



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 11-04818
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel

For Applicant: *Pro se*

May 22, 2012

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on January 12, 2011. (Government Exhibit 1.) On August 26, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, which detailed 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 September 16, 2011, and requested a decision without a hearing (Answer). Department Counsel subsequently requested that the case be converted to one with a hearing before an administrative judge, under the provisions of ¶ E3.1.8 of the Directive. (Transcript (Tr.) 7.) Department Counsel was prepared to proceed on October 17, 2011. This case was assigned to me on January 20, 2012. DOHA issued a notice of hearing on January 23, 2012. I convened the

hearing as scheduled on February 10, 2012. The Government offered Government Exhibits 1 and 2, which were received without objection. Applicant testified on his own behalf, and submitted Applicant Exhibits A and B, which were also received without objection. DOHA received the transcript of the hearing on February 22, 2012. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

Applicant is 35 and single. He is employed by a defense contractor and seeks to obtain a security clearance in connection with his employment. Applicant has never held a security clearance.

Paragraph 1 (Guideline H - Drug Involvement)

Paragraph 2 (Guideline E - Personal Conduct)

The Government alleges under Guideline H that Applicant is ineligible for clearance because he has used illegal drugs. He admitted both allegations in the SOR under this paragraph. (1.a and 1.b.) Those admissions are findings of fact.

The Government alleges under Guideline E that Applicant is ineligible for clearance because his conduct under Paragraph 1 also shows untrustworthiness, questionable judgment, unreliability, or other characteristics indicating that Applicant may not properly safeguard classified information. Applicant did not answer this allegation in the SOR, which I consider a denial.

Applicant used marijuana in 2009. At that point he had worked for the same company for about nine years. He was not working in the defense industry at that time and did not have a security clearance. Applicant knew that his employer had a zero tolerance policy regarding drug use. He used marijuana in about September 2009. Applicant subsequently received a random urinalysis, which came up positive for marijuana. Because of this violation of the drug policy he was terminated from his employment.

Applicant freely admits that he does not have “a good answer” for why he used marijuana knowing his former employer’s policy. He testified, “It was a stupid mistake.” He states that this was the last time that he used marijuana. (Tr. 26-27.) Applicant further testified about the differences between his life now and in 2009, “I’ve matured. I realize now I have a lot more responsibilities with the work we do, and it’s not something I want to do.” He also testified, “I don’t associate with any of the friends I had before. I don’t hang out in the areas I used to hang out with, where people that I suspected were drug users are.” (Tr. 35-36.) Finally, he stated, “I mean what I did wasn’t right. I realize. I’m trying to do the best I can in my work.” (Tr. 41-42.)

Applicant obtained his new job in January 2010. In August 2011 he filled out Government Exhibit 1 in order to obtain a security clearance. In that e-QIP he was

completely forthcoming about his drug use and the fact that he was terminated for “failed random drug screen.” (Government Exhibit 1 at Sections 13c and 23.)

The Assistant Facility Security Officer at Applicant’s current employer knows about his prior drug use and the fact that he was terminated from his employment. (Tr. 32-33.) Applicant stated that about ten other people, including family and friends, know about his drug use and job termination. (Tr. 37-38.)

Applicant submitted documentary evidence showing that he is a highly respected employee. He started work with his new employer in January 2010. He was first nominated for Employee of the Month in February 2010. At least seven other nominations followed. He was Employee of the Month for September 2010, Employee of the Month Runner Up in December 2011, and Employee of the Year Runner Up for 2011. (Applicant’s Exhibit A.) He also submitted the only written evaluation he has received from this employer. It shows that he met or exceeds all the performance criteria and that his overall performance rating was that he exceeds expectations. (Applicant’s Exhibit B.)

Policies

Security clearance decisions are not made in a vacuum. When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used as appropriate 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. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that, “Any 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 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. Security clearance decisions include, by necessity, consideration of the possible risk that 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.

Finally, as emphasized in Section 7 of Executive Order 10865, “Any determination under this order adverse to an applicant shall be a determination 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

Paragraph 1 (Guideline H - Drug Involvement)

The security concern relating to the guideline for Drug Involvement is set out in AG ¶ 24:

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. 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; Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

I have considered the disqualifying conditions under Drug Involvement AG ¶ 25 and especially considered the following:

- (a) any drug abuse; and
- (b) testing positive for illegal drug use.

Applicant used marijuana in 2009. His employer required him to take a random urinalysis and his test result was positive, which resulted in his termination. I find that both of the above disqualifying conditions apply.

I have considered all of the mitigating conditions under Drug Involvement AG ¶ 26 and especially considered the following:

- (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 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 are used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant's abuse of marijuana occurred over two years ago. He was very foolish to use drugs knowing of his company's drug abuse policy, and admits as much. He took his punishment and has moved on. He evinces a credible intent not to use drugs in the future, has an appropriate period of abstinence, and has changed his companions and avoids the places where drugs are may be present. He has completely mitigated this incidence of drug use. Paragraph 1 is found for Applicant.

Paragraph 2 (Guideline E - Personal Conduct)

The security concern for Personal Conduct is set out in AG ¶ 15:

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 in 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 history of Applicant's drug use, and his termination from employment, are activities, which may affect his professional standing at his employer. The following Disqualifying Condition is arguably applicable under AG ¶ 16:

(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 . . .

Based on all the available evidence, the following Mitigating Conditions apply under AG ¶ 17:

(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; and

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

Applicant showed that all three of these Mitigating Conditions apply in this case. It has been two years since Applicant used marijuana. As described under Paragraph 1, above, Applicant has shown that the drug use is extremely unlikely to recur, and he has acknowledged and changed his behavior. In addition, family, friends and his current employer know of his conduct and its outcome. He has mitigated this concern. Paragraph 2 is found for 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. 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. My Guidelines H and E discussion applies here as well. Applicant engaged in experimental drug use that ended over two years ago. He is respected at his place of employment, and credibly states he will not use drugs in the future. In particular, he has matured, understands the nature of his conduct, and credibly shows that such conduct will not happen in the future.

There is considerable evidence of rehabilitation. Based on the state of the record, I find that there have been permanent behavioral changes under AG ¶ 2(a)(6). Accordingly, at the present time, I find that there is little to no potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)); and that there is also little to no likelihood of recurrence (AG ¶ 2(a)(9)).

Overall, the record evidence leaves me without questions and doubts about 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 Involvement and Personal Conduct. He is currently eligible for a security clearance.

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:	
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.

WILFORD H. ROSS
Administrative Judge