



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



In the matter of:)
)
) ISCR Case No. 10-09794
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

August 22, 2011

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline H, Drug Involvement. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On March 11, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, Drug Involvement. DOHA acted 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 March 31, 2011, and requested a hearing before an administrative judge. The case was assigned to me on May 19, 2011. DOHA issued a notice of hearing on May 31, 2011, and the hearing was convened as scheduled on

June 28, 2011. The Government offered exhibits (GE) 1 and 2, which were admitted into evidence without objection. Department Counsel's exhibit index is marked as Hearing Exhibit (HE) I. Applicant testified and offered exhibits (AE) A through J that were admitted into evidence without objection. The hearing was not held open for the receipt of additional evidence.¹ DOHA received the hearing transcript (Tr.) on July 9, 2011.

Findings of Fact

In Applicant's answer to the SOR, he admitted all the allegations under Guideline H. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 59 years old. He has been married to his second wife since 2003. He has one stepson. He has a Ph.D in geology. Since December 2007, he has worked for a defense contractor. He has no military service and does not currently hold a security clearance. He previously worked for the Department of Energy (DOE) for two years (1993-1995) and held a clearance at that time.²

Applicant's admitted conduct raised in the SOR includes: using marijuana on numerous occasions from 1966 (when he was 15 or 16) through August 2010 (in his testimony he admitted use through December 2010); purchasing and growing marijuana; and during an interview with a government investigator he indicated an intent to continue his use of marijuana in the future, but he would be willing to stop using marijuana if that was a condition to receiving a security clearance. (See SOR ¶¶ 1.a – 1.d).

Applicant first began using marijuana in about 1966 when he was in high school. He continued his use through 1993 using it on a monthly basis. He stopped using marijuana in 1993 when he worked for the DOE. He again resumed using it when he no longer worked for DOE in 1995. He used marijuana by either smoking rolled cigarettes or by sharing pipes with friends. His use between 1995 and August 2010 was weekly, usually on Friday or Saturday. From August to December 2010, his use decreased to about once a month. He completed his security clearance application on July 16, 2010, and had an investigative interview for his clearance on August 24, 2010. He stated his last use of marijuana was after these events in December 2010. During the course of his years of using marijuana, he purchased it about every year to 18 months. He obtained a medical marijuana card in September 2010 and purchased marijuana through legal marijuana dispensaries. Before obtaining the card, he purchased

¹ Applicant sent me an *ex parte* email on June 29, 2011. In it he further explained his answers to questions about his medical marijuana card. He also asked to make further argument in his case. I responded to his email on July 6, 2011, denying his request. I will, however, consider the factual information contained in Applicant's email concerning his medical marijuana card. Department Counsel had no objection. His email and my response are marked as HE II.

² Tr. at 7-8, 32-33, 35-36; GE 1.

marijuana illegally. In the 1970s he grew marijuana for a short time. He no longer engages in that activity.³

Applicant used marijuana because he believed using it was similar to drinking alcohol in a social manner. He also believes marijuana should be legal and cited the legality of marijuana in some states for medical purposes. He did admit, however, that his wife does not condone his use of marijuana and that he has not informed her of his use on occasions. He has never been through a drug evaluation or treatment program.⁴

Applicant originally obtained the medical marijuana card because he was experiencing pain in his ankle from an earlier surgical procedure. He used the marijuana to alleviate the pain he was then experiencing. He then received physical therapy for his ankle, which relieved the pain such that he no longer needed to use the marijuana for that purpose. He does not intend to renew his medical marijuana card when it expires in September 2011.⁵

Applicant testified that he does not intend to use drugs in the future. Although in an earlier statement to an investigator, he stated that he would continue to use marijuana but would discontinue his use if he received a security clearance. He also offered into evidence a signed statement manifesting an intent not to use drugs. Additionally, he offered to undergo drug testing. However, his company does not currently have a drug-testing program.⁶

He presented statements from his friends, colleagues, former instructors, and coworkers that described him as honest, reliable, and trustworthy. His most recent performance appraisal rated him as an overall "exceptional contributor" (rating of 5.0). He also offered evidence of his involvement in community activities.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 used in evaluating an applicant's eligibility for access to classified information.

³ Tr. at 21; GE 2.

⁴ Tr. at 46, 62, 71-72; GE 2.

⁵ Tr. at 43-44, 66, 75-76.

⁶ Tr. at 42-43, 60; GE 2; AE H.

⁷ AE A-G.

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 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, 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, and 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 that an applicant may deliberately or inadvertently fail to 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.

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).

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.

I have considered all of the evidence in this case and the disqualifying conditions under Drug Involvement AG ¶ 25 and considered the following relevant:

- (a) any drug abuse;
- (b) illegal drug possession, including cultivation; and
- (h) expressed intent to continue illegal drug use, or failure to clarify and convincingly commit to discontinue drug use.

Appellant used and purchased marijuana on a number of occasions. He also grew marijuana on one occasion. He also made an ambiguous statement to an investigator about his continued drug use. I find the above disqualifying condition applies.

I have considered all of the evidence in this case and the mitigating conditions under Drug Involvement AG ¶ 26 and considered the following relevant:

- (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.

Applicant has a 43-year history of marijuana use. He stopped using for two years when he worked for the DOE, but started again when he no longer held that position. He even used marijuana after completing his security clearance application and investigative interview. His last use occurred in December 2010. He used marijuana despite his wife's desire that he not do so. Applicant's use of drugs was long-term, frequent, and recent. The period of abstinence is insufficient to demonstrate Applicant's intent not to use in the future. Additionally, even though he signed a statement indicating his intent not to use in the future, his own past track record undercuts that assertion. He stopped using when he went to work for the DOE then began again. He has used marijuana for 43 years. For all these reasons, Applicant has not presented sufficient evidence to mitigate the security concerns based upon his drug use. Neither AG ¶ 26(a) nor AG ¶ 26(b) applies.

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 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 considered Applicant's supportive character evidence, his job appraisal, his community involvement, and his willingness to be drug-tested. I also considered Applicant's statement of intent not to use drugs in the future. However, I also weighed that he used marijuana for 43 years, and as recently as December 2010, which was after he applied for a security clearance and after his investigative interview. Applicant failed to provide sufficient evidence to mitigate the security concerns.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline H, Drug Involvement.

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.d:	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 grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Robert E. Coacher
Administrative Judge