



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



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| In the matter of: |) | |
| |) | |
| ----- |) | ISCR Case No. 13-00850 |
| |) | |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: Catie Young, Esquire

May 1, 2014

Decision

MOGUL, Martin H., Administrative Judge:

On August 19, 2013, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline H 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 adjudicative guidelines (AG), effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant replied to the SOR (RSOR) in writing on September 4, 2013, and he requested that his case be decided on a hearing before an Administrative Judge. I received the case assignment on February 10, 2014. DOHA issued a notice of hearing on February 13, 2014, and I convened the hearing by Video Teleconference, as scheduled on March 12, 2014. The Government offered Exhibits 1 through 5, which were received without objection. Applicant testified on his own behalf and one additional witness testified on his behalf. Applicant submitted Exhibits A through O at the time of hearing, which were also admitted without objection. Applicant also identified an additional document, identified as Exhibit P, which was not submitted at the time of the

hearing. I granted Applicant's request to keep the record open until March 19, 2014, to submit Exhibit P, which has been timely received and entered into evidence. DOHA received the transcript of the hearing (Tr) on March 21, 2014. Based upon a review of the pleadings, exhibits, and the testimony of Applicant, eligibility for access to classified information is granted.

Findings of Fact

In his RSOR, Applicant admitted both SOR allegations 1.a. and 1.b. 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 RSOR, the admitted documents, and the testimony of Applicant and the additional witness, and upon due consideration of that evidence, I make the following additional findings of fact:

Applicant is 42 years old. He is currently unmarried, but he was married from November 1997 to May 2011, and he has three children. Applicant received a Bachelor of Science degree in 1994 and became a Certified Public Accountant in 1997. Applicant has been employed by his present employer, a defense contractor, since 2007, and he seeks a DoD security clearance in connection with employment in the defense sector.

Guideline H - Drug Involvement

The SOR lists two allegations (1.a. and 1.b.) under Adjudicative Guideline H.

1.a. The SOR alleges, and Applicant has admitted in his RSOR, that he, "used cocaine approximately two times in December 2011." At the hearing, Applicant testified that his former wife was going through a mid-life crisis and had a long-time affair with a man whom Applicant knew. She then moved out of their house and for six months he had full custody of their children. Applicant described his wife's affair as "traumatic" to him, and while he alleged that it did not affect his work, it did cause him some self-doubts. Applicant averred that he then started dating too soon, within three months of the separation. He started dating again in November 2010, and the woman he dated was the person with whom he used cocaine. Applicant dated this woman for one year, and he also had a daughter with her. (Tr at 33-36.)

In December 2011, two months after the birth of their child, Applicant's girlfriend brought home some cocaine, and after they had been drinking some wine, she suggested they ingest the cocaine. He admitted that he tried it on that occasion. Again about a week later on New Year's eve, December 31, 2011, she again presented cocaine to him, and again after consuming a few glasses of wine, he ingested the cocaine, approximately two lines each time. Applicant testified credibly that with the exception of the two times discussed above, he has never used any illegal substance, either before or after these two usages, nor has he associated with people who use illegal substances. Although he indicated that when he was in college he had

opportunities to use drugs; he just chose not to use them. He does still associate with his ex-girlfriend, but only to coordinate their co-parenting duties. (Tr at 36-40, 48.)

Applicant testified that his use of cocaine was a mistake and he will never use it again, first because “it is against the law,” and also because “it is not compatible with my lifestyle, which is a healthy, honest lifestyle.” (Tr at 48-49, 52.) Finally, Applicant explained that up until the time of his divorce, he had gone through a relatively stress-free life, so now that he has weathered that situation, he knows if he found himself in another stressful situation, he would never use drugs again. (Tr at 57-58.)

Applicant submitted a statement (Exhibit P), signed by him under penalty of perjury in which he wrote:

1. I am submitting this statement as intent to never use illegal drugs again.
2. Should there be any violation with regard to illegal drug use, I hereby consent to automatic revocation of my security clearance.

1.b. The SOR alleges, and Applicant has admitted in his RSOR, that he, “used cocaine after being granted a DoD security clearance on November 21, 2005.” Applicant conceded that using drugs is a legitimate concern of the Government, especially when someone is holding a security clearance. However, he claimed that now he has had time to heal from his divorce, and he has come out stronger than before. He also testified that he has an important position with his employer, and he is very involved with the lives of his children. Applicant also indicated that he volunteered the information about his drug usage on his Security Clearance application and when he met with a Government investigator regarding his security clearance. (Tr at 41-44.)

At the hearing Department Counsel requested that I take administrative notice of United States Code Title 21, Sections 802 and 812, regarding the Controlled Substance Act, which have been identified and entered into evidence without objection as Exhibit 5. The request was granted. (Tr at 24-25.)

Mitigation

As stated above, one additional witness testified on behalf of Applicant. The witness has known Applicant since they were in college, and since that time he has never witnessed Applicant use any illegal drug. The witness further testified that when Applicant explained to him that the hearing was because Applicant had used illegal drugs, Applicant expressed regret and disappointment in himself. He described Applicant as a “reliable, trustworthy individual.” Finally, he stated that he believes Applicant will never use drugs again because Applicant “is a person of his word and his integrity, that if he makes a statement, then I believe he will follow through with it.” (Tr at 62-66.)

Additionally, Applicant submitted nine extremely positive and laudatory character letters from individuals who know Applicant professionally and personally. (Exhibits A

through I.) He also submitted 13 awards and certificates that he has earned. (Exhibit J.) Finally, Exhibit M showed that Applicant received significant bonuses from his employer for years 2011, 2012, and 2013.

Policies

When evaluating an applicant's suitability for a security clearance, the 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, 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 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 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 relating to the guideline 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 judgement and because it raises questions about a person’s ability or willingness to comply with laws, rules and regulations.

With respect to Guideline H, the Government has established its case. Applicant's improper and illegal drug abuse, specifically the use of cocaine as recently as December 31, 2011, while he was holding a security clearance, is of great concern, especially in light of his continued desire to have access to the nation's secrets. Applicant's overall conduct pertaining to his illegal substance abuse clearly falls within Drug Involvement ¶ 25(a) “any drug abuse” and (c) “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.”

However, I find credible his testimony and his written statement that he intends to abstain from using cocaine or any illegal drug in the future. I also considered that Applicant only used an illegal drug on two occasions during the most stressful period of his life, and his testimony that he would know better how to cope with any potential severe stress in the future. Additionally, the fact that Applicant revealed his drug usage on a security clearance application and to a Government investigator without any apparent outside source is significant. Finally, I considered the positive testimony of the witness and the laudatory character letters, which make Applicant’s stated intentions to never use illegal drugs again more credible and convincing. Therefore, I conclude that ¶ 26(a) is applicable since “the behavior . . . was so infrequent” and “happened under such circumstances that it is unlikely to recur.” Also, ¶ 26(b) “a demonstrated intent not to abuse any drugs in the future,” including (3) “an appropriate period of abstinence;” and (4) “a signed statement of intent with automatic revocation of clearance for any violation,” is applicable and mitigating.

In this case, the Government has met its initial burden of proving that Applicant has used illegal drugs 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, Guideline H of the SOR is concluded 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) 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. Based on all of the reasons cited above as to why the mitigating conditions are applicable and controlling, I find that the record evidence leaves me with no significant 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 has mitigated the security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

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|---------------------------|---------------|
| Paragraph 1, Guideline H: | FOR APPLICANT |
| Subparagraph 1.a.: | For Applicant |
| Subparagraph 1.b.: | 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