



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



In the matter of:)
)
) ISCR Case No. 14-01551
)
Applicant for Security Clearance)

Appearances

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

09/08/2014

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 June 5, 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 June 27, 2014, and requested a hearing before an administrative judge. The case was assigned to me on July 30, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on July 30, 2014. I convened the hearing as scheduled on August 19, 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. The record was held open until August 26, 2014, to allow Applicant to submit an additional document, which he did. It was marked AE C and admitted into evidence without objection.¹ DOHA received the hearing transcript (Tr.) on August 27, 2014.

Findings of Fact

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

Applicant is 38 years old. He graduated from high school in 1995. He married in 1998 and has three children ages 17, 12, and 5. He has worked for a government contractor since 2006. He has held a security clearance since 2007.²

In July 2013, Applicant was at a friend's apartment. He was aware his friend occasionally used illegal drugs. There were other friends at the apartment for a party. Applicant's wife was also present. For the past ten years he and his friend visited each other about once a month, either at Applicant's house or the friend's apartment. His friend is not married, but cohabitates with his girlfriend, with whom he has a child. His friend does not work. He has never seen his friend use illegal drugs, but is aware he uses marijuana occasionally.³

While at the party, a marijuana cigarette was passed around and Applicant "took a drag" and inhaled the marijuana. He explained he used it because "it was there."⁴ He stated he only took one puff like it was a cigarette and declined it when it was passed around a second time. He was unsure of who supplied the marijuana. Applicant had been drinking. He estimated he had 8 to 10 beers, the majority of them before he smoked the marijuana and some after. He stated he drinks this amount of alcohol two to three times a week. He stated he was immediately remorseful for his actions. His wife did not see him smoke the marijuana. He told her about his actions, and she became angry.⁵

In his background interview on January 6, 2014, Applicant indicated that when he returned to work after the weekend, he was advised by his supervisor that he was selected to take a random urinalysis. He provided the sample and returned to work. A

¹ Hearing Exhibit I is a memorandum from Department Counsel indicating he had no objection to the exhibit.

² Tr. 21-22.

³ Tr. 27-30, 42-45.

⁴ Tr. 34.

⁵ Tr. 17, 27, 31-35, 45-51.

couple of days later he was approached by his supervisor who stated that his sample had tested positive for marijuana. Applicant then told his supervisor about his use over the weekend. The supervisor advised him that their employer was mandating Applicant attend a substance-abuse class and his government vehicle driving privileges were suspended until he completed the class. He completed the class in July 2013. The class lasted one week and included group sessions and one-on-one counseling for a total of seven sessions. After completion, his government vehicle driving privileges were restored.⁶

Applicant admitted using marijuana in July 2013 while holding a security clearance. He was aware that using illegal drugs while holding a security clearance is prohibited. He admitted he made a mistake. At his hearing, he testified that after being selected to submit a urine sample for drug testing and before submitting the sample, he told his supervisor that he used marijuana over the weekend and his sample would probably test positive. He stated the supervisor did not have the test results when he told him he used marijuana. This is inconsistent with the statement he provided the government investigator. When asked why he did not inform his supervisor of his drug use immediately upon returning to work and before being advised he was selected for a random test, he stated he was afraid of the potential repercussions and was hoping it would not “be brought up.” He stated he would have told his supervisor if he had been arrested for driving under the influence of alcohol, but because he was not arrested for his drug use he felt he was “home safe.” He stated he would have told his supervisor of his drug use even if he had not tested positive. He admitted that despite having sufficient time upon his return to work to tell his supervisor, he failed to do so because he was afraid of the supervisor’s reaction and what his employer might do.⁷

Applicant stated that his use of marijuana in July 2013 was the only time in his entire life he used it. He stated he never used it in high school. Some of his friends used marijuana, and it was around him, but he did not use it. When he used it in July 2013, he did not think about the fact it could potentially cost him his job. As soon as he used it he felt bad. He has told his 17-year-old son about his use to set an example of why his son should not use drugs. Applicant continues to associate with his friend who held the party and uses marijuana, but asked that he not have illegal drugs present when Applicant is around him. Applicant does not intend to use illegal drugs in the future. He stated he has taken other drug tests since the incident and the results were negative.⁸

Applicant provided a copy of his 2013 performance evaluation. He is described as a dependable and very qualified worker who can be depended on to contribute 100% towards any job assignment. He is very good at problem solving and is very supportive

⁶ Tr. 38-40; GE 2; AE A, B.

⁷ Tr. 17-18, 30, 36-38, 42-45, 61-66.

⁸ Tr. 25-27, 50-52, 56-57.

of team work. He is willing to stay late and work weekends to ensure the project is completed. This evaluation noted his violation of the drug-free workplace policy.⁹

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 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.

⁹ AE C.

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 for 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;
- (b) testing positive for illegal drug use; and
- (g) any illegal drug use after being granted a security clearance.

Applicant used marijuana in July 2013. He tested positive during a random urinalysis. He held a security clearance when he used marijuana. I find the above disqualifying conditions apply.

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 stated he only used marijuana once in his life. Regardless of how many times he may or may not have used illegal drugs, the fact remains that Applicant was aware of the special trust he was given when he was granted a security clearance, a

trust he violated. Applicant did not immediately report his conduct to his security manager before being made aware that he was to submit to a urinalysis. He only made his supervisor aware of his drug use after he was aware his test results would likely be positive for marijuana use. Applicant's conduct casts doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 26(a) does not apply.

Applicant continues to associate with his friend who held the party and uses marijuana. Applicant credibly testified that he does not intend to use illegal drugs in the future. It has been a year since he used marijuana. 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 38 years old. He has held a security clearance since 2007. The Government requires people it entrusts with security clearances to do the right thing even when no one is looking, regardless of the repercussions. Applicant violated that trust when he used marijuana at a party where he was binge drinking. He did not report his marijuana use until he was aware that he would likely test positive on a random urinalysis. He indicated his intent to refrain from marijuana use in the future. Applicant was beyond the age of youthful indiscretion when he used marijuana as an adult, a father, and a trusted employee. 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
Subparagraphs 1.a-1.b:	Against 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