



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



In the matter of:)
)
) ISCR Case No. 11-04888
)
Applicant for Security Clearance)

Appearances

For Government: David F. Hayes, Esquire, Department Counsel
For Applicant: *Pro se*

09/17/2012

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings and exhibits, Applicant's eligibility for access to classified information is denied.

Statement of the Case

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on October 6, 2010. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) on March 23, 2012, detailing security concerns under Guideline H, drug involvement, and Guideline 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 For Determining Eligibility for Access to Classified Information* (AG) implemented on September 1, 2006.

Applicant acknowledged receipt of the SOR on April 3, 2012. He submitted a notarized, written response to the SOR allegations dated May 23, 2012. He requested a decision on the written record in lieu of a hearing.

Department Counsel prepared a file of relevant material (FORM) and mailed Applicant a complete copy on July 9, 2012. Applicant received the FORM on July 18, 2012. He had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. He did not submit a response. DOHA assigned this case to me on September 11, 2012. The Government submitted seven exhibits, which have been marked as Items 1-7 and admitted into the record. Applicant's response to the SOR has been admitted as Item 4, and the SOR has been admitted as Item 1.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a and 1.c of the SOR. His admissions are incorporated herein as findings of fact. He denied the factual allegations in ¶¶ 1.b and 2.a of the SOR.¹ He also provided additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant, who is 52 years old, works as a technician for a Department of Defense contractor. He began working with his employer in July 2001. In his 11 years of employment, he has not been disciplined. Applicant has held a Department of Defense security clearance since 2007. He graduated from high school in 1979 and has some technical school training. He is not married, and he does not have any children.²

In late June 2010, Applicant injured his back on the job. Physicians treated his resulting back pain with the medications, Motrin and Skelaxin, which are muscle relaxants. Even with these medications, Applicant continued to feel pain and discomfort in his back. On Friday evening, July 2, 2010, Applicant attended a neighborhood house party, where marijuana was being smoked. Because his back still hurt, Applicant decided to try the marijuana to relieve his back pain. He took two to three puffs on a marijuana joint, which dulled his back pain. Before he left the party, he purchased a

¹When SOR allegations are controverted, the Government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the Government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the Government must establish a nexus between the existence of the established facts and events and a legitimate security concern." See ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 08-06605 at 3 (App. Bd. Feb. 4, 2010); ISCR Case No. 08-07290 at 2 (App. Bd. Nov. 17, 2009).

²Item 5.

small bag of marijuana for use over the weekend. When he woke up the next morning, he smoked one-half of a marijuana joint.³

Around midday on July 3, 2010, Applicant left his residence and began driving north, as he intended to camp over the weekend. The police stopped him for speeding. As the police officer asked for his driver's license and registration, she smelled marijuana. She then asked permission to search his car, which he gave. He also advised the police officer that there was marijuana in a backpack in the car. He told the police officer that he held a security clearance, and this incident could cost him a job. The police officer gave him a speeding citation with a \$155 fine and a second citation for misdemeanor possession of marijuana. Applicant reported the police stop and citations to his security officer and on his e-QIP,⁴

During his interview with the Office of Personnel Management (OPM) investigator, Applicant advised the investigator that he appeared at court on July 22, 2010 for the marijuana citation. The court staff told him that the court did not have a citation or other charging document on the docket in his name for that date or for any other date and that he was free to leave. He has not received any other information from the court about the marijuana citation nor does the court have a record of any charges against him for use of marijuana. He paid the fine on the speeding ticket.⁵

Applicant told the OPM investigator that he made an error in judgment when he decided to smoke the marijuana, which was his first time. He regretted his decision to try marijuana. He has not used any marijuana since this time. Applicant stated to the OPM investigator that he did not have an intent to use drugs in the future. In his sworn response to DOHA interrogatories, Applicant stated, in writing, that he would not repeat this behavior, that he had not had any further involvement with drugs, and that he had stayed away from anyone involved with drugs.⁶

Appellant has never sold drugs. He has not received drug counseling nor has he been diagnosed with a drug problem. He acknowledged that he held a security clearance at the time he used marijuana.⁷

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief

³Item 6.

⁴Item 5 - Item 7.

⁵Item 4; Item 6.

⁶Item 4; Item 6.

⁷Item 6.

introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used 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.

Under 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 applicant or proven by Department Counsel. . . ." An applicant has the ultimate burden of persuasion for 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 an 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

AG ¶ 24 expresses the security concern pertaining to 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.

(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 the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

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

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

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

Applicant acknowledged using marijuana twice in one weekend in July 2010, while he held a security clearance. He also purchased one bag of marijuana that same weekend. By smoking and purchasing the marijuana, he possessed it. Security concerns are established under AG ¶¶ 25(a), 25(c), and 25(g).

The Drug Involvement guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 26(a) through 26(d), and the following are potentially applicable:

(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;

(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.

Applicant's use of marijuana was infrequent. He has not used marijuana in two years. He distanced himself from his neighbor, who provided the marijuana at the party. Applicant told the OPM investigator that he no future intent to use any illegal drugs and reiterated his intent in his response to the interrogatories. His decision to use this illegal drug showed bad judgment. While I am persuaded that Applicant is not likely to abuse marijuana in the future, and favorable findings are returned as to SOR allegations 1.a. and 1.b that does not end the inquiry in this case.

Although Applicant intends not to use drugs in the future, he breached a special trust when he used marijuana, an illegal drug, while he held a security clearance. He knew that marijuana was an illegal drug, and he knew that the use of an illegal drug violated his security clearance requirements as shown by his statement to the police officer. Despite this knowledge, he decided to smoke marijuana on two occasions, and he purchased marijuana to use while he camped over the weekend. I find that his breach of the trust given him outweighs the other mitigating factors regarding his drug involvement and entitlement to a security clearance. Applicant has failed to fully mitigate the security concern under Guideline H.

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.

AG ¶ 16 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

(c) 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; 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,

Applicant's drug use while holding a security clearance violates the rules for holding a security clearance. His use of an illegal drug violates the criminal rules of society. These disqualifying conditions are raised as to SOR allegation 2.a.

The Personal Conduct guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 17(a) through 17(g), and the following is potentially applicable:

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

The mitigating condition outlined in AG ¶ 17(e) applies to Applicant's drug involvement as security officials are well aware of this conduct. Applicant has taken the positive step of disclosure, eliminating any vulnerability to exploitation, manipulation or duress. I do not believe Applicant would compromise national security to avoid public disclosure of his past marijuana use. Any personal conduct security concerns pertaining to his use of marijuana are dealt with more thoroughly under the specifically, pertinent guidelines in this decision. He has mitigated the security concerns under Guideline E.

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 an 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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the

evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has worked for his employer for 11 years without any disciplinary problems. He pays his bills and complies generally with the rules of society. After he injured his back at work in June 2010, he accepted an offer to smoke a marijuana joint because he thought it would help relieve his back pain. Because the marijuana dulled his back pain, he purchased a small amount of it to use while he was camping during the weekend. The next day, he smoked the marijuana shortly before he left on his camping trip. He held a security clearance when he smoked the marijuana, and he knew that such illegal activity was prohibited and could result in the loss of his job. He exercised poor judgment when he decided to smoke marijuana and breached the Government's trust in him when he made this decision. While I find that he did not falsify his e-QIP, his breach of the special trust given to him by the Government prevents me from granting him a security clearance.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his drug involvement under Guideline H, but he has mitigated the personal conduct security concerns under Guideline E.

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 |
| Subparagraphs 1.a - 1.b: | For Applicant |
| Subparagraph 1.c: | Against 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 not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

MARY E. HENRY
Administrative Judge