



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



In the matter of:)
)
) ISCR Case No. 11-06702
)
Applicant for Security Clearance)

Appearances

For Government: Caroline H. Jeffreys, Esq., Department Counsel
For Applicant: Angela Dougherty, Esq.

01/29/2013

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline H, drug involvement. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On December 7, 2011, the Department of Defense (DoD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement. DoD acted under Executive Order (EO) 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) implemented by the DoD on September 1, 2006.

Applicant answered the SOR on December 27, 2011, and requested a hearing. The case was assigned to me on October 23, 2012. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on November 13, 2012, and the

hearing was convened as scheduled on December 3, 2012. The Government offered exhibits (GE) 1 through 4, which were admitted into evidence without objection. Department Counsel's exhibit index is marked as Hearing Exhibit (HE) I. Applicant testified and offered exhibits (AE) A through C, which were admitted into evidence without objection. The record was left open for Applicant to submit post-hearing evidence. He did so in a timely manner and AE D was admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on December 14, 2011.

Findings of Fact

In Applicant's answer to the SOR, he admitted all the allegations under Guideline H; however, he disputed several factual statements within some of the allegations. After a thorough and careful review of the evidence submitted, I make the following findings of fact.

Applicant is 56 years old. He has been married for seven years. This is his second marriage. He does not have any children from either marriage. He has a high school diploma. He has worked for various defense contractors since 2006. He worked for other contractors since 1993 who were not defense contractors at the time. He has no military service and has held a security clearance since 2006.¹

Applicant's admitted conduct raised in the SOR includes using marijuana from 1974 through 1985. He denied an alleged use of marijuana in 1993, but admitted uses in about 2006 and about August 2009 while holding a security clearance. He also admitted being arrested and charged with delivery of a controlled substance in 1985, a felony, for which he received a sentence of probation. (See SOR ¶¶ 1.a – 1.c).

Applicant stated that he began using marijuana when he was about 20 years old. He used it about once or twice a week up until about 1985 when he was arrested. He also purchased marijuana about one to two times per month. In 1985 he was arrested for distributing a half an ounce of marijuana to a friend. He was charged with felony intent to deliver drugs, of which he was convicted. He was sentenced to 60 months of probation. He received an early discharge from probation in January 1992 because he completed a residential substance abuse program and remained drug free according to the drug screening tests he was required to take between 1989 and 1992. When interviewed by an investigator in February 2011, Applicant described his 1985 arrest, conviction, and resulting probation as "a wakeup call for him in his life."²

Applicant claims he did not use marijuana in 1993 even though he listed that date in his answers to DOHA interrogatories as a date he used marijuana. In his hearing testimony, he stated that his inclusion of that date in the answers to interrogatories was a mistake. He stated that the next time he used marijuana was in 2006. He was working

¹ Tr. at 62, 87-88; GE 1.

² Tr. at 62-66; GE 3, 4; Applicant's answer (Answer).

as a government contractor at the time in a foreign country. Over a weekend, he visited another foreign country where he bought and smoked marijuana. He held a security clearance at the time. He was alone when he used the marijuana and did not tell anyone about his use of marijuana when he returned to his job site. His next uses of marijuana were in 2009. Once again, he was working for a government contractor in a foreign country. On four or five occasions, he visited a different foreign country and while there purchased and smoked marijuana on each visit. He held a security clearance at the time of these marijuana uses. He did not report his use of marijuana when he returned to his job site. He knew his use of marijuana was prohibited. He did not tell his wife about his marijuana use until 2011.³

Applicant did not fully disclose the extent of his drug use during the course of his security clearance investigation. In his January 2011 security clearance application, he failed to list his 2006 marijuana use. He listed his multiple 2009 uses of marijuana, but he answered “no” to a question asking whether he ever used illegal drugs while holding a security clearance. When he was interviewed by an investigator in 2011, he again failed to bring up his use of marijuana in 2006. He listed both his 2006 and 2009 marijuana use in his answers to DOHA interrogatories completed in October 2011.⁴

Applicant testified that his last use of marijuana was in 2009. When faced with the allegations in the SOR, he requested and received a substance abuse evaluation in December 2011. The evaluating counselor indicated that Applicant showed no indications of substance abuse or dependence. He also offered several drug screening results for the following dates: March 28, 2008; January 23, 2009; December 16, 2011; December 20, 2011; April 17, 2012; and December 10, 2012. Although none of the tests were random (all the tests were conditions of employment tests when he started working on a new contract), they all indicated negative results for the presence of illegal drugs.⁵

