



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 10-05956

Appearances

For Government: Eric Borgstrom, Esquire, Department Counsel

For Applicant: *Pro se*

April 11, 2011

Decision

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

On November 30, 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 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 20, 2010, response, Applicant admitted the two allegations raised under Guideline H and the sole allegation under Guideline E. He also requested a decision without hearing. On January 11, 2011, Department Counsel requested a hearing in the case under ¶ E3.1.7 of the Directive. DOHA assigned the case to me on March 2, 2011. The parties proposed a hearing date of March 29, 2011. A notice setting the hearing date for March 29, 2011, was issued on March 10, 2011. I convened the hearing as scheduled.

Applicant gave testimony and was given through April 8, 2011, to submit any documents for consideration. Department Counsel offered six documents, which were

admitted as exhibits (Exs.) 1-6 without objection. The transcript (Tr.) of the proceeding was received on April 6, 2011. On April 7, 2011, Department Counsel forwarded three documents timely received from Applicant. Absent any objections to those documents, they were accepted into the record as Exs. A-C 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 security concerns related to drug involvement. Clearance is denied.

Findings of Fact

Applicant is a 53-year-old staff test engineer who has worked for the same defense contractor for 31 years. He earned a high school diploma and attended some college. Married, Applicant has two adult children, one of whom is currently serving in the U.S. military. Applicant has maintained a security clearance for about 30 years.¹

From 1976 until 1977, Applicant attended college. Between approximately September 1977 and October 1977, he tried using marijuana from two to five times. By 1978, he had focused his life on building a career. In January 1980, he started working for his present employer, where he has risen from security guard to management professional. The security clearance application form he used in December 1980 did not ask about past drug use, only whether he had ever been addicted to the use of habit forming drugs.² He was ultimately granted a security clearance.

Applicant married in 1988 and started a family. In 1989, he submitted an application for a security clearance. On that form, he disclosed that he had tried marijuana “2 or 3 times” in 1977.³ In response to a question requesting “a statement concerning [his] intention of future use,” Applicant typed “no future use.”⁴

In about February 2001, Applicant and his wife hosted a party. To Applicant’s knowledge, none of the guests were known to be drug abusers.⁵ At some point, a guest produced a marijuana cigarette and it began circulating. He knew marijuana use was illegal.⁶ To be “sociable,” Applicant had an inhalation of the drug and passed it on.⁷ It did not effect him. His wife did not use the drug, nor does she approve of the use of drugs. Applicant stated that he could give no explanation as to why he inhaled from the

¹ See, e.g., Tr. 9, 15, 17.

² Ex. 4 (Security Questionnaire, dated Dec. 11, 1980) at 4.

³ Ex. 3 (Security Questionnaire, dated Apr. 21, 1989) at 8.

⁴ *Id.*

⁵ Tr. 18.

⁶ Tr. 23.

⁷ Tr. 24.

marijuana cigarette, admitting that his action was “incredibly stupid.”⁸ There is no evidence that Applicant disclosed his marijuana use to his security officer or employer that year.

In February 2008, after being granted a security clearance, Applicant attended a party thrown for his 50th birthday at a bar. At some point, his brother passed a marijuana cigarette around. As it circulated, Applicant inhaled the drug before passing it on.⁹ He observed that this incident, and the summer of 2008 incident discussed below, may have been the result of a mid-life crisis.¹⁰ There is no evidence that Applicant disclosed this marijuana use to his security officer or employer that year.

In the summer of 2008, Applicant and his wife were enjoying their hobby, sailing. Earlier, they had met others who were kindred spirits in their enjoyment of boating. One day, they went for a boat ride with others and a marijuana cigarette was circulated among those aboard. Applicant cannot recall if he inhaled any of the offered marijuana or whether he simply passed it on.¹¹ He recollects simply passing it on, but thought handling the drug was sufficient to warrant comment.¹² Applicant’s wife, who does not use drugs, “smacked [him] up beside the head . . . for even touching it, which was the right thing to do.”¹³ Applicant regrets these recent incidents. There is no evidence that Applicant disclosed this marijuana until he completed a security clearance application in October 2009.

