



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



In the matter of:)
)
) ISCR Case No. 11-00193
)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: Lance R. Gallardo, Esquire

September 28, 2012

Decision

CEFOLA, Richard A., Administrative Judge:

The Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) on September 1, 2010. On March 14, 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 March 21, 2012. He answered the SOR in writing on April 24, 2012, and requested a hearing before an Administrative Judge. DOHA received the request on June 5, 2012, and I received the case assignment that same day. I granted the Applicant's request for a delay until "September 5th, 6th, or 7th" of 2012, in order for his counsel to be available. DOHA issued a notice of hearing on August 6, 2012, and I convened the hearing as scheduled

on September 6, 2012. The Government offered Exhibits (GXs) 1 through 3, which were received without objection. The Applicant testified on his own behalf, as did a psychiatrist/attorney and his wife, and submitted Exhibits (AppXs) A through V, which were received without objection. DOHA received the transcript of the hearing (TR) on September 19, 2012. The record closed on September 6, 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, and at his hearing, the Applicant admitted the factual allegations in Subparagraphs 1.a., and 1.b. of the SOR, with explanations. He denied the factual allegations in Subparagraph 2.a. of the SOR. (TR at page 6 line 20 to page 9 line 25.)

Guideline H - Drug Involvement & Guideline E - Personal Conduct

1.a., 1.b. and 2.a. The Applicant has held a security clearance since June of 2001. (GX 1 at pages 38~39.) Since that time, his Work Evaluations show that he has for the most part exceeded his employer's Expectations. (AppXs E~O.)

In 1989, at the age of 18, the Applicant began to use marijuana, infrequently and on a recreational basis; and this usage continued until the "[e]arly to mid-90's." (TR at page 113 line 13 to page 114 line 13; see also GX 1 at page 1.) In a sworn statement executed in June of 2000, he averred, in part, the following "I have no intentions of . . . smoking it again, because I want my security clearance and I understand marijuana is illegal." (GX 1 at page 1, see also TR at page 104 line 23 to page 106 line 12.)

In 2003, the Applicant admits to again using marijuana, this time to help alleviate the pain from a fractured toe. (TR at page 77 line 21 to page 78 line 17, at page 29 lines 9~20, and at page 114 lines 13~17.) This is verified by a psychiatrist/attorney, who testified on the Applicant's behalf. (TR at page 34 line 7 to page 35 line 5; see also AppX 1 at page 4.) However, prior to these testimonies, in October of 2011, the Applicant averred that this usage was for recreational purposes. (GX 2 at page 2.) The Applicant explained this obvious inconsistency was due to the embarrassment of sharing his medical condition with others. (TR at page 97 line 25 to page 99 line 10.) The fact remains that he illegally used marijuana in 2003.

In 2008~2010, the Applicant again admitted to using marijuana, this time to help alleviate the pain from "thrombosed hemorrhoids . . . fissures." (TR at page 79 line 21 to page 83 line 15, and at 114 line 18 to page 116 line 20.) This is also verified by the psychiatrist/attorney, who testified on the Applicant's behalf. (TR at page 34 line 7 to page 35 line 5, see also AppX 1 at page 4.) However, again prior to these testimonies, in October of 2011, the Applicant averred that this usage was for recreational purposes. (GX 2 at page 2.) The Applicant explained this obvious inconsistency was also due to

the embarrassment of sharing his medical condition with others. (TR at page 97 line 25 to page 99 line 10.) The fact remains that he illegally used marijuana from 2008~2010.

In August of 2012, the Applicant declared “that having a security clearance is incompatible with personal use of marijuana for any reason, medical or not, as it is a prohibited, controlled substance under Federal law.” (AppX B.) He further declared “[t]hat I shall not use Marijuana in the future for any reason because I do not want to lose my security clearance” (*Id.*) Furthermore, his psychiatrist concluded, after a psychiatric examination that:

[the Applicant] . . . has not had recurrences of his rectal condition in the last two years and the condition is considered resolved. Given that the medical condition led to the marijuana use, and it has been almost two years, it is highly unlikely that [the Applicant] . . . would revert to using marijuana. (AppX A at page 5.)

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 marijuana usage occurred about two years ago, and there is no indication that it will be repeated, as verified by the Applicant’s psychiatric witness. 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 Declaration, the Applicant has eschewed any future Drug Involvement. Drug Involvement is found for the Applicant. The fact that twelve years ago he said that he would not smoke marijuana, does not vitiate his current Declaration. I believe he is sincere as to his current stated intention.

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.*" While the marijuana use occurred two years ago, the Government notes that the Applicant's inconsistency as to the reason for his marijuana usage was only a year ago during his "Drug Interrogatory." I find that this admitted inconsistency to be "minor," as the gravamen of this case is the Drug Involvement. Furthermore, it happened "under such unusual 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 numerous awards and special commendations going back to 1997 (AppX C.). The record evidence leaves me with no questions and 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 Involve 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
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