



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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-----, -----) ISCR Case No. 08-03913
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: John Warner Widell, Esquire

January 29, 2009

Decision

WHITE, David M., Administrative Judge:

Applicant used marijuana about once a month on social occasions from about January 2004 to about February 2008. He honestly admitted this use during the security clearance investigation, and there was no other evidence of it. His life circumstances have changed, and he persuasively established his intent not to abuse any drugs in the future. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Applicant submitted his Electronic Questionnaires for Investigation Processing (e-QIP), on May 21, 2007. On July 16, 2008, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H, and E. 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 acknowledged receipt of the SOR on July 18, 2008. He answered the SOR in writing on that same date (AR), and requested that his case be decided without a hearing. On July 31, 2008, Applicant submitted a written supplemental response withdrawing his previous election and requesting a hearing before an administrative judge. Department Counsel was prepared to proceed on August 28, 2008, and the case was assigned to me on September 3, 2008. DOHA issued a notice of hearing on September 3, 2008, and I convened the hearing as scheduled on September 26, 2008. The Government offered exhibits (GE) 1 and 2, which were admitted without objection. The Government also offered HE II, comprising the Under Secretary of Defense (Intelligence) Memorandum, dated June 20, 2008, and three sections of the United States Code, to support a request that I take administrative notice of the facts that the Bond Amendment prohibits granting a security clearance to an unlawful user of a controlled substance or a drug addict, and that marijuana is a controlled substance. Applicant had no objection, and administrative notice was taken of these facts together with pertinent definitions of those terms. Applicant testified on his own behalf, and submitted exhibits (AE) A1 through A12, which were admitted without objection. Applicant's wife, supervisor, and several law enforcement and security personnel with whom he has worked also testified for him. DOHA received the transcript of the hearing (Tr.) on October 7, 2008.

Findings of Fact

In his Answer to the SOR, Applicant admitted all of the factual allegations concerning his drug involvement except having purchased marijuana. He clarified his earlier statement to an investigator about this by stating that his wife actually made the purchases. He also denied that his actions gave rise to Guideline E security concerns because he fully and honestly disclosed his occasional marijuana use. Although he did not formally respond to SOR ¶ 1.f concerning the Bond Amendment, his counsel stated that it was his intent to deny its applicability. (Tr. at 20-21.) Applicant's admissions, including those contained in his response to DOHA Interrogatories (GE 2), are incorporated in the following findings.

Applicant is a 31-year-old network security engineer. He has worked for his present employer since December 1999. He also served in the Army National Guard, from 1998 to 2003, when he was medically discharged under honorable conditions following a vehicle accident. During his service, he was awarded an Army Commendation Medal. (AE A6.) He immigrated to the United States in 1997 to attend college, and became a naturalized U.S. citizen in December 2002. He renounced his former foreign citizenship and holds only a U.S. passport. He has never held a security clearance. He and his first wife were married from 1998 to 2003, and had no children. He married his current wife in February 2007, and they have one child born very recently. (GE 1 at 1-3, 7-9, 15-17, 21; Tr. at 98, 103-107, 116.)

On his e-QIP, Applicant admitted to using marijuana on an occasional, recreational basis from January 2004 to present. (GE 1 at § 24.) He later described his use as about once per month, on average, with his wife or close friends. (GE 2 at 3.) His

wife confirmed that he only smoked marijuana once every month or two, in social settings with her and friends. (Tr. at 90.) He never used marijuana while he was in the National Guard, and never tested positive or was arrested for any drug use. (Tr. at 96-97.) His use was casual enough that he does not remember exactly when it started and stopped, but knows it was not before January 2004 or after February 2008, when he and his wife made a firm commitment that neither would use marijuana again because they found out she was pregnant. He had also committed to stopping when required to do so by the security clearance process, but had believed his wife might continue use until her pregnancy. Both Applicant and his wife testified very firmly and credibly that they decided to stop using marijuana altogether in February 2008, had no problem doing so, and were not going to use it, or any other illegal drug, in the future. (GE 2 at 3; Tr. at 80-91, 98-100, 110-115.)

