



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



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ISCR Case No. 08-04547
SSN: XXX-XX-XXXX)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Melvin A. Howry, Esq., Department Counsel
For Applicant: *Pro se*

April 23, 2009

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns pertaining to Drug Involvement. Clearance is granted.

Statement of the Case

Applicant submitted his Security Clearance Application (e-QIP), on January 30, 2007. On July 24, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) 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 in writing on August 11, 2008. DOHA received the response on October 8, 2008, and Department Counsel was prepared to proceed on November 19, 2008. On November 24, 2008, and on November 28, 2008, the case was

assigned and reassigned to other administrative judges. On January 15, 2009, the case was reassigned to me. On December 12, 2008, DOHA issued a notice of hearing scheduling the hearing for January 22, 2009. The hearing was held as scheduled.

The Government offered Government Exhibits (GE) 1 through 4, which were received without objection. The Government Exhibit List was marked as Exhibit (Ex.) I, and copies of 21 U.S. Code § 802, Definitions, and 21 U.S. Code § 812, Schedules of controlled substances, were marked Ex. II and III, respectively. Applicant offered Applicant Exhibits (AE) A and B, which were received without objection, and he testified on his own behalf. I held the record open to afford the Applicant the opportunity to submit additional documents. Applicant timely submitted AE C through E without objection, which were forwarded to me by Department Counsel by e-mail dated January 30, 2009 (Ex. IV). DOHA received the transcript of the hearing (Tr.) on February 2, 2009.

Findings of Fact

Applicant admitted all of the SOR allegations, SOR ¶¶ 1.a. through 1.e. After a thorough review of the evidence, I make the following additional findings of fact:

Applicant is a 44-year-old business manager for a village corporation located in a remote U.S. location accessible only by sea or air. The corporation is responsible for retail sales of utilities, general merchandise, heavy equipment, and subsistence resources. He has held this position since January 1989. Applicant supervises 14 employees and reports to a Board of Directors. His village has a population of approximately 900 residents. Applicant, like the majority of village residents, is a member of a Native American group. Tr. 17-18, 22.

He also serves as a member of the Board of Directors, and as Vice Chairman of the Board's parent corporation, a Native American corporation. The parent corporation has a contract with DoD and it is in this capacity as Vice Chairman that Applicant is required to have a security clearance. Applicant has been on the Board of Directors of this corporation since June 1998. Tr. 24, 27-31.

Applicant graduated from high school in May 1982, and attended a community college for one semester. Tr. 23. His primary language is a Native American dialect with English as his second language. Tr. 19. He served in his state's National Guard from September 1985 to September 1994, and was honorably discharged as a sergeant (pay grade E-5) with a Military Occupational Specialty of 11B, Infantryman. GE 1, Tr. 24-25. Applicant has been married since June 1987. He and his wife have four children, three sons, ages 21, 16 and 11, and a 10-year-old daughter. All of his children reside at home with the exception of his 16-year-old son, who boards at high school during the school year. GE 1, Tr. 19-22.

The facts are not in dispute. During his background investigation, Application admitted to using marijuana with varying frequency from 1986 to 2007. During cross-examination, Applicant admitted using marijuana "probably twice a quarter" during this

timeframe. Tr. 36. He did not characterize his marijuana use as “regular.” Tr. 35. He quit using marijuana because he wanted to “change” his life. Tr. 36. Applicant stated that marijuana was readily available in his community. Tr. 39. There is no evidence in the record that Applicant is drug dependent.

Applicant’s solution to avoid using marijuana is to “keep busy” and disassociate himself from drug-using associates. He described his community as one in which he is required “to live off the land and the waters” and his life as one of “two worlds.” Tr. 37. His full-time job provides him with the economic means to cover costs associated with hunting and fishing. He relies on hunting and fishing to provide food for his family, his mother, and the elderly in his community. Tr. 37. He fishes for salmon and chum, and hunts for moose, black bear, brown bear, and caribou. Tr. 38. Applicant spends a considerable amount of his discretionary free time with his family gathering subsistence food such as berries, particularly in the fall, in order to have enough food to survive the winter. Tr. 50.

Applicant credibly testified that he has disassociated himself from any associates who he has used marijuana with since at least October 2008. Tr. 42-47. Post-hearing, Applicant submitted a signed, sworn statement that he has quit using marijuana, that he will not use and does not intend to use marijuana or any other controlled substance in the future, and understands and agrees that any future use of a controlled substance will result in the automatic revocation of his security clearance. AE D.

