



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



In the matter of:)
)
) ISCR Case No. 11-07094
)
Applicant for Security Clearance)

Appearances

For Government: Caroline E. Heintzelman, Esq., Department Counsel
For Applicant: Kenneth Roberts, Esq.

06/10/2014

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke his eligibility for a security clearance to work in the defense industry. Between 1998 and 2010, Applicant used marijuana on at least six occasions. His most recent use occurred in July 2010 while he had a security clearance. Applicant failed to mitigate the drug involvement and personal conduct concerns raised by his behavior. Clearance is denied.

Statement of the Case

On December 20, 2012, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing security concerns under the drug involvement and personal conduct guidelines.¹ DOD adjudicators were unable to find that it is clearly consistent

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.

with the national interest to grant or continue Applicant's security clearance. Applicant timely answered the SOR (Answer) and initially requested an administrative determination. After receiving the file of relevant material, Applicant retained counsel and requested a hearing before an administrative judge.²

This case was initially assigned to another administrative judge in August 2013. However, the scheduling of the case was delayed because Applicant was deployed overseas until January 2014. The case was assigned to me on October 30, 2013.³ The hearing commenced on January 30, 2014, by video teleconference (VTC), but was continued to February 19, 2014 to allow the parties to cure discovery-related issues.⁴ Before the rescheduled hearing date, Applicant requested a continuance, which I granted, without objection from Department Counsel.⁵ When the hearing reconvened by VTC on March 8, 2014, I admitted Government's Exhibits (GE) 1 through 6 and Applicant's Exhibits (AE) A through H, without objection. Applicant offered the testimony of one witness before I halted the hearing because of recurring technical issues.⁶ On April 29, 2014, the hearing reconvened and Applicant completed the presentation of his case-in-chief. Applicant offered AE I, which I admitted over Department Counsel's objection. Applicant's counsel offered a written copy of his closing argument, which is appended to the record as Hearing Exhibit (HE) I. Applicant also testified. I received the completed transcript on May 12, 2014.⁷

Findings of Fact

Applicant, 32, works as a munitions technician for a federal contractor. He was initially granted a security clearance in 2001. During a 2011 reinvestigation, Applicant revealed illegal drug use. Applicant admits, as alleged in the SOR, that he used marijuana on numerous occasions in 2000, 2009, and 2010. Applicant also admits that his marijuana use in 2010 occurred while he held a security clearance.⁸

Applicant first used marijuana in 1998 while he was still in high school. In 2000, Applicant went to college on a baseball scholarship. He used the drug at least two more times at parties. After testing positive for marijuana on a urinalysis test ordered by his coach, Applicant was dismissed from the team and lost his scholarship. As a result, Applicant could not afford to continue his education and had to leave school. Applicant's drug use and the resulting loss of his scholarship caused a rift with his parents and they

² Notice of Appearance, dated July 19, 2013.

³ The correspondence related to the scheduling of the case can be found in the correspondence folder of the case file.

⁴ January 30, 2014 Transcript (TR1).

⁵ Continuance request, dated February 12, 2014.

⁶ March 18, 2014 Transcript (TR2).

⁷ April 29, 2014 Transcript (TR3).

⁸ GE 1, GE 6, Answer.

kicked him out of the house. During his case-in-chief, Applicant testified that he only used marijuana once at a college party. He also testified that he enlisted in the Air Force after high school. He did not reveal the events leading up to his decision to enlist.⁹

Applicant served eight years in the Air Force and was honorably discharged in January 2009. After leaving active duty, Applicant struggled to find employment and accepted a position with a national retail chain and eventually moved on to a position with a private security company. Applicant testified that he used marijuana again on at least two occasions in 2009, while he believed his security clearance was inactive. Applicant began working his current position in July 2009 and soon began deploying to locations overseas. In between deployments in July 2010, Applicant used marijuana again. According to Applicant, the circumstances of his 2009 and July 2010 marijuana use were similar. Each incident of use occurred at house parties with individuals he did not know very well and with whom he no longer associates. According to the record, Applicant's July 2010 drug use occurred at a party thrown by his sister-in-law at her home to celebrate Applicant's recent marriage to her sister. The party was attended by family members and close friends.¹⁰

When completing his security clearance application in March 2011, Applicant reviewed the questions about past drug use and approached his supervisor for advice. Applicant confessed his past marijuana to his supervisor and asked what he should disclose on the form. Applicant heeded his supervisor's advice to tell the truth and disclosed his illegal drug use as required. In preparation for the hearing, Applicant underwent a substance abuse evaluation. The evaluator, a certified rehabilitation counselor and a licensed alcohol and drug counselor, opined that Applicant exhibited a low risk of substance abuse issues.¹¹

Applicant testified that he regrets each instance of his past drug use. On each occasion, he claims that his judgment was impaired by alcohol consumption. Although he continues to consume alcohol, Applicant promises not to use illegal drugs in the future.¹²

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.

⁹ TR3. at 8, 25, 44-46, 59-62; GE 3-4.

¹⁰ TR3. at 25-28, 51-53, 59-62; GE 5.

¹¹ TR3. at 38-39, 42-43; AE A.

¹² GE 4, AE A.

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).

Analysis

Applicant’s conduct is disqualifying under the drug involvement and personal conduct guidelines. Use of an illegal drug raises concerns about a person’s ability or willing to comply with laws, rules, and regulations.¹³ Applicant admitted disqualifying conduct under the drug involvement guideline; specifically, having a history of illegal drug use¹⁴ and using illegal drugs after being granted a security clearance.¹⁵ Under the personal conduct guideline, the decision to use illegal drugs suggests questionable judgment, which raises additional concerns about an individual’s reliability, trustworthiness, and ability to protect classified information.¹⁶ Applicant’s use of illegal drug is disqualifying under the personal conduct guideline because his conduct supports a whole-person assessment of questionable judgment, untrustworthiness, reliability, lack of candor, and an unwillingness to comply with rules and regulations, or other characteristics indicating that he may not properly safeguard classified information.¹⁷ None of the mitigating conditions available under either guideline apply.

¹³ AG ¶ 24.

¹⁴ AG ¶ 25(a).

¹⁵ AG ¶ 25(g).

¹⁶ AG ¶ 15.

¹⁷ AG ¶ 16(c).

Applicant's illegal drug use is not mitigated by its infrequent nature or the passage of time. Nor can his use, at least six times between 1998 and 2010, be considered isolated incidences. Applicant's use of illegal drugs did not occur under unusual circumstances, each use occurred in a social setting. The record does not contain any evidence to indicate that Applicant's use of illegal drugs was caused by substance dependence or abuse issues, emotional or physical problems, or any form of duress. Applicant has expressed his intent not to use drugs in the future. However, Applicant has not presented anything to guarantee this statement, such as a signed a statement of intent with automatic revocation for any future violations – an option suggested among the drug involvement mitigating conditions. Furthermore, his promises to abstain from illegal drug use are undercut by his testimony and the record evidence. During the hearing Applicant provided inconsistent testimony about the circumstances of his illegal drug use. Throughout his testimony, he offered a whitewashed version of events, eliminating the more unfavorable aspects of his conduct until confronted on cross-examination.

Applicant chose to use illegal drugs and his decision to do so continues to reflect negatively on his current security worthiness. At 18 years old, Applicant experienced devastating consequences after using marijuana. He endured the embarrassment of being dismissed from his college baseball team, he lost his scholarship and was forced to withdraw from college, all culminating in a rift in the relationship with his parents. Given this experience, Applicant's decision to use illegal drugs again, especially after being granted a security clearance, cannot be considered a minor lapse in judgment, but a pattern of behavior that indicates and unwilling to follow rules and regulations.

Applicant argues that the mistakes he has made in his personal life should not be used as the basis for revoking his security clearance because he has performed his professional duties with honor, dependability, and trustworthiness.¹⁸ Applicant believes that self-reporting his misconduct shows that he continues to be worthy of the government's trust. However, security clearance decisions are not limited to conduct during duty hours;¹⁹ off-duty conduct, especially where it reflects poor judgment, provides a rational basis for the government to question an applicant's security worthiness.²⁰ Furthermore, Applicant's eventual self-reporting of his illegal drug use does not change the security significance of the underlying conduct. Here, Applicant engaged in an activity he knew to be in direct contravention of federal law and his responsibilities as an individual holding a security clearance. His behavior showed a disregard for the law, regulations, and the fiduciary relationship he voluntarily entered into with the Government when he was granted access to classified information.

¹⁸ AE A.

¹⁹ See, e.g., ISCR Case No. 98-0620 at 3 (App. Bd. Jun. 22, 1999).

²⁰ See, e.g., *Cole v. Young*, 351 U.S. 536, 550 n.13 (1956); *Croft v. Department of Air Force*, 40 M.S.P.R. 320, 321 n.1 (1989).

Based on the record, I have doubts about Applicant's judgment and trustworthiness. I have also considered the whole-person factors at AG ¶ 2. The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information.²¹ Applicant has demonstrated a serious lack of judgment in his repeated decision to use illegal drugs. He has not met his burden of production or persuasion to mitigate the alleged security concerns. 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, Drug Involvement:	Against Applicant
Subparagraphs 1.a – 1.b:	Against Applicant
Paragraph 2, Personal Conduct:	Against Applicant
Subparagraph 2.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. Clearance is denied.

Nichole L. Noel
Administrative Judge

²¹ *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980).