Applicant submitted two urine samples, collected August 19, and September 6, 2008, for private testing at a laboratory. Both samples tested negative for all seven drugs screened. (AE A2; AE A3.) Applicant's wife, and four supervisors who have known him for years, all testified that he is completely honest and very firm in following through on his commitments. His four supervisors hold senior and highly responsible positions in organizational security and information protection. All hold high-level security clearances, and expressed their complete trust and confidence in Applicant's ability to protect sensitive information, and to abstain from any drug abuse in the future. All of their testimony in this regard was highly credible and compelling. (Tr. at 47-91.) Applicant also submitted his most recent outstanding annual performance review and four letters of appreciation spanning 2003 to 2008 for excellent performance of important work, for much of which he is uniquely qualified. (AE A7 through A11.)

Applicant has ended all contact with former drug-involved associates, except his wife and one friend who has not used marijuana for a long time. (Tr. at 101-102.) He and his wife are dedicated to providing a good example for their child, and find any drug use incompatible with parenting. Applicant testified openly and honestly about his past drug abuse, and convincingly declared his intent never to abuse drugs in the future. He knew that he would have to stop while holding a clearance, and always intended to do so. He honestly did not know, and no one ever told him, that occasional use while his application was pending could be disqualifying, but was told by his security manager to be fully honest about all such matters. (Tr. at 73-75, 97-98.) He also submitted a signed, sworn statement of intent never to use marijuana or other controlled substances in the future, with automatic revocation of his clearance resulting from any such use. (AE A1.) He understands and agrees that, if granted a clearance, his terms of employment will require him to undergo random drug testing. (AR at 4.)

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 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 common sense 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 "Any 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, "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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Section 7 of Executive Order 10865 provides that "Any 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.” AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Disqualifying conditions raised by the SOR allegations and asserted by Department Counsel are: “(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.” (Tr. at 119.) SOR ¶ 1.f also alleges that his use of marijuana disqualifies Applicant from being granted a clearance under the Bond Amendment.

Applicant admitted to recreational use of marijuana about once a month over about a four-year period between January 2004 and February 2008. He then stopped using it, both because it is incompatible with holding a security clearance and because he and his wife committed to stop after learning she was pregnant (AG ¶ 25(a)). They purchased the marijuana they used, but never grew or distributed any (AG ¶ 25(c)). Applicant never expressed an intent to continue illegal drug use, although he did tell an investigator he thought his wife might do so and said he could stop if his clearance so required. At that July 2007 interview, those statements would reasonably support security concerns under AG ¶ 25(h).

AG ¶ 26 provides conditions that an applicant could establish in order to mitigate security concerns. Mitigating conditions raised by this record include: “(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; and, (4) a signed statement of intent with automatic revocation of clearance for any violation.”

Applicant’s drug possession and use occurred over about four years, and as recently as February 2008. This conduct was relatively recent and not particularly infrequent. However, it did happen under circumstances that have significantly changed. First, Applicant and his wife became parents and convincingly testified that they believe marijuana use to be incompatible with their new lives and raising their child. Second, Applicant now understands that what he formerly considered casual and socially acceptable marijuana use is incompatible with obtaining a security clearance. He clearly values the ability to perform the important work for which his supervisors support his clearance far more than he values any future drug use. Applicant met his burden of establishing that his drug possession and use occurred under circumstances that it is unlikely to recur and does not cast doubt on his current reliability, trustworthiness or good judgment (AG ¶ 26(a)). He did not do so while in the military and will not do so while a parent or while holding a clearance. Applicant provided substantial evidence of his intent not to abuse drugs in the future, including his disassociation from drug-using contacts, his abstinence for almost a year and two negative urinalysis tests, and his signed statement of intent with automatic revocation (¶ 26(b)). This case did not involve

abuse of prescription drugs, nor was any drug treatment program prescribed, so neither AG ¶¶ 26 (c) nor (d) apply.