Applicant also credibly testified he understands use or continued use of marijuana will preclude him from being eligible for a security clearance. Tr. 51. His family, position in his community, and his position as Vice Chairman on the board of his parent company are very important to him. Applicant’s wife is a school librarian in their community and does not approve of his past use of marijuana. Tr. 53-56.

There are no drug treatment centers in Applicant’s community. The most viable help available to him or one in his situation would come from counseling provided by community elders. Applicant described the number of elders in his community as less than 10 and that the elders are given great deference within the community.

Post-hearing, Applicant submitted a signed, sworn statement from one of his village elders. The elder knows Applicant very well and counseled him on the adverse effects of any controlled substance. The elder described Applicant as an “emerging leader of our village corporation and community and member of our village.” The elder further added that “the whole community relies on [Applicant] as the business manager of [village], and community school.” AE E.

Applicant is active in his church, serves on the school advisory board, was a former local radio announcer, regularly volunteers for community events, and participates in wilderness and river search and rescue missions. Tr. 62-63. In his capacity as Business Manager, Applicant “take[s] care of the whole community.” The community depends on him to ensure they are provided with electricity, oil, gas, and life

sustaining needs. If a village resident needs assistance, they seek out the Applicant. Tr. 63.

Applicant submitted two additional reference letters. The first is from the President of his parent corporation, who is sponsoring him for a security clearance. The second is from the Chairman of his village board. Both individuals have known Applicant for significant periods of time and offered very positive comments about Applicant and attest to his good character. AE A, AE B.

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(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 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 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

Under Guideline H (Drug Involvement), the Government’s concern is that 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 ¶ 24.

The Government established its case under Guideline H through Applicant’s admissions and the evidence presented. Applicant has used marijuana with varying frequency from 1986 to at least 2007.

A review of the evidence supports application of two Drug Involvement Disqualifying Conditions. AG ¶ 25(a): “any drug abuse (see above definition);”¹ and AG ¶ 25(c) “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia.”

Considering the totality of the circumstances in this case, I find application of Drug Involvement Mitigating Condition AG ¶ 26(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 complied with each and every component of this Mitigating Condition, i.e. he no longer associates with drug-using associates; he has shifted his focus to his work, providing for his family and recognizing their needs and the needs of his community as coming first; has not used marijuana since last year; and signed a statement of intent with automatic revocation of clearance for any violation. Applicant has also sought rehabilitative counseling from a community elder.

Applicant presented credible evidence of actions taken to overcome his problem, and established he is currently abstinent and submitted evidence he is not drug dependent. He is remorseful for his behavior and has initiated lifestyle changes. His reference letters and statements from senior company representatives show Applicant’s

¹ AG ¶ 24(b) defines drug abuse as the illegal use of a drug or use of a legal drug in a manner that deviates from approved medication direction.

work behavior has not been indicative of his having a drug problem. He is viewed as a valuable employee, who is reliable, dependable, and professional. His value to his community and as an employee is supported by senior company officials, who know him personally and professionally, and by his own credible testimony and evidence presented. At his hearing, Applicant acknowledged the problems misuse of marijuana has caused him, demonstrated remorse, and manifested a steadfast commitment to continue lifestyle changes consistent with total abstinence of marijuana or any other drugs.

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) 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.

Applicant has been willing to do whatever is necessary to conform his behavior to whatever is required to qualify for a security clearance. He has family support, stable employment and a strong work ethic. His family, community support and rehabilitative counseling should ensure his continued success. Applicant demonstrated the correct attitude and commitment to remaining drug free. Considering his demeanor and testimony, I believe Applicant has learned from his mistakes, and his questionable behavior is unlikely to recur. In sum, I find Applicant has presented sufficient evidence of rehabilitation.

Also noteworthy is Applicant's past behavior, which serves as a reliable indicator of future behavior. His community is isolated from the rest of the U.S. and inhabitants must place considerable trust and confidence in their authority figures. Applicant is one of those authority figures that his family and community rely on in ways not commonly seen in other venues. Applicant honorably served in the National Guard for nine years. He is at the forefront of all community activities to include wilderness and river search and rescue operations. Applicant is living a different lifestyle consistent with someone who wishes to remain drug free. He is married and the father of four children, and a responsible and contributing member of society.

To conclude, Applicant presented sufficient evidence to explain, extenuate, or mitigate the security concerns raised. Applicant met his ultimate burden of persuasion to obtain a favorable clearance decision. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my “careful consideration of the whole person factors”² and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. For the reasons stated, I conclude he is eligible for access to classified information.

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.e:	For Applicant

Decision

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

ROBERT J. TUIDER
Administrative Judge

²See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).