



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



In the matter of:)	
)	
)	ISCR Case No. 13-00089
)	
Applicant for Security Clearance)	

Appearances

For Government: Richard Stevens, Esq., Department Counsel
For Applicant: *Pro se*

06/04/2013

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant mitigated the Government’s security concerns under Guideline H, drug involvement. Applicant’s eligibility for a security clearance is granted.

Statement of the Case

On February 19, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H. 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 adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

Applicant answered the SOR on March 4, 2013, and requested a hearing before an administrative judge. The case was assigned to me on April 15, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on April 29, 2013. I convened the hearing as scheduled on May 20, 2013, by video teleconference. The

Government offered exhibits (GE) 1 through 5, which were admitted into evidence without objection. Applicant testified and offered exhibits (AE) A and B, which were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on June 3, 2013.

Procedural Issues

Department Counsel moved to amend the SOR by withdrawing Paragraph 2.a. There was no objection and the motion was granted.¹

Findings of Fact

Applicant admitted SOR ¶ 1.a and denied ¶ 1.b with an explanation. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 52 years old. He earned a bachelor's degree in 1983 and a master's degree in 1992. He served on active duty in the Army from 1985 to 1992 and was honorably discharged as a sergeant (E-5). He has been married since 1982. He has a 30-year-old daughter by a previous relationship. He and his wife had a daughter who passed away from cancer in 2007 at the age of 21. Applicant has held a top secret security clearance since 1987. Since his discharge from the Army, he has worked for the federal government and for federal contractors.²

When Applicant's second daughter was approximately 19 years old, she was diagnosed with cancer. She was prescribed various medications to combat the disease. To alleviate the symptom of nausea associated with chemotherapy, she was given the drug Marinol intravenously. She was also prescribed it in pill form to be used at home. It was successful in helping her with her nausea.³

Applicant suffers from acid reflux and was prescribed the medication Protonix. It helped his ailment, but had a side effect of nausea. Applicant credibly testified that in July 2010 he ate spicy food and took Protonix. He was miserable and did not think he would be able to complete his shift at work. He did not want to call in sick. He went to his daughter's medicine cabinet and saw a bottle of medicine with her name on it. The medicine label identified it as Marinol and said it was to treat nausea. There was one pill remaining. Applicant took the pill. He acknowledged that he was not prescribed the medication. He knew the medication was for nausea, and he thought it was better to

¹ Tr. 12.

² Tr. 11, 45-46, 65-66.

³ Tr. 45-50.

take it than to take an over the counter “random pill.”⁴ He testified that he now knows that his conduct was “dumb and stupid.”⁵

After completing the night shift, the next morning Applicant was randomly selected by his employer to take a urinalysis. Throughout his adult life, Applicant has been subjected to random drug screenings, including when he was in the Army, working as a federal employee, and as a federal contractor. He estimated that he has taken at least 50 drug tests during his service and employment. He estimated he took two urinalysis tests at his present place of employment since he began working there. In the past, he has never tested positive for any banned substance. Applicant was later advised that his sample tested positive for Tetrahydrocannabinol (THC). He denied knowingly using THC, which is the active ingredient in marijuana.⁶

Applicant contacted the doctor who was responsible for handling his urine sample and told him that there was a mistake and the doctor must have mixed up his sample with someone else’s. He asked the doctor, his supervisor, and his human resource representative if he could take another drug test. He was told that he could have the same sample retested, but he could not submit a new sample. Applicant did not think that would be helpful, but continued to be adamant that he did not use THC.⁷

Applicant researched to see if his acid reflux medicine had THC in it and determined it did not. Applicant struggled to figure out how his urine sample had THC in it. He looked at the medicine bottle that was prescribed to his daughter. He did an Internet search and learned Marinol has synthetic THC in it. He contacted the doctor from the lab, and the doctor told him that he could not help Applicant because the drug was not prescribed to him, but was for his daughter.⁸

Applicant attempted to find out information from his daughter’s medical records to substantiate that she was prescribed Marinol, but could not gain access because his daughter never signed a Health Insurance Portability and Accountability Act (HIPAA) form. He explained that he and his wife were reluctant to ask her to sign a HIPAA form because they did not want her to think that they thought she was dying or that they had lost hope for her recovery. Applicant does not have the prescription bottle that he took the pill from. His wife threw the bottle away along with other medication prescribed to their daughter. Applicant told his wife there was no reason to save the bottle because the medication was not prescribed to him.⁹

⁴ Answer to SOR.

