



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 08-09983
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Francisco Mendez, Esq., Department Counsel
For Applicant: *Pro se*

September 23, 2009

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline H (Drug Involvement). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on July 9, 2008. On May 28, 2009, the Defense Office of Hearings and Appeals (DOHA) sent Applicant a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline H. 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 adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

Applicant received the SOR on June 4, 2009; answered it on June 22, 2009; and requested a hearing before an administrative judge. DOHA received the request on June 24, 2009. Department Counsel was ready to proceed on July 17, 2009, and the

case was assigned to me on July 22, 2009. DOHA issued a notice of hearing on July 24, 2009, scheduling the hearing for August 27, 2009. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through G, which were admitted without objection. The record closed upon adjournment of the hearing. DOHA received the transcript (Tr.) on September 3, 2009.

Amendment of SOR

On my own motion, and without objection from either side, I amended the SOR to correctly reflect Applicant's full name (Tr. 4-5).

Findings of Fact

Applicant is a 23-year-old analyst employed by a federal contractor. He graduated from college in May 2008 with a bachelor's degree in information systems, and he began working for his current employer shortly after graduation. He has never held a security clearance.

When Applicant submitted his security clearance application, he disclosed that he used marijuana 80-100 times from September 2004 to February 2008, used cocaine once on New Year's Day, 2008, sold marijuana to friends from August 2007 to February 2008, and obtained and sold cocaine to two people. He explained that he stopped his drug involvement because he realized he needed to "grow up" and prepare for his "real life." He attributed his single use of cocaine to bad judgment (GX 1 at 31-32).

During an interview with a security investigator in September 2008, Applicant stated that he began using marijuana in high school, and smoked it regularly two or three times a week. He told the investigator he used marijuana mostly because of peer pressure, but he also relied on it as a stress reliever, and to relieve the pain of his Crohn's disease. He decided to stop using marijuana after he experienced a bad flare-up of his Crohn's disease in January 2008 and was hospitalized (GX 2 at 8-9). He has never sought or received treatment for drug abuse and does not believe he needs it (Tr. 33). He no longer associates with any of the persons with whom he used drugs, purchased drugs, or provided drugs (Answer to SOR). His present circle of friends and his father know about his prior drug involvement (Tr. 39).

Applicant worked at various part-time and summer jobs while in college, including a local restaurant. Applicant purchased marijuana from one of the cooks at the restaurant (Tr. 35), and he sold it to friends, usually making about a \$5.00 profit on each transaction (Tr. 36).

In his response to the SOR, Applicant admitted all the allegations in the SOR. He submitted matters in mitigation, including a notarized statement that he "will never again use or distribute any illegal substance and [he] understand[s] that doing so will result in an automatic revocation of [his] security clearance, among other consequences."

At the hearing, Applicant submitted his college transcript, reflecting a grade point average of 2.970 on a four-point scale (AX A). He also submitted statements from five friends and former classmates (AX B-G). They describe him as honest, trustworthy, dependable, generous, compassionate, and loyal. They comment on his increased maturity, hard work, and enthusiasm for his new job. None of the friends who submitted letters were involved in his drug abuse (Tr. 34). His younger brother describes him as a reliable and trustworthy person who has matured significantly since his graduation from college (AX H). His performance appraisal for the period ending in June 2009 rates him as frequently exceeding expectations and comments favorably on his ability to take on independent responsibility (AX B).

Applicant has recently begun graduate school, while working full-time. He intends to obtain a master's degree in information security. He is active in his church and participates in several musical and sports groups.

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. It is merely an indication the applicant

has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline H, Drug Involvement

The SOR alleges Applicant purchased and used marijuana with varying frequency from September 2004 until February 2008 (SOR ¶ 1.a), used cocaine once on New Year’s Eve (December 31, 2007-January 1, 2008) (SOR ¶ 1.b), purchased and sold marijuana to friends from August 2007 to February 2008 (SOR ¶ 1.c), and purchased and sold cocaine to two people between August 2007 and February 2008 (SOR ¶ 1.d). The concern under this guideline is as follows: “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.

Guideline H encompasses “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).” AG ¶ 24(a)(1). Drug abuse is “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.” AG ¶ 24(b). Disqualifying conditions under this guideline include “any drug abuse”; and “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.” AG ¶¶ 25(a) and (c). Applicant’s drug involvement raises AG ¶ 25(a) and (c), shifting the burden to him to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition,

and the burden of disproving it never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns under this guideline may be mitigated if “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.” AG ¶ 26(a). The first prong of AG ¶ 26(a) (“happened so long ago”) focuses on whether the drug involvement was recent. There are no “bright line” rules for determining when conduct is “recent.” The determination must be based on a careful evaluation of the totality of the evidence. If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

Applicant’s drug involvement stopped in February 2008, about 18 months before the hearing. He had been regularly involved in marijuana for more than three years and had been selling drugs for about six months. He stopped his drug involvement voluntarily because he wanted to change his life. He graduated from college and began working for his current employer in May 2008. He has a new circle of friends. He is deeply involved in his job, attends graduate school part-time, and is involved in his community. He appears to have left his college lifestyle behind him. I conclude AG ¶ 26(a) is established.

Security concerns also may be mitigated by “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.” AG ¶ 26(b). Applicant no longer associates with drug users, has moved from the college environment to the adult workforce, has abstained from drugs for 18 months, and submitted a statement of intent that effectively places him on self-imposed probation. I conclude AG ¶ 16(b) is established.

Security concerns also may be mitigated by “satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.” AG ¶ 26(d). This mitigating condition is not established, because Applicant has not sought or received any drug treatment.

Whole Person Concept

Under the whole person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of the applicant’s conduct and all the relevant circumstances. An 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 have incorporated my comments under Guideline H in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is young, working on his first real job after graduation. He apparently evaluated his lifestyle while hospitalized in February 2008, looked toward the future, and decided it was time to "grow up." He was very candid, sincere, and credible at the hearing. He has been open and honest about his previous drug involvement, thereby minimizing his vulnerability to coercion by threats of disclosure. By submitting his statement of intent, he has voluntarily put himself on probation, knowing that any return to drug involvement will terminate his budding career. After weighing the disqualifying and mitigating conditions under Guideline H, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on his drug involvement. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement): FOR APPLICANT

Subparagraphs 1.a-1.d: For Applicant

Conclusion

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

LeRoy F. Foreman
Administrative Judge