



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



In the matter of:

)	
)	ISCR Case No. 10-10999
)	
Applicant for Security Clearance)	

Appearances

For Government: Tovah A. Minster, Esquire, Department Counsel
For Applicant: *Pro se*

September 14, 2011

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the written record in this case, I conclude that Applicant failed to rebut or mitigate the Government's security concerns under Guideline H, Drug Involvement. His eligibility for a security clearance is denied.

Statement of Case

Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) on August 31, 2010. On June 16, 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 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) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR on June 28, 2011. With his Answer, Applicant provided additional information and requested a decision on the record in lieu of a hearing. The Government compiled its File of Relevant Material (FORM) on July 7, 2011. The FORM contained documents identified as Items 1 through 6. On July 15, 2011, DOHA forwarded a copy of the FORM to Applicant, with instructions to submit any additional information and/or objections within 30 days of receipt. Applicant received the file on July 25, 2011. His response was due on August 24, 2011. On August 3, 2011, he submitted a nine-page response to the FORM. Department Counsel did not object to the admission of Applicant's response. On August 16, 2011, the case was assigned to me for a decision. I marked Applicant's response to the FORM as Item A and entered it in the record.

Findings of Fact

The SOR contains one allegation of disqualifying conduct under Guideline H, Drug Involvement (SOR ¶ 1.a.). SOR ¶ 1.a. alleges: "You used marijuana from approximately March 2006 to at least February 2010." In his Answer to the SOR, Applicant admitted the allegation. Applicant's admission is entered as a finding of fact. (Item 1; Item 4.)

Applicant is 25 years old, never married, and has no children. He attended a university and earned a bachelor's degree in 2007 and a master's degree in 2009. Since July 2010, he has been employed as a software engineer by a government contractor. He seeks a security clearance for the first time. (Item 5.)

In August 2010, Applicant completed an e-QIP. Section 23a on the e-QIP asks the following question: "In the last 7 years, have you illegally used any controlled substance, for example, cocaine, crack cocaine, THC (marijuana, hashish, etc.), narcotics (opium, morphine, codeine, heroin, etc.), stimulants (amphetamines, speed, crystal methamphetamine, Ecstasy, ketamine, etc.), depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), steroids, inhalants (toluene, amyl nitrate, etc.), or prescription drugs (including painkillers)? Use of a controlled substance includes injecting, snorting, inhaling, swallowing, experimenting with or otherwise consuming any controlled substance." (Item 5 at 40; italics in original omitted.)

Applicant responded "Yes" to question 23a and provided additional information. He reported that he smoked marijuana five times from March 2006 until February 2010.¹

¹ On his e-QIP, Applicant reported that he was a full-time student from July 2003 until May 2006. From May 2006 until November 2007, he worked as an undergraduate research assistant at a university. From November 2007 until May 2009, he worked as a graduate research assistant at a university. From May 2009 until December 2009, he was employed full-time as a research engineer by a federal contractor, and from December 2009 until July 2010, when he accepted employment with his current employer, he was unemployed. (Item 5 at 18-23.)

Applicant was interviewed about his illegal drug use by an authorized investigator from the U.S. Office of Personnel Management (OPM) in October 2010.² In the personal subject interview, as summarized by the investigator, Applicant stated that began to use marijuana when he was a child in the fourth grade. He stated that he was a regular user of marijuana between fourth grade and seventh grade. During that time, his brother and friends provided Applicant with marijuana. Applicant's brother and his friends also provided Applicant with methamphetamine, which he smoked as a fourth grader and continued to use until seventh grade. He stated that marijuana made him feel high and humorous and methamphetamine made him feel euphoric. He did not recall that his drug use affected his behavior or his relationships at school. Applicant told the investigator that he stopped using marijuana and methamphetamine when he entered high school because he decided to be a more serious student and a more religious person. He stated that he did not resume his use of marijuana until he was a college student in 2006. (Item 6 at 4-5.)

Applicant continues to have contact with his brother and one friend with whom he used marijuana, although Applicant, his brother, and the friend live in different states and do not see one another often. He told the investigator that he smoked marijuana "because he felt free to seek the pleasure of it with no fear of addiction."³ In his answer to the SOR, he said he no longer associates with most of the individuals with whom he used illegal drugs, and he stated that he has no intention of using illegal drugs in the future. He stated that his illegal drug use occurred in another state and under circumstances he no longer endorses. With his answer to the SOR, Applicant included a signed and notarized letter of intent with automatic revocation of his clearance for any violation. Applicant's letter of intent reads:

I [Applicant] affirm that I will not abuse drugs in the future. This affirmation includes that I will not use illegal drugs, I will not misuse prescription drugs, and I will not possess, cultivate, process, manufacture, purchase, sell, or distribute drugs. I volunteer that if I violate this statement by using illegal drugs or any other way, any security clearance I possess shall be automatically revoked.

(Item 4, at 3-5; Item 6; Item A.)

Applicant's Facility Security Officer (FSO) provided a letter for the record in which she stated that on July 6, 2010, Applicant passed a drug test administered by his employer. Applicant has not received any drug counseling or treatment. He has not been diagnosed or evaluated as an abuser of drugs or dependent on drugs. (Item 4 at 6; Item 6 at 4-5.)

² On March 29, 2011, in response to DOHA interrogatories, Applicant confirmed the accuracy of the information in the investigator's report. (Item 6, 4-7.)

³ After reviewing the investigator's summary of his October 2010 interview, Applicant amended the investigator's summary by stating that he recognizes the serious risks of drug addiction. (Item 6 at 6.)

In his response to the FORM, Applicant asserted that his childhood drug use was a consequence of immaturity and peer pressure. He stated that his adult drug use was infrequent, sporadic, and not a lifestyle choice. He stated that his illegal drug use occurred in the past under circumstances that were unlikely to recur. Applicant also denied that his illegal drug use cast doubt on his current reliability, trustworthiness, and good judgment. (Item A.)

Burden of Proof

The Government has the initial burden of proving controverted facts alleged in the SOR. The responsibility then shifts to the applicant to refute, extenuate, or mitigate the Government's case. Because no one has a right to a security clearance, the applicant then bears the burden of persuasion. The "clearly consistent with the national interest" standard compels resolution of any doubt about an applicant's suitability for access to classified information in favor of protecting national security.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant an applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, the administrative judge applies these 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 applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion in obtaining 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 protect classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual’s reliability and trustworthiness 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 ¶ 24(a) defines drugs as “mood and behavior altering substances.” The definition of drugs includes “(1) drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances.” AG ¶ 24(b) defines drug abuse as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.”

Through Applicant’s admissions, the record establishes that he used marijuana, at least 5 times over a period of approximately four years, from March 2006 until at least February 2010. The record also establishes that Applicant, who is now 25 years old, used marijuana in his college years and after he began his professional career. As recently as February 2010, he continued to use marijuana. This conduct casts doubt on his reliability, trustworthiness, and good judgment. It also raises security concerns about his ability or willingness to comply with laws, rules, and regulations. I conclude that Applicant’s illegal drug use raises security concerns under AG ¶¶ 25(a) and 25(c). AG ¶ 25(a) reads: “any drug abuse [as defined at AG ¶ 24(b)].” AG ¶ 25(c) reads: “illegal drug

possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.”

Two Guideline H mitigating conditions might apply to the facts of Applicant’s case. If Applicant’s drug use happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on his current reliability, trustworthiness, or good judgment, then AG ¶ 26(a) might be applicable in mitigation. If Applicant demonstrated an intent not to abuse any drugs in the future by (1) disassociation from drug-using associates and contacts, (2) changing or avoiding the environment where drugs were used, (3) abstaining from drug use for an appropriate period, or (4) signing a statement of intent with the automatic revocation of his security clearance for any violation, then AG ¶ 26(b) might be applicable.

Applicant claims his last use of marijuana was in February 2010, approximately 1½ years ago. In October 2010, approximately one year ago, Applicant told an OPM investigator of his intent not to use illegal drugs in the future. He said he no longer associated with some of the individuals with whom he had used illegal drugs. However, he also stated that he continues to have contact with his brother and one friend with whom he used illegal drugs in the past. In his answer to the SOR, he provided a signed and notarized statement of intent with automatic revocation of his security clearance if he used illegal drugs in the future.

Applicant’s illegal drug use is recent and occurred periodically over a period of four years. He used illegal drugs as a young adult and after beginning his professional career. Insufficient time has elapsed to demonstrate whether he will carry out his intent to abstain from illegal drug use in the future. He also failed to provide documentation establishing that he had abstained from drug use for an appropriate period or that he had disassociated from those with whom he had used drugs in the past.

I conclude that AG ¶ 26(a) and AG ¶ 26(b) do not fully apply in mitigation to the facts of Applicant’s case.

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 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 raised by the written record in this case. While Applicant was candid in revealing his drug abuse when he completed his e-QIP and when he was interviewed by an OPM investigator, he failed to credibly demonstrate that he would not return to drug use in the future. Additionally, while he expressed an intent not to use illegal drugs in the future, he failed to document specific actions to demonstrate his intent. I am unable to conclude that he met his burden of persuasion in mitigating the Government's allegations under the drug involvement adjudicative guideline.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate the security concerns arising from his relatively recent involvement with illegal drugs.

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

Joan Caton Anthony
Administrative Judge