



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



In the matter of:)
)
) ISCR Case No. 10-10068
)
Applicant for Security Clearance)

Appearances

For Government: Raashid S. Williams, Esq., Department Counsel
For Applicant: *Pro se*

September 27, 2011

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant failed to mitigate the Drug Involvement and Personal Conduct concerns. He used marijuana in 2001 and 2009 while possessing a security clearance. He failed to demonstrate that he will not use illegal drugs in the future. Clearance is denied.

Procedural History

On June 8, 2011, the Defense Office of Hearings and Appeals (DOHA) made a preliminary determination to deny Applicant access to classified information.¹ The basis for this decision is set forth in a Statement of Reasons (SOR), which alleges security concerns under Guideline H (Drug Involvement) and Guideline E (Personal Conduct). Applicant responded to the SOR on June 28, 2011 (Answer). He requested a hearing and, after coordinating with the parties, I scheduled the hearing for September 13, 2011.

¹ This action was taken pursuant to Executive Order 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.

At hearing, Department Counsel offered two exhibits, which were marked and admitted into evidence as Government Exhibits (GE) 1 and 2. Applicant testified, but did not offer any exhibits beyond the six exhibits he enclosed with his Answer.² At the conclusion of the hearing, the Government moved to withdraw SOR, ¶ 2.a. I granted the motion. The transcript was received on September 22, 2011.

Findings of Fact

Applicant is 34 years old, single, with no children. After graduating from college in June 2000, he was hired by his current employer, a government contractor. He filled out a security clearance application (SCA) and, shortly thereafter, was granted a security clearance.³

Applicant used marijuana in 2001 and 2009 while possessing a security clearance. His employer has a policy prohibiting its employees from using illegal drugs and Applicant was aware of this policy when he decided to use marijuana. Applicant claims that when he used marijuana in 2001 and 2009 he only took two puffs from a marijuana cigarette that was being passed around by others. At the time he engaged in this conduct, he understood his use of marijuana was wrong and contrary to his employer's drug policy.⁴

As part of his current periodic reinvestigation, Applicant filled out a SCA in July 2010. Question 23.b of the SCA asked: “[h]ave you EVER illegally used a controlled substance while possessing a security clearance . . .?” Applicant revealed his August 2009 marijuana use and stated that he “took a couple puffs to try it (marijuana) out”. He did not disclose his prior use of marijuana in 2001. Applicant claims this omission was unintentional. He testified that he simply forgot about his prior use when filling out the SCA and, if he did recall his prior use, he was simply confused by the question, as the other drug questions only asked him to go back seven years. Applicant first revealed his 2001 use of marijuana during his August 2010 background interview.⁵

Applicant does not believe his limited use of marijuana raises a security concern. In his mind, a security risk only exists if an individual uses marijuana on a persistent or continual basis.⁶

² At the start of the hearing, Applicant provided me Enclosures 0 – 5, which were missing from the file copy of the Answer. I have attached these enclosures to the file copy of the Answer.

³ Tr. at 33-34; GE 1.

⁴ Tr. at 27-28, 35-41, 48-53; GE 1; GE 2 at 87.

⁵ GE 1 at 31-32; Tr. at 25-26, 41-47, 53-57. *But see*, GE 2 at 87 (Applicant tells agent that he had revealed his 2001 marijuana use during initial background investigation).

⁶ Tr. at 39-40, 48, 52.

Applicant submitted a statement promising not to use illegal drugs in the future. He claims to have not used marijuana since August 2009 and no longer associates with those who use illegal drugs. He submitted a drug screen that he took shortly after receiving the SOR, which was negative for the presence of illegal substances. His performance reports and employer awards demonstrate that he is a good worker.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.

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.

⁷ Tr. at 50-52; Answer, Enclosures 2-5.

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 regarding illegal drug involvement is set forth at 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 disqualifying conditions under AG ¶ 25. Appellant's use of marijuana while possessing a security clearance establishes AG ¶¶ 25(a) “any drug abuse” and 25(g) “any illegal drug use after being granted a security clearance.”

