement concerning an automatic revocation of his clearance, which would be mitigating. Finally, his period of abstinence, in this particular case, is insufficient. This guideline is found against the Applicant.

### **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 relevant circumstances. 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. The administrative judge must 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has engaged in marijuana use for seven years. He only stopped because he tested positive for such use. Under AG ¶ 2(a)(3), Applicant’s conduct is recent. Based on the state of the record, I cannot find that there have been permanent behavioral changes under AG ¶ 2(a)(6). Accordingly, at the present time, I find that there is the potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)); and that there is a high likelihood of recurrence (AG ¶ 2(a)(9)).

Overall, the record evidence leaves me with questions and doubts as to Applicant’s eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his Drug Involvement.

On balance, I conclude that Applicant has not successfully overcome the Government’s case opposing his request for a DoD security clearance. Accordingly, the evidence supports a denial of his request for a security clearance.

