



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 11-00446
)
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esquire, Department Counsel
For Applicant: *Pro Se*

03/22/2012

Decision

HOWE, Philip S., Administrative Judge:

On October 31, 2007, Applicant submitted his electronic version of the Security Clearance Application (SF 86) (e-QIP). On December 5, 2011, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H (Drug Involvement) and E (Personal Conduct). 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 on September 1, 2006.

Applicant answered the SOR in writing on December 15, 2011. Applicant requested his case be decided on the written record in lieu of a hearing.

On January 9, 2012, Department Counsel submitted the Department's written case. A complete copy of the file of relevant material (FORM) was provided to the Applicant on January 11, 2012. He was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant received the file on January 23, 2012. Applicant filed a Response to the FORM on January 30, 2012, within the 30 day time allowed that would have expired on February 22, 2012. I received the

case assignment on February 14, 2012. Based upon a review of the pleadings and exhibits, eligibility for access to classified information is denied

Findings of Fact

Applicant admitted the allegations in Paragraph 1 of the SOR. He neither admitted nor denied the allegations in Paragraph 2. In his January 30, 2012 Response to the FORM Applicant acknowledged he erred in not making an answer to Paragraph 2. He admitted the allegations in Paragraph 2.

Applicant is 27 years old and not married. He has an associate's degree earned in 2005. A government contractor has employed him since June 2006. During this time he was promoted twice and received several merit pay increases. (Item 3 and Response Attachment)

Applicant used marijuana from June 2002 to September 2009. Applicant described his marijuana use as one or twice a month at parties until June 2004. From then until September 2009 his marijuana use decreased to one or two times a year with friends, according to Applicant's admissions. (Items 3-7, Answer, Response)

Applicant was arrested in April 2006 for driving while intoxicated. His blood alcohol content (BAC) was .14%. Applicant drove at 91 miles per hour when arrested by the police. He was ordered to pay a \$1,300 fine, court costs, issued a restricted driving permit, and sent to a substance abuse counseling course from August 2006 to February 2007. Next, he was ordered to participate in an alcohol safety program from the completion of the first program until May 2007. (Items 4, 5)

Applicant received a security clearance in February 2008. His previous e-QIP is dated October 2007. On that form Applicant admitted only using marijuana five times between June 2002 and June 2004. Applicant continued to use marijuana while holding this security clearance until at least September 2009. (Items 4-7)

On August 24, 2009, Applicant was arrested by the local police in his apartment for using and possessing marijuana. Applicant was at his apartment with his girlfriend when the police knocked on his door seeking the identity of the person who parked illegally in or near a handicapped parking space. Applicant's girlfriend was that person. The police detected the odor of marijuana from inside Applicant's apartment and arrested him. Applicant admitted he bought the marijuana several months earlier and smoked it several times since then. This admission contradicts Applicant's other admissions that he only used marijuana once or twice a year from 2004 to 2009. (Items 3-7)

Applicant pled "no contest" to the marijuana charge. He received probation and community service, along with paying a fine. (Items 3-7)

Applicant submitted a character statement from the president of his company. That person states in his letter that Applicant is a trustworthy and honest employee. The letter author further characterizes Applicant as a person who has grown personally and professionally. He has a strong work ethic evidenced by his work product. (Response Attachment)

Applicant's personal conduct security concern, according to the SOR, includes the marijuana use alleged in Paragraph 1 of the SOR and his failure to answer Section 24(a) of his application truthfully by fully disclosing his marijuana use. Applicant answered this question about his illegal drug use in the past seven years by stating he used marijuana only on five occasions between June 2002 and June 2004. Applicant failed to disclose he used marijuana on the average of once a year between June 2004 and October 2007. (Items 3-7, Answer, Response)

Applicant stated he has left behind his illegal drug use in his response to DOHA interrogatories in October 2011. In the same interrogatory Applicant stated his marijuana use created conflict with his job and he no longer wished to risk his job and home. He also stated in the interrogatory that he leaves any situation in which other people use drugs. (Item 5)

Applicant did not submit any objective drug evaluation or results of his 2006 and 2007 courses on drug and alcohol use. I was unable to evaluate his credibility, demeanor, or character in person since he elected to have his case decided without a hearing.

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, the administrative judge applies the guidelines 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.

According to 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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. 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 illegal drugs:

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.

AG ¶ 25 describes eight conditions that could raise a security concern and may be disqualifying. Four disqualifying conditions apply in this case:

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

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

(g) any illegal drug use after being granted a security clearance; and

(h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

Applicant admits his marijuana drug use from June 2002 to September 2009 (AG ¶ 25 (a)). He admitted possessing marijuana which he used during that time period (AG

¶ 25 (c)). Applicant admitted using marijuana after February 2008 when he received his interim security clearance (AG ¶ 25 (g)). Finally, Applicant failed to clearly and convincingly commit to discontinue illegal drug use. He claims he ceased his marijuana use in September 2009 after seven years of use without any objective proof of that alleged cessation (AG ¶ 25 (h)).

AG ¶ 26 provides four conditions that could mitigate security concerns. Two conditions might apply 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;

None of these mitigating conditions applies. Applicant has a long history of marijuana use. His asserted abstinence is only two years in duration, a short time in comparison to the duration of marijuana use, including after Applicant obtained a security clearance. Applicant claims he ceased his use because it imperiled his job and his home. Yet, he does not provide any objective professional information confirming those assertions.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining 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. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms

or releases, and cooperation with medical or psychological evaluation;
and,

(b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Applicant did not disclose the extent of his marijuana use in the past seven years as requested in Section 24 (a) of the e-QIP he signed on October 31, 2007. This deliberate omission is alleged in SOR Paragraph 2. Applicant's personal conduct security concern includes his repeated marijuana use from 2002 to 2009. AG ¶ 16 (a) applies.

Applicant's personal conduct involving marijuana creates a vulnerability to exploitation, manipulation, or duress because his activities may affect his personal, professional, or community standing. AG ¶ 16 (e) applies.

AG ¶ 17 provides seven conditions that could mitigate security concerns:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is

unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and,

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

None of these mitigating conditions apply. Applicant did not make prompt good-faith efforts to correct his omissions on his security clearance application. His actions are serious and continuous over a seven-year period. Applicant has not obtained substance abuse counseling to change his behavior or taken other positive steps to alleviate his problems or reasons underlying the illegal conduct. The behavior is likely to continue without professional assistance. Finally, Applicant has not taken positive steps to reduce or eliminate vulnerability to exploitation, except allegedly stopping his marijuana use.

AG ¶¶ 17 (f) and (g) are not applicable in this case.

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 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.

I considered the potentially disqualifying and mitigating conditions in light of all facts and circumstances surrounding this case. Applicant was an adult when he used marijuana. He used it after receiving a security clearance in 2008. He knew such drug use was illegal. Applicant claims he ceased his drug use to protect his job and home, but did not submit any objective drug evaluation information or evidence of rehabilitation. He voluntarily used marijuana frequently from 2002 to 2009. Because of his past marijuana use there is potential for coercion, pressure, exploitation, or duress. There is also a likelihood of a recurrence of Applicant's illegal drug use.

Overall, the record evidence leaves me with questions or substantial doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant did not mitigate the security concerns arising under the guidelines for Drug Involvement or Personal Conduct. I conclude the "whole-person" concept against Applicant.

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 to 1.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a and 2.b:	Against 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.

PHILIP S. HOWE
Administrative Judge