



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



In the matter of:

ISCR Case No. 10-09145

Applicant for Security Clearance

Appearances

For Government: Richard Stevens, Esquire, Department Counsel

For Applicant: *Pro Se*

August 31, 2011

Decision

CREAN, THOMAS M., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on May 21, 2010, to obtain a security clearance required for employment with a defense contractor. After an investigation conducted by the Office of Personnel Management (OPM), the Defense Office of Hearings and Appeals (DOHA) issued an interrogatory to Applicant to clarify or augment potentially disqualifying information in his background. After reviewing the results of the background investigation and Applicant's response to the interrogatory, DOHA could not make the preliminary affirmative findings required to issue a security clearance. On March 10, 2011, DOHA issued Applicant a Statement of Reasons (SOR) detailing security concerns for drug involvement (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); Department of Defense (DoD)

Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation); and the adjudicative guidelines (AG) effective in the Department of Defense on September 1, 2006.

The SOR alleges that Applicant used marijuana with varying frequency from March 1995 until May 2010 (SOR 1.a), that he used cocaine in 2005 (SOR 1.b), and that he tested positive for marijuana in 2002 on a drug test administered for his employment (SOR 1.c). Applicant admitted the allegations in his April 29, 2011, response to the SOR. Department Counsel was prepared to proceed on May 12, 2011, and the case was assigned to me on May 19, 2011. DOHA issued a Notice of Hearing on June 9, 2011, scheduling a hearing for June 20, 2011. I convened the hearing as scheduled. The Government offered two exhibits which were marked and admitted into the record without objection as Government Exhibits (Gov. Ex.) 1 and 2. Applicant testified. I kept the record open for Applicant to submit additional documents. Applicant timely submitted three documents I marked and admitted to the record as Applicant Exhibits (App. Ex.) A through C. Department Counsel had no objection to admission of the document. (Gov. Ex. 3, Memorandum, dated June 24, 2011) DOHA received the transcript of the hearing (Tr.) on June 28, 2011.

Procedural Issues

Applicant received the notice of hearing a few days before the hearing. Applicant is entitled to 15 days advance notice of a hearing (Directive E3.1.8.). On May 12, 2011, Applicant discussed with Department Counsel the hearing date of June 20, 2011. Applicant was ready to proceed and had sufficient time to prepare. Applicant affirmatively waived the 15-days notice requirement. (Tr. 5-7)

Findings of Fact

Applicant admissions to the SOR allegations under Guideline H are included in my findings of fact. After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact.

Applicant is a 34-year-old high school graduate who works as an electrician in construction. He was married in 1997 but divorced in 2003. He has two children. He is seeking a security clearance to work for a defense contractor as an electrician in construction overseas. (Tr. 9-10)

Applicant admits he used marijuana about three to five times a week starting in March 1995 when he was 18 years old until May 2009. He curtailed his use after May 2009 and only used about five times until May 2010 when he stopped using marijuana or other drugs. He was working in construction the entire time and used marijuana as a sleep aid. Marijuana was easy to find and its use was prevalent in the construction trades. He would purchase a "1/4 bag" for \$25 and it would last him about two weeks. He was randomly drug tested by many of his employers but only tested positive once in 2002. He was working for an electrical staffing company which did not drug test but was tested when he was sent to a unionized job. The other companies that he worked for

drug tested as part of the hiring process. He did not use all of the time and knew he would be tested when he went for the interview. He never failed one of these drug tests. He did use marijuana after being hired but he was not tested. (Tr. 14-20)

Applicant admitted he used cocaine one time in 2005 as an experiment. The drug was supplied by his then girlfriend. He felt nervous after taking the drug. (Gov. Ex. 2, Answer to Interrogatory, Testimonies at 1.)

After the hearing, Applicant voluntarily submitted for a drug test. The results were negative for all drugs tested. (App. Ex. 1 through 3)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised Administrative Guidelines. 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 ¶ 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 burden of persuasion 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.

Analysis

Guideline H, Drug Involvement

The use of an illegal drug can raise questions about an individual's reliability and trustworthiness, because it may impair judgment and 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 in the Controlled Substances Act of 1970. Marijuana and cocaine are listed in the Act. 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). Applicant admits purchasing and using marijuana from 1995 until May 2010, use of cocaine one time in 2005, and failing a drug test in 2002. He stopped using marijuana about the same time he submitted his security clearance application. Applicant's admitted drug use raises Drug Involvement Disqualifying Conditions AG ¶ 25(a) (any drug use); AG ¶ 25(b) (testing positive for illegal drug use); and AG ¶ 25(c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia).

The Government produced sufficient evidence to establish the disqualifying conditions as required in AG ¶¶ 25(a), 25(b), and 25(c). The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns under drug involvement. An applicant has the burden to refute an established allegation or prove a mitigating condition, and the burden to prove or disprove it never shifts to the Government. Applicant raised conditions that may mitigate the security concern.

I considered Drug Involvement Mitigating Conditions AG ¶ 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 AG ¶ 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). These mitigating conditions do not apply. While there is no "bright line" rule for determining when conduct is recent or sufficient time has passed since the incidents, a determination whether past conduct affects an individual's present reliability and trustworthiness 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 evidence of drug involvement, there must be an evaluation whether that period of time demonstrates changed circumstances or conduct sufficient to indicate a finding of reform or rehabilitation.

Applicant admits using marijuana for over 15 years from 1995 until 2010. For all but the last year, he used marijuana from three to five times a week. In the last year, he

used only about five times. He purchased the marijuana and used it to help him sleep. There were no unusual circumstances leading to the drug use. His use started as a teenager but he was in his early thirties when he curtailed and stopped using in 2009/2010. He was employed, married, and the father of two children during the time he used marijuana. He stopped using contemporaneous with submitting his security clearance application. Applicant's long and frequent use of marijuana for over 15 years casts doubt on his reliability, trustworthiness, and good judgment. Applicant experimented with cocaine once in 2005, and failed a drug test for marijuana in 2002. His onetime use of cocaine in 2005, and his failed drug test in 2002 no longer create a security concern. The behavior was long ago and the cocaine use was infrequent.

There is no indication that his drug use would not recur. Balanced against his long time use of marijuana is Applicant's abstinence for just one year. The only indication of a changed circumstance is that he applied for a security clearance required for a desired position with a defense contractor. There are no indications he sought or received treatment for his drug use, that he changed associates, or is in a different environment. There is limited information about his intent not to use drugs in the future. There is only his statement that he will not use. The information is not sufficient to overcome his long term use of marijuana. Even though he recently tested negative for drugs, Applicant failed to mitigate the security concerns for his use of marijuana from 1995 until 2010. He has not established sufficient changes of circumstance to show he has reformed and will no longer use illegal drugs.

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 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 used marijuana from 1995 until 2010. He has not used marijuana for a year and passed a voluntary drug test after his hearing. The only change of circumstances in his life is that he stopped using

marijuana when he applied for a security clearance for employment with a defense contractor. Applicant has not presented sufficient information to establish changed circumstances or a change in life style sufficient to establish he will not use illegal drugs in the future. He failed to meet his burden showing his long term drug use does not still reflect adversely on his reliability, honesty, trustworthiness, and good judgment. For all these reasons, I conclude Applicant has not mitigated the security concerns for illegal drug use from 1995 until May 2010. Overall, the record evidence leaves me with questions and doubts as to Applicant's judgment, reliability, and trustworthiness. Access to classified information is denied.

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
Subparagraphs 1.b – 1.c:	For Applicant

Conclusion

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

THOMAS M. CREAN
Administrative Judge