



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



In the matter of:)
)
) ISCR Case No. 09-02906
)
)
Applicant for Security Clearance)

Appearances

For Government: Gina L. Marine, Esquire, Department Counsel
For Applicant: *Pro Se*

December 7, 2009

Decision

DAM, Shari, Administrative Judge:

Based on the evidence as a whole, Applicant failed to rebut or mitigate the government's security concerns raised under Guideline H, Drug Involvement. His eligibility for a security clearance is denied.

On December 9, 2008, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On July 27, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline 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.

On August 17, 2009, Applicant answered (AR) the SOR in writing and elected to have the case decided on the written record in lieu of a hearing. On September 30, 2009, Department Counsel prepared a File of Relevant Material (FORM), containing five Items, and mailed Applicant a complete copy on October 7, 2009. Applicant received the FORM on October 13, 2009, and had 30 days from its receipt to file objections and submit additional information. Applicant timely submitted a letter and three exhibits to which Department Counsel had no objection. On November 16, 2009, DOHA assigned the case to me. I subsequently marked Applicant's submission as Applicant's Exhibits (AE) A through D and admitted them into the record.

Procedural Issue

Pursuant to Directive E3.1.17, I am amending the SOR so that the allegation in Paragraph 1.a conforms to the record evidence. It shall read as follows: "You used marijuana, with varying frequency, from about 1978 (high school) to at least September 2008." The date of December 2008 is stricken.

Findings of Fact

In his AR, Applicant denied the sole factual allegation contained in Paragraph 1 of the SOR pertaining to the time frame that he illegal used marijuana.

Applicant is 41 years old. He is married and has two children from a previous marriage. In May 1994, he earned a Master of Science degree in Mechanical Engineering. In January 1995, he began working as a project engineer for a federal contractor. In December 2008, he submitted an e-QIP. (Item 4.)

In response to Section 24: *Your Use of Illegal Drugs and Drug Activity* on the e-QIP, Applicant disclosed that he used marijuana from "1/2001 (Estimated) to Present" and explained as follows:

In the last 7 years, I have smoked marijuana very occasionally at social events where it was passed around. This has occurred maybe 6 – 8 times in that period of time. I do not purchase or possess marijuana. No other drug use of any kind. My judgement (sic) and trustworthiness has not been effected (sic) by this infrequent social use.

In December 2008, Applicant "made a clear and conscious decision that [he] would not smoke marijuana again because it is illegal and [he] wanted to hold a position of more responsibility at work, and smoking marijuana was in direct conflict with that goal." (AE A.)

On March 6, 2009, a government investigator interviewed Applicant about answers in his e-QIP. Applicant admitted that he started illegally smoking marijuana in high school and used it frequently. His use decreased when he entered college to once or twice a semester. After graduating, he sporadically smoked marijuana once or twice

in some years, and not at all in other years. (Item 5 at 3.) The last time he used marijuana was in September 2008 while he was on a camping trip with some friends. Previous to that time, he used it in June 2008. He never purchased marijuana, but used it when it was offered to him in social settings. (*Id.* at 4.) He no longer associates with the individual who gave him the marijuana during the September 2008 camping trip. (AE A.) Both his wife and security officer are aware of his illegal drug abuse. (Item 5 at 4.)

In his response to the FORM, Applicant asserted that he has “lived a drug free lifestyle for the last 13 months as an example of [his] commitment to abstinence and change in behavior.” (AE A.) He signed a statement of his intention never to use it again and understands that if he does use it in the future it would mean an automatic revocation of his security clearance. (AE B.)

Applicant’s supervisor submitted a recommendation that he be granted a security clearance. The supervisor wrote that Applicant has “received exemplary performance reviews every year while being entrusted to carry out some very challenging US DoD projects.” (AE D; C.)

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 AGs 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 overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 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 “Any 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.

According to Directive ¶ E3.1.14, the government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by 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 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.”

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 an 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

The security concern pertaining to 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.

(a) 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;

(b) 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 ¶ 25 describes conditions that could raise a security concern and may be disqualifying:

(a) any drug abuse (see above definition);

(b) testing positive for illegal drug use;

- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;
- (d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;
- (e) evaluation of drug abuse or drug dependence by a licensed clinical social worker who is a staff member of a recognized drug treatment program;
- (f) failure to successfully complete a drug treatment program prescribed by a duly qualified medical professional;
- (g) any illegal drug use after being granted a security clearance; and,
- (h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

Based on Applicant's admissions that he illegally used marijuana for most of his adult life up to September 2008, the government raised a potential disqualifying condition under AG ¶ 25(a).

After the government has raised a potential disqualifying condition, the burden shifted to Applicant to rebut and prove mitigation of the resulting security concerns. AG ¶ 26 includes examples of conditions that could mitigate the security concern arising from illegal drug use:

- (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;
- (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;
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) 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 ¶ 25(a) does not apply because Applicant regularly used illegal drugs over the course of his adult life up to September 2008. Given his long history of illegal marijuana use, including while he was employed with a federal contractor, his behavior casts doubt on his current trustworthiness and good judgment. Applicant stated that he does not intend to use illegal drugs in the future and that he signed a statement of intent with an automatic revocation of his clearance for any violation. He asserted that he no longer associates with one of his friends who smokes marijuana. Those claims, albeit unsubstantiated, warrant a very limited application of AG ¶¶ 25(b) (1) and (4). Applicant's uncorroborated assertions that he has not used marijuana for 13 months does not trigger the application of AG ¶ 25(b) (3) because said abstinence is insufficient evidence to establish an appropriate period of abstinence, in view of his thirty years of sporadic use. No evidence supports the application of AG ¶ 25(c). The record does not contain evidence that Applicant has participated in a substance abuse treatment, which is necessary to warrant the application of AG ¶ 25(d).

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 relevant 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.

According to 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 is a 41-year-old married man, who has illegally used marijuana most of his adult life, beginning in 1978 until September 2008, when he realized that his drug usage could effect his employment.¹

¹Apparently, Applicant was either unaware of federal employment prohibitions against illegal drug use or chose to ignore them since he became employed in 1995.

While his candid admissions of the illegal drug use throughout the security clearance process are noteworthy, his assertion that he has no intention to illegally use marijuana in the future is not persuasive. Other than his personal assurances, he did not provide any independent evidence to corroborate his assertions that he has not used it since September 2008, or that he has gained significant insight or personal skills that will prevent future illegal behavior. His long history of use, albeit sporadic but while employed with a federal contractor, raises concerns about his reliability, judgment, and ability to comply with rules and regulations.

Overall, the record evidence leaves me with questions as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant did not mitigate 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: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

SHARI DAM
Administrative Judge