



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



In the matter of:)
)
) ISCR Case No. 10-11126
)
)
Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esquire, Department Counsel
For Applicant: *Pro se*

October 28, 2011

Decision

CREAN, Thomas M., Administrative Judge:

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

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on June 14, 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 18, 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); 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 April 1999 until February 2010 (SOR 1.a). Applicant admitted the allegation in his May 10, 2010, response to the SOR. Applicant requested a hearing on May 23, 2011. (Hearing Exhibit I) Department Counsel was prepared to proceed on June 13, 2011, and the case was assigned to me on July 25, 2011. DOHA issued a Notice of Hearing on August 4, 2011, scheduling a hearing for August 23, 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. DOHA received the transcript of the hearing (Tr.) on September 9, 2011.

Procedural Issues

Applicant did not remember the date he received the Notice of Hearing. However, he discussed the date of the hearing with Department Counsel before the notice was issued on August 4, 2011. Applicant is entitled to 15 day notice of a hearing (Directive E3.1.8.). Applicant was ready to proceed and had sufficient time to prepare. Applicant affirmatively waived the 15-day notice requirement. (Tr. 5-6)

Findings of Fact

Applicant's admission to the SOR allegation under Guideline H is 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 29-year-old scientist who has worked for a defense contractor for over four years. His work for the defense contractor until now has been in areas not requiring access to classified information. His employer wants to use his expertise in areas requiring access to classified information. Applicant received bachelor's degrees in dual science majors in April 2004, and master's degrees in the same majors in April 2008. He started working for the defense contractor in April 2007 after completing his master's degree class work while writing his thesis. He is single. (Tr. 10-15, 36; Gov. Ex. 1, e-QIP, dated June 14, 2010)

Applicant has been direct and forthcoming about his use of illegal drugs. He experimented with a variety of illegal drugs, to include marijuana, while in high school after the death of his father. He has not used the other drugs, except marijuana, since he was young and in high school. He admits using marijuana with varying frequency from April 1999 to February 2010. Applicant admits using marijuana while in college which was a violation of the college drug policy and could have led to academic suspension. He admits that he and his roommates used drugs in their dorm room and in a house they rented. Some of the use was sporadic. At times, it was almost daily, to include more than once a day. He admits using marijuana with his friends away from campus while on camping and vacation trips. He named some of his friends and fellow students who used drugs with him. He notes that his drug use did not affect his

academics or his work. He received his degrees on time with honors. His work performance with the defense contractor has been outstanding. (Tr. 15-25)

After completing his undergraduate degrees and while working for the defense contractor and studying for his master's degrees, he did not use drugs for approximately 18 months. He used drugs sporadically after that time with fellow graduate students. He is not in contact with these students now. The other friends he is in contact with do not now use drugs. He still is in contact with his college roommate and he sees him about three times a year. The last time they used drugs together was December 2009. Since his former roommate is now an attorney clerking for a judge, he does not believe he still uses drugs. He admits that he has sporadic contact, especially when he is home on a visit, with some of his old drug using friends. Some may still use drugs but he has not talked to them about drugs, in over a year (Tr. 25-32)

When Applicant was hired by the defense contractor in July 2007, he was not asked about his drug use. His only discussion about drug use was to sign a statement that he was subject to random drug screening and a positive test would result in termination. Applicant used drugs after commencing his employment even though he risked termination. He does not know the number of times he used illegal drugs. His employer placed him on special sensitive and dangerous international missions. He would be gone for months at a time on international travel and would not use drugs. When he returned, and especially while home on the weekends, he used drugs sporadically in a social setting. He used illegal drugs when he was in an environment in which drugs were used. (Tr. 32-38)

His employer has great faith and trust in his character, abilities, and professionalism. He stopped using marijuana in February 2010 for health and professional reasons. He did not like the way the drug affected his health and he felt it was a detriment to his professionalism and career. He also has seen while on his international travels for his employer the damage done in countries by the drug industry. He is saddened and embarrassed that he contributed to the violence as a drug user. He finds his former drug use extremely embarrassing. He has moved on from using drugs, has not used drugs in over 18 months, and has signed a pledge that he will not use drugs in the future. If he did use drugs, he will be immediately terminated. He has grown and matured and now leads a healthier lifestyle. He exercises and eats healthier. He lost his father to lung cancer and this presents him with health issues. He does have a heart problem that is not a result of drug use. However, he does feel that marijuana use could affect his health. (Tr. 32-34, 38-41; Go. Ex.2, Response to Interrogatory, dated February 4, 2011)

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 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. 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 is 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 using marijuana with various frequency from April 1999 until February 2010. Applicant's admitted drug use raises Drug Involvement Disqualifying Conditions AG ¶ 25(a) (any 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 in AG ¶¶ 25(a) and 25(c). To use an illegal drug, the individual has to possess the drug. 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 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 has passed without evidence of drug involvement, there must be an evaluation whether that period demonstrates changed circumstances or conduct sufficient to indicate a finding of reform or rehabilitation.

Applicant admits using marijuana for almost 12 years from 1999 until February 2010. His use during part of this time was sporadic. At times, while he was younger and in high school and college, the use was more frequent, sometimes daily and more than once daily. In later years, the use was not as frequent. He did not use when working overseas for his employer. He used at home, on vacation, and when he was in an environment in which drugs were used. There were no unusual circumstances leading to the drug use. His use started as a teenager but he was in his late 20s when he curtailed and stopped using marijuana in 2010. He was young and immature during most of the time he used marijuana. Applicant's long and frequent use of marijuana for over 12 years casts doubt on his reliability, trustworthiness, and good judgment.

There are clear indications that his drug use will not recur. Balanced against his long-term use of marijuana is Applicant's abstinence for approximately 18 months. He is a bright and smart individual who was straightforward and direct about his use of marijuana. He admitted his use in high school, in college, and while employed. He identified the individuals who used marijuana with him and his present relationship or lack of relationship with them. He stated a cogent and logical reason why he has now stopped using marijuana even though it took him until his late 20s to realize that drug use was illegal and bad for him. There are no indications he sought or received treatment for his drug use. However, he indicates he no longer associates with those that use drugs, is in a different environment, and he signed a document stating his intent not to use drugs in the future. His change of circumstance is sufficient to overcome his long term use of marijuana. Applicant mitigated the security concerns for

his use of marijuana from 1999 until February 2010. He 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 starting in 1999 when he was in high school until February 2010. He has not used marijuana for over 18 months. He established that his life circumstances have changed indicating he will not use drugs in the future. He is now older, wiser, and mature. He realizes the effect of marijuana use on his health and professionalism. While Applicant has come to these changed life circumstances a little later than some individuals, he realized that his drug use is contrary to his career goals and being cleared for access to classified information. Applicant has presented sufficient information to establish changed circumstances or a change in lifestyle sufficient to establish he will not use illegal drugs in the future. He met his burden to show his long-term drug use does not and will not reflect adversely on his reliability, honesty, trustworthiness, and good judgment. For all these reasons, I conclude Applicant has mitigated the security concerns for illegal drug use from 1999 until February 2010. Overall, the record evidence leaves me without questions or doubts as to Applicant's judgment, reliability, and trustworthiness. Access to classified information is granted.

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

Conclusion

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

THOMAS M. CREAN
Administrative Judge