



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



In the matter of:)
)
) ISCR Case No. 08-07721
)
)
Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esquire, Department Counsel
For Applicant: Gary J. Rigney, Esquire

March 31, 2009

Decision

CREAN, Thomas M., Administrative Judge:

Applicant submitted a Questionnaire for Sensitive Position (SF 86) for a periodic update of his security clearance on May 7, 2008. On December 17, 2008, The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline H for 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 acknowledged receipt of the SOR on January 7, 2009, and answered the allegations in writing on January 12, 2009. He admitted both allegations under Guidelines H with explanation, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on January 28, 2009, and the case was assigned to me on February 23, 2009. DOHA issued a Notice of Hearing on February 24, 2009, for a hearing on March 18, 2009. I convened the hearing as scheduled. The government offered three exhibits, marked Government Exhibits (Gov. Ex.) 1-3 which

were received without objection. Applicant submitted two exhibits marked Applicant Exhibits (App. Ex.) A and B, which were received without objection. Applicant and two witnesses testified on Applicant's behalf. DOHA received the transcript of the hearing (Tr.) on March 26, 2009. Based on a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact. Applicant admitted all of the factual allegations in the SOR with explanation. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is a 23-year-old unmarried engineer working as a computer electronic designer for a defense contractor. He started working as a co-op student for the defense contractor when he was 17 years old and in high school (See Gov. Ex. 2, Security Clearance Application, dated April 30, 2003). He continued in the position through college and started working full time for the defense contractor in March 2008, shortly after graduating from college in December 2007 with an engineering degree. Applicant received his first security clearance in 2003 when he was just turning 18 years old, entering college, and working as a college level co-op student (Tr. 13-14, 26-31; Gov. Ex. 1, SF 86, dated May 7, 2008).

Applicant submitted a security clearance application for a periodic update of his security clearance on May 7, 2008 (Gov. Ex. 1, SF 86, dated May 7, 2008). In response to questions 24A and 24B concerning use of illegal drugs, Applicant answered "YES" to using illegal drugs and using illegal drugs while holding a security clearance. In the remarks section under question 24, Applicant noted he used marijuana twice, once in January 2007 and again in December 2007. In response to Interrogatories, Applicant stated he took one to three hits of marijuana each time. He stated his last use of marijuana was in December 2007 (Gov. Ex. 3, Answers to Interrogatories, dated September 8, 2008).

Applicant was interviewed on June 19, 2008, by a security investigator concerning his use of marijuana. In a summary of his responses to the security agent attached to his Answer to the Interrogatories, Applicant stated he used marijuana with either his older brother or friends on both occasions. He stated his use was experimental out of curiosity. He felt no effect from the drug, and the marijuana tasted bad and made him cough. He stopped using marijuana after the December 2007 use because he did not plan to make it a habit to use marijuana and he did not feel the need to use the drug. He did not purchase the drug either time since the marijuana was offered to him in a social setting (Gov. Ex. 3, Answers to Interrogatories, dated September 8, 2008).

Applicant testified that his older brother used drugs when they were growing up and it caused a problem in the family. This gave him a motivation not to use drugs. His first use of marijuana was in January 2007 with friends while playing video games. He

took a few hits from a device that was passed to him. He wanted to be polite to his friends while in this social setting. He believed it would be rude not to participate. His friends knew where he worked but not that he held a security clearance. At the time, he was 22 years old. His friends were about the same age. While he was free to decide at the time if he wanted to use the drug, he did not think about the consequences of drug use (Tr. 15-16, 31-33, 41-44).

Applicant used marijuana again in December 2007 at a party at his brother's house to celebrate Applicant's graduation from college. He again took two or three hits of marijuana from a device to be polite. There were six to eight friends present and they were drinking beer and using a vaporizer to inhale marijuana. They were having a party and everyone was using the marijuana. He was with friends and family that he trusted and respected so he used the marijuana (Tr. 15-20, 35-36).

Applicant stated it has been his practice since high school to leave an area where drugs are used. He told people that he does not want to be involved in illegal drug use. He admitted going against his own policy when he used marijuana in January and December 2007. He also admitted that his facility security officer impressed upon him when he first applied for a security clearance in 2003 that he should not use illegal drugs while holding a security clearance. At that time, he was against drug use. He took her advice seriously, but he did not think about it when he used marijuana in 2007. In 2007, he was just completing college and he made a mistake by using marijuana (Tr. 44-47).

Applicant stated that he has changed his social habits since 2007. He does not now normally associate with friends who use drugs. He does see his brother but does not know if he still uses drugs since he does not use drugs around him. If he sees his friends now, they are in public and not at someone's house where it is easy to use illegal drugs. He is now working full time and has obligations to help his father who is retired and needs his support. He does not have close friends who use illegal drugs. He spends his time in athletics, like martial arts and swimming. He took a drug test in February 2009 on the advice of his attorney which was negative for drugs (App. Ex. B, Test results, dated February 11, 2009). He completed an affidavit that he consents to testing for drug use and acknowledges that if he uses illegal drugs in the future, he would lose his access to classified information (App. Ex. A, Affidavit, dated February 11, 2009). Applicant stated his only use of illegal drugs was in January and December 2007, and his last use of illegal drugs was in December 2007. He stated his intention not to use illegal drugs in the future because he no longer has friends that use illegal drugs and he realizes the consequences of illegal drug use for himself and his job (Tr. 21-26, 39-42, 46-50).

