



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



In the matter of:)
)
-----) ISCR Case No. 11-12165
)
Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: *Pro se*

11/06/2013

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant has not mitigated the Government’s security concerns under the guideline for drug use. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

In March 2011, Applicant completed a security clearance application (SCA). On January 7, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H (Drug Use). 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 DOD on September 1, 2006.

In a January 25, 2013, response to the SOR, Applicant admitted all three allegations raised under Guideline H, and requested a determination without hearing. The Government ultimately converted the case to one for hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. I was assigned the case

on August 9, 2013. DOHA issued a notice of hearing on August 19, 2013, setting the hearing for September 20, 2013.

The hearing was convened as scheduled. The Government offered Exhibits (GX) 1-3. They were accepted without objection. Applicant gave testimony, introduced two witnesses, and offered three documents, which were accepted into the record as Applicant's Exhibits (AX) A-C without objection. He was given until September 16, 2013, to submit any additional information. On September 13, 2013, the Government forwarded to me a document dated September 12, 2013, it had received from Applicant. It was accepted into the record as AX D. The transcript (Tr.) was received on September 28, 2013, and the record was closed.

Findings of Fact

Applicant is a 33-year-old director of operations for a defense contractor, where he has been employed since 2009. His position requires a security clearance. He has worked in the area of cybersecurity for nearly a decade, and first received a security clearance in August 2004. Applicant has a GED and is currently pursuing a bachelor's degree. Applicant was married in October 2010. He and his wife have an infant child who lives with them. Applicant is also the father of an eight-year-old child, who spends weekdays with his mother and weekends with Applicant. Applicant sporadically used marijuana between January 1999 and January 2011. He has no intent to use illegal drugs again.

Applicant first used drugs between January 1999 and August 2000, when he was in college. During that time, Applicant was about 19 years of age and under the influence of a college roommate, with whom he admittedly made some poor choices. During that time, he used marijuana about 15 times. The drug did not do much for him and he only used it socially. By late 2000, Applicant asked the roommate to move out and Applicant stopped using the drug. Applicant eventually stopped attending college. Until December 2001, he continued with a network engineering position he had started in 1998. He was then unemployed from December 2001 until March 2002, when he started working for a string of employers, culminating with his hiring as a network technician by one employer in December 2002.

While working for his most recent employer, Applicant also found work at a research center. In August 2004, Applicant received a security clearance. In March 2005, he left an engineering position to pursue DOD certification and accreditation. From March 2005 to December 2009, he was the senior lead security systems engineer for a noted defense contractor. He stayed there until accepting his current position. By 2010, Applicant was 30 years old, established in his career, and romantically involved.

At Applicant's bachelor party in June 2010, a former friend showed up at the festivities with marijuana. Applicant knew he should not use the drug because he had a security clearance and because it was illegal. Despite a decade of abstinence, he accepted the drug because of "a lack of judgment," and he soon "recognized [his] error

in many ways.” (Tr. 22) Between New Year’s Eve of 2010 and New Year’s Morning of 2011, Applicant was outside of a home where a holiday party was underway. He was with about six other people when he was again offered marijuana. Without thinking, he used the drug a second time.

Applicant has not had any drug counseling. He did, however, briefly discuss his behavior with his mother, who is a substance abuse counselor. (Tr. 25) Applicant noted that he has not actually handled restricted or protected material. He discovered that despite a decade without drugs and six years maintenance of a security clearance, however, it was “this process [that] solidified the seriousness of that type of behavior and [Applicant has] no desire to . . . do it ever again.” (Tr. 26) He stated that he was inebriated during both his 2010 and 2011 lapses, then explained that he has substantially reduced his use of alcohol since the birth of his youngest child about eight months earlier. (Tr. 28) He attributed his bachelor party lapse to not being in ‘the best state of mind.’ (Tr. 26) He partly attributed his New Year’s lapse to being with some of the same people in the same type of gathering; he knew he should decline the offer of marijuana, but cannot explain why he accepted it. (Tr. 26-27) He stresses that he no longer associates with those individuals or with those who use drugs. (Tr. 29) He also stresses that he has changed his environment and now avoids places where drugs may be available, preferring instead to spend time with his family at home and at work. He emphasized that while a period short of three years may not be an appropriate length of abstinence in general terms, it does represent a significant gap of abstinence when combined with a credible and heartfelt expression of commitment to remain drug-free, his new commitments as husband and father, and his mature commitment as a responsible professional. In addition, after the hearing, Applicant submitted a Statement of Intent not to use illegal drugs in the future that conforms to the description set forth in AG ¶ 26(b)(4). (Tr. 30)

In restating that he no longer associates with those who used drugs, Applicant offered three highly complimentary reference letters from recent colleagues who praise Applicant’s capabilities and integrity. (Exs. AX 1-3) Applicant also introduced two witnesses. The founder and chairman of his company, who has known Applicant for over four years, recently promoted Applicant to a directorship despite his knowledge of Applicant’s lapses with drugs. He finds the Applicant of today to be of good judgment, strong character, and trustworthy. (Tr. 34-35) He notes that Applicant has handled all information appropriately and with the “utmost scrutiny and integrity.” (Tr. 37)

Applicant’s wife credibly testified that Applicant has made positive efforts to make sure he never again is tempted by marijuana. Personally, she does not use drugs, notes that they are illegal, and has little patience for their use. She had no reason to think Applicant used or ever had used marijuana during their courtship. (Tr. 46) Applicant felt bad telling her of his lapse and his past drug use, but he did so after the New Year’s party. It was at this time that Applicant’s wife first learned that Applicant had used marijuana as an adult. (Tr. 47) Learning this fact led to a discussion on the types of things that would not be permitted in their home or around their child. (Tr. 43-44, 46)

She pointedly stated during the hearing that should he again use illegal drugs, that there would be “consequences . . . especially given the fact that we do have a child.” (Tr. 44)

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 derived from 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 the applicant may deliberately or inadvertently fail to safeguard 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

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) "Drugs" are defined as mood and behavior altering substances and include 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 inhalants and other substances. (AG ¶ 24(a)(1-2)) "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 ¶ 24(b))

Here, Applicant admits using marijuana about 15 times as an underclassman, between about January 1999 and August 2000. He also admits that he was granted a DOD security clearance in August 2004. He further admits he subsequently used marijuana at his June 2010 bachelor's party and again several months later at a January 1, 2011, New Year's party. Such facts are sufficient to raise Drug Involvement Disqualifying Conditions AG ¶ 25(a) (*any drug abuse*), 25(c) (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*), and 25(g) (*any illegal drug use after being granted a security clearance*). With disqualifying conditions thus raised, the burden shifts to Applicant to mitigate related security concerns.

As a preliminary matter, Applicant makes a special note to stress that he has not handled classified material. That is not the point. The point is that in 2004, he was entrusted with a security clearance based on certain criteria and conditions. Such conditions included his remaining abstinent from both illegal drugs and illegal activity while maintaining the security clearance; it similarly obligated him to report any transgressions as soon as practicable.

For Applicant, a seven- to eight-month period of marijuana experimentation and drug abuse was quickly and uneventfully curtailed in January 2000 without any repercussions. By the time he received a security clearance in August 2004, that period of youthful indiscretion was behind him. What breathed new life into such old security concerns, however, was Applicant's use of marijuana at his June 2011 bachelor party and a January 1, 2011, New Year's Day party. While the former incident is sufficient to move drug involvement security concerns forward into the recent past, the latter incident increases the frequency of Applicant's lapses, doubles the instances at issue, and makes the conduct even more recent. Moreover, given the circumstances, the repeated lapses cast serious doubts on Applicant's trustworthiness and judgment. This scenario obviates applicability of Drug Involvement Mitigating Condition AG ¶ 26(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*). Similarly, under these facts, a period of less than

three years of abstinence is deficient to demonstrate a renewed commitment to remaining drug-free. Therefore, AG ¶ 26(b)(3) (*an appropriate period of abstinence*) does not apply.

However, Applicant has made significant changes with regard to his peers, contacts, and venues, and he executed a Statement of Intent not to use drugs in the future in conformance with AG ¶ 26(b)(4). Therefore, I find that AG ¶ 26(b)(1) (*disassociation from drug-using associates and contacts*); AG ¶ 26(b)(2) (*changing or avoiding the environment where drugs were used*) and AG ¶ 26(b)(4) (*a signed statement of intent with automatic revocation of clearance for any violation*) apply.

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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). 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. I have incorporated my comments under the three above-referenced guidelines in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed above, but some warrant additional comment.

Applicant is a 33-year-old director of operations for a defense contractor, where he was been employed since 2009. He has a significant background in cybersecurity. He has earned a GED and is currently in college. Applicant used marijuana as an underclassman in college briefly, then quit in about August 2000. Shortly thereafter, he embarked on his current career. He first received a security clearance in August 2004. By 2010, his life was coming together. He had started his current job and was engaged.

Here, however, Applicant's lapses were multiple in number, over the period of several months, and after he possessed a security clearance. While this process is not meant to be punitive, and while a proper invocation of the applicable mitigating conditions can accomplish much for an applicant seeking to meet his burden in this process, less than three years of renewed abstinence is insufficient to demonstrate the level of commitment to abstinence Applicant previously demonstrated until June 2010, only three years ago. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the drug involvement guideline.

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

Subparagraph 1.a:

For Applicant

Subparagraphs 1.b-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 a security clearance. Eligibility for access to classified information is denied.

Arthur E. Marshall, Jr.
Administrative Judge