AG ¶ 26 sets forth a number of conditions that could mitigate the Guideline H concern. The following mitigating conditions warrant discussion:

(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's marijuana use did not occur under unusual circumstances – both occasions involved social events where other individuals were smoking the drug and passed it around for others to use or not. There was no pressure or coercion involved. Applicant was a mature 32-year-old adult when he decided to use marijuana again in 2009. By that point, he had held a security clearance and been working for a government contractor for nearly a decade. He used marijuana on both occasions knowing that it was wrong and contrary to his employer's drug policy. He still does not understand that any use of an illegal drug – even just two puffs from a marijuana cigarette – is incompatible with holding a security clearance. Under such circumstances,

the mere passage of time, in this case just two years have passed since Applicant's last use of marijuana, does not warrant the application of AG ¶ 26(a).⁸

Although Applicant submitted a statement promising not to use illegal drugs in the future, he failed to demonstrate that his involvement with illegal drugs will not recur. Applicant's two uses of marijuana occurred after the government had placed its trust and confidence in him by granting him a security clearance. He also violated the trust of his employer by violating its drug policy on two separate occasions. I did not find his self-serving, contradictory explanations for why he failed to disclose his 2001 marijuana use on his current SCA credible. In light of Applicant's failure to keep his previous promises not to use drugs, his inability to recognize that any drug use is incompatible with holding a security clearance, and incredulous explanation for why he failed to disclose his 2001 drug use on his SCA, he failed to establish the applicability of AG ¶ 26(b). Applicant failed to mitigate the drug involvement concern.⁹

Guideline E, Personal Conduct

The security concern for Personal Conduct is set out in AG ¶ 15, as follows:

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.

I incorporate my Guideline H analysis herein and, for similar reasons, find against Applicant under Guideline E.¹⁰ Applicant's use of marijuana demonstrated poor judgment¹¹ and was contrary to his employer's drug policy.¹² Applicant's inability to

⁸ See *generally*, ISCR Case No. 10-06480 (App. Bd. Aug. 19, 2011) (four year passage of time since last use of marijuana, with the last use being a puff from a marijuana cigarette, does not mitigate drug involvement concern).

⁹ *Id.* at 3 ("The Board has previously held that use of marijuana following a pre-employment drug test and after submitting a SCA significantly undercuts an applicant's claim to have demonstrated an intent not to use drugs in the future."). See *also*, ISCR Case No. 06-18905 (App. Bd. Nov. 16, 2007) (application of AG ¶ 26(b) not warranted because, although applicant's last marijuana use occurred two and half years prior the hearing, his use of marijuana occurred while holding a security clearance).

¹⁰ ISCR Case No. 06-21537 at 5 (App. Bd. Feb. 21, 2008) ("the Directive does not provide that if conduct raises a disqualifying condition under a specific guideline, then that conduct is precluded from consideration under any other guideline. . . . The Board has held that an applicant's behavior may have security significance under more than one Guideline.").

¹¹ AG ¶¶ 16(c) and (d).

¹² AG ¶ 16(f) "violation of a written or recorded commitment made by the individual to the employer as a condition of employment."

appreciate the significance of his drug use – albeit limited as it was – and failure to keep his prior promises not to use drugs, leaves me with doubts as to his reliability, trustworthiness, and good judgment.¹³ Applicant failed to meet his burden to mitigate the personal conduct concern.

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 relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).¹⁴ I have considered all the favorable and extenuating factors in this case. Applicant has worked for his employer for the past 11 years and by all accounts is a good performer. However, this favorable evidence, as well as the other mitigating record evidence, does not outweigh the security concerns at issue.

Formal Findings

I make the following formal findings regarding the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement):	AGAINST APPLICANT
Subparagraphs 1.a – 1.c:	Against Applicant
Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	Withdrawn
Subparagraph 2.b:	Against Applicant

Conclusion

In light of the record evidence and for the foregoing reasons, it is not clearly consistent with the national interest to grant Applicant access to classified information. Applicant's request for a security clearance is denied.

Francisco Mendez
Administrative Judge

¹³ See AG ¶ 17(c). The wording of this personal conduct mitigating condition is similar to AG ¶ 26(a) and for similar reasons is inapplicable under the circumstances.

¹⁴ (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.