Applicant's immediate supervisor testified that he hired Applicant as a co-op student while Applicant was in high school. Applicant has worked for him for about eight years. He has known Applicant for over 15 years and watched him grow up. He hired Applicant out of high school because he knew of his talents and his good attitude towards work. Applicant is very dependable and seeks work. He is a valuable core member of his team and is dependable with good work ethics. Applicant has always

adhered to the physical security rules at work for handling classified information. Applicant socializes with him and his family and others from work. Applicant conducts himself very appropriately. He has never seen Applicant in any inappropriate behavior. He was shocked to learn of Applicant's use of illegal drugs on two occasions. He believes Applicant made a mistake and it does not alter his opinion of Applicant. He is disappointed in Applicant for making such an unfortunate mistake. His company does not have a formal drug policy except that it is known that employees should not use illegal drugs because of their access to classified information (Tr. 53-65).

A fellow worker who has known Applicant for over five years testified he sees Applicant on a daily basis and works close to him. Applicant is pleasant at work, arrives on time, and is rarely absent from work. Applicant does a fantastic job and is the office go-to person to solve problems. Applicant always follows the rules concerning access to classified information. Applicant relates well to others at work. He was surprised to learn that Applicant used marijuana on two occasions. However, he is not surprised Applicant admitted the use since he is a very honest person. Applicant's use of marijuana does not alter his opinion of him, and he does not believe it will hinder Applicant's handling of classified information. The witness and his family and other fellow employees socialize with Applicant outside of work. None of the group uses illegal drugs. He believes the company drug policy follows the federal guidelines in that they cannot use illegal drugs (Tr. 65-74).

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

The 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 mood and behavior altering substances, and include those listed on the Controlled Substances Act of 1970. Marijuana is listed as a controlled substance drug under the Controlled Substance Act of 1970. Drug abuse is the illegal use of a drug or the use of a legal drug in a manner that deviates from approved medical direction (AG ¶ 24).

The information in the exhibits presented at the hearing by the government and Applicant's answers and testimony are sufficient to raise Drug Involvement Disqualifying Conditions (DI DC) AG ¶ 25(a) "any drug use", DI DC AG ¶ 25(c) "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution", and DI DC AG ¶ 25(g) "any illegal drug use after being granted a security clearance". It is clear from Applicant's own statement that he used marijuana in January and December 2007. He had to possess the marijuana to use it. He has held a security clearance since 2003, so he used marijuana while holding a security clearance. Even though his drug use was experimental, it raises a security clearance concern.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 25(a), (c), and (g), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate his use of illegal drug (Directive ¶ E3.1.15). An applicant has the burden to refute an established allegation or prove a mitigating condition, and the burden of disproving it never shifts to the government.

I considered Drug Involvement Mitigating Conditions (DI MC) ¶ 26(a) "the behavior happened so long ago, was so infrequent, or happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment"; and DI MC ¶ 26(b) "a demonstrated intent not to abuse 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 used marijuana twice in 2007 with his last use in December 2007, about fifteen months before the hearing. At the time of his use of the illegal drug, Applicant was twenty-two years old and a college student who was socializing with his brother and other friends. He used marijuana on these occasions mainly out of curiosity. His use of marijuana was infrequent in that he only used it twice about twelve months apart. Applicant used marijuana while holding a security clearance which he received when he was about eighteen years old. He has now graduated from college, is steadily employed, and has changed his social habits and his friends. His supervisor and fellow worker attest to his good work performance and ethics and his reputation for honesty and integrity.

Applicant stated his intention not to use illegal drugs in the future. He stated he no longer goes to places where drugs are used and rarely associates with people that use drugs. He submitted to a drug test just prior to the hearing which indicates that he was drug free at the time of the test and a further indication that he is not now using illegal drugs. He executed an affidavit that he will not use illegal drugs in the future and that he would automatically lose his access to classified information if he did use illegal drugs.

Applicant reported that he used marijuana on two occasions on his security clearance application. Except for Applicant's admission on the application, it is doubtful that his marijuana use would be known to his company or security officials. While he was required to list his use of marijuana on his security clearance application because of the requirement to answer all questions truthfully, the fact that he did list his marijuana use is some indication of his honesty and truthfulness. He testified at the hearing openly and candidly providing detailed responses to questions. His testimony that he only used marijuana on two occasions in 2007 and has not used marijuana since December 2007 is credible. His intention not to use marijuana in the future is also understandable and credible. His testimony is sufficient information to establish he no longer uses illegal drugs. While the time since his last use of marijuana is only fifteen months, under the circumstances of his age at the time of use, his status as a college student, a recent negative drug test, and the execution of a document of automatic revocation for using illegal drugs, sufficient time has passed since his last use of illegal drugs to indicate he no longer uses illegal drugs. Applicant met his heavy burden of

establishing that his past drug use does not now raise questions concerning his reliability, trustworthiness, judgment, or willingness to comply with rules and regulations. I find for Applicant as to drug involvement under Guideline H.

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. I considered that Applicant has been employed by the same defense contractor since he was a high school student, that his employment record is good, and that he is held in high esteem by this supervisor and fellow worker. I considered that he was only twenty-two years old and a college student when he used marijuana and that he has now matured and understands the consequences of his action in using illegal drugs. He has changed his social habits and the people he socializes with to avoid situations where drugs are used. I considered that he recently tested negative for drug use, and he signed a document that if he used illegal drugs in the future he would automatically lose his security clearance. Overall on balance, 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 involvement.

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

Conclusion

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

THOMAS M. CREAN
Administrative Judge