



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 08-06543
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel

For Applicant: *Pro se*

March 30, 2009

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP), on December 31, 2007 (Government Exhibit 2). On November 21, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H and E concerning the Applicant. 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 President Bush on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant submitted an Answer to the SOR on December 5, 2008, and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on December 17, 2008. I received the case assignment on December 22, 2008. DOHA issued a notice of hearing on January 8, 2009, and I convened the hearing as scheduled on February 5, 2009. The Government offered Government

Exhibits 1 through 3, which were received without objection. Applicant testified on his own behalf and submitted Applicant's Exhibits A through D, without objection. DOHA received the transcript of the hearing on February 11, 2009. The Applicant had asked for the record to remain open and, on February 20, 2009, offered Applicant's Exhibit E, which was also received without objection. The record closed on February 20, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

The Applicant is 44, married with two children, and has a Bachelor of Arts degree. He is employed by a defense contractor and seeks to retain a security clearance previously granted in connection with his employment.

Guideline H - Drug Involvement

Guideline E - Personal Conduct

The Government alleges under Guideline H that the Applicant is ineligible for clearance because he has used illegal drugs. Under Guideline E., the Government further alleges that the Applicant's conduct set forth under Guideline H has independent validity under this Guideline. Specifically, that his conduct shows questionable judgement, dishonesty and/or an unwillingness to comply with rules and regulations that raises questions about the Applicant's reliability, trustworthiness and ability to protect classified information.

The Applicant used marijuana on a single occasion in October 2007. This was the Applicant's first, and last, use of marijuana since 1988. He was on an annual camping trip with some childhood friends. One of them had some marijuana and offered it to the group. This was the first time such an event had happened. When the marijuana was offered to the Applicant he had some of it.

The Applicant freely admits that this was a very foolish decision on his part, but states he has consistently been up front about it. (Transcript at 36.) In fact, he testified that he realized he had put his security clearance in danger as soon as he took some marijuana. (Transcript at 21-22.) The Applicant admitted this use without confrontation in December 2007 and March 2008. (Government Exhibits 2 and 3.) In addition, he stated, "I have had to approach people that I respect and trust and let them know about what I have done." (Transcript at 34.) (See, "Mitigation," below.)

Realizing the possible consequences of using marijuana this one time, the Applicant is very remorseful stating:

I'm not happy about what I've done. I believe that in order to be responsible for it, whatever comes from this hearing, whether it be I lose my clearance and all the things that go along with that, or whether it be I'm

found that mitigating circumstances are enough that I would be able to proceed with my job, at least I would have told the truth and I would have – well, at least I would have told the truth about it. (Transcript at 23.)

The people on the camping trip with the Applicant have been his friends for over 30 years. His friends know the implications of what happened in 2007, are also remorseful for putting him in this predicament, and the Applicant is confident that the situation will not occur again. (Transcript at 25-29, 38-39, 42-45.)

The Applicant submitted a written statement. That statement says:

In October 2007 I inappropriately used marijuana while being trusted with a security clearance. I am deeply shamed by my action and have not indulged in any illegal substance since that time. With this letter I formally declare my intention to never again indulge in any illegal substances. I also declare my acceptance of automatic revocation of any future clearance I may be provided in the event that I violate this sworn statement. (Applicant's Exhibit A.)

Mitigation

The Applicant submitted documentary evidence showing that he is a highly respected person and employee. Applicant's Exhibits B, C and D are from his current supervisor, the facility security officer, and a past supervisor, respectively. All three of these people have knowledge of the incident which resulted in the issuance of the SOR. (Transcript at 39-40, 47.) All three of the correspondents recommend that the Applicant retain his security clearance stating he is "serious about security," a person to be trusted "implicitly" and that he is "dedicated."

Applicant's Exhibit E contains letters from people the Applicant knows outside of work, connected to Scouting and to a martial arts activity that his children are involved with. They describe the Applicant as an "upstanding" and "trustworthy" person.

Policies

Security clearance decisions are not made in a vacuum. 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. In addition, the Administrative Judge may also rely on his own common sense, as well as his knowledge of the law, human nature, and the ways of the world, in making a reasoned 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. Security clearance decisions include, by necessity, consideration of the possible risk that 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.

Finally, as emphasized by President Eisenhower in Section 7 of Executive Order 10865, “Any determination under this order . . . 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.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H - Drug Involvement

Guideline E - Personal Conduct

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

I have considered the disqualifying conditions under Drug Involvement AG ¶ 25 and especially considered the following:

- (a) any drug abuse; and
- (g) any illegal drug use after being granted a security clearance.

The Applicant used marijuana on a single occasion in October 2007. He held a security clearance at the time he used the marijuana. I find that both of the above disqualifying conditions apply.

I have considered all of the mitigating conditions under Drug Involvement AG ¶ 26 and especially considered the following:

- (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 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 are used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation.

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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.

The guideline notes several conditions that could raise security concerns. I find that one is arguably applicable here under AG ¶ 16:

(c) Credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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.

As stated above, the Applicant used marijuana on a single occasion in 2007 after being granted a security clearance. The evidence is sufficient to raise this potentially disqualifying condition, requiring a closer examination.

The guideline also includes examples of conditions that could mitigate security concerns arising from personal conduct involving questionable judgment under ¶ 17. I especially considered the following:

(c) The offense is so minor, 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, and

(d) The individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

The evidence is clear that the Applicant's use of marijuana on a single occasion in October 2007 was an aberration and will not be repeated. The Applicant's credible testimonial evidence shows that he is extremely remorseful about this event, has been truthful about the incident on repeated occasions with the Government and his employers, and has taken steps to alleviate any possibility of recurrence. I have considered the fact that the Applicant has not dropped his lifelong friends, but under the particular circumstances of this case I find that such a drastic action is not necessary.

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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. The Applicant is a hard-working, respected, professional person who engaged in a single act of poor judgment after many years in the Defense industry. In viewing all the facts of this case, I find that the Applicant has mitigated the security significance of his prior conduct. As set forth at length above, I find that there have been permanent behavioral changes under AG ¶ 2(a)(6). In addition, I find that there is little to no potential for pressure, coercion, exploitation, or duress (AG ¶2(a)(8)), and that the likelihood of recurrence is close to nil (AG ¶2(a)(9)).

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

On balance, it is concluded that the Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the Government's Statement of Reasons.

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 THE APPLICANT

Subparagraph 1.a:

For the Applicant

Paragraph 2, Guideline E:

FOR THE APPLICANT

Subparagraph 2.a:

For the 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 eligibility for a security clearance. Eligibility for access to classified information is granted.

WILFORD H. ROSS
Administrative Judge