Concerning the Bond Amendment, that provision of law prohibits all Federal Agencies from granting or renewing a security clearance to any person who is an unlawful user of a controlled substance or is an addict. There is neither an allegation nor any evidence indicating that Applicant is addicted to anything. The Under Secretary of Defense (Intelligence) defined an “unlawful user” for Bond Amendment implementation purposes in his June 20, 2008 memorandum (HE II), as follows:

an “unlawful user of a controlled substance” is a person who uses a controlled substance and has lost the power of self-control with reference to the use of the controlled substance, and any person who is a current user of the controlled substance in a manner other than as prescribed by a licensed physician. Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct.

Up until February 2008, Applicant met the definition of an unlawful user of marijuana. After that time, he has convincingly stopped being an unlawful user of marijuana and is most unlikely to ever do so again. He never lost self-control with reference to his use of marijuana. Accordingly, Applicant has met his burden of showing he is no longer disqualified from eligibility for a clearance under the Bond Amendment.

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 sets forth potentially disqualifying conditions. The SOR alleged Applicant's use of marijuana after having submitted his security clearance application as the conduct giving rise to Guideline E concerns. Department Counsel argued that this allegation raised AG ¶ 16(d)(3):

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply

with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

- (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;
- (2) disruptive, violent, or other inappropriate behavior in the workplace;
- (3) a pattern of dishonesty or rule violations; and,
- (4) evidence of significant misuse of Government or other employer's time or resources.

While smoking marijuana at any time is covered under Guideline H, the particular issues of judgment and willingness to abide by rules and regulations that potentially arise from doing so while a clearance application is pending are not covered there. The Guideline H aggravated disqualifying condition only pertains to drug use after being granted a clearance (AG ¶ 25(g)). Applicant has not been dishonest in the least. In fact, his candid admissions are the only evidence raising any concerns in the first place. His occasional, casual marijuana use was technically illegal but not otherwise of special concern within his then-existing social circle. He expressed his willingness and ability to stop doing so when required by his clearance status, and was never told it was of immediate concern while his application was pending. Had he been so told, he would have stopped earlier than he voluntarily did in February 2008. All who know him well testified that, other than this self-admitted and now-regretted series of bad decisions, he is a stickler for rules, has excellent judgment, and is highly dependable.

This personal conduct analysis, by terms of the guideline, overlaps with and implicates the following whole person analysis as well. For the same reasons discussed above under Guideline H, security concerns arising from this conduct are substantially mitigated under AG ¶ 17(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”). Because all his supervisors and family already know about this past drug use, he also established mitigation under AG ¶ 17(e) (“the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress”).

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 established by the record evidence. 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. Applicant's conduct of security concern involved a four-year period of occasional marijuana use. He was never arrested for this, never distributed any drugs, never tested positive for use or showed any impairment or other effects at work, where he excelled. This occurred when he was mature and fully responsible for his choices, but in a social situation where it was considered acceptable behavior. He and his wife both decided to stop smoking marijuana for good in February 2008, and have not done so since. This behavioral change appears to be permanent and drug use is most unlikely to recur. Applicant's motivation for the conduct was social enjoyment, but that interest is now heavily outweighed by his desire to be a good parent and to be worthy of a security clearance to do pending, important work. I have seldom seen a more impressive, serious, and convincing group of character witnesses testify as credibly about their confidence in his integrity and determination to refrain from any future drug use or other irresponsible behavior.

Applicant's use of marijuana was casual and occurred during a relatively brief period of his life comprising the early years of his relationship with his second wife. She clearly influenced his choice to do this, and has now joined him in his commitment to permanently change that aspect of their lives. His supervisors at work were somewhat surprised to learn he had used marijuana, but were neither surprised by his honesty about it when asked, nor the least bit doubtful of his determination and ability to stop. There is no susceptibility to coercion or duress arising from this past conduct, since it is known to all whose knowledge of it could be detrimental to Applicant.

Overall, the record evidence leaves me with no doubt as to Applicant's present eligibility and suitability for a security clearance. He has fully met his burden to mitigate the security concerns arising from drug involvement and personal conduct considerations.

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
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant

Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

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

DAVID M. WHITE
Administrative Judge