



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



In the matter of:)
)
) ISCR Case No. 11-05843
)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: *Pro se*

04/19/2012

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant abused marijuana with varying frequency from 1991 until March 2010. He also used Ecstasy between 1995 and 1997. Applicant intends no future involvement with any illegal drugs, but it is too soon to conclude with confidence that his marijuana use is not likely to recur. Clearance denied.

Statement of the Case

On October 14, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline H, Drug Involvement, why it was unable to find that it is clearly consistent with the national interest to continue his security clearance. DOHA took action 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 on September 1, 2006.

Applicant answered the SOR allegations on November 4, 2011, and he requested a decision without a hearing. On January 3, 2012, the Government submitted a File of Relevant Material (FORM) consisting of seven exhibits (Items 1-7). DOHA forwarded a copy of the FORM to Applicant and instructed him to respond within 30 days of receipt. Applicant received the FORM on January 13, 2012. He submitted a response dated February 12, 2012, which was received by DOHA on February 15, 2012. Applicant's rebuttal to the FORM was admitted into the record as Applicant exhibit (AE A) without objection. On March 23, 2012, the case was assigned to me to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Findings of Fact

The SOR alleged under Guideline H that Applicant used marijuana with varying frequency from about 1991 to March 2010 (SOR 1.a), including after he was granted a Secret security clearance around May 2008 (SOR 1.c). Applicant also allegedly used Ecstasy with varying frequency from about 1995 to 1997 (SOR 1.b). Applicant admitted the allegations, and his admissions are incorporated as findings of fact. After considering the Government's FORM, which includes Applicant's Answer to the SOR allegations (Item 3), I make the following additional findings of fact.

Applicant is a 39-year-old contracts manager with a master's degree. He has been married since November 2004, and he has two children, who are both under age ten. Applicant had five years of experience managing procurement contracts when he went to work for his present employer, a defense contractor, in January 2002. Applicant was granted a DOD Secret security clearance around May 2008. (Item 4.) He applied for an upgrade of his security clearance to Top Secret for duties involving another federal department around May 2010. He was denied eligibility for a Top Secret clearance in January 2011 because of his involvement with illegal drugs. As a result of that denial, his DOD Secret security clearance was apparently suspended. (Items 6, 7.)

Applicant began using marijuana in approximately 1991. He smoked the drug about five to ten times through 1992. While in college in 1993 and 1994, he used the drug one to three times per week. From 1995 through 2000, Applicant abused marijuana once or twice a month. Between January 2001 and March 2010, he abused marijuana about once a year while socializing with others at concerts or parties. Applicant was given the marijuana on those occasions, at times from persons he did not know. Applicant also ingested Ecstasy about five times around 1995 to 1997. (Items 5-7.) Applicant decided to stop using marijuana because "even infrequent use was not worth the complications and potential consequences related to [his] job and obtaining a clearance." Family obligations and a lack of desire to use marijuana also led him to cease his involvement. (Item 5.)

After Applicant was denied eligibility for a Top Secret security clearance for his duties with another government agency, he completed an Electronic Questionnaire for Investigations Processing (e-QIP) for the DOD on January 31, 2011, to "satisfy [an] official

requirement.” In response to question 23 concerning any illegal drug activity, Applicant responded affirmatively to whether he had illegally used any controlled substance in the last seven years, and also to whether he had ever illegally used a controlled substance while possessing a security clearance. Applicant disclosed recreational use of marijuana approximately once a year, about seven to eight times total, from January 2001 through March 2010. Applicant admitted that he had a security clearance or access authorization denied, suspended, or revoked in January 2011, although he had not yet received formal notice of the circumstances that led to the denial. (Item 4.)

