



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



In the matter of:)	
)	
)	ISCR Case No. 10-06840
)	
Applicant for Security Clearance)	

Appearances

For Government: Gregg A. Cervi, Esq., Department Counsel
For Applicant: *Pro se*

September 29, 2011

Decision

HEINY, Claude R., Administrative Judge:

Applicant used marijuana from 1995 to 2007 and then again in January 2010. Even though his clearance application was denied in 1999 due to illegal drug use, he continued to smoke marijuana. Applicant has failed to rebut or mitigate the security concerns under drug involvement. Clearance is denied.

Statement of the Case

Applicant contests the Department of Defense's (DoD) intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) on April 13, 2011, detailing security concerns under Guideline H, drug involvement.

¹ 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.

On May 5, 2011, Applicant answered the SOR and elected to have the matter decided without a hearing. Department Counsel submitted the Government's case in a File of Relevant Material (FORM), dated June 22, 2011. The FORM contained eight attachments. On July 11, 2011, Applicant received a copy of the FORM, along with notice of his opportunity to file objections and submit material to refute, extenuate, or mitigate the potentially disqualifying conditions.

Responses to the FORM are due 30 days after receipt of the FORM. Applicant's response was due on August 10, 2011. As of September 21, 2011, no response had been received. On September 27, 2011, I was assigned the case.

Findings of Fact

In Applicant's Answer to the SOR, he admits he used marijuana from 1995 to 2007 and then again in 2010. (Item 4) I incorporate Applicant's admissions to the SOR allegations. After a thorough review of the pleadings, and exhibits, I make the following additional findings of fact:

Applicant is a 35-year-old senior systems engineer who has worked for a defense contractor since April 1999, and seeks to obtain a security clearance. In 1998, Applicant graduated from university and obtained employment with his current employer the following year. Applicant produced no work or character references.

In Applicant's April 2011 Electronic Questionnaires for Investigations Processing (E-QIP), Standard Form (SF) 86, he indicated he used marijuana recreationally from January 2003 to January 2010. (Item 5) Also in his e-QIP, he indicated he had applied for a clearance in May 1999, but that application was denied because of his recent drug usage. (Item 5) On his e-QIP, he listed an October 1995 felony charge for possession of LSD, a controlled substance. He stated on the e-QIP that he had paid fines, did community service, and the sentence was deferred. (Item 5) From September 1995 to March 1996, he attended a drug/alcohol education class. (Item 6) He completed the class, but the record fails to document what he learned from the class.

In August 2005, Applicant was arrested for driving under the influence (DUI). His blood alcohol content (BAC) was 0.124. He pleaded guilty to driving while alcohol impaired (DWAI), paid a \$1,500 fine, placed on one-year unsupervised probation, and required to complete 40 hours of community service. (Item 6) In October 1995, he went to make payment on his DWAI fine and was arrested for possession of LSD. In going through a security check at the county court building, three tabs of LSD were found in his backpack. (Item 6) In November 1995, he pled guilty to possession of a controlled substance, a felony, and received a deferred sentence, paid a \$1,500 fine, was placed on one-year unsupervised probation, and ordered to perform 80 hours of community service. From the record, it is unclear if this was in addition to the penalty for his DWAI or whether it is included in that penalty.

In Applicant's June 2010 personal subject interview, he stated between January 2003 and January 2010, he used marijuana approximately 100 times. (Item 6) In his interview, he said he stopped smoking marijuana in about 2007 because he had outgrown his desire to smoke marijuana. (Item 6) In January 2010, following his use of marijuana during a ski trip, he decided to quit smoking marijuana because he wanted to do more with his life than be around illegal drug use. (Item 6) He asserts he has no intention of using marijuana in the future. (Item 6)

In response to written interrogatories, the time frame as to when he smoked marijuana changed. He stated he smoked marijuana about 100 times between 1995 and 2007 and one time in January 2010. (Item 6) He asserted he had smoked marijuana less than five times since 2000. (Item 6) In response to later interrogatories, he said he had smoked marijuana less than ten times since 2000. (Item 7)

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 must be considered 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.

The protection of the interests of 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 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 Executive Order (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).

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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying:

- (a) any drug abuse;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

In 1999, Applicant obtained employment with his current employer. Between 1995 and 2007, he used marijuana a 100 times. The disqualifying conditions in ¶ 25(a) and ¶ 25(c) apply.

AG ¶ 26 provides conditions that could mitigate security concerns:

- (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;
- (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; and,

(4) a signed statement of intent with automatic revocation of clearance for any violation;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and,

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

None of the conditions that could mitigate security concerns apply. AG ¶ 26 (a) does not apply because his use was not infrequent. In both his April 2011 e-QIP and during his June 2010 interview, he stated he had used marijuana 100 times between January 2003 and January 2010. However, in his November 2010 response to interrogatories he stated this use of marijuana occurred over a longer period of time, having occurred between 1995 and 2007.

Because Applicant chose to have this matter handled administratively, I am unable to evaluate his demeanor, appearance, or form a positive determination as to his truthfulness. From the record, I am unable to find Applicant was sincere, open, and honest when he indicated the time frame of his usage was 1995 to 2007 and not January 2003 to January 2010. Over either time frame, his use was not infrequent.

Applicant's January 2010 marijuana usage is recent. His 1999 clearance application was denied because of his recent drug use. Even though he knew that illegal drug usage would prevent him from having a clearance he continued to use marijuana while employed at his current job. Continuing to use marijuana after being denied a clearance for drug use casts doubt on Applicant's current reliability, trustworthiness, and good judgment. The mitigating condition in AG ¶ 26 (a) does not apply.

Applicant states he will not use illegal drugs again. His assertion has limited weight because of his 2007 statement that he had stopped smoking marijuana because he had outgrown the desire to smoke, only to smoked again. There is no showing he has disassociated himself from drug-using associates and contacts, changed or avoids the environment where drugs are used, or executed a signed statement of intent with automatic revocation of clearance for any violation. It has been less than two years since his last use. Considering the frequency and history of his use, this period of abstinence is insufficient, AG ¶ 26 (b) does not apply.

The mitigating condition in AG ¶ 26 (c) does not apply because prescription drugs were not abused. The mitigating condition in AG ¶ 26 (d) does not apply because

the record fails to provide sufficient information about the drug/alcohol education class he completed in March 1996. With his more than 100 uses of marijuana ending in 2010, the class appears to have had limited impact on his illegal drug usage. He finished his class in 1996, but there was recurrence of marijuana use.

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. In 1999, Applicant obtained employment with his current employer and his application for a security clearance was denied. Since that time, he has continued to use marijuana. Applicant asserts he will not smoke marijuana in the future, but he has made a similar assertion before only to smoke marijuana again. Additionally, I have no way of ascertaining the veracity of this assertion.

The awarding of a security clearance is not a once in a life time occurrence, but is based on current disqualifying and mitigating conditions. Although the Applicant's evidence of rehabilitation is insufficient at this time, should he in the future be afforded an opportunity to reapply for a security clearance, with the passage of sufficient additional time, rehabilitation, and no future incidents of illegal drug usage, he may well demonstrate persuasive evidence of his security worthiness. But that time has not yet arrived.

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 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, Drug Involvement: 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 interests of national security to grant Applicant a security clearance. Eligibility for access to classified information is denied.

CLAUDE R. HEINY II
Administrative Judge