



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



In the matter of:)	
)	
)	ISCR Case No. 14-02572
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: John Bayard Glendon, Esquire, Department Counsel
For Applicant: *Pro se*

03/13/2015

Decision

WHITE, David M., Administrative Judge:

Applicant admitted sharing a marijuana cigarette with friends one time after his March 2007 wedding on a cruise ship. He denied adverse actions for workplace misconduct on his security clearance application, after receiving a policy-required verbal warning for taking a day of leave without pay with prior agreement from his supervisor. Resulting security concerns were mitigated. Based upon a review of the pleadings, testimony, and exhibits, eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on April 12, 2013. On July 25, 2014, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline H (Drug Involvement) and Guideline E (Personal Conduct). 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 for Determining Eligibility for*

Access to Classified Information, effective within the Department of Defense after September 1, 2006.

Applicant answered the SOR in writing (AR) on August 25, 2014, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on October 30, 2014, and the case was assigned to me that same day. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Video Teleconference Hearing on December 5, 2014, setting the hearing date for December 16, 2014.¹ I convened the hearing as scheduled, with Department Counsel participating from DOHA Headquarters by video teleconference. The Government offered Exhibit (GE) 1, which was admitted without objection. Applicant testified on his own behalf. I granted Applicant's request to leave the record open until January 9, 2015, for submission of additional evidence. Applicant submitted Exhibit (AE) A, which was admitted without objection. DOHA received the transcript of the hearing (Tr.) on January 2, 2015.

Findings of Fact

Applicant is a 60-year-old employee of a defense contractor, where he has worked for thirty years. He is a high school graduate, who has no military service. He has held a security clearance for 25 years, without incident. He is married for the second time, has two adult children, and two adult stepchildren. (GE 1; Tr. 7, 30-32, 40.)

Applicant admitted on his security clearance application and in his response to the SOR that he used marijuana one time in March 2007 during his wedding reception when an old friend offered it to him. He and his wife were married on a cruise ship, that subsequently docked at an island owned by the cruise line where the friend passed a marijuana cigarette around among a group of male wedding attendees. Applicant was not thinking about his security clearance obligations at the time, and characterized this drug use as a momentary lapse in judgment. He candidly admitted this mistake, and his admission is the only source of record information concerning the event. (GE 1; AR; Tr. 36-37, 43.)

Applicant's service anniversary date at his employer is January 9th of each year. After that date, he is credited with the following year's entitlement to vacation time and sick leave. He had a preplanned vacation trip during the first week of January 2012, for which he thought he would have enough vacation credit. However, he took an unplanned day of vacation earlier that fall to celebrate his daughter's engagement. His company policy permitted him to take leave without pay (LWOP) for absences not covered by vacation entitlements, but taking more than one day of LWOP during any 60-day period generated an automatic "verbal warning," which would be documented in personnel records for one year as the first step in a three-step process for dealing with

¹Applicant confirmed that he and Department Counsel discussed and agreed to this hearing date, and that he was ready to proceed without needing any additional time to prepare. He waived the 15-day notice that the Directive provides, and I granted him 28 days of additional time to submit evidence due to the pending holidays. (Tr. 11-12, AE A.)

excessive absences. The second incident in a one-year period would result in a “written warning,” while the third incident during the period could lead to disciplinary action up to or including termination. (AR; AE A; Tr. 38, 44.)

Applicant discussed his vacation plans with his supervisor, including the fact that he had taken another day of LWOP on November 18, 2011, and needed to take another one on January 9, 2012. They mutually understood and agreed that he would be absent on the second day, without pay, and would receive the documented “verbal warning” as mandated by company policy. That is what happened, and he returned to work with no subsequent instances of attendance or performance concerns. After the one-year anniversary of the “verbal warning,” it was removed from his personnel files and the “three-strikes” attendance policy reset to “zero.” (AR; AE A; Tr. 37-38, 44-46.)

