



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



In the matter of:)
)
) ISCR Case No. 14-00642
)
Applicant for Security Clearance)

Appearances

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

07/07/2014

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline H, drug involvement. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On March 25, 2014, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement. 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 April 11, 2014, and requested a hearing before an administrative judge. The case was assigned to me on April 30, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 20, 2014. I convened the hearing as scheduled on June 12, 2014. The Government offered exhibits

(GE) 1 and 2, and they were admitted into evidence without objection. Applicant testified on his own behalf. He offered Applicant's Exhibit (AE) A and B, which were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on June 23, 2014.

Procedural Issues

Department Counsel moved to amend the SOR to reflect information disclosed on Applicant's Electronic Questionnaires for Investigations Processing. Department Counsel requested the date in SOR ¶ 1.a be changed from 1989 to 1984. Applicant did not object and the motion was granted.

Findings of Fact

Applicant admitted both allegations in the SOR with explanations. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 44 years old. He earned a bachelor's degree in 1991. He married in 1997 and has three children, ages twelve, ten, and seven. He has never held a security clearance.¹

Applicant admitted he began using marijuana when he was in middle school in approximately 1984, when he was between 14 and 15 years old. He continued using marijuana in high school. During his college years his frequency of use was at its peak, and he used marijuana about two to three times a week, sometimes less. After college he used it about three to five times a year. He stated that since about 2001, he used marijuana about one to three times every two to three years. He indicated he last used marijuana in April 2013.²

Applicant was arrested in 1989 for possession of marijuana and drug paraphernalia. He was 20 years old and received a citation. The possession charge was dismissed and he pled nolo contendere to possession of drug paraphernalia. He received a fine, one day of community service, and was required to attend a three-day drug program. He completed the terms of his sentence. He resumed using marijuana about six to seven months later.³

Applicant's wife also uses marijuana. She used it in college and after they married she would use it with the same frequency as him. They would use it together with friends and neighbors, but never consumed it in their home and never purchased it.

¹ Tr. 18-20.

² Tr. 29-34.

³ Tr. 45-48. This information is not considered for disqualifying purposes, but will be considered when analyzing Applicant's credibility and in the "whole person" analysis.

Applicant continued to use marijuana because of its effects, and he enjoys relaxing and socializing with friends while using it.⁴

Applicant disclosed on his security clearance application and during his subject interview that he intended to use marijuana if it is legalized. He and his wife do not drive after using marijuana. He does not believe his marijuana use impacted his work performance. He provided a statement of intent to refrain from illegal use of marijuana and failure to comply would result in automatic revocation of a clearance for as long as he was to “hold a clearance and marijuana is a controlled substance.”⁵

Applicant has discussed drug use with his oldest child. His children are unaware of their parents’ marijuana use. He and his wife agreed they have not been good role models regarding their drug use. He stated his wife backs him regarding his intent not to use marijuana as long as it is illegal. He and his wife have agreed that they need to cease using marijuana. He conceded his use of marijuana as late as April 2013 was immature and he exercised poor judgment. He admitted that each time he used marijuana he broke the law. Since completing his security clearance application, Applicant no longer associates with one of his neighbors with whom he used marijuana. Since becoming a candidate for a security clearance he is committed to not using marijuana because it is inconsistent with holding a clearance.⁶

During Applicant’s prior employments he was not subjected to random drug testing. He is not aware of his current employer’s drug policy. Applicant provided a character letter from his supervisor. He is described as well respected and an elite employee who is an expert in his field and has outstanding character and integrity. Applicant stated this supervisor is aware of his last drug use in April 2013, but he is not aware of Applicant’s prior drug history. He admitted some of his other character references were not aware of his prior drug history. His other character references indicate he is an honest, trustworthy, hardworking, responsible, professional, and a devoted father and husband. Applicant considers himself a good person, capable of making a good contribution to the federal government. He is involved in his community.⁷

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.

⁴ Tr. 20, 27-29, 33-36.

⁵ Tr. 20, 37; AE A.

⁶ Tr. 49-58.

⁷ Tr. 37-44, 59-60, 62; AE B.

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 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.

I have considered the following disqualifying conditions for drug involvement under AG ¶ 25 and the following are potentially applicable:

(a) any drug abuse; and

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

Applicant used marijuana with varying frequency from 1984 to April 2013. He expressed his intent not to use marijuana as long as it is illegal and while he holds a clearance. I find AG ¶ 25(a) applies and ¶ 25(h) does not.

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

(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; 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 were used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant has used marijuana with varying frequency since 1984. His peak period of use was while in college. Although the frequency of use diminished after college he continued to use marijuana several times a year and after 2001 he used it one to three times every two to three years. Applicant was aware that the use of marijuana is illegal. Because illegal drug use is inconsistent with holding a security clearance Applicant intends not to use marijuana in the future unless it is legalized. It appears Applicant's motivation for discontinuing his marijuana use is so he can obtain a security clearance. He has disassociated with one friend that he used marijuana with in the past.

Applicant used marijuana for 29 years and has abstained from using it for fourteen months. His drug abuse is relatively recent and was frequent. It did not happen under unique circumstances. Due to his lengthy use, I am not convinced that under the circumstances his behavior is unlikely to recur. His past behavior casts doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 26 (a) does not apply.

Applicant stated he no longer associates with one of his neighbors with whom he used marijuana. He obviously continues to associate with his wife with whom he used

marijuana. He stated she agreed they should cease using marijuana, but the evidence is insufficient regarding her commitment. He has signed a statement of intent to not use marijuana in the future while holding a security clearance and if it is illegal. Based on his longevity of use and his short period of abstinence there is an insufficient period of time to convince me that he will not use marijuana in the future. AG ¶ 26 (b) partially applies.

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 and mitigating 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 44 years old. He enjoys a good reputation among his supervisors, coworkers and friends. He is involved in his community and appears to be a good father and husband. Applicant made a conscious decision for the past 29 years to violate the law by using the illegal drug marijuana. His last use of marijuana was in April 2013. He has expressed his intent to refrain from marijuana use in the future if he was to hold a security clearance and it remained illegal. Applicant was beyond the age of youthful indiscretion when he continued to use marijuana as an adult, father, and respected employee. At this juncture, it is too soon to conclude Applicant is committed to long term abstinence and compliance with the law. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate 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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For 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 a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge