



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



In the matter of:)
)
) ISCR Case No. 10-06978
)
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esquire, Department Counsel
For Applicant: *Pro se*

April 29, 2011

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings and exhibits, I deny Applicant’s eligibility for access to classified information.

Statement of the Case

Applicant signed an Electronic Questionnaire for Investigations Processing (e-QIP) version of a security clearance application (SF-86) on March 2, 2010. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) on February 4, 2011, detailing security concerns under Guideline H, Drug Involvement, that provided the basis for its preliminary decision to deny him a security clearance. 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 For*

Determining Eligibility for Access to Classified Information (AG) implemented on September 1, 2006.

Applicant received the SOR on February 9, 2011. He answered the SOR in writing on February 24, 2011. He requested a decision on the written record in lieu of a hearing.

Department Counsel prepared a File of Relevant Material (FORM) and mailed Applicant a complete copy on March 16, 2011. Applicant received the FORM on March 24, 2011. He had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. He submitted an undated written response, which was received in April 2011. DOHA assigned this case to me on April 18, 2011. The Government submitted six exhibits, which have been marked as Items 1-6 and admitted into the record. Applicant's response to the SOR has been marked and admitted as Item 4, and the SOR has been marked as Item 1. His written response to the FORM is admitted into the record as Applicant exhibit A (AE A).

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in the SOR. His admissions are incorporated herein as findings of fact. He also provided additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant, who is 25 years old, works as a technician for a Department of Defense contractor. He began his job in May 2009.¹

Applicant graduated from high school in 2003. He received awards in high school for math, for competing on the golf team, and for participating in a State event. He graduated from college in 2009 with a bachelor's degree in physics. He worked during college. He is single and lives independently.²

When he completed his e-QIP, Applicant acknowledged using marijuana from 2003 until January 2010. He first smoked marijuana as a high school student. During his senior year of high school, he smoked marijuana four to five times a week. He continued smoking marijuana four to five times a week throughout college. In 2004 or 2005, he received a prescription from a medical doctor for medical marijuana because he suffered from insomnia. With the prescription, he was given a medical marijuana

¹Item 6; Item 6.

²Item 4; Item 5; Item 6.

card. He purchased the marijuana with the card at a legal location. He smoked marijuana in college to cope with stress and the fast pace of his studies.³

After his graduation from college, Applicant started his current employment, which changed his friends, associates, and perspective on his life. He decided to change his lifestyle, including his marijuana use. He most recently smoked marijuana in January 2010. He manages his stress with exercise, golf, and conversation about his concerns. His insomnia has improved with his change in stress-management techniques.⁴

Applicant used cocaine one time as a college freshman. He did not like the effects of this drug and has not used it again. When he met with the investigator from the Office of Personnel Management (OPM), he indicated that he did not have any financial or other problems because of his marijuana use. He advised that he felt better after he stopped his marijuana use. In his response to the SOR, he indicated that he had been presented with the opportunity to smoke marijuana since he decided to stop using it and that he turned down the marijuana “without a second thought.” He did not explain the circumstances under which he was offered the marijuana, nor did he explain the conflict in this statement with his statement that he no longer associated with individuals who use drugs.⁵

In his response to the FORM, Applicant listed several people who would provide information about the changes in his life, but he did not provide any signed statements from these individuals. He indicated that he does not seek out his old drug-using friends, but given that he lives in a small community, he encounters these friends on the street or at a dinner party. He does not crave marijuana or need to use marijuana, as his life is better without marijuana. He stated that he believed his marijuana use was a crutch and may have prevented him from reaching his full potential in college.⁶

Applicant’s response to the FORM reflects that he read the disqualifying and mitigating conditions under the guidelines. He noted that the guideline had a sentence about a “signed intent with automatic revocation of clearance for any violation.” He then stated: “If need be, I would have no reservation about signing a statement like this regarding the use of illegal drugs. I have NO intention of ever using illegal drugs again; I have closed the door to that part of my life. . .” He also told the OPM investigator that he had no intent to smoke marijuana in the future.⁷

³Item 1; Item 4.

⁴AE A.

⁵Item 4; Item 6; AE A.

⁶AE A.

⁷*Id.*; GE 6.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used 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(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.

Under 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. . . ." An applicant has the ultimate burden of persuasion for 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 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.

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

AG ¶ 24 expresses the security concern pertaining to drug involvement:

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.

Under the potential disqualifying conditions described in AG ¶ 25, the following conditions could raise a security concern and may be disqualifying in this case:

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

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant started smoking marijuana in high school. By his senior year of high school, he was smoking marijuana four to five times a week. He continued his use in college, eventually obtaining a medical marijuana card to purchase it. He used marijuana regularly and frequently between 2002 and 2009. Because he smoked marijuana, he had to possess it. The Government has established its prima facie case under the above disqualifying conditions.

Under the potential mitigating conditions described in AG ¶ 26, the following conditions may mitigate the security concerns in this case:

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

Applicant's drug use is recent and occurred while he was a student in college. He is now working in a mature work place. His daily associations are with individuals who are different from his college friends. He does not seek out his college drug-using friends, but he does run into them around town occasionally. He has not used marijuana for 15 months. He also expressed an intent not to use marijuana in the future in his response to the SOR and when he met with the investigator. While he did not sign a statement of intent with automatic revocation of clearance for any violation, his statement in his response to the SOR is sufficient to meet the requirements of mitigating condition AG ¶ 26(b)(4). Applicant has presented some evidence of mitigation; however, his marijuana use is too recent and extensive to fully mitigate concerns.

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 an 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.

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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct,

but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

Applicant started smoking marijuana regularly and frequently while a high school student. He continued the same level of marijuana use level while a college student, even obtaining a medical marijuana card because he believed the marijuana helped with his insomnia problems. After college, he reassessed his marijuana use and his friends. He no longer associates with individuals who use marijuana or other illegal drugs. He stopped using marijuana 15 months ago, which in light of his previous extensive use of marijuana for seven years, is insufficient time to show that he will continue his abstinence. His cocaine use was experimental and is not a security concern. He did not provide statements or testimony from his friends and associates about his current lifestyle and abstinence from contacts with marijuana. While he has presented some evidence of mitigation, he has not presented sufficient evidence to overcome the security concerns raised by his past marijuana use.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his drug involvement under Guideline H.

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 2, Guideline H:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For 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.

MARY E. HENRY
Administrative Judge