On March 7, 2011, Applicant was interviewed by an authorized investigator for the DOD, in part about his illegal drug use. As reflected in the investigator’s report (Item 6) and in an affidavit executed by Applicant (Item 7), he used marijuana between January 2001 and March 2010 at parties or concerts. He was unable to provide specific dates, but named four cities wherein he used marijuana after January 2001. Applicant indicated that on each of the occasions, he obtained the marijuana from persons he did not know who were at the same parties or concerts. He maintained that he does not associate with anyone who uses drugs illegally. Applicant denied any intent to use any illegal drug in the future and any involvement ever in selling, distributing, manufacturing, or purchasing any illegal drug. Applicant further averred that his spouse was aware of his past use of marijuana. He explained that his application for a Top Secret security clearance with another federal executive department was denied in January 2011 due to his previous marijuana use. He received formal notification of the denial in February 2011, and his DOD Secret clearance was suspended automatically as a result of the denial of his Top Secret eligibility. Applicant added that the clearance denial and suspension did not change his employment status. He had committed no security violations, nor had he had any problems at work. (Items 6, 7.)

In June 2011, Applicant had an opportunity to review the investigator’s report. Applicant clarified that there were some occasions where he knew the person who had given him marijuana at parties or concerts. (Item 6.) In a separate response to interrogatories from DOHA asking whether he had ever used any non-prescribed narcotic, depressant, stimulant, hallucinogen, or cannabis, Applicant reported that he had used marijuana from about 1991 to March 2010 at specified frequencies, including one to three times weekly from 1993 to 1994. He also disclosed that he used Ecstasy five times from 1995 to 1997. Applicant indicated that he decided to cease “even infrequent use” of marijuana in March 2010. He denied that he presently possessed any illegal drug; that he currently associated with persons who use illegal drugs; or that he frequented places where he had reason to believe illegal drugs were being used. Applicant indicated that he had not sought out or received any counseling or treatment related to illegal drugs, including any treatment indicative of positive efforts on his part to refrain from illicit substance involvement. Concerning any changes in his personal or professional situation indicative of a change in his lifestyle away from illegal drugs, Applicant responded:

There have been no significant changes to my personal or professional situations that have caused me to change my lifestyle. My use over the past 10 years or so was rare, so I simply have made a conscious decision to discontinue all use. I now recognize the serious effect my past use has had

on my ability to obtain a clearance, and have decided it is no longer something that I should do, even infrequently. (Item 5.)

Applicant recognizes that even rare use of marijuana is not acceptable. Applicant attributes his “infrequent incidents” of marijuana use over the past ten years to poor decisions that were not symptomatic of a problem or drug habit that would adversely affect his ability to safeguard classified information. As of February 15, 2012, Applicant intends to refrain from any illicit substance abuse in the future and does not currently associate with known illegal drug users. (AE A.)

In rebuttal to the FORM, Applicant cited his honesty about the details of his illegal drug use “going all the way back to [his] teen years and early 20’s.” He asserted that “there has never been any doubt on the part of [his] family, friends, or colleagues about [his] dedication to [his] job or [his] loyalty to the U.S. Government.” He expressed confidence that his associates, who may have been interviewed during his background investigation, would attest to his dedication and loyalty. (AE A.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 required to be considered 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overall 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 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 the 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

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.

Under AG ¶ 24(a), drugs are defined as “mood and behavior altering substances,” and include:

- (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),¹ and
- (2) inhalants and other similar substances.

Under AG ¶ 24(b), drug abuse is defined as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.” Disqualifying condition AG ¶ 25(a), “any drug abuse,” applies because Applicant abused marijuana from 1991 to March 2010. He also ingested the synthetic illicit drug Ecstasy on five occasions sometime between 1995 and 1997, when he was in his early to middle 20s. AG ¶ 25(c), “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia,” is established only in that Applicant would have had physical possession (control) over marijuana on the occasions that he smoked it. Applicant has admitted using marijuana as frequently as one to three times a week between 1993 and 1995. His use may not have been limited solely to concerts or

¹Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act, are contained in 21 U.S.C. § 812(c).

parties at that time, although there is no evidence to the contrary. Similarly, the frequency of his abuse in the 1990s would suggest that he contributed funds for marijuana if not purchased it, but he volunteered no details about the circumstances of his illegal drug involvement before 2001. AG ¶ 25(g), “any illegal drug use after being granted a security clearance,” applies because he abused marijuana after he was granted a Secret security clearance in 2008.

