



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



In the matter of:)
)
-----) ISCR Case No. 07-07619
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Ray T. Blank, Jr., Esquire, Department Counsel
For Applicant: *Pro Se*

June 26, 2008

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on April 20, 2006. On March 11, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline H and Guideline E that provide the bases for its decision to deny Applicant access to classified information. The action was taken 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on March 17, 2008. He answered the SOR in writing on March 31, 2008, and requested a decision without a hearing. On April 24, 2008, the government submitted a File of Relevant Material (FORM) consisting of five exhibits (Items 1-5). DOHA forwarded a copy of the FORM to Applicant and

instructed him to respond within 30 days of receipt. On May 23, 2008, Applicant submitted his rebuttal to the FORM consisting of his statement (Ex. A), to which the government did not object. On June 9, 2008, 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. Based on a review of the government's FORM and Applicant's response, eligibility for access to classified information is denied.

Findings of Fact

DOHA submits under Guideline H, drug involvement, that Applicant used LSD 50 times, "mushrooms,"¹ mescaline, and cocaine three times each, and ecstasy two or three times from approximately 1967 to 1971 (SOR ¶ 1.a); that he used marijuana from 1967 to June 2006 (SOR ¶ 1.b); and that he indicated during a January 31, 2007, interview with a Department of Defense investigator that while he had no definite plans to use marijuana in the future, he expected to continue his current pattern of use one to two times per year (SOR ¶ 1.c). Under Guideline E, personal conduct, Applicant was alleged to have used marijuana in June 2006 after he had submitted his security clearance application (SOR ¶ 2.a). Applicant admitted the allegations with explanation while expressing his disagreement with any suggestion of concern about his personal candor. After consideration of the evidence of record, I make the following findings of fact.

Applicant is a 55-year-old cavity production manager, who has worked for his current employer, a defense contractor, since September 1999 (Item 4). The available record does not show that he has ever held a security clearance.

Applicant began using marijuana on a daily basis with small groups of friends when he was 14 years of age, and he continued that abuse through high school. He purchased marijuana from friends at school about once a month. During that same period, from about 1967 to 1971, Applicant "in the spirit of exploration or self-discovery" (Item 2) also used other illegal drugs with small groups of friends: LSD about 50 times, most of it before 1969; psilocybin mushrooms approximately three times; mescaline also about three times; cocaine two to three times; and "a chemical precursor" to the synthetic drug ecstasy once. He obtained these drugs from school acquaintances. (Item 5).

After 1971, his illicit drug involvement was limited to marijuana. He reduced the frequency of his abuse of marijuana and had stopped using other drugs "in the context of a culture in which everyone around [him] was continuing to use psychedelics and were using marijuana several times a day." Applicant used marijuana about ten times per year until fall 1980 when he went to college full time. For the first year or so he continued his involvement with the drug once or twice a year, and refrained from any use of marijuana between 1982 and 1984. He resumed using marijuana, no more than

¹Presumably, the government meant hallucinogenic mushrooms or psilocybin.

once or twice per year and usually when on fishing trips with a certain group of friends, with a latest use in June 2006 (Items 2, 5).

In June 1984, Applicant went to work as a cathode operations manager at his present work location. In December 1987, Applicant married his spouse. From July 1997 to September 1999, Applicant was employed as a senior process engineer for a commercial company. Applicant and his employer had mutual disagreements about the methodologies for solving problems or time management for hourly wage personnel, and Applicant left the job at the request of his direct manager. In September 1999, he assumed his present employment. On April 20, 2006, Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) that was entered into the e-QIP system electronically. He certified that his statements on the Questionnaire for National Security Positions (SF 86 Format) were "true, complete, and correct to the best of [his] knowledge and belief and [were] made in good faith." (Item 4). A printed form of the completed e-QIP was not included in the file for review.

A Questionnaire for Sensitive Positions (SF 86) was prepared and then printed out on April 27, 2006, with a "YES" response to question 24A, "LAST 7 YRS, ILLEGAL DRUG USE?" and indicating use of marijuana seven times from April 1999 to June 2005. Item 4 of the FORM includes the SF 86 with Applicant's signature forms from the e-QIP attached. There is no information of record as to how the signature forms for the e-QIP came to be attached to the SF 86, which does not contain a signature block.

On January 31, 2007, Applicant was interviewed by an Office of Personnel Management (OPM) investigator for the Department of Defense about his drug use. Applicant detailed his history of illegal drug use, including his involvement with marijuana once or twice per year since he was 30 (1983) to a latest use in June 2006. When asked about his future intentions, Applicant had no definite plans but expected to continue to use the drug moderately, in his current pattern. Applicant indicated that his spouse, mother, friends, and one coworker are aware that he had used drugs other than marijuana in the past. His use of psychedelic drugs was at a time and place where they were widely used, and generally more accepted than at present. The thinking at the time was that psychedelic drugs in particular could expand one's consciousness, and he used them primarily for that purpose. He averred he was "long disillusioned" from that way of thinking and denied any intent to use any illegal drug other than marijuana in the future (Item 5). Marijuana use fostered for him "a quiet introspective view of life once in a while." He did not view it as something illegal and thought that as long as he was totally honest with the Department of Defense about his intentions, it would address the primary concerns of the defense community (Item 2).

As of March 2008, Applicant denies any intent to use any illegal drug in the future. He now realizes that any expressed intent to use marijuana in the future is "an impediment to holding a security clearance." (Item 2).

Policies

When evaluating an Applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 overarching adjudicative goal is a fair, impartial and common sense 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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 as to obtaining 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 or 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.” Applicant began using illegal drugs with friends when he was only 14. He tried psilocybin, mescaline, and cocaine three times each, and an ecstasy equivalent two to three times. He also ingested LSD about 50 times and used marijuana daily. He purchased marijuana once a month. His drug abuse after 1971 was limited to marijuana. Applicant used it about ten times per year until fall 1980 when he went to college full time. For the first year or so, he continued his involvement with the drug once or twice a year, and refrained from any use of marijuana between 1982 and 1984. He resumed using marijuana, no more than once or twice per year, until June 2006. Disqualifying conditions AG ¶ 25(a), “any drug abuse,” and AG ¶ 25(c), “illegal drug possession, including cultivation, processing, manufacture, purchase, sale or distribution; or possession of drug paraphernalia,” are clearly pertinent to an assessment of his security suitability.

The government also argues persuasively for consideration of AG ¶ 25(h), “expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.” During his subject interview of January 2007, Applicant expressed no definite plan to use marijuana in the future, but also his expectation that he would continue to use the drug in its current pattern, which was once or twice a year.

In contrast, Applicant expressed an unequivocal denial of any intent to resume involvement with other dangerous controlled substances. While his LSD use was extensive even for a time and place historically given to experimentation with mind-altering drugs, there has been no recurrence of any drug use apart from marijuana since 1971. Yet, 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 apply in mitigation. His abuses of LSD, psilocybin, mescaline, cocaine, and the ecstasy equivalent are part of his long history of illegal drug involvement and cannot be assessed separately from his marijuana abuse. Applicant’s marijuana use continued until at least June 2006, which is considered relatively recent given that he used marijuana throughout most of his adult life, albeit with limited frequency.

Since receiving the SOR, Applicant has forsworn any future marijuana involvement as well. His record of candor concerning his past drug use and future intentions leads me to find him credible when he states that he has no intention of using any illegal drug after being granted a clearance. The salient issue is whether he will be able to abide by this very recent resolve to abstain from a drug that for him “fostered a

quiet introspective view of life” for so many years. AG ¶ 26(b) provides some of the factors that demonstrate an intent not to abuse any drugs. In recent years, Applicant has used marijuana usually on fishing trips with certain friends, including in June 2006. There is no evidence of record that he has taken steps to dissociate himself from these friends, so AG ¶ 26(b)(1), “disassociation from drug-using associates and contacts” does not apply. Nor is there any indication that Applicant has informed these friends that he is no longer using drugs (see AG ¶ 26(b)(2), “changing or avoiding the environment where drugs were used”), so the potential for Applicant again being around others using marijuana and being offered marijuana cannot be discounted. As for “an appropriate period of abstinence” (AG ¶26(b)(3)), two years is not long enough to guarantee against recurrence when viewed in light of marijuana use over the course of some 35 years. His denial of any future intent is in writing and notarized, so it fulfills AG ¶ 26(b)(4), “a signed statement of intent with automatic revocation of clearance for any violation,” but is not enough to overcome the Guideline H concerns.

Guideline E, Personal Conduct

The security concern for personal conduct is set out 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 exercised poor judgment raising personal conduct concerns when he smoked marijuana on at least one occasion, in June 2006, after he had applied for a security clearance. While AG ¶ 15 is implicated, I am not persuaded by the government’s contention that AG ¶ 16(c) and ¶ 16(d) apply. AG ¶ 16(c) on its face is pertinent only when there is “credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline.” AG ¶ 16(d) is appropriately considered only when there is “credible adverse information that is not explicitly covered under any other guideline.” The use of marijuana is already covered under AG ¶ 25(a) and sufficient for an adverse determination, as discussed in Guideline H, *supra*. The government has not alleged or proven that Applicant understood fully the concerns raised by marijuana use when he completed his e-QIP and that he deliberately disregarded those concerns thereafter by using marijuana. Applicant explained that he had long ceased viewing marijuana use as illegal, and he assumed any security concerns were assuaged by his full disclosure (“It has been my guiding principle throughout this entire investigation that personal honesty is crucial to the DOD being able to make an accurate assessment of my eligibility for a clearance.” Item 2). While this is a naive view, it is consistent with his admission in January 2007 that he expected to continue to use marijuana in the future.

His failure to fully appreciate that his marijuana use was inconsistent with his obligation to obey the law raises in and of itself judgment concerns that cast doubt about whether he can be counted on to comply with security practices and procedures. Those judgment concerns are not fully mitigated in the absence of credible efforts to discontinue his friendships with those involved in criminal drug use (see AG ¶16(g), “association with persons involved in criminal activity”). None of the Guideline E mitigating conditions apply. His illegal drug involvement was not minor and not enough time has passed to favorably consider AG ¶ 17(c), “the offense is so minor, or so much time has passed, or the behavior is so 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.” His decision to refrain from marijuana use after being granted a security clearance is a very recent development forced on him if he wants to obtain the clearance and not borne predominantly of any desire to conform his behavior to the law. It falls short of the positive changes sufficient to apply AG ¶ 17(d), “the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.”

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 the applicant’s conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant’s drug abuse was heaviest during his youth (see AG ¶ 2(4)), but he did not leave it behind once he reached adulthood. He abstained for a time in college only to return to marijuana as an aid to introspection and on occasion while socializing with friends. He clearly enjoyed its effects and had long since lost sight of its illegality by the time he applied for a security clearance at age 53. As of January 2007, he expected his use of marijuana to continue.

His abstinence for the past two years is some proof of his ability to abstain, but it is not enough to overcome the serious security concerns. Based on the record before me, I am unable to conclude that it is clearly consistent with the national interest to grant him access.

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:	Against Applicant
Subparagraph 1.c:	Against Applicant
Paragraph 2, Guideline E:	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. Eligibility for access to classified information is denied.

ELIZABETH M. MATCHINSKI
Administrative Judge