



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



In the matter of:)
)
) ISCR Case No. 10-06480
)
Applicant for Security Clearance)

Appearances

For Government: Gregg Cervi, Esq., Department Counsel
For Applicant: John Griffith, Esq.

May 24, 2011

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated drug involvement security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On January 17, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, drug involvement. The action was taken 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 January 28, 2011, and requested a hearing before an administrative judge. The case was assigned to another administrative judge on March 17, 2011, and reassigned to me on March 28, 2011. DOHA issued a notice of hearing on April 8, 2011, and the hearing was convened as scheduled on May 3, 2011.

The Government offered exhibits (GE) 1 through 5, which were admitted without objection. Applicant testified, called three witnesses, and submitted exhibits (AE) A through N, which were admitted without objection. DOHA received the hearing transcript (Tr.) on May 18, 2011.

Findings of Fact

Applicant is a 57-year-old engineer for a defense contractor. He has worked for his current employer for about 30 years. He seeks to retain his security clearance, which he has held for more than 30 years. He has a master's degree. He is divorced with three adult children.¹

Applicant smoked marijuana about once every two months while he was in college from 1972 to 1976. There is no evidence that he used any illegal drugs between 1976 and 2005. Applicant revealed his marijuana use when he first applied for a security clearance in 1977. He received his security clearance. He revealed the drug use during subsequent investigations. He submitted a personnel security questionnaire in 1988. He wrote: "I smoked marijuana occasionally during my college years between 1972 and 1976. I have no intention of using illegal drugs in the future."² He provided a signed statement in 1989, in which he wrote:

I last used marijuana in June 1976 which occurred just prior to my girlfriend and I deciding to end our relationship. I then became serious about my future life and career. Involvement with marijuana did not fit into my future plans. I have not used marijuana since June 1976 and I have no intention or desire to use marijuana in the future.³

Applicant submitted another personnel security questionnaire in 1995. He again wrote: "I smoked marijuana occasionally during my college years between 1972 and 1976. I have no intention of using illegal drugs in the future." Applicant was interviewed for his background investigation a few weeks later. He discussed his drug use in the 1970s, and he stated that he did not intend to use illegal drugs in the future.⁴

Applicant went to a concert with a longtime friend and coworker in 2005. The friend offered marijuana to Applicant before the concert, and he smoked it. Applicant stated that he took one puff of the marijuana from a pipe. In 2007, Applicant and the same friend were on a skiing trip to Canada with a few other people. They were skiing

¹ Tr. at 51-56; GE 1; AE M.

² GE 2-4.

³ GE 3.

⁴ GE 2, 5.

off the trail when a local guide offered them marijuana, and they smoked it. Applicant stated that he again only took one puff of the marijuana from a pipe.⁵

Applicant admitted that he knew that illegal drug use was inconsistent with holding a security clearance. He was unaware of any requirements that he would have to immediately self-report his illegal drug use, but he knew he would have to list the drug use the next time he submitted a security clearance application. He knew that marijuana use could adversely affect his security clearance, but thought the drug use would be forgiven, like his previous drug use in college was forgiven. He listed his marijuana use when he submitted his questionnaire for national security positions (SF 86) in November 2009. He also fully discussed his marijuana use in a March 2010 background interview and in his responses to DOHA interrogatories. I find that any statements by Applicant that the 2005 marijuana use occurred in 2004 or 2006 were unintentional.⁶

Applicant stated that he does not intend to use illegal drugs again. His longtime friend offered marijuana to Applicant in about 2008, but Applicant declined it. Applicant still sees the friend occasionally, most recently about a month before the hearing, but the friend has not offered marijuana to Applicant since the 2008 incident. Applicant does not know if the friend still smokes marijuana. Applicant has revealed his drug use to his employer, coworkers, and his partner, with whom he lives. His partner credibly testified that she has not observed him use any illegal drugs, and she disapproves of their use. Applicant submitted a signed statement of intent not to use illegal drugs, with automatic revocation of his clearance for any violation. He passed several drug tests. He received a psychological evaluation from a clinical psychologist in April 2011.⁷ The psychologist concluded:

[Applicant] appears to have used marijuana on a very limited basis, regrets that use, feels guilty about it, and feels he has let himself and coworkers down by creating a situation where his trustworthiness has been questioned. He does not appear physically or psychologically addicted to marijuana, or anything else. He appears at low risk for future use at this time.