When Applicant completed his security clearance application, he answered, “No,” to two questions as alleged in the amended SOR. The first (Section 13A) asked, “For this employment, in the last seven (7) years have you received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as a violation of a security policy?” The second (Section 13C) asked, “Have any of the following happened to you in the last seven (7) years at employment activities that you have not previously listed? (If ‘Yes’, you will be required to add an additional employment in section 13A.)” This question then lists issues including being fired from such a job; leaving by mutual agreement after some problem; or receiving a written warning, reprimand, suspension, or discipline for misconduct. The SOR further alleges that Applicant’s negative response to these questions was an attempt to knowingly conceal the “verbal warning” he received for his January 2012 LWOP discussed above. (SOR; AR.)

Applicant credibly testified that he answered, “No,” to these two questions because he honestly believed that to be the correct answer. He said the LWOP was discussed with, and agreed to in advance by, his supervisor and was not “misconduct in the workplace,” and certainly not similar to a violation of security policy. Although Applicant did not make this distinction, a careful reading of the second question in Section 13C shows that it asks only about employment that was not previously listed and covered by the question in Section 13A, in which Applicant had listed the employment in question. Accordingly, his “No” answer to that second question was not incorrect under any interpretation of the underlying facts. (GE 1; Tr. 39, 46-51.)

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 (DCs) and mitigating conditions (MCs), which are to be 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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 the 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, "[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Section 7 of Executive Order 10865 provides: "[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

A person applying for access to classified information seeks to enter 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.

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. The two DCs raised by the evidence in this case are:

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

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

Applicant admittedly shared one marijuana cigarette that was passed around among a group of his friends during a gathering after his March 2007 wedding on a cruise ship. He held a security clearance at the time. These facts support application of the foregoing DCs, shifting the burden to Applicant to prove mitigation of resulting security concerns.

AG ¶ 26 provides conditions that could mitigate the security concerns. The facts in this case support application of two of them:

(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's abuse of marijuana was a one-time incident far removed in time and place from any work-related concerns. His free admission of this error in judgment is the only evidence that it took place, and supports the credibility of his intention not to repeat such conduct. The incident occurred eight years ago, under unique circumstances, and there is compelling evidence that drug abuse is unlikely to recur. Substantial mitigation under AG ¶ 26(a) was accordingly established.

Applicant no longer associates with the friend who passed around the marijuana, and does not engage in recreational activities where peer pressure to use drugs might exist. He has been abstinent since that one incident in March 2007. These facts establish additional mitigation under AG ¶ 26(b).

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The DC alleged by the Government and supported by some evidence is:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant received a "verbal warning" as required by his company's personnel policies after taking a second day of LWOP during a 60-day period. He denied having received any written warning, official reprimand, suspension, or discipline for misconduct in the workplace similar to a security violation on his security clearance application. He honestly did not consider the LWOP verbal warning incident to be one that met these criteria, and his belief is both credible and reasonable. He correctly answered, "No," to the other question that the amended SOR alleges that he falsified. Security concerns under AG ¶ 16(a) were not raised by substantial evidence under these facts.

AG ¶ 17 describes conditions that could mitigate security concerns under the Personal Conduct guideline. In case there were found to be any remaining security concerns from Applicant's negative response to the question in Section 13A on his security clearance application, the MC that is plainly established by the evidence in this case is:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

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 pertinent facts and circumstances surrounding this case. Applicant is a credible and mature individual who honestly admitted one brief lapse in judgment after his wedding in March 2007, and has thereby substantially eliminated the potential for pressure, coercion, or duress. Recurrence of such conduct is unlikely, and his voluntary disclosure of that drug abuse incident eight years ago further confirms the conclusion that he had no nefarious intention to conceal a verbal warning for having taken a day of LWOP in January 2012. Overall, the record evidence creates no doubt as to Applicant's present eligibility and suitability for a security clearance.

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:

Paragraph 1, Guideline H:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant
Subparagraph 2.c:	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's eligibility for a security clearance. Eligibility for access to classified information is granted.

DAVID M. WHITE
Administrative Judge