



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 11-07492
)	
Applicant for Security Clearance)	

Appearances

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

11/28/2012

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant did not falsify his security clearance application, as he fully disclosed his involvement with marijuana on his application and during the course of the ensuing background investigation. However, in light of his 12-year history of frequent marijuana use, which only ended in late 2010, the past two years of abstinence is insufficient to dispel the security concerns raised by his past drug use. Clearance is denied.

Statement of the Case

On June 15, 2012, the Defense Office of Hearings and Appeals (DOHA) sent Applicant a Statement of Reasons (SOR), setting out security concerns under Guideline H (Illegal Drug Involvement) and Guideline E (Personal Conduct).¹ On July 5, 2012, Applicant answered the SOR and requested a decision based on the written record.

¹ DOHA took this action under Executive Order (EO) 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.

On September 18, 2012, Department Counsel's File of Relevant Material (FORM) was forwarded to Applicant.² DOHA received Applicant's Response on October 15, 2012, and the file was forwarded to the Hearing Office on November 13, 2012.

SOR Amendment

The SOR alleges in ¶ 1.a: "You have used marijuana, with varying frequency, from about September 1998 to at least November 2010. *Upon completion of community service, this charge was dismissed in June 2002.*" (emphasis added) The SOR further alleges in ¶ 1.c: "In about October 1999, you were charged with Possession of Marijuana in or near (z location)." Applicant admitted both allegations and neither side moved to amend the SOR to correct the allegations. Pursuant to Directive, Enclosure 3, ¶ E3.1.17, the SOR is hereby amended by striking the last sentence in ¶ 1.a and adding said sentence to the end of ¶ 1.c.³

Findings of Fact

Applicant is 32 years old. His wife recently gave birth to their first child. He is employed in the information technology field and has provided cyber security training to foreign law enforcement agencies and other entities around the globe. He is seeking a security clearance to help bolster the nation's cyber security.⁴

Applicant used marijuana on a frequent basis from about September 1998 to late 2010. His illegal drug involvement led to his arrest and conviction in 1999 on a misdemeanor charge of marijuana possession. He was sentenced to community service and, after completing the community service, the charge was dismissed. Applicant stopped using marijuana because of health concerns and, with the arrival of his first child, his perspective on the use of marijuana changed.⁵ However, Applicant admits he would consider using marijuana in the future if he were diagnosed with a terminal illness. Applicant caveats this statement by noting that under no circumstances would he use marijuana if he were ever granted access to classified information.⁶

Applicant disclosed his involvement with marijuana, including his 1999 marijuana conviction, on his security clearance application (SCA) that he submitted in January 2011.⁷ During the ensuing background investigation, Applicant provided higher

² The FORM contains the Government's argument and eight documentary exhibits. Government Exhibits (GE) 1 through 6 are hereby admitted into the record. GE 7 and 8 are not admitted as they are cumulative with GE 6 and provide no additional, relevant information.

³ The alleged location has been omitted to further protect Applicant's identity and privacy.

⁴ GE 3 at 5, 33-34; GE 4, Q. 6; Response.

⁵ GE 2 – GE 6.

⁶ GE 2; GE 4; Response.

⁷ GE 3 at 37-38.

estimates of the amount of marijuana he had used during that 12 year time frame than he had previously provided on his SCA.⁸ Applicant explained that the higher estimates he provided were simply estimates, and at no time did he attempt to hide from the Government his past marijuana use or the fact that he had used it on a frequent basis.⁹

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 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 Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, an 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." Directive ¶ E3.1.15. An applicant has the ultimate burden of persuasion to obtain a favorable security decision. In resolving this ultimate question, an administrative judge must resolve "[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security." AG ¶ 2(b).

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. Decisions regarding an applicant's suitability 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.

⁸ Compare GE 3 at 38 [From approximately 9/98 to 11/10 "I have smoked marijuana on and off since college (up to a few times per month)"], with, GE 4, *Subject Interview* ("From 9/98-11/10 the subject has used marijuana approximately 3-4 times per month") and GE 4, *Interrogatory Responses*, Q. 1 (from approximately 9/98 to 11/10, used marijuana on average 3-4 times per week).

⁹ GE 2; Response.

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.

Applicant's illegal drug involvement from 1998 to late 2010 raises the above concern and the following disqualifying conditions under AG ¶ 25:

- (a) any drug abuse; and
- (b) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

AG ¶ 26 sets forth a number of conditions that could mitigate the Guideline H concern. The following mitigating conditions were potentially raised by the evidence:

- (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 . . .

Applicant no longer associates with those he was arrested with in 1999 and writes that he has matured greatly with the birth of his child. Although I do not question Applicant's sincerity, his last use of marijuana occurred just two months before he submitted his SCA. At this point, only two years have passed since his last use of marijuana. In light of Applicant's extensive use of marijuana over a 12-year time span, this recent period of abstinence and other favorable record evidence is insufficient to establish AG ¶ 25(a) or (b). Applicant's past drug use remains a concern.

Guideline E, Personal Conduct

The personal conduct concern is set forth at AG ¶ 15:

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.

The SOR alleges that Applicant deliberately falsified his SCA when he estimated that he had used marijuana “up to few times a month from September 1998 to November 2010,” rather than his later estimate of three to four times weekly. This allegation raises the applicability of disqualifying condition AG ¶ 16(a).¹⁰

The security clearance process is contingent upon the honesty of all applicants. It begins with the answers provided in the SCA. An applicant should disclose any potential derogatory information. However, the omission of material, adverse information standing alone is not enough to establish that an applicant intentionally falsified. Instead, an administrative judge must examine the facts and circumstances surrounding the omission to determine an applicant’s true intent.¹¹

Applicant did not falsify his SCA. He not only voluntarily provided the adverse information about his drug use that forms the basis of the drug involvement concern, but also disclosed other relevant information on his SCA, to include providing detailed information about his cyber security work for foreign governments. Furthermore, Applicant has been fully upfront and cooperative throughout his background investigation. His estimates regarding the amount of marijuana he used during a 12-year time span in his SCA, during his background interview, and then in response to DOHA interrogatories, were nothing more than estimates based on his own faulty memory and assumptions. The material, adverse information that placed the Government on notice of a potential concern was the fact that Applicant had frequently used marijuana from 2008 to late 2010, as disclosed in his SCA and alleged in SOR ¶ 1.a; not the estimates of such use that Applicant tried to discern years later. Applicant’s estimates increased to provide the Government the high end, worst case scenario regarding the extent of his past drug use in order to allow the Government to make an informed decision as to his suitability. An individual who intends to hide or mislead the Government about his past drug involvement would not have been as forthcoming. Applicant’s sincerity did not falter even after he was made aware of the Government’s concern regarding his past drug use. He did not backtrack from his prior statements regarding his frequent marijuana use and freely admits he would consider using marijuana again if he were diagnosed with a terminal illness. Again, an individual who seeks to deceive or mislead would not be so candid. Accordingly, the personal conduct concern is decided in Applicant’s favor.

¹⁰ Deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

¹¹ See *generally* ISCR Case No. 02-12586 (App. Bd. Jan. 25, 2005); ISCR Case No. 02-15935 (Appl. Bd. Oct. 15, 2003).

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).¹² I considered the favorable and extenuating factors in this case, including Applicant's employment record, his honesty throughout the security clearance process, and how he has matured with the birth of his child. However, this favorable evidence does not fully mitigate the concerns raised by his past drug use. Hopefully, Applicant will continue to abstain from illegal drug use and be able to establish his suitability for a clearance in the near future.

Formal Findings

I make the following formal findings regarding the SOR allegations:

Paragraph 1, Guideline H (Drug Involvement)	AGAINST APPLICANT
Subparagraph 1.a :	Against Applicant
Subparagraph 1.b:	For Applicant ¹³
Subparagraphs 1.c & 1.d:	Against Applicant
Paragraph 2, Guideline E (Personal Conduct)	FOR APPLICANT
Subparagraph 1.a:	For 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

¹² The adjudicative factors are: (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.

¹³ SOR ¶ 1.b alleges the purchase of marijuana that Applicant later used, which is duplicative of the disqualifying conduct alleged in ¶ 1.a. The allegations are merged and ¶ 1.b is decided for Applicant.