Overall, [Applicant] appears to be functioning well, with no signs of psychopathology. No follow up treatment of any type is recommended.⁸

Applicant's performance evaluations reflect that he is a valued, trusted employee. Three witnesses testified on his behalf, and he submitted several character letters

⁵ Tr. at 57-67, 77-78; Applicant's response to SOR; GE 1-2. Applicant's marijuana use in Canada violated no U.S. laws. Canada's marijuana laws are somewhat murky and will not be analyzed, except that non-medicinal marijuana use was not clearly legal in 2007.

⁶ Tr. at 60-62, 67-68, 72-74, 88-92; GE 1, 2.

⁷ Tr. at 42-50, 68-83; GE 2; AE F-H, L, N.

⁸ AE N.

attesting to his excellent job performance, responsibility, professionalism, candor, trustworthiness, honesty, patriotism, community involvement, work ethic, and integrity⁹

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 to be 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, administrative judges apply the guidelines 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.

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 the applicant or proven by Department Counsel." The applicant 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the

⁹ Tr. at 13-50; AE A-E, I-K.

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 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. Three are potentially applicable in this case:

- (a) any drug abuse;¹⁰
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (g) any illegal drug use after being granted a security clearance.

Applicant possessed and smoked marijuana in 2005 and 2007 while holding a security clearance. All of the above disqualifying conditions are applicable.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially applicable:

- (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.

¹⁰ Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

Applicant smoked marijuana when he was in college. He reported his marijuana use when he first applied for a security clearance in 1977. He discussed his marijuana use during subsequent security clearance applications and background investigations. On several occasions, he stated that he did not intend to use illegal drugs in the future. Despite those statements, Applicant smoked marijuana with an old friend in 2005 and 2007. He was offered marijuana by the same friend in 2008, but Applicant did not accept the invitation. Applicant still sees the friend occasionally, most recently about a month before the hearing, but the friend has not offered marijuana to Applicant since the 2008 incident. Applicant stated that he does not intend to use illegal drugs again, and he submitted a signed statement of intent not to use illegal drugs, with automatic revocation of his clearance for any violation. There is no bright-line rule for when conduct is recent. Applicant has not used illegal drugs in more than four years. He appears sincere in his desire to remain drug-free. However, he previously stated that he would not use illegal drugs again, and he later smoked marijuana with full knowledge that illegal drug use is inconsistent with holding a security clearance. Applicant will probably not use marijuana again; however, I am unable to conclude that illegal drug use is completely in his past. Applicant's drug use continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 26(a) has limited applicability. He does not receive full mitigation under AG ¶ 26(b) for the same rationale. In sum, I conclude that security concerns remain despite the presence of some mitigation.

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 relevant 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 have incorporated my comments under Guideline H in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

I considered Applicant's long and stable work history, his excellent job performance, and his favorable character evidence. I found him to be a credible witness and tend to believe that he will probably not use marijuana again. However, I have lingering doubts. Moreover, even if Applicant never uses illegal drugs again, his illegal drug use on two separate occasions while holding a security clearance, knowing it was illegal and counter to DoD policy, raises doubts about his current judgment, reliability, and trustworthiness. Four plus years of abstinence is not enough to mitigate his incidents of extremely poor judgment, disregard for the law, and violation of the trust instilled in him while holding a security clearance.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant has not mitigated drug involvement security concerns.

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:	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 continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge