



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



| | | |
|----------------------------------|---|------------------------|
| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 10-04448 |
| |) | |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: Paula W. Phinney, Esquire

November 6, 2012

Decision

CEFOLA, Richard A., Administrative Judge:

The Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) on January 14, 2010. On May 16, 2012, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H and E for 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 adjudicative guidelines (AG), effective within the Department of Defense after September 1, 2006.

The Applicant acknowledged receipt of the SOR on May 29, 2012. He answered the SOR in writing through counsel on June 13, 2012, and requested a hearing before an Administrative Judge. DOHA received the request on June 18, 2012, and I received the case assignment on August 3, 2012. I granted the Applicant's request for a delay until September 28, 2012, in order for his counsel to be available. DOHA issued a notice of hearing on August 21, 2012, and I convened the hearing as scheduled on

September 28, 2012. The Government offered Exhibits (GXs) 1 through 3, which were received without objection. The Applicant testified on his own behalf and submitted Exhibits (AppXs) A through X, which were received without objection. DOHA received the transcript of the hearing (TR) on October 9, 2012. The record closed on October 9, 2012. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

In his Answer to the SOR, the Applicant admitted the factual allegations in Subparagraphs 1.a., 1.b., and 1.c. of the SOR, with explanations. He denied the factual allegations in Subparagraphs 1.d. and 2.a. of the SOR. He also provided additional information to support his request for eligibility for a security clearance.

Guideline H - Drug Involvement & Guideline E - Personal Conduct

The Applicant is an inventor, who holds “four U.S. Patents.” (TR at page 55 line 10 to page 58 line 5.) He was granted a Top Secret Security Clearance in May of 2005. (TR at page 26 lines 7~12.) He had a motorcycle accident in January of 2005; and as a result, broke his “right clavicle collar bone.” (TR at page 32 line 20 to page 34 line 8, and AppX T.) He was prescribed medication for his resulting pain, but found it to be “pretty strong,” upsetting his stomach. (TR at page 34 line 9 to page 35 line 21.) In 2008, he also received “steroid injections” and “a muscle relaxer” to treat his chronic pain. (TR at page 35 line 22 to page 38 line 2, and AppX U.)

1.a.~1.d. and 2.a. In October of 2009, the Applicant “was out riding dirt bikes,” when he credibly avers the following occurred:

I remember I was out of water or something like that, and my neck was hurting pretty bad. One of the fellas was talking about the fact that he had, you know the term medical in front of it and said it would help, and that he had a card, and I accepted it. (TR at page 31 line 24 to page 32 line 6.)

The Applicant does not excuse his actions, when in October of 2009, he smoked a total of three marijuana cigarettes, on three separate occasions, to self-medicate his pain. (TR at page 31 line 24 to page 41 line 7.) The third and last time he used the illegal substance, he was cited for its usage. (TR at page 42 lines 10~23.) As a result of this citation, in December of 2009, he successfully completed a five month, 20 session, diversion program. (TR at page 47 line 9 to page 51 line 25, at page 59 lines 13~17, and at page 77 lines 8~18.) The citation against him has been dismissed. (TR at page 90 lines 21~24.)

The Applicant foreswears any future involvement with illegal drugs, and has signed a notarized “Statement of Intent” to that end. (TR at page 46 lines 7~25, and AppX Q.)

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 commonsense decision. According to AG Paragraph 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. Paragraph 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 Paragraph E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive Paragraph 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

Paragraph 24 of the adjudicative guidelines sets out the security concern relating to Drug Involvement: "Use of an illegal drug . . . can raise questions about an individual's reliability and trustworthiness"

The adjudicative guidelines set out certain conditions that could raise security concerns. Paragraphs 25(a) and 25(g) provide, respectively, that "*Any drug abuse,*" and "*any illegal drug use after being granted a security clearance,*" may raise security concerns. These are countered, however, by the mitigating conditions set forth in Paragraphs 26(a) and 26(b)(4). Paragraph 26(a) notes that it is mitigating when "*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.*" Here, the Appellant's three time marijuana usage occurred about three years ago, and there is no indication that it will be repeated. Paragraph 26(b)(4) notes that it is mitigating when there is "*a demonstrated intent not to abuse any drugs in the future, such as: (4) a signed statement of intent with automatic revocation of clearance for any violation.*" By a notarized "Statement of Intent," the Applicant has eschewed any future Drug Involvement. Drug Involvement is found for the Applicant.

Guideline E - Personal Conduct

Paragraph 15 of the new adjudicative guidelines sets out the security concern relating to Personal Conduct:

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.

The adjudicative guidelines again set out certain conditions that could raise security concerns. Paragraph 16(c) applies and provides that "*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*" may be disqualifying. This is countered, however, by the mitigating condition set forth in Paragraph 17(c). It notes that it is mitigating when "*the offense is so minor, or so much time has passed, or the behavior is so infrequent, or happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgement.*" His use of marijuana

happened three years ago, and “under such unique circumstances that it is unlikely to recur.” Personal Conduct is found for the Applicant.

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. Under AG Paragraph 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. The Administrative Judge should also consider the nine adjudicative process factors listed at AG Paragraph 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.

I considered all of the evidence, including the potentially disqualifying and mitigating conditions surrounding this case. The Applicant has received numerous awards and those that know him in the work place speak most highly of his character (AppXs A~C, I and R.). The record evidence leaves me with no 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 and related Personal Conduct.

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 |
| Subparagraph 1.c: | For Applicant |
| Subparagraph 1.d: | For Applicant |

Paragraph 2, Guideline E:

FOR APPLICANT

Subparagraph 2.a:

For 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.

Richard A. Cefola
Administrative Judge