Mitigating condition AG ¶ 26(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,” cannot reasonably apply to a 19-year history of marijuana abuse, even though his involvement with Ecstasy would fall within AG ¶ 26(a). Concerning AG ¶ 26(b), “a demonstrated intent not to abuse any drugs in the future,” can be shown by “(1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; or (4) a signed statement of intent with automatic revocation of clearance for any violation.” Applicant informed an authorized investigator for the DOD in March 2011, and DOHA in June 2011, that he last used marijuana in March 2010; did not intend to use any illegal drug in the future; and was not associating with anyone who uses drugs illegally. Applicant satisfies AG ¶ 26(b)(1) and ¶ 26(b)(2), although his avoidance of known drug users and places conducive to drug use does not necessarily guarantee against recurrence of future abuse. In recent years, his use of marijuana was not dependent on a certain social circle or circumstance. From 2001 until 2010, Applicant smoked marijuana at parties or concerts in several locales, apparently to be social with persons he did not always know.

As to whether AG ¶ 26(b)(4) applies, Applicant indicated in his rebuttal to the FORM that he has “**absolutely** no intention of using any illegal drug in the future,” and that he is committed to the ethical behavior required of a person with a security clearance. Yet, by using marijuana while he held a Secret clearance, Applicant raised considerable doubts about whether he can be counted on to comply with his fiduciary obligations. Applicant submits that he now recognizes the risk presented by illegal drug use for his security clearance.² Whether or not Applicant was aware of the DOD prohibition against illegal drug use, he knew or should have realized around 2008 that using marijuana was incompatible with his security responsibilities. His uncorroborated claims of abstention since March 2010 are accepted, but they are not enough to overcome a lengthy history of marijuana use, which continued after his marriage, the birth of his two children, and while he held a Secret clearance. A demonstrated track record of sustained abstinence is required before I can apply AG ¶ 26(b)(3) or fully mitigate the drug involvement concerns.

²In response to any changes in his personal or professional situation indicative of a lifestyle no longer conducive to illegal drug use, Applicant stated in June 2011, “I now recognize the serious effect my past use has had on my ability to obtain a clearance, and have decided it is no longer something that I should do, even infrequently.” (Item 5.)

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 his conduct and all relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(a).³ In making the overall commonsense determination required under AG ¶ 2(c), I have to consider Applicant's poor judgment in abusing marijuana from 1991 to March 2010. Although his use of marijuana decreased to about once a year after he started working for his present employer, he was at an age where his use of the drug can no longer be attributed to youth or immaturity.

Applicant submits that he has been fully forthright about his marijuana use, and that the Government should therefore be able to trust his promise to abstain completely from any future illegal drug activity. Applicant was granted his DOD Secret clearance around March 2008. It is unclear what the Government knew about his past drug use at that time. The e-QIP of record was submitted to "satisfy [an] official requirement" after he had been denied eligibility for a Top Secret clearance by another federal department in 2011. Presumably, his DOD Secret clearance would not have been granted in 2008 if he had failed to clearly and convincingly commit to discontinue drug use. Yet, Applicant smoked marijuana on at least one occasion, if not more, thereafter. Applicant is credited for disclosing his involvement with illicit substances, but there is a strong presumption against the grant of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Based on the facts before me and the adjudicative guidelines that I am bound to consider, for the aforesaid reasons, I am unable to conclude that it is clearly consistent with the national interest to grant or restore to Applicant the security clearance that has apparently been suspended because of his illegal drug abuse.

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
Subparagraph 1.b:	For Applicant

³The factors under AG ¶ 2(a) are as follows:

(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.

Subparagraph 1.c: 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 or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Elizabeth M. Matchinski
Administrative Judge