



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



In the matter of:)	
)	
)	ISCR Case No. 11-07400
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro se*

August 29, 2013

Decision

CEFOLA, Richard A., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) on October 6, 2010. On January 3, 2013, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H and E for Applicant. 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 after September 1, 2006.

Applicant answered the SOR in writing on February 5, 2013, and requested a hearing before an Administrative Judge. DOHA received the request on February 7, 2013, and I received the case assignment on March 29, 2013. DOHA issued a notice of hearing on April 3, 2013, and I convened the hearing as scheduled on May 9, 2013. The Government offered Exhibits (GXs) 1 through 5, which were received without objection. Applicant testified on his own behalf and submitted Exhibits (AppXs) A

through C, which were received without objection. DOHA received the transcript of the hearing (TR) on May 20, 2013. I granted Applicant's request to keep the record open until June 10, 2013, to submit additional matters. On June 10, 2013, he submitted Exhibits D and E, which were received without objection. The record closed on June 11, 2013. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Procedural and Evidentiary Rulings

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to 21 U.S.C. Sections 802 and 812. The request was granted. The request, and the attached documents, were not admitted into evidence, but were included in the record. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in Subparagraphs 1.a., and 1.b. of the SOR, without explanations. He denied the factual allegations in Subparagraph 2.a. of the SOR, with explanations. He also provided additional information to support his request for eligibility for a security clearance.

Guideline H - Drug Involvement & Guideline E - Personal Conduct

1.a., 1.b. and 2.a. Applicant is 30 years of age. (GX 3 at page 6.) As a 21 year old attending college in 2004, he used marijuana "about 20 or 30 times." (TR at page 26 lines 2~16.) As a result, his "school performance went down. . . . So, then . . . [he] just kind of stopped it." (TR at page 26 lines 14~18.) Applicant then used marijuana about five times until his last usage in March of 2010. (TR at page 16 line 20 to page 29 line 14, at page 32 lines 12~22, at page 35 line 8 to page 36 line 14 and at page 44 line 9 to page 51 line 6.)

Applicant was granted a security clearance in about October of 2008. (GX 2 at page 15.) He used marijuana twice in 2010, the last time, as stated above, was in March of that year. (TR at page 27 line 17 to page 31 line 2, and at page 43 line 21.) Applicant has recently submitted a signed letter of intent with automatic revocation of his clearance should he use any controlled substance. (AppX E.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially

disqualifying conditions and mitigating conditions, which are useful 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 over-arching adjudicative goal is a fair, impartial and commonsense decision. According to AG Paragraph 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. Paragraph 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive Paragraph E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive Paragraph E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion as to 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 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.

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

The security concern relating to the guideline for Drug Involvement is set out in Paragraph 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.

The guideline also notes several conditions that could raise security concerns. Under Subparagraph 25(a), "*any drug abuse*" may be disqualifying. In addition, "*any illegal drug use after being granted a security clearance*" under Subparagraph 25(g) may be disqualifying. Here, Applicant used marijuana 25 to 35 times, and twice in 2010 after having been granted a security clearance.

These are countered, however, by the mitigating conditions found in Subparagraphs 26(a) and 26(b). Applicant's "*behavior happened so long ago, was so infrequent . . . that it is unlikely to recur . . .*" Furthermore, he has shown "*a demonstrated intent not to abuse any drugs in the future, such as: (4) a signed statement of intent with automatic revocation of clearance for any violation.*" The Applicant was last involved with any illegal substance more than three years ago. He has also signed a letter of intent not to abuse any drugs in the future. I find his statement of intent to be credible and sincere.

Guideline E - Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in Paragraph 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.

The guideline notes several conditions that could raise security concerns. Under Subparagraph 16(d), "*credible adverse information that is not explicitly covered by any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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. This includes but is not limited to consideration of: . . . (3) a pattern of dishonesty or rule violations*" Here, Applicant used marijuana on numerous occasions in contravention of the law.

However, I find that countervailing Mitigating Condition 17(c) is applicable here, in that “so much time has passed,” more than three years, “that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment.”

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. Under AG Subparagraph 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 Administrative Judge should also consider the nine adjudicative process factors listed at AG Subparagraph 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.

I considered all of the evidence, including the potentially disqualifying and mitigating conditions surrounding this case. The Applicant has the unqualified support of those who know him in the workplace. (AppX C at pages 1~6). The record evidence leaves me without questions and doubts as to Applicant’s eligibility and suitability for a security clearance. For this reason, I conclude Applicant has mitigated the security concerns arising from his Drug Involvement and related Personal Conduct.

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.:	For 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 clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Richard A. Cefola
Administrative Judge