



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



In the matter of:)
)
 REDACTED) ISCR Case No. 11-07807
)
 Applicant for Security Clearance)

Appearances

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

08/10/2012

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant failed to mitigate the Personal Conduct concern. He used marijuana on two separate occasions in the past four years while possessing a security clearance. He failed to demonstrate that he will not engage in similar questionable conduct in the future. Clearance is denied.

Procedural History

On May 11, 2012, the Defense Office of Hearings and Appeals (DOHA) sent Applicant a Statement of Reasons (SOR), setting out security concerns under Guideline E (Personal Conduct).¹ On May 30, 2012, Applicant answered the SOR and requested a hearing before a DOHA Administrative Judge.

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 June 27, 2012, Department Counsel indicated the Government was ready to proceed with a hearing. I was assigned the case on July 2, 2012 and, after coordinating with the parties, scheduled the hearing for July 26, 2012. At hearing, Department Counsel offered Government Exhibits (GE) 1 – 3, which were admitted without objection. Applicant testified and submitted a character reference from his employer, which was admitted as Applicant's Exhibit (AE) A. He subsequently submitted AE B – D, which were also admitted.² The transcript was received on August 2, 2012.

Findings of Fact

Applicant is 46 years old. He is an avid cyclist and runner, and involved in a number of charitable endeavors. He has been married for 17 years and has lived at the same address for nearly a decade. He was granted a bachelor's degree from a prestigious university in 1997. He has been working as an independent contractor for his current employer since December 2001. Applicant's employer describes him as "resourceful, reliable, and trustworthy." (Tr. at 19-20, 23-25, 28; GE 1; AE A - D)

Applicant served in the U.S. Navy in the mid-1980s. He deployed on several occasions in support of U.S. operations, and was granted access to classified information in approximately 1985. This initial period of access to classified information terminated upon Applicant's honorable discharge from the Navy in about 1988. (Tr. at 24-27, 34-35; GE 2; AE C)

Applicant reapplied for a security clearance in 2005. He submitted a security clearance application (SCA) and disclosed therein that he had used marijuana once in 2003. He explained that he and his wife shared a marijuana cigarette that had been left at their home by a guest after a birthday party. Applicant testified that during the subsequent background investigation he may have promised to not use illegal drugs in the future. He was then granted a clearance in 2006. (Tr. at 21-22, 27-30, 33-35; GE 2)

Applicant submitted his most recent SCA in 2011. He disclosed that he had again used marijuana. His recent uses occurred in 2008 and 2010. (GE 1) Applicant explained that his 2008 use took place while on vacation, when an older couple he had never met before offered him a marijuana cigarette. He "felt silly or embarrassed saying no," and shared the marijuana cigarette with the older couple in the back seat of their car. (Answer; Tr. at 20, 30) His 2010 use took place at home, on a weekend evening, when he had no plans to go anywhere. He was listening to classic rock and decided to use a marijuana cigarette that had been left at his home by a "friend of a friend," because "that just seemed like the thing to do."³ (Tr. at 21-22, 31-32; Answer)

Applicant understood when he used marijuana in 2008 and 2010 that such use was inconsistent with the standards expected of those possessing a security clearance. (Tr. at 33) His decision to use marijuana on these occasions "were lapses in judgment

² See Hearing Exhibits 1 and 2 for a listing of the parties' exhibits.

³ Applicant "was listening to Pink Floyd's 'Dark Side of the Moon'." (Tr. at 22)

or not thinking things through all the way.” (Tr. at 19) Applicant is clearly remorseful for his conduct and has “no intentions to do anything like this in the future.” (Answer; Tr. at 19, 22, 35)

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. 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline E, Personal Conduct

The personal conduct security concern is set forth in 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.

Applicant's use of marijuana after being granted a security clearance raises this concern because it calls into question his judgment and willingness to comply with rules and regulations.⁴ It also establishes disqualifying condition AG ¶ 16(c).⁵

Applicant failed to meet his burden to mitigate the personal conduct concern. Although the adverse information regarding his drug use was voluntarily disclosed, such candor is insufficient to mitigate the significant security concerns raised by his poor judgment to use marijuana while possessing a security clearance. Applicant's drug use did not take place under a unique set of circumstances, nor is he a young individual whose conduct could be attributed to mere experimentation. For instance, the 2008 drug use occurred when Applicant, who was 42 years old at the time, was on vacation and a stranger offered him marijuana. An individual, with Applicant's background, is expected under such circumstances to *at a minimum* decline the opportunity offered by a stranger to engage in illegal conduct. Furthermore, one would not expect an individual in Applicant's shoes to engage in illicit drug use simply because they are at home alone. Under the circumstances, Applicant's illicit drug use, although infrequent, leaves me to conclude that similar questionable conduct may recur. Applicant's past conduct leaves me to question whether he has the requisite reliability, trustworthiness, and good judgment required of those granted access to classified information.⁶

⁴ Although Applicant's recent use of marijuana while possessing a security clearance is the conduct that raises a heightened concern, his 2003 use of marijuana also calls into question his willingness to comply with rules and regulations. By itself, the 2003 use may have been mitigated by the passage of time. However, Applicant's 2003 use of marijuana, together with his recent uses, calls into question his judgment and willingness to comply with rules and regulations.

⁵ Credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not safeguard protected information.

⁶ I considered all the mitigating conditions listed under AG ¶ 17, but Applicant failed to establish the applicability of any of the conditions listed thereunder. I specifically found that AG ¶ 17(c) does not apply. See AG ¶17(c): "the offense is so minor, or so much time has passed, or the behavior is so

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).⁷ I gave due consideration to all the favorable and extenuating factors in this case, including Applicant's military service and years of safeguarding classified information. However, this favorable evidence, as well as the other mitigating record evidence, does not outweigh the security concerns at issue.⁸ Security clearance adjudications are by their very nature predictive judgments, where an applicant's past history is the best indicator of future conduct. Applicant's past conduct leaves me with doubts as to his judgment and suitability.

Formal Findings

I make the following formal findings regarding the allegations in the SOR:

Paragraph 1, Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraphs 1.a – 1.d: Against 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. Accordingly, Applicant's request for a security clearance is denied.

Francisco Mendez
Administrative Judge

infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment."

⁷ The non-exhaustive list of 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.

⁸ ISCR Case No. 11-02087 at 3 (App. Bd. Mar. 20, 2012) ("[e]ven years of safeguarding national security information may not be sufficient to mitigate" security concern raised by an applicant's conduct); ISCR Case No. 10-02803 at 6 (App. Bd. Mar. 19, 2012) ("Applicant's documented service to the country was record evidence which the Judge had to consider," but on its own may not be sufficient to overcome concerns raised about an applicant's judgment and reliability).