Applicant indicated that he had many personal issues impacting him in 2009 that may have made him susceptible to using marijuana. His parents were both hospitalized for periods of time and he was helping them pay their bills. He was also having difficulties in his marriage because he was out of the country so much with his work.⁶

Applicant presented the testimony of the operations manager for his current employer. He testified that Applicant has worked for him off and on since 1993. He described Applicant as an excellent performer who is reliable, exercises good judgment, and is someone who he can trust. Applicant also presented letters of support from his pastor and several work colleagues who noted his hard work, superior attitude,

³ Tr. at 68, 70-71, 73, 75-76, 79; GE 1, 3.

⁴ Tr. at 52, 73; GE 1, 3.

⁵ Tr. at 46; AE B, C, Answer.

⁶ Tr. at 42-43.

professional demeanor, job knowledge, and work ethic. He also presented a signed statement of automatic security clearance revocation in the event he violates any provision of Guideline H in the future.⁷

Policies

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 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, and has the ultimate burden of persuasion to obtain 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 that an applicant may deliberately or inadvertently fail to 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.

⁷ Tr. at 24-26; AE A, C; Answer.

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.

I have considered all of the evidence in this case and the disqualifying conditions under drug involvement AG ¶ 25, and considered the following relevant:

- (a) any drug abuse;
- (c) illegal drug distribution; and
- (g) any illegal drug use after being granted a security clearance.

Applicant used marijuana on a number of occasions from 1974 to 1985, and 2006 and 2009. He also used marijuana after being granted a security clearance in 2006. He was convicted of drug distribution in 1985 and sentenced to 60 months’ probation. I find the above disqualifying conditions apply.

I have considered all of the evidence in this case and the mitigating conditions under drug involvement AG ¶ 26, and considered the following relevant:

- (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; (4) a signed statement of intent with automatic revocation of clearance for any violation; and
- (d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements,

without recurrence of abuse, and a favorable prognosis by a qualified medical professional.

Applicant was a regular marijuana user from 1974 to 1985, until he was arrested for felony distribution of marijuana. He called this arrest a “life changing” event for him. He stopped using marijuana until 2006 and again in 2009. On both these occasions he held a security clearance. His “life changing” arrest in 1985 did not deter him from using marijuana years later after he gained the trust of the government and obtained a security clearance. Under these circumstances, his use of drugs was frequent and recent (last use in 2009). Given his long history of marijuana use, and his resumption of use after an extended period of claimed abstinence (1985-2006), his period of recent abstinence is insufficient to demonstrate Applicant’s intent not to use in the future. Applicant is not a young individual experimenting with drugs for the first time. He made a conscious lifestyle choice at various times over more than thirty years to use marijuana, despite its illegality. He claims he has changed his lifestyle and he no longer intends to use marijuana. Although his 1985 conviction is dated, his recent uses of marijuana have made that action timely again. He submitted a letter of intent to not use illegal drugs in the future. His past actions demonstrate more about his intent than a statement about his future intent. I am not convinced that he has a demonstrated intent not to use marijuana in the future. Moreover, his affirmative decision to repeatedly use marijuana after receiving a security clearance casts doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 26(a) does not apply, and AG ¶ 26(b) partially applies.

In December 2011, Applicant was evaluated by a drug abuse counselor who stated that there was no indication of substance abuse or dependence. Although this evaluation has some probative value, it does not constitute “completion of a prescribed drug treatment program” as contemplated by AG ¶ 26(d). This mitigating condition partially applies.

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 guideline and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered Applicant's statement of intent to not use illegal drugs in the future, his positive character witness and statements, and his drug evaluation. However, I also weighed his age when he last used marijuana, that he held a security clearance when he last used marijuana, that he was not candid in his 2011 security clearance application, or when he talked with an investigator about his 2006 marijuana use. This shows a lack of rehabilitation and reflects poorly on him. Applicant failed to provide sufficient evidence to mitigate the security concerns.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline H, drug involvement.

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.c:	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.

Robert E. Coacher
Administrative Judge