



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



In the matter of:)
)
) ISCR Case No. 13-00745
)
Applicant for Security Clearance)

Appearances

For Government: Daniel Crowley, Esq., Department Counsel
For Applicant: *Pro se*

02/20/2014

Decision

LYNCH, Noreen, A., Administrative Judge:

The Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) alleging security concerns arising under Guideline H (Drug Involvement). The SOR was dated September 11, 2013. 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) implemented in September 2006.

Applicant timely answered the SOR and requested a hearing before an administrative judge. The case was assigned to me on October 30, 2013. DOHA issued a notice of hearing on November 4, 2013, scheduling the hearing for December 10, 2013. The case was postponed due to inclement weather and rescheduled for January 7, 2014. Government Exhibits (GX) 1 and 2 were admitted into evidence without objection. Applicant Exhibits (AX) A through C were admitted into evidence without objection. Applicant testified in his own behalf. He requested the record be kept open for additional documentation. Applicant timely submitted a document, which was marked as AX D, and admitted without objection. DOHA received the transcript (Tr.) on January 16, 2014. The record closed on February 18, 2014. Based on a review of the

pleadings, testimony, and exhibits, eligibility for access to classified information is granted.

Findings of Fact

In his answer to the SOR, Applicant admitted the factual allegation under Guideline H (Drug Involvement) with explanation.

Applicant is a 38-year-old engineer who works for a defense contractor. He obtained his undergraduate degree in 1995. He received his master's degree in 2011. He is divorced and has no children. Applicant has worked for his current employer since January 2011. He has held a security clearance since 2008. (GX 1)

In March 2007, Applicant discovered on a ski trip that he became ill from the high altitude. In fact, he was hospitalized with pulmonary edema. Applicant's lung collapsed, and he was coughing blood. He remained in the hospital for almost two days. (AX C) When he returned home, he consulted his physician.

In 2008, Applicant's physician prescribed a drug to prevent high altitude sickness. (AX B) A year later on a ski trip, Applicant brought the medication. He had no difficulties with the altitude.

Applicant admitted that while on a ski trip in February 2010, he did not have his prescription medication with him. He did not bring the medicine on that trip because he thought the altitude was lower, and he did not go to the doctor to get a prescription. While on the ski lift he began to feel uncomfortable, and he had difficulty breathing. A friend of a friend offered him marijuana. He took one puff for less than two seconds. (Tr. 15) Applicant experienced dizziness and nausea. He does not associate with the person who provided marijuana to him. He realized that this was a bad decision. He believed the puff would alleviate the symptoms that he was having on the ski lift. He does not use illegal drugs. He signed a letter of intent to refrain from using any illegal drugs in the future. (AX A) He was credible when he stated that he never used drugs in the past and has no desire to do so in the future.

The information concerning the use of the marijuana was given voluntarily during a polygraph in 2011. He also passed an employer drug test in September 2011. (Tr. 22) Applicant disclosed the 2010 incident on his 2012 security clearance application. He explained at the hearing that when he goes on a ski trip in the future, he will take his medication so that he will not encounter a similar situation. (Tr. 15)

Applicant provided a letter of recommendation from his company production manager. (AX D) He is described as a dedicated engineer who has a vast knowledge base, and he is an effective leader. He is respected and trusted by management at all levels. He adapts to an ever-changing environment and excels at challenges. Applicant has a strong work ethic and commitment to his work.

Policies

When evaluating an applicant's suitability for a security clearance, an 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. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." An 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.

The Government must present evidence to establish controverted facts alleged in the SOR. 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. . . ." The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based on 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 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." "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information. The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant's character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying:

(a) any drug abuse (see above definition);

(b) testing positive for illegal drug use;

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

(d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;

(e) evaluation of drug abuse or drug dependence by a licensed clinical social worker who, is a staff member of a recognized drug treatment program;

(f) failure to successfully complete a drug treatment program prescribed by a duly qualified medical professional;

(g) any illegal drug use after being granted a security clearance; and,

(h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

Applicant admitted his use of marijuana, an illegal drug, in 2010 on a ski trip. At that time, Applicant held a security clearance. He disclosed his marijuana use while holding a security clearance in 2011, on his 2012 SF 86, in his SOR response, and at the hearing. AG ¶¶ 25(a), 25(c), and 25(g) apply.

AG ¶ 26 provides conditions that could mitigate security concerns:

(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;

(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 were used;

(3) an appropriate period of abstinence; and,

(4) a signed statement of intent with automatic revocation of clearance for any violation;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and,

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

AG ¶ 26(a) can mitigate security concerns when drug offenses are not recent. There are no "bright line" rules for determining when such conduct is "recent." The determination must be based "on a careful evaluation of the totality of the record within the parameters set by the directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." The passage of time after ending marijuana use is not considered in isolation. Marijuana use while holding a security clearance is a significant factor weighing against granting

access to classified information. See ISCR Case No. 06-18270 at 3 (App. Bd. Nov. 7, 2007) (marijuana use after completing an SF 86 “undercuts” favorable application of the drug involvement recency mitigating condition).

Applicant’s use of marijuana (an illegal substance) was an isolated event in 2010 on a ski trip. He stated that he has not used any illegal drugs since that time or in fact before that time. He stated that he has no intention of using any illegal drugs in the future. Applicant signed a letter of intent not to use any illegal drugs in the future. He recognized that marijuana use shows poor judgment. Applicant did not bring his altitude medication because he believed he would not need it for the ski trip. I accept Applicant’s statement that he used marijuana once after not feeling well at high altitude. He admitted this during his security clearance interview, his SOR answer, and at the hearing. I find him credible that he intends to abstain from any future drug use. He acknowledged that he was not thinking clearly and felt ill. AG ¶ 26(a) applies because his marijuana use was almost four years ago. However, use of illegal drugs while holding a security clearance shows a lack of judgment. Applicant’s future drug use is unlikely to recur given the facts in this case. It does not cast doubt on his current reliability, trustworthiness, or good judgment.

Applicant demonstrated his intent not to abuse illegal drugs in the future. He has not used illegal drugs since the incident in February 2010; he has disassociated from the friend’s friend who offered the marijuana to him; and he intends to take his medication with him on ski trips. AG 26(b) applies.

In conclusion, Applicant used marijuana while on a ski trip in February 2010 because he felt ill and did not have his altitude medication with him. He disclosed the information. He passed an employee drug test in September 2011. Sufficient time has elapsed without marijuana use to demonstrate a sufficient track record of no drug abuse to eliminate drug involvement as a bar to his access to classified information.

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 an 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. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the whole-person factors. Applicant is a 38-year-old professional who is educated and holds a position that requires a security clearance. He is well-respected by his employer. He is described as an invaluable asset to the company. He admitted that he used marijuana on a February 2010 ski trip while holding a security clearance.

The factors supporting reinstatement of Applicant's clearance are significant. He was forthright during a 2011 polygraph, SOR answer, 2012 security clearance application, responses to DOHA, and at the hearing. He has the maturity and trustworthiness to conscientiously comply with security requirements. He is recommended by his employer. He has worked in the field and held a security clearance, and there is no evidence of any security violations. He admits that he used poor judgment due to feeling ill. Applicant understands why the marijuana use was improper, and he intends not to use illegal drugs in the future. The isolated incident occurred almost four years ago. Sufficient time has elapsed. Applicant has mitigated the concerns in this case.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AG, to the facts and circumstances in the context of the whole person. I conclude drug involvement concerns are mitigated.

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

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to continue Applicant's security clearance. Clearance is granted.

NOREEN A. LYNCH.
Administrative Judge