



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



In the matter of:)
)
) ISCR Case No. 07-16806
)
)
Applicant for Security Clearance)

Appearances

For Government: Nichole Noel, Esq., Department Counsel
For Applicant: *Pro Se*

August 28, 2008

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated the security concerns raised by his drug involvement. Eligibility for access to classified information is granted.

On May 8, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR on May 23, 2008, and requested a hearing before an Administrative Judge. The case was assigned to another Administrative Judge on June 16, 2008, and reassigned to me on July 2, 2008. DOHA issued a notice of hearing on July 17, 2008, and the hearing was convened as scheduled on August 12, 2008. The Government offered Exhibits (GE) 1 and 2, which were received without objection.

Applicant testified on his own behalf and submitted Exhibits (AE) A through C, which were received without objection. DOHA received the transcript of the hearing (Tr.) on August 21, 2008.

Procedural and Evidentiary Rulings

Notice

I advised Applicant of his right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. Applicant affirmatively waived his right to 15 days notice.

Request for Administrative Notice

Department Counsel requested that I take administrative notice of certain facts relating to marijuana, cocaine, and heroin, as contained in GE 3 through 5. These are InfoFacts sheets provided by the National Institute of Drug Abuse, National Institute of Health, U.S. Department of Health & Human Services. Applicant did not object and the request was approved. The characteristics of these drugs are well known. While I have considered the nature of the drugs in my decision, I have not explicitly listed specific facts about the drugs in the Findings of Facts.

Findings of Fact

Applicant is a 39-year-old employee of a defense contractor. He has been with his current employer since about August 2006. He is attending community college. He is single with no children.¹

Applicant first smoked marijuana in about 1987, when he was in high school. He continued to smoke marijuana on an occasional basis until about June 2006. He estimated that he used marijuana about 20 times in the ten years between 1996 and 2006. When he was a teenager, he and a friend tried to grow two marijuana plants with seeds from their marijuana. Both seeds sprouted but quickly died. He has not tried to grow marijuana since. He also used heroin on one occasion in about 2004, and cocaine on about two occasions in about 2005.²

Applicant submitted a Questionnaire for National Security Positions (SF 86), certified as true on January 30, 2007. He completely listed his illegal drug use in the Questionnaire. He also fully discussed his drug use during his background interview on August 17, 2007. He admitted that there was an impact on his judgment, reliability, and ability to hold a confidence when he smoked marijuana. Applicant told the investigator that he would never use cocaine or heroin again, but he could not absolutely rule out the use of marijuana at some point in the future. Applicant later explained that he was attempting to be 100% honest with the investigator. He had no intention or “desire to

¹ Tr. at 19; GE 1.

² Tr. at 20-27; Applicant's response to SOR; GE 1, 2.

use marijuana, but if, maybe five years from [then], it was offered to [him] in an ideal social setting. [he] might accept.”³

Since the 2007 interview, Applicant’s stance on marijuana has crystallized. In his response to the SOR he stated:

It was my hope that this statement would not lead to an understanding that I use marijuana because I do not. I have no desire to use marijuana now or in the future so I would like to clarify, for the record, that I will not use marijuana in the future. Now that I understand it violates provisions in the DoD guidelines and since I honestly have no desire to try it again, I can assert that I will never use marijuana again.

Applicant last used marijuana in June 2006, about two months before he started his current job. He passed the employer’s drug test, which is consistent with his statements about his last use of marijuana. Applicant moved in November 2006 to a town that is in the same general geographic area as he used to live, but fairly remote and relatively distant. He no longer associates with the people he used drugs with. He is focused on school and his career. His current friends and associates do not use drugs. He admitted that his drug use showed poor judgment. He stated unequivocally and credibly that he will never use illegal drugs again. He is willing to sign a statement of intent with automatic revocation of clearance for any violation.⁴

Applicant submitted performance appraisals from 2007 and 2008. His 2007 appraisal reported that he “works well and gets along with all members of this team and is proving to be a valued member of this organization.” His manager reported in 2008 that he “provides superior customer satisfaction to all our customers and is a respected member of the team.” He has taken little or no time off since he started working. His company earnings statement reflects that Applicant works overtime, contributes to his 401(k) retirement plan, and has accrued an extensive balance of vacation/paid time off (PTO).⁵

Policies

When evaluating an applicant’s suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant’s eligibility for access to classified information.

³ Tr. at 28; Applicant’s response to SOR; GE 1, 2.

⁴ Tr. at 27-34.

⁵ Tr. at 17-18; AE A-C.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, Administrative Judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense 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 the 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 adverse 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 judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. Three are potentially applicable in this case:

- (a) any drug abuse;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

Applicant's drug possession,⁶ use, and attempt to grow marijuana are sufficient to raise AG ¶¶ 25(a) and (c) as disqualifying conditions. His failure to clearly and convincingly commit to discontinue drug use in his 2007 interview raises AG ¶ 25(h).

Two Drug Involvement Mitigating Conditions under AG ¶ 26 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 admitted to using illegal drugs up until June 2006. His drug use was too recent for him to receive the full benefit of AG ¶ 26(a). In an attempt to be totally honest with the background investigator in 2007, he stated that he could not completely rule out smoking marijuana in the future. Since that interview, his intentions against using illegal drugs have hardened. He has a good job with an established company. He made his

⁶ Drugs must be possessed in order to be used.

work and education a priority. He moved away and no longer associates with people who use drugs. He is willing to sign a statement of intent with automatic revocation of clearance for any violation. AG ¶ 26(b) is applicable.

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 common sense 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. Applicant is 39 years old. Of concern is his episodic drug use, which included experimentations with the harder drugs, cocaine and heroin, and continued well into his 30s. He chose to break the law every time he used illegal drugs. However, he presented himself as someone who has finally matured and moved past the mistakes of the not-so-young. He has been completely forthright about his drug use throughout the process. I found him to be a truthful, credible witness. When Applicant's drug use is looked at over the last ten years, it adds up to being extensive. But a closer examination reveals that it occurred several times a year. It was never frequent enough to dominate his life. He has moved on and is dedicated to education and his career. I am satisfied that illegal drugs are no longer a part of his life.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his drug use.

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

Subparagraphs 1.a-1.f: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interest of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Edward W. Loughran
Administrative Judge