⁵ Tr. 42-44, 49-50, 55-57, 67-70; Answer to SOR.

⁶ Tr. 44, 52-57, 66, 73; GE 3.

⁷ Tr. 56-62.

⁸ Tr. 62-64.

⁹ Tr. 50-52; 76-77.

Marinol, or the generic name dronabinol, is an FDA-approved drug that has synthetic cannabinoid or THC in it. It is prescribed for the treatment of nausea and vomiting associated with cancer chemotherapy. It is excreted in both feces and urine. Following a single dose of the drug, low levels of dronabinol metabolites have been detected for more than five weeks in the urine or feces.¹⁰

Applicant admitted he used his daughter's prescription drug Marinol for his nausea. He denied he was aware that it contained THC. Applicant's wife testified on his behalf and corroborated that Applicant told her that he thought the laboratory made a mistake with his urine sample. They were both shocked and confused by the positive test results. Neither knew at the time that Applicant's use of his daughter's prescription was wrong. Applicant never hid the fact that he took his daughter's prescription drug.¹¹

Four character witnesses testified on Applicant's behalf and Applicant submitted two character letters. Each one attested to Applicant's integrity and trustworthiness. Those working with him consider him one of their most dependable employees. He is trusted with the most sensitive material. He is ethical and hard working. He has an exceptional commitment to the mission and an outstanding work ethic. He is considered an honest and trustworthy employee.¹²

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are 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, 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 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 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

¹⁰ GE 4, 5.

¹¹ Tr. 66, 69-75.

¹² Tr. 21-37.

on the evidence contained in the record. Likewise, I have not drawn 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, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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

AG ¶ 24 expresses the security concern pertaining to drug involvement:

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. (a) Drugs are defined as mood and behavior altering substances, and include: (1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances; (b) Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

I have considered the disqualifying conditions under AG ¶ 25 and concluded the following have been raised:

- (a) any drug abuse;

(b) testing positive for illegal drug use; and

(g) any illegal drug use after being granted a security clearance.

Applicant used his daughter's prescription drug for nausea. He was not prescribed the drug. Unbeknownst to him, the prescription drug contained synthetic THC, and he tested positive. He held a security clearance at the time. I found Applicant's testimony credible and believable. I find he did not knowingly use THC, but did knowingly use a drug not prescribed to him. The above disqualifying conditions apply.

I have considered all of the mitigating conditions under AG ¶ 26. The following two are potentially applicable:

(a) the behavior happened so long ago, was so infrequent or happened under circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(b) a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs are used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant's one-time use in 2010 of a drug not prescribed to him and for the sole purpose of alleviating nausea is a unique circumstance. Applicant has not repeated this conduct. He has a long history of random drug testing, all with negative results. His behavior happened almost three years ago and is unlikely to recur. His conduct does not cast doubt on his current reliability, trustworthiness, or good judgment. Applicant admitted he used his daughter's prescription, but he had no idea that one of the components of the drug was THC. Although his misuse of the drug was wrong, his intent was not to abuse THC but to relieve his nausea. He now understands the seriousness of taking a drug not prescribed to him. Applicant does not intend to repeat his actions in the future. I find AG ¶¶ 26(a) and 26(b) apply.

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 relevant 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 conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline H in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is 52 years old. He made a mistake when he took his daughter's prescribed medication for nausea. He was unaware that the medication had synthetic THC in it. Applicant did not knowingly use THC. It was not his intent to use THC. He made a one-time mistake using his daughter's medication. Applicant has no history of drug abuse. He has a long history of negative drug test results. Applicant has an excellent employment record and is considered a trustworthy employee. Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under the drug involvement guideline.

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
Subparagraphs 1.a-1.b:	For Applicant
Paragraph 2, Guideline E	WITHDRAWN
Subparagraph 2.a:	Withdrawn

Conclusions

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 a security clearance. Eligibility for access to classified information is granted.

Carol G. Ricciardello
Administrative Judge