



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)	
)	
-----)	ISCR Case No. 07-00852
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Candace Le'i, Esquire, Department Counsel
 Alison O'Connell, Esquire, Department Counsel
 For Applicant: Holly Walker, Esquire

June 11, 2008

Decision On Remand

MOGUL, Martin H., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on April 26, 2006. On August 17, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H and E for Applicant. 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 responded to the SOR (RSOR) in writing on October 2, 2007, and requested a hearing before an Administrative Judge. I received the case assignment on November 13, 2007. DOHA issued a Notice of Hearing on January 8, 2008, and I convened the hearing on January 28, 2008. The Government offered Exhibits (Ex.) 1 through 7, which were received without objection. Applicant testified on his own behalf and two other witnesses testified on behalf of Applicant. He submitted Exhibits A

through L, without objection. DOHA received the transcript of the hearing (Tr) on February 5, 2008.

On February 7, 2008, I issued a written decision granting Applicant's request for a security clearance. On May 27, 2008, the Appeal Board issued a Appeal Board Decision remanding the case to me, requesting further processing of the case.

Findings of Fact

In his RSOR Applicant admitted SOR allegations 1.a., 1.c., 1.d., and 1.e., and he denied 1.b. and 2.a. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 30 years old. He is not married, and he has no children. He received a Bachelor of Science degree in 2000.

Applicant works for a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 (Guideline H - Drug Involvement)

The SOR lists 5 allegations regarding illegal drug involvement under Adjudicative Guideline H. All of the allegations will be discussed in the same order as they were listed in the SOR:

1.a. Applicant used marijuana with varying frequency from approximately 1995 through October 2005. He used it one last time on July 21, 2006.

Applicant testified that he never used marijuana in high school. He started using it when he began attending college in 1995. It was sporadic, but for one quarter in 1998, his usage increased to one or two times a week. When he noticed that it was affecting his grades, his usage decreased to approximately once a month. After he graduated in 2000, his use of marijuana decreased even more significantly to one or two times a year until his second to last usage in October 2005. He ceased usage in October 2005, because he was aware that he would be applying for a SCA. However, Applicant conceded that he used it one last time on July 21, 2006, when it was offered to him on his birthday.

He testified credibly that he intends to never use marijuana again. He explained that he has committed to his girlfriend that he will not use it again. He is planning a life with his girlfriend, and he does not want drugs to play a part in that life. He also testified that using marijuana would hurt his career, about which he is now more serious. Finally,

he testified that even if he did not need a security clearance, he has made a decision that he will not use marijuana or any other illegal drug in the future.

1.b. Applicant used marijuana in July 21, 2006, after he executed a Security Clearance Application (SCA) on April 26, 2006. In the SOR, the Government alleged that Applicant knew he could not use drugs while holding a security clearance. Applicant denied this allegation in his RSOR, although during his testimony, he conceded that he did use the marijuana one last time after applying for a security clearance. He described it as “a lapse in judgement” (Tr at 103). He also concluded, “in retrospect, it was very foolish” (Tr at 104).

1.c. Applicant has purchased some of the marijuana that he has used.

1.d. Applicant used mushrooms in the Netherlands in 1999. He testified that he purchased the mushrooms at a store, and he was under the belief that the mushrooms were legal in the Netherlands. He never again used mushrooms or any other hallucinogenic drug after that incident.

1.e. Applicant used Ecstasy in 2002. He testified that his girlfriend gave him a third of a pill, which she identified as Ecstasy. He felt no effect from the pill. He has never used Ecstasy since that time, and he has no intension of using it in the future. Applicant is no longer with that girlfriend.

Paragraph 2 (Guideline E - Personal Conduct)

2.a. As discussed in 1.b., above, Applicant executed a SCA on April 26, 2006 (Exhibit 1). He thereafter used marijuana on one occasion on July 21, 2006. The Government alleges that Applicant’s use of marijuana after he applied for a security clearance exhibits questionable judgement and unwillingness to comply with rules and regulations.

Mitigation

Applicant received the very prestigious Eagle Scout Award from the Boy Scouts of America in 1993 when he was 16. He submitted the Eagle Scout certification and a number of Eagle Scout commendations from important public figures (Exhibit J).

He also submitted his performance evaluations form his employer for years 2004, 2005, and 2006 (Exhibit G). His evaluations were fairly positive and his work efforts seem to be moving in the right direction.

Finally, two witnesses, who are coworkers of Applicant, testified on his behalf. Applicant also offered into evidence character letters from individuals who know or have known him in his professional or private life (Exhibit E). They all were extremely laudatory in describing Applicant’s high integrity, reliability, and good judgement.

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 over-arching 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

With respect to Guideline H, the Government has established its case. Applicant's improper and illegal drug abuse, including the possession, and use of marijuana, and his use after applying for a security clearance is of concern, especially in light of his desire to have access to the nation's secrets. Applicant's overall conduct pertaining to his illegal substance abuse clearly falls within Drug Involvement Disqualifying Condition (DC) 25. (a) (any drug abuse), and (c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution).

Based on the Applicant's extremely limited use of any illegal substance in the last few years, and his demonstrated intention not to continue using drugs in the future, I conclude that Applicant's conduct comes within Mitigating Condition (MC) 26. (b) because of Applicant's (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used and (3) an appropriate period of abstinence.

In this case, the Government has met its initial burden of proving by substantial evidence that Applicant has used illegal drugs for many years under Guideline H. Applicant, on the other hand, has introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's case against him. Accordingly, Paragraph 1, Guideline H of the SOR is concluded for Applicant.

Guideline E - Personal Conduct

With respect to Guideline E, the evidence establishes that Applicant executed a SCA on April 26, 2006, and he thereafter used marijuana on July 21, 2006.

While Applicant's use of marijuana after completing a SCA does show poor judgement, it was done only on one occasion, and he testified that he has realized the folly of such conduct.

In reviewing the DCs under Guideline E, I conclude that no DCs apply. I resolve Paragraph 2, Guideline E, for Applicant.

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) 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 have considered the potentially disqualifying and mitigating conditions under Guidelines H and E, in light of all the facts and circumstances surrounding this case. Based on all of the reasons cited above, including Applicant’s strong and credible testimony that he will not use any illegal substance in the future, together with his achievement of Eagle Scout and his positive employment evaluations, and the laudatory letters of recommendation and testimony, I find that the record evidence leaves me without questions or doubts as to Applicant’s eligibility and suitability for a security clearance under the whole person concept. For all these reasons, I conclude Applicant mitigated the security concerns.

Further Discussion of Drug Involvement and Personal Conduct Under the Remand Parameters

The following are some of the factors that were considered in concluding that Applicant had mitigated the Guideline H, Drug Involvement concerns, although not all of them were articulated in the Decision: From 2000 to 2005, Applicant’s use of marijuana was reduced to one or two times a year. In 2005, Applicant made a conscious decision to abstain from all drug usage because he was going to apply for a security clearance. He used marijuana on only one additional time after he applied for a security clearance, and that was at his birthday party in July 2006, when it was offered to him, and he succumbed. While there is no question that he used extremely poor judgement by accepting and using the marijuana that was offered to him, as he absolutely conceded at the hearing, I considered that not only did he not pursue the marijuana that he used on that one occasion, but once he realized his mistake, there is no record that he ever used any illegal substance again.

I also considered Applicant’s testimony extremely credible, based not only on what he said, and on the character evidence on behalf of Applicant, but also on what I found to be his sincere and believable manner in voice, eye contact, and mannerism, qualities that can really only be judged by hearing and watching Applicant during his testimony. The testimony that I determined to be so credible included Applicant’s strong declaration that he has become very serious about his career, and he would absolutely not use marijuana in the future, since that could potentially damage the career. He also testified that he had a very serious relationship with a woman, with whom he hoped to establish a family, and he promised this woman that he would never use any illegal drugs in the future.

Based on all of the evidence introduced at the hearing, I determined that Applicant used marijuana on one occasion, in July 2006, after he applied for a security clearance, and he had not used it for approximately one and one half years before the hearing. Additionally, he has made a sincere determination not to use any illegal

substance in the future. He has become far more mature and serious about his career and his personal relationships, and he has decided that marijuana is not going to be a part of his life in the future. While he may still have some minimal contact with individuals with whom he had used marijuana in the past, Applicant indicated that they also had matured, and he no longer associated in a manner where drugs were likely to be present. Finally even if drugs were present where he was, his testimony was convincing that it would not influence him to use drugs in the future.

Under the whole person concept, as was discussed in the Decision, I considered Applicant's achievement of his Eagle Scout Award, which stresses duty, honor to country, perseverance, and many other positive traits, as an extremely high honor for a young man to achieve. I also considered the four character letters submitted by Applicant (Exhibit E), in which individuals who have known Applicant in business and personal settings, described him as trustworthy, loyal, responsible, and honest. Finally, the two witnesses, who testified on behalf of Applicant, were also extremely positive about Applicant's good character and trustworthiness.

Regarding the Guideline E Personal Conduct concerns, there is no doubt that Applicant exhibited extremely poor judgement when he used marijuana, after he began working for his employer and especially on the one occasion after he had applied for a security clearance. While an argument could be made that Disqualifying Condition (f) applies, the evidence has not established that Applicant's conduct violated a written or recorded commitment made by Applicant to his employer as a condition of his employment. No evidence was ever introduced as to what Applicant's employer's drug policy was, nor that Applicant had been informed about said policy. Nevertheless, Applicant's poor judgement could be considered adversely under Guideline E. However, I have considered Mitigating Condition (d) to be applicable and controlling, since Applicant has acknowledged that his use of marijuana after applying for a security clearance showed poor judgement, and he has changed his lifestyle by being more involved in his career and beginning to establish a serious relationship, so that this inappropriate and illegal behavior is unlikely to recur.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant

Paragraph 2, Guideline E:

FOR APPLICANT

Subparagraph 2.a:

For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Martin H. Mogul
Administrative Judge