In his October 2009 security clearance application, Applicant admitted having “taken one inhale 2-3 times in the past 10 years” of marijuana.¹⁴ He noted his dates of use as being from February 2001 to June 2009.¹⁵ Applicant credibly stated, however, that his last drug use occurred in about June 2008, not June 2009.¹⁶

Applicant recognizes both the illegality of his past marijuana use and his violation of the terms of his security clearance. He acknowledges that his employer provides regular security training or refreshers. He showed that he has the support of his security

⁸ *Id.*

⁹ Tr. 19.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* Although unsure whether he inhaled the marijuana cigarette, Applicant stated, “I handled the joint. I definitely was in violation, I believe.”

¹³ Tr. 21.

¹⁴ Ex. 1 (Security Questionnaire, dated Oct. 29, 2009) at 34 of 39.

¹⁵ *Id.*

¹⁶ Tr. 26.

director.¹⁷ He is contrite about his past drug use. He now eschews the company of “anybody who uses drugs on a constant basis.”¹⁸ He has explained his situation to his brother and told him that he could not bring illegal drugs to Applicant’s home, into Applicant’s car, or into Applicant’s presence.¹⁹ He has not seen the boaters with whom he sailed in the summer of 2008 since that time. He does not frequent venues where drugs might be present.²⁰ He has the full support of his wife, who does not abuse illegal drugs.²¹ Neither of Applicant’s children use illegal drugs. If any of Applicant’s associates use drugs, he is unaware of it. He has no intention of using marijuana or any illegal drugs in the future.

Applicant submitted a statement of intent with automatic revocation of any security clearance held or granted for any future violation.²² He understands that this document represents more than a statement regarding his future intentions about using marijuana in the future, as was posed in his 1989 security clearance questionnaire.²³ He stated that he would not do anything that would every again jeopardize his work or his 30 years with his employer. He stated that, at age 53, he is now older, wiser, and in a better position to “realize the consequences of [his] actions.”²⁴

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

¹⁷ Tr. 22; Ex. C (Letter, dated Apr. 4, 2011).

¹⁸ Tr. 20, 27. *See also* Ex. B (Spouse’s letter, dated Apr. 6, 2011).

¹⁹ Tr. 21.

²⁰ Tr. 27.

²¹ Ex. B, *supra*, note 18.

²² Ex. A (Letter and statement of intent, dated Apr. 5, 2011).

²³ Tr. 29-30.

²⁴ Tr. 28.

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. . . .”²⁵ The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant.²⁶

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 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). “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”²⁷ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.²⁸

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.

²⁵ See *also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

²⁶ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

²⁷ *Id.*

²⁸ *Id.*

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.²⁹ "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.³⁰ "Drug abuse" is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.³¹

Applicant admitted he used marijuana, an illegal drug, in 1977 and between 2001 and 2009. He also admitted to its use after he was granted a security clearance in 2002. Therefore, Drug Involvement Disqualifying Conditions AG ¶ 25(a) (any drug abuse) 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 used marijuana in the 1970s in his youth. He resumed the use of marijuana in 2001, after he was first granted a security clearance about 30 years ago. He last used marijuana in the summer of 2008, less than three years ago. He did not disclose either his 2001 or 2008 marijuana uses until he completed a 2009 security clearance application. Although his subsequent disclosure demonstrated improved judgment, there is insufficient evidence to establish Drug Involvement Mitigating Condition AG ¶ 26(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).

Applicant no longer associates with those who use drugs, and his brother has been advised not to use or bring drugs within Applicant's presence or the presence of his family. Applicant avoids venues where drugs might be used. Although Applicant's continued association with his brother is sufficient to obviate application of AG ¶ 26(b)(1) (disassociation from drug-using associates and contacts), AG ¶ 26(b)(2) (changing or avoiding the environment where drugs were used) applies.

Applicant quit using marijuana as a young man in about 1977. He next used marijuana in 2001 when he was in his 40s. He then used it at age 50 in February 2008, and then either used the drug or aided in its circulation in the summer of 2008. The incidents in the 2000s were multiple in number, occurred well after Applicant had

²⁹ AG ¶ 24.

³⁰ *Id.* at ¶ 24(a)(1-2).

³¹ *Id.* at ¶ 24(b).

reached maturity, and while he maintained a security clearance. Although Applicant presented notable information about his efforts to mitigate his more recent drug use, under these circumstances, more time than two-and-a-half years is needed to demonstrate Applicant's commitment to eschew drugs. AG ¶ 16(b)(3) (an appropriate period of abstinence) does not apply.

At the hearing, Applicant made several credible statements regarding his reasons for quitting drugs and for refraining from their use in the future. In addition, Applicant submitted highly-positive recommendations. He is valued as an employee and he values his position. He has signed a statement of intent with automatic revocation of clearance for any future drug-related violations. Therefore, AG ¶ 26(b)(4) (a signed statement of intent with automatic revocation of clearance for any violation) applies. However, that mitigating condition is given limited weight because Applicant previously indicated his intent to avoid future drug use, and he was unable to maintain his expressed intent into the 2000s.

Applicant admitted the Guideline H allegations raised in the SOR at ¶¶ 1.a-1.b. Applicant stresses his current age (53) and maturity to reenforce his stated intent to not use drugs in the future. The drug use at issue, however, extends past his youthful indiscretions to his 40s and shortly past he turned 50. Insufficient time has passed to demonstrate his commitment to returning to a drug-free life, particularly in light of the fact that his more recent drug use occurred after he received a security clearance. 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.”³² 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.³³

The single allegation raised under this guideline reiterates the two allegations raised under Guideline H. Specifically, that Applicant used marijuana in 1977, then again between approximately February 2001 and about June 2009. Applicant credibly testified that his drug use ended in June 2008, not June 2009. Regardless, given this specific allegation, only 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

³² AG ¶ 15.

³³ *Id.*

characteristics indicating that the person may not properly safeguard protected information) potentially applies.

AG ¶ 16(d) specifically contemplates “adverse information that is not explicitly covered under any other guideline.” The adverse information indicated in SOR allegation ¶ 2.a explicitly repeats that information as set forth under Guideline H. Those admitted facts and related circumstances were thoroughly considered and discussed under Guideline H above, making AG ¶ 16(d) inapplicable. In light of these considerations, and in light of the ultimate disposition of the case, no personal conduct disqualifying condition applies.

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, credible, and articulate 53-year-old man. He has a high school diploma and has attended some college. He is married and has raised children successfully. He has been employed for over 30 years, during most of which he maintained a security clearance. He disclosed his 2001 and 2008 drug use in his 2009 security clearance application. He vows to eschew drugs in the future.

Applicant’s drug use in the 1970s occurred when he was about 20 years old. In the succeeding two decades, he matured, raised a family, built a professional career, and was granted a security clearance. Although he knew marijuana was illegal and knew that the illegal use of drugs was antithetical to the maintenance of a security clearance, he used marijuana in his early 40s. He again used it on his 50th birthday in 2008. Shortly thereafter, he either used marijuana again or facilitated its use among others. He did not disclose his 2001 and 2008 drug use until 2009. This pattern does not represent a singular lapse, but a pattern of repeated violations of the law. The fact that he maintained a security clearance at the time, and the fact he belatedly reported his drug lapses, heighten the security concerns raised by his illegal drug abuse.

To his credit, Applicant has taken preventive measures to make sure he again stays clear of marijuana and illegal drugs in the past two-and-a-half years. While he apparently still maintains a relationship with his brother, who uses or used marijuana, he now avoids people and places associated with drug use. He signed a statement of intent with revocation of his security clearance if he again uses drugs. Applicant states that he feels he can maintain his resolve now that he is older and wiser. Age and wisdom, however, served as ineffective safeguards between 2001 and 2008, the year

he turned 50. While his signed statement of intent and credible testimony provide support his expressions of resolve, less than three years have passed since his last use of marijuana. Based on the mitigating information offered, I find that more time is needed to demonstrate his commitment and ability to remain drug free. As previously noted, any doubt concerning personnel being considered for access to classified information will be resolved in favor of national security. Consequently, I conclude that drug involvement security concerns remain unmitigated. Clearance is denied.

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
Subparagraph 1.a-1.b	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 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