



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 11-06455

Appearances

For Government: Jeff Nagel, Esq., Department Counsel
For Applicant: Alan K. Hahn, Esq.

08/22/2012

Amended Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated drug involvement and personal conduct concerns. Eligibility for access to classified information is denied.

Statement of the Case

On September 12, 2011, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether his clearance should be granted, continued, denied, or revoked. 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 (AGs) implemented by the Department of Defense on September 1, 2006.

Applicant responded to the SOR on September 28, 2011, and requested a hearing. The case was assigned to me on May 3, 2012, and was scheduled for hearing on June 27, 2012. A hearing was held on the scheduled date for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At the hearing, the Government's case consisted of two exhibits (GEs 1-2); Applicant relied on one witness (himself) and one exhibit (AE A). The transcript (Tr.) was received on July 6, 2012.

Summary of Pleadings

Under Guideline H, Applicant is alleged to have used, purchased, and sold illegal drugs between January 2007 and August 2010. And under Guideline E, Applicant allegedly abused drugs, continued using marijuana knowing such use violated his former's employer's drug policy, and, in addition, accessed five to six adult pornographic web-sites in 2010 without paying, by using passwords provided by computer hackers.

In his response to the SOR, Applicant admitted all of the allegations covering his drug activities and misuse of adult pornography websites. He explained he stopped using marijuana in August 2010 because he realized he needed to mature and pursue a career, and has no intention of using marijuana or any other controlled substance in the future. Applicant claimed his purchases of marijuana were for his own personal use, which he does not intend to repeat in the future. And he explained his marijuana sales were limited to a few friends out of his personal supply. He claimed he sold marijuana to a roommate between September and December 2009 as a favor to the friend. Further, he claimed he does not intend to sell or distribute marijuana or any controlled substance in the future, subject to automatic revocation of his clearance for any violation.

Findings of Fact

Applicant is a 25-year-old software developer for a defense contractor. He seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Background

Applicant has never married and has no children. He earned a bachelor's degree from a respected university in December 2009. (GE 1; Tr. 15-16, 31) He claims no military experience.

Applicant's drug history

Applicant did not use illegal drugs in high school, and was introduced to marijuana in college. (GE 2; Tr. 32) Between January 2007 and August 2010, Applicant used

marijuana repeatedly. He began as an occasional user in January 2007 and increased his frequency of use between January 2008 and December 2009 to twice-a-day use, mostly in social settings at home. (GEs 1 and 2; Tr. 22-23, 33-35) He estimates he used marijuana on 150 occasions between January 2007 and January 2008, and on 750 occasions between January 2008 and December 2009. (Tr. 36-37) While a college student, he worked for a local video employer on a part-time basis (*i.e.*, between August 2006 and November 2008). Aware of his employer's anti-drug policy, Applicant still continued to smoke marijuana. (GE 2)

After briefly ceasing his marijuana use in December 2009 following his college graduation, he resumed his use in March 2010. He used marijuana daily between March 2010 and August 2010 and estimates he used it on at least 150 occasions over a six-month period while employed by a local retailer. (GEs 1 and 2; Tr. 17, 37) Applicant attributes his resumption of his marijuana use to job dissatisfaction with his post-graduation employer. (GE 2; Tr. 24-25) He was somewhat familiar with his employer's anti-drug policy when he became employed by the firm, but continued using marijuana just the same until August 2010. (GE 2; Tr. 26-27, 39-40) Even though he knew that marijuana use was against the law, "he didn't really consider the consequences." (GE 2; Tr. 26, 34)

Between January 2007 and August 2010, Applicant purchased marijuana for his own personal use and occasionally sold the drug to friends (approximately 10 times) for their personal use. His marijuana sales were limited to a few friends out of his personal supply and involved small amounts. (GEs 1 and 2; Tr. 23, 34-35) One of the friends he sold marijuana to was his roommate. He sold marijuana to this roommate as a favor, and not for profit. (GE 2) He assured he never resold marijuana he purchased for a profit. (GEs 1 and 2) He assured, too, that he does not intend to purchase, sell, or distribute marijuana or any controlled substance in the future. Applicant's assurances are credible and are accepted.

In completing his security clearance application (e-QIP) in January 2011, Applicant was fully candid about his past drug involvement. (GE 1) When interviewed by an agent of the Office of Personnel Management (OPM) two months later (in March 2011), he incorporated his e-QIP admissions and addressed his past drug history and employer drug policies in considerable detail. During the course of his interview, he fully acknowledged his awareness of the anti-drug policies of his two previous employers. He made his disclosures without any apparent agent prodding or confrontation. (GE 2; Tr. 21) His answers reflect a candid accounting of his past drug activities and his acknowledged mistakes in using drugs. Committed to becoming a more productive member of society, he quit using marijuana in August 2010 and has not used illegal drugs since that time. (Tr. 25-26, 41-42) Applicant no longer associates with his old friends who still use marijuana and consistently avoids situations where illegal drugs are available. (Tr. 41)

Applicant has abstained from illegal drugs for almost two years and has no intention of ever returning to illegal drug use in the foreseeable future. (Tr. 25, 29)

However, he has never been drug-tested and has nothing to document his suspended drug use. (Tr. 48) Applicant's assurances have been consistently truthful, though, and are entitled to acceptance.

Accessing adult pornographic web-sites

In May 2010, Applicant accessed five to six adult pornographic websites on his personal home computer without paying by using passwords that had been provided by computer hackers. (GE 2) At the time, he did not think it was a very big deal. (GE 2; Tr. 27) Applicant accessed these sites on his personal computer at home and has not repeated these activities. He assures he never entered into any other website systems without approvals or authorization and will never repeat these activities in the future. (GE 2; Tr. 28) Applicant considered the web-sites he accessed to be legal ones. He was never contacted by any law-enforcement officials about his use of these websites. And to the best of his knowledge, he never broke any federal or state internet access laws or regulations.

Endorsements

Applicant did not provide any personal endorsements from his supervisors and coworkers. His furnished personnel evaluations reveal acceptable performance ratings in all phases of his work for the calendar year of April 2011 through March 2012. (AE A); Tr. 18-20)

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns." These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c)

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the revised AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. "[S]ecurity-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). And because all security clearances must be clearly consistent with the national interest, the burden of persuasion must remain with the Applicant.

Viewing the issues raised and evidence as a whole, the following adjudication policy concerns are pertinent herein:

Drug Involvement

The Concern: 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.

Personal Conduct

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, 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 ¶ 15.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence

accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. See *United States v. Gaudin*, 515 U.S. 506, 509-511 (1995). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. “[S]ecurity-clearance determinations should err, if they must, on the side of denials.” See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). And because all security clearances must be clearly consistent with the national interest, the burden of persuasion must remain with the Applicant.

Analysis

Applicant is a dependable software developer who presents with a considerable history of drug involvement. Principal security issues in this case center on Applicant's drug involvement and his accessing of pornographic websites on his personal computer.

Drug concerns

Over a four-year period (between January 2007 and August 2010), Applicant used marijuana regularly in social settings with friends and contacts. Use, purchases, and sales of illegal drugs, (inclusive of marijuana) are proscribed by both state law and federal law (see 21 U.S.C. § 802, *et seq.*). Some of his marijuana use occurred during periods of part-time employment in violation of his employers' anti-drug policies.

Applicant's admissions to using illegal drugs raise initial security concerns over risks of recurrence as well as judgment issues. On the strength of the evidence presented, two disqualifying conditions of the AGs for drug abuse are applicable: DC ¶ 25(a), “any drug abuse,” and DC ¶ 25(c), “illegal possession, including cultivation,

processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.”

Applicant’s recurrent use of marijuana over a four-year period raises questions over the strength of his abstinence commitments. Because of the extended time and amounts of marijuana usage, purchases, and sales availed by Applicant, his recurrent involvement with the drug cannot be considered fully mitigated. While Applicant’s recurrent use of illegal drugs between 2007 and 2010 has never been resumed since August 2010 in any proven way, it remains an area of security concern.

Applicant has made noticeable gains in his efforts to mitigate his past drug activities. Still, his multiple drug activities covered a considerable period (over four years), and have not been accompanied by any cognizable counseling or programmatic rehabilitation. Considering the regularity and quantity of his marijuana use over a considerable period of time, most of the mitigating conditions for drug involvement are not available to Applicant.

To his credit, Applicant has ceased contact with persons who use drugs since he stopped using illegal drugs in August 2010. Accordingly, he may fully invoke MC ¶ 26(b)(1), “disassociation from drug-using associates and contacts,” and MC ¶ 26(b)(2), “changing or avoiding the environment where drugs were used,” to the merits of his situation. Moreover, he has exhibited candor about his marijuana abuse and his associations with friends and contacts involved in drug activities. Applicant’s assurances that his drug involvement is a thing of the past are encouraging. More time is needed, though, to facilitate safe predictions that he is not a recurrence risk.

From a whole-person perspective, Applicant has established independent probative evidence of his overall honesty, trustworthiness, and understanding of DoD policy constraints on the use of illegal substances. He lacks enough positive reinforcements, however, to facilitate safe predictions he is at no risk of recurrence.

Considering the record as a whole, at this time there is insufficient probative evidence of sustainable mitigation to make predictable judgments about his ability to avoid drugs and related activities in the foreseeable future. Taking into account all of the facts and circumstances surrounding Applicant’s drug activities over a four-year period, he does not mitigate security concerns with respect to the allegations covered by subparagraphs 1.a through 1.c of the SOR.

Personal conduct concerns

Security concerns are raised as well over Applicant’s judgment, reliability, and trustworthiness under Guideline E as the result of his use, purchases, and sales of marijuana while employed by employers known to have anti-drug policies governing their employees. His continuing marijuana activities between July 2007 and August 2010 invites application of DC ¶ 16(d)(3), “a pattern of dishonesty or rule violations.”

Applicant fully disclosed his drug involvement in the e-QIP he completed and was candid about his awareness of his employers' anti-drug policies when later queried by the OPM agent who interviewed him in March 2011. MC ¶ 17(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," applies to Applicant's situation.

Because the cited drug-related conduct is covered by Guideline H and can be resolved under that Guideline, it does not have the independent significance required to consider the conduct separately under Guideline E. While his use of marijuana in college and in contravention to his part-time employer's known anti-drug policy reveals poor judgment, his judgment lapses acquire no more significance than they do under judgment predicate that underlies the drug involvement guideline.

For sure, questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, are each core policy concerns of the personal conduct guideline (AG ¶ 15) Judgment concerns are tied to Applicant's drug activities whether considered under Guideline H or Guideline E. The same concerns that attach to Applicant's repeated drug involvement apply with equal force to the judgment concerns associated with his drug activities under the personal conduct guideline and essentially duplicate one another. For this reason, Applicant's drug-related activities do not warrant any independent cognizance under the personal conduct guideline. See ISCR Case No. 06-20964, at 6 (April 10, 2008).

In evaluating all of the circumstances surrounding Applicant's continuing drug activities while employed by employers with known anti-drug policies, his explanations and whole-person considerations, his disclosures are sufficient to enable him to convincingly refute or mitigate personal conduct concerns associated with his continued drug use. Overall, Applicant's explanations are persuasive enough to warrant conclusions that his judgment lapses associated with his continuing drug activities while employed by employers with known anti-drug policies are mitigated.

Also covered under the personal conduct guideline are Applicant's multiple instances of accessing adult pornography on his personal computer without paying for this access. His repeated misuse of his internet access reflect pattern rule violations covered by DC ¶ 16 (a)(3), "a pattern of dishonesty or rule violations." His actions are isolated, though, and have not been repeated in the past two years. Mitigation credit is available to him under MC ¶ 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."

Evaluating all of the facts and circumstances developed in the record, Applicant mitigates security concerns associated with the allegations covered by subparagraphs 2.a and 2.b of the SOR that are duplicated for the most part in the drug involvement

guideline. Applicant also mitigates the separate allegation under subparagraph 2.c of the personal conduct guideline covering his internet abuse on his personal computer.

Formal Findings

In reviewing the allegations of the SOR in the context of the findings of fact, conclusions, and the factors and conditions listed above, I make the following separate formal findings with respect to Applicant's eligibility for a security clearance.

GUIDELINE H (DRUG INVOLVEMENT): AGAINST APPLICANT

 Subparas. 1.a through 1.c: Against Applicant

GUIDELINE E (PERSONAL CONDUCT): FOR APPLICANT

 Subparas. 2. a through 2.c: For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge