



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



In the matter of:)
)
 REDACTED) ISCR Case No. 11-08744
)
 Applicant for Security Clearance)

Appearances

For Government: Pamela Benson, Esq., Department Counsel
For Applicant: *Pro se*

04/29/2013

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant failed to mitigate the security concerns arising from his positive drug test for marijuana. He claims the positive result was caused by his passive inhalation of second-hand marijuana smoke. He did not submit any evidence to corroborate his story. His use of marijuana while possessing a security clearance and failure to take responsibility for his illegal drug use raise doubts about his current reliability, trustworthiness, and good judgment. Clearance is denied.

Statement of the Case

On September 25, 2012, the Department of Defense (DoD), in accordance with DoD Directive 5220.6, as amended (Directive), issued Applicant a Statement of Reasons (SOR), alleging security concerns under Guideline H (Drug Involvement). Applicant answered the SOR, waived his right to a hearing, and requested a decision on the written record.

On February 3, 2013, Department Counsel's file of relevant material (FORM) was sent to Applicant. The FORM contains the Government's proposed findings of facts, argument, and eight documentary exhibits. Applicant did not object to Government

Exhibits (Gx.) 1 through 8, and they are hereby admitted. Applicant's responded to the FORM (Response) and submitted a letter from his employer, dated March 12, 2013, which was marked and admitted without objection as Applicant's Exhibit (Ax.) A. Applicant's case was assigned to me on April 23, 2013.

Findings of Fact

Applicant is 33 years old, single, with no children. He served in the U.S. military from 1997 to 2001, and received an honorable discharge. He first received a security clearance in about 1996, and maintained it while in the military. He earned an associate's degree in 2003. (Gx. 5)

Applicant has been working for his current employer since November 2010. He passed a pre-employment drug screen prior to starting his job and submitted a security clearance application shortly thereafter. He was granted a security clearance in December 2010. (Gx. 5; Gx. 7; Ax. A.)

In February 2011, Applicant failed a random drug test that was administered by his employer. The drug test indicated Applicant had used marijuana. Applicant was suspended from his work for two and half weeks, and was referred to his company's employee assistance program (EAP) for assessment and treatment. His follow-up drug tests have been negative for the presence of illicit drugs and his EAP counselor indicated no additional treatment was required. He signed a "last chance agreement" with his employer. (Ax. A; Gx. 6) He did not submit a copy of this agreement.

Applicant denies he ever used illicit drugs, to include marijuana. He claims that the positive drug test result was caused by his passive inhalation of marijuana, which was being regularly used by his sister and her boyfriend who he had been living with since 2009. (Gx. 5 at 10; Gx. 6; Gx. 7) He claims that the night before the drug test he was "in a small and confined room with second hand [marijuana] smoke for over two hours." (Gx. 6, Subject Interview at 1) He moved out of his sister's house in about June 2011. (Gx. 6) He did not submit any evidence to support his claim that his passive inhalation of second-hand smoke caused the positive drug test.¹

In his Response, Applicant states that "this was a onetime occurrence that will not be repeated at any time." However, he continues to maintain that his positive drug test was caused by his innocent, passive inhalation of second-hand marijuana smoke that was being used by his sister and her boyfriend. (Response; Answer)

¹ *But see*, Gx. 8 (summary of scientific journals discounting the possibility of passive inhalation of second-hand marijuana smoke causing a positive drug test).

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are only eligible for access to classified information “only upon a finding that it is clearly consistent with the national interest” to authorize such access. Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry*, § 2 (Feb. 20, 1960), as amended.

When evaluating an applicant’s eligibility, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a common sense manner, considering all available and reliable information, in arriving at a fair and impartial 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 establish their eligibility.

In resolving the ultimate question regarding an applicant’s eligibility, 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). Moreover, “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531. Furthermore, “[o]nce a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance.” ISCR Case No. 07-16511 at 3 (App. Bd. Dec. 4, 2009) (citing *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991)).

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. 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 an 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.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” E.O. 10865 § 7. Thus, a decision to deny a security clearance amounts to a finding that an applicant, at the time the decision was rendered, did not meet the strict guidelines established for determining eligibility for access to classified information.

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.

The drug involvement guideline notes several disqualifying conditions that could raise a security concern under AG ¶ 25. The following warrant discussion:

- (a) any drug abuse;
- (b) testing positive for illegal drug use; and
- (g) any illegal drug use after being granted a security clearance.

Applicant's positive drug test establishes by substantial evidence that he used marijuana while possessing a security clearance. Applicant did not submit any evidence to corroborate his story that the positive drug test result was caused by his passive inhalation of second-hand marijuana smoke. He did not even submit a statement from his sister to corroborate his version of events. He also did not submit any evidence to suggest that the drug test was flawed or incorrect. In light of the lack of credible evidence contradicting the drug test result and drawing all reasonable inferences from said drug test result, I find that AG ¶¶ 25 (a), (b), and (g) apply.²

I also find that none of the mitigating conditions listed under AG ¶ 26 apply. Although Applicant's drug use occurred two years ago and he completed drug treatment through the EAP, his refusal to accept responsibility for his illicit drug use leaves me to question the effectiveness of such treatment and leads me to conclude that there is a likelihood of recurrence of illegal drug use. Consequently, Applicant's past drug use continues to cast doubt on his current reliability, trustworthiness, and good judgment.

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).³ I considered Applicant's military service and his

² SOR ¶¶ 1.a and 1.b allege Applicant's failed drug test and, thus, ¶ 1.a is decided for Applicant.

³ The non-exhaustive list of adjudicative factors are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the

handling of classified information without issue while in the military and as a federal contractor. He also signed a last chance letter with his employer and his recent drug screens have been negative for the presence of illegal drugs. However, these favorable whole-person factors do not mitigate the significant security concerns raised by his past drug use and refusal to accept responsibility for his conduct. Applicant was 31 years old when he decided to use marijuana. He used marijuana after starting employment as a federal contractor, undergoing a pre-employment drug test, and submitting a security clearance application, all of which should have put him on notice that illegal drug involvement was prohibited. Furthermore, he was quite aware of the requirement of those granted access to classified information to not use illegal drugs from his years of holding a security clearance while in the military, but he decided to use anyway. Even if his farfetched story were true, i.e., that his positive drug test was due to him passively inhaling marijuana smoke in a small, confined room for over two hours while his sister and her boyfriend used marijuana, his decision to remain in such a drug-infested environment calls into question his judgment.

After weighing the disqualifying and mitigating conditions, and evaluating all the evidence in the context of the whole person, I conclude Applicant did not mitigate the drug involvement concerns. Overall, the record evidence leaves me with doubts about Applicant's continued eligibility for access to classified information.

Formal Findings

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

| | |
|--|-------------------|
| Paragraph 1, Guideline H (Drug Involvement): | AGAINST APPLICANT |
| Subparagraph 1.a: | For Applicant |
| Subparagraph 1.b: | 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 continued access to classified information. Applicant's request for a security clearance is denied.

Francisco Mendez
Administrative Judge

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.