



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 12-01723

Appearances

For Government: Greg Cervi, Esq., Department Counsel
For Applicant: *Pro se*

03/14/2013

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant did not mitigate drug involvement. Eligibility for access to classified information is denied.

Statement of the Case

On September 6, 2012, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOD 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, DOD 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, 2012, and requested a hearing. The case was assigned to me on November 26, 2012, and was scheduled for hearing on December 4, 2012. A hearing was held on the scheduled date. At the hearing, the Government's case consisted of two exhibits (GEs 1-2); Applicant relied on one witness (himself) and no exhibits. The transcript (Tr.) was received on December 12, 2012.

Summary of Pleadings

Under Guideline H, Applicant allegedly (a) used marijