



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



In the matter of:)
)
) ISCR Case No. 10-09634
)
Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: *Pro se*

February 16, 2012

Decision

LOUGHRAN, Edward W., Administrative Judge:

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

Statement of the Case

The Defense Office of Hearings and Appeals (DOHA) issued an undated Statement of Reasons (SOR) that was received by Applicant on September 12, 2011. The SOR detailed security concerns under Guidelines H (drug involvement) and E (personal conduct). 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 September 21, 2011, and elected to have the case decided on the written record in lieu of a hearing. Department Counsel exercised the Government's option to request a hearing before an administrative judge. See

Hearing Exhibit (HE) I. On November 9, 2011, Department Counsel amended the SOR, adding an additional allegation under Guideline H. Applicant received the amendment, but he did not respond to the amendment. See HE III. The case was assigned to me on December 12, 2011. DOHA issued a notice of hearing on January 3, 2012, scheduling the hearing for January 12, 2012. See HE II. The hearing was convened as scheduled. The Government offered Exhibits (GE) 1 through 4, which were admitted without objection. Applicant testified and submitted Exhibit (AE) A, which was admitted without objection. The record was held open for Applicant to submit additional information. Applicant timely submitted documents that were marked AE B through E and admitted without objection. Department Counsel's memorandum is marked HE IV. DOHA received the hearing transcript (Tr.) on January 22, 2012.

Findings of Fact

Applicant is a 55-year-old employee of a defense contractor. He has worked for his current employer since 1992. He seeks to retain a security clearance that he has held since the mid 1990s. He was honorably discharged after serving two years in the U.S. military in the 1970s. He is a high school graduate. He is married for the second time. He has two adult children and two adult stepchildren.¹

Applicant smoked marijuana when he was an adolescent and a young adult. He did not smoke marijuana for several decades until mid 2009. Applicant's mother passed away in June 2009. Applicant had a difficult time coping with the loss of his mother. Applicant turned to marijuana as a means of dealing with his grief. He estimated that he smoked marijuana several times a week. He bought the marijuana from various people on the street. Applicant held a security clearance when he was using the marijuana.²

Applicant's company had annual drug tests. In February 2010, Applicant tested positive on a drug test, indicating the use of marijuana. Applicant attended counseling through his company's employee assistance program. As part of the program, he was diagnosed by his therapist as marijuana dependent.³

Applicant was interviewed by an investigator from the Office of Personnel Management (OPM) in July 2010. He told the investigator that he had smoked marijuana for the first time at a party before the drug test. He stated that was the only time he had ever used marijuana. On the same day as the interview, Applicant called the investigator on the telephone. He told the investigator that he provided false information during the interview, and he wanted to provide the correct information. The

¹ Tr. at 26, 32-34; GE 1.

² Tr. at 21-29; Applicant's response to SOR; GE 2, 4.

³ Tr. at 21-22, 29-31; Applicant's response to SOR; GE 2-4; AE A.

investigator interviewed Applicant again on the same day. Applicant provided accurate information, detailing the full extent of his marijuana use.⁴

Applicant has not used marijuana or any other illegal drug since the positive drug test. He is remorseful for his actions and acknowledges that he exercised poor judgment. He completed his counseling program, which consisted of six therapy sessions in March and April 2010. Applicant stated that the therapy taught him valuable lessons.⁵ His therapist noted:

[Applicant] was cooperative and open during treatment. He demonstrated a sincere desire to improve and sustain positive life changes. He did NOT demonstrate at any time behaviors or traits that would be a risk to others. He was honest about his mistake. His behaviors did not appear to indicate a risk for security or liability at work. (emphasis in original)⁶

Applicant submitted a number of letters stating that he is honorable and trustworthy.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 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.

⁴ Tr. at 22-23, 26; Applicant's response to SOR; GE 2.

⁵ Tr. at 22, 27-32; Applicant's response to SOR; GE 2; AE A.

⁶ AE A.

⁷ AE B-E.

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 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 conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

- (a) any drug abuse;⁸
- (b) testing positive for illegal drug use;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;
- (e) evaluation of drug abuse or drug dependence by a licensed clinical social worker who is a staff member of a recognized drug treatment program; and

⁸ Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

(g) any illegal drug use after being granted a security clearance.

Applicant possessed and smoked marijuana while he held a security clearance. He tested positive for marijuana use. Applicant was diagnosed by his therapist at his company's employee assistance program as marijuana dependent. The Appeal Board has stated that an administrative judge should take an expansive view of what constitutes a licensed clinical social worker who is a staff member of a recognized drug treatment program. See ISCR Case No. 07-00558 (App. Bd. Apr. 7, 2008). 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;

(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; and

(c) 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.

Distraught with grief over his mother's death, Applicant resumed smoking marijuana in mid 2009 after decades of abstinence. He held a security clearance at the time. He completed counseling and his therapist provided a favorable endorsement for his security clearance. He has not used illegal drugs since his positive drug test, and he stated that he does not intend to use illegal drugs again.

There is no bright-line rule for when conduct is recent. Applicant has not used illegal drugs in about two years. He appears sincere in his desire to remain drug-free. However, he went decades without using illegal drugs, and then smoked marijuana on numerous occasions with full knowledge that illegal drug use is inconsistent with holding a security clearance. I am unable to conclude that illegal drug use is completely in his past. His drug use continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶¶ 26(a), 26(b), and 26(c) all have some applicability. Notwithstanding, I conclude that security concerns remain despite the presence of some mitigation.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15:

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. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

- (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative; and
- (e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant intentionally provided false information about his drug use to an OPM investigator in July 2010. AG ¶ 16(b) is applicable. His illegal drug use created a vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is also applicable.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant called the investigator on the same day as the interview, told him that he provided false information during the interview, and, during another interview on the same day, he provided accurate information, detailing the full extent of his marijuana use. AG ¶ 17(a) is applicable.

Applicant has not used illegal drugs since February 2010. He completed therapy, and he has corrected any misstatements about his drug use. He has taken positive steps to reduce his vulnerability to exploitation, manipulation, and duress. However, I am unable to conclude that illegal drug use is completely in his past. His drug use continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 17(e) is applicable, and AG ¶¶ 17(c) and 17(d) have some applicability. With unresolved doubts about Applicant's current reliability, trustworthiness, and judgment, I conclude that personal conduct 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 Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

I considered Applicant's honorable military service and his favorable character evidence. However, Applicant's illegal drug use while holding a security clearance, knowing it was illegal and counter to DoD policy, raises doubts about his current judgment, reliability, and trustworthiness. Two 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 and personal conduct 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
Subparagraphs 1.a-1.e:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	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