



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



In the matter of:)
)
) ISCR Case No. 11-02359
)
Applicant for Security Clearance)

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

03/27/2012

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Defense Department’s intent to deny his eligibility for a security clearance to work in the defense industry. Applicant used marijuana while holding a security clearance. Clearance is denied.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on July 13, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) explaining that it was unable to find that it is clearly consistent with the national interest to grant Applicant access to classified information. The SOR, which detailed the reasons for the action under the drug involvement guideline, recommended the case be

¹ This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

submitted to an administrative judge for a determination to revoke or deny Applicant's access to classified information.

Applicant timely answered the SOR and requested a hearing. The case was assigned to me on November 4, 2011. The hearing took place as scheduled on January 17, 2012. At hearing, Government's Exhibits (GE) 1 and 2 were admitted without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through I, which were also admitted without objection. I received the transcript (Tr.) on January 23, 2012.

Findings of Fact

Applicant is a 26-year-old employee of a federal contractor. He is not married and has no children. On his initial security clearance application in September 2007, he disclosed marijuana use in high school and college. Notwithstanding his prior drug use, Applicant was granted access to classified information in early 2008.²

In June 2009, while smoking a tobacco cigarette outside of a club, Applicant accepted and smoked a marijuana cigarette offered to him by a stranger. After the incident, Applicant debated whether to disclose the drug use to his security officer. Although he knew that using illegal drugs violated federal law and company policy, he did not believe that he was under any obligation to self-report his drug use. He consulted a pamphlet produced by his employer's security department for guidance on the issue. The pamphlet explained the importance of self-reporting conduct, albeit embarrassing or illegal, and the consequences of failing to do so. The document then listed conditions, including substance abuse and criminal conduct, that cleared personnel were required to report immediately to the security officer. Based on the literature, Applicant determined that his one-time drug use did not merit reporting because he was not a drug abuser and he never intended to use drugs again. He sought counsel from his co-workers who advised him that the drug use was "not that big of a deal" and that he was being too hard on himself. At hearing, Applicant admitted that he was ashamed and embarrassed by his conduct and was concerned about changing his supervisors' opinions of him.³

Applicant reported the conduct in June 2010 on a pre-screening questionnaire used by his employer to vet individuals being nominated for access to sensitive compartmented information (SCI). In completing the application, the facility security officer (FSO) advised Applicant to disclose any negative information that could cause him to divulge classified information. The FSO also advised Applicant to tell his supervisors about the conduct so that he could obtain a letter of compelling need in support of his SCI application. In approaching his supervisors about the letter, Applicant told them about his drug use the previous summer. He informed them that it was a one-time incident and nothing they needed to worry about. One of Applicant's supervisors

² Tr. 43-45; GE 1-2.

³ Tr. 33-34, 46,-48, 51; Answer; GE 2; AE A, G.

wrote a letter on his behalf, but did not reference Applicant's purported confession of drug use.⁴

Applicant believes that his belated disclosure shows that he is an honest and trustworthy person because the Government would not have known about his drug use but for his candor. Just as he did during his initial security clearance investigation in 2007, before his 2009 relapse, Applicant stated his intent to abstain from illegal drugs in the future.⁵

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). 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.

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." 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 protect 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 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).

⁴ Tr. 32, 38-39, 49; AE D-E.

⁵ Tr. 26, 56.

Analysis

Guideline H, Drug Involvement

The security concern related to drug involvement is explained 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 willing to comply with laws, rules, and regulations.

Under AG ¶ 25, two disqualifying conditions are applicable to this case:

- (a) any drug abuse; and
- (g) any drug abuse after being granted a security clearance.

Applicant admits using marijuana, with varying frequency, in high school and college. He also admits using marijuana after being granted a security clearance in early 2008.

None of the mitigating conditions available under AG ¶ 26⁶ apply. Although Applicant's drug use occurred over three years ago, the incident continues to reflect negatively on his security worthiness. The circumstances surrounding Applicant's drug use were banal. He was not pressured, coerced, or under duress; nor was the ingestion accidental. He made a conscious decision to use the drug, which reflects a grievous error in judgment. Given his past history of drug use, the June 2009 incident cannot be considered an aberration. Because he smoked marijuana after stating his intentions to

⁶ (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;

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

(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.

the Government that he would not do so in the future during his 2007 investigation, his renewed attestations to the same are not credible. Therefore, I cannot find that future use is unlikely to recur. He has not signed a statement of intent with automatic revocation of his security clearance for any future violation. Nor has Applicant completed a drug treatment program.

I have significant reservations about Applicant's current reliability, trustworthiness, and ability to protect classified information. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2. The inquiry regarding Applicant's security worthiness does not end with his decision to use illegal drugs after being granted access to classified information. His actions after the fact are just as revealing about his ability to protect classified information. Applicant rationalized and minimized his behavior, to relieve himself of the duty and attendant consequences of self-reporting. Applicant chose to protect his self-interest, preserving his reputation and job status, over the fiduciary duty he entered into with the Government upon being granted a security clearance. Willingness to self-report breaches of security, even at the risk of detriment to reputation and career, are essential. Applicant's behavior raises doubts about his ability to willingly self-report information that could lead to personal consequences. Although Applicant ultimately disclosed the drug use after concealing the incident for a year, he did so only after being advised to do so by his FSO.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information.⁷ Security clearance decisions are not an exact science, but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances.⁸ The government does not have to show that an applicant presents a "clear and present danger" to security before it can deny or revoke access to classified information.⁹ Indeed, the federal government need not wait until an applicant actually mishandles or fails to properly handle or safeguard classified information before it can deny or revoke access to such information.¹⁰ Direct or objective evidence of nexus is not required before the government can deny or revoke access to classified information.¹¹ All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information.¹²

⁷ *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980).

⁸ *Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988).

⁹ *Smith v. Schlesinger*, 513 F.2d 462, 476 n.48 (D.C. Cir. 1975).

¹⁰ *Adams v. Laird*, 420 F.2d 230, 238-39 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970).

¹¹ *Gayer v. Schlesinger*, 490 F.2d 740, 750 (D.C. Cir. 1973).

¹² See, e.g., ISCR Case No. 98-0188 (April 29, 1999) at p. 4.

Although Applicant uttered words of contrition, their weight was undercut by portions of his testimony and demeanor. Applicant seemed surprised that what he views as a single gaffe, a temporary lapse in judgment, should generate such a high level of scrutiny. He was unable to extrapolate the nexus between his actions and his security worthiness. Applicant's past conduct shows that he does not possess the good judgment or trustworthiness required of an individual given access to classified information. He has also shown that he will place his self-interest above that of the Government. As such, clearance is denied.

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.b:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Clearance is denied.

Nichole L. Noel
Administrative Judge