



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



In the matter of:)
)
) ISCR Case No. 11-03420
)
Applicant for Security Clearance)

Appearances

For Government: Paul M. DeLaney, Esquire, Department Counsel
For Applicant: Adam R. Webber, Esquire

January 10, 2012

Decision

LAZZARO, Henry, Administrative Judge

Applicant purchased and used marijuana when he attended college and for about two years thereafter. He has not used marijuana or any other controlled since December 2009, and he has submitted a signed statement of intent with automatic revocation of his clearance if he is found to have used any controlled substance in the future. Clearance is granted.

On July 15, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.¹ The SOR alleges a security concern under Guideline H (drug involvement). Applicant submitted a response to the SOR, dated August 15, 2011, in which he admitted both SOR allegations and requested a decision based on the record without a hearing.

¹ This action was taken under Executive Order 10865, DoD Directive 5220.6, dated January 2, 1992, as amended (Directive), and the adjudicative guidelines which became effective within the Department of Defense for SORs issued after September 1, 2006.

Department Counsel prepared a File of Relevant Material (FORM) on September 20, 2011, which was mailed to Applicant on October 4, 2011. Applicant was notified he had 30 days from receipt of the FORM to submit his objections thereto or any additional information he wanted considered. Applicant acknowledged receipt of the FORM on August 13, 2011. He submitted a response to the FORM through his attorney on November 4, 2011. On November 15, 2011, Department Counsel submitted a memorandum stating he did not object to consideration of Applicant's response to the FORM. The case was assigned to another administrative judge on December 8, 2011, and reassigned to me on December 15, 2011, due to caseload considerations.

Findings of Fact

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the pleadings and exhibits, I make the following findings of fact:

Applicant is a 27-year-old single man who has been employed as a software engineer by a defense contractor since December 2008. He was employed as a contract employee by the same defense contractor from June 2007 until December 2008. Applicant attended college from August 2003 until June 2007. He was awarded a bachelor's degree in computer science from that college in December 2007. Applicant worked several part-time and full-time jobs while he attended college.

Applicant submitted a security clearance application on December 13, 2010, in which he revealed he used marijuana as follows:

Frequent use, about once a week during the 2004-05 school year. Infrequent use, about once every 6 months, 2005-2007. Very infrequent use, about once a year, 2007-2009. 23c: Only purchases for personal use.

Applicant was questioned about his reported marijuana use on January 7, 2011. At that time, he disclosed the identities of the people with whom he used marijuana and stated he did not plan on using marijuana in the future, but he couldn't say for certain because "you never know." In his response to the FORM Applicant clarified this statement by explaining that what he meant to imply was "like his father, he may be prescribed legal medical marijuana at some point for an as-yet-unknown medical condition."

Applicant submitted a number of letters of recommendation from people who know him through work and as long-time friends. Each of those individuals state they are aware of Applicant's prior use of marijuana, and they each still attest to his reputation as a responsible, reliable, trustworthy, and truthful individual. Included in those letters is one from the person with whom Applicant primarily used marijuana while in college and afterwards. That individual avers he no longer uses marijuana and Applicant told him a long time ago that he no longer intended to use marijuana. Applicant no longer associates with the other persons with whom he used marijuana.

Applicant submitted the results of a drug test performed on a specimen he provided on October 28, 2011. The results of that test were negative for all controlled substances tested for. Applicant submitted an undated notarized statement of intent in response to the

FORM in which he pledged not to use or have any involvement with any controlled substances. He also acknowledged that “any violation of this statement will result in automatic revocation of any clearance granted to me.”

Policies

The Directive sets forth adjudicative guidelines to consider when evaluating a person’s eligibility to hold a security clearance. Chief among them are the disqualifying and mitigating conditions for each applicable guideline. Clearance decisions must be fair and impartial decisions based upon relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶¶ 6.3.1 through ¶¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline H (drug involvement), with its disqualifying and mitigating conditions, is most relevant in this case.

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.² The Government has the burden of proving controverted facts.³ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁴ although the Government is required to present substantial evidence to meet its burden of proof.⁵ “Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.”⁶ Once the Government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁷ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁸

No one has a right to a security clearance⁹ and “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of

² ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

³ ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

⁴ *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

⁵ ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

⁶ ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

⁷ ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

⁸ ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

⁹ *Egan*, 484 U.S. at 528, 531.

denials.”¹⁰ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.¹¹

Analysis

Guideline H, 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. AG ¶ 24

In the security clearance application he submitted in December 2010, Applicant reported he used and purchased marijuana with declining frequency between August 2004 and December 2009. Disqualifying Conditions (DC) 25(a): *any drug abuse*; and DC 25(c): *illegal drug possession, including . . . purchase* apply.

Applicant’s last use of marijuana occurred in December 2009. The majority of Applicant’s use of marijuana occurred while he was in college. He no longer associates with the people with whom he used marijuana, except for a longtime friend who himself has averred that he no longer uses marijuana, and he has expressed his intent to not use marijuana in the future. Applicant submitted a statement of intent providing for the automatic revocation of his clearance if he misuses any controlled substance in the future. Mitigating Conditions (MC) 26(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 MC 26(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; (4) a signed statement of intent with automatic revocation of clearance for any violation* apply. The remaining mitigating conditions have no application to the facts of this case.

I have considered all relevant and material facts and circumstances present in this case, including Applicant’s age when he used and purchased marijuana, the extremely supportive letters of recommendation he submitted, the whole-person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions. Applicant mitigated the security concern created by his prior use and purchase of marijuana. He has overcome the case against him and satisfied his ultimate burden of persuasion. It is clearly consistent with the national interest to grant Applicant a security clearance.

¹⁰ *Id* at 531.

¹¹ *Egan*, Executive Order 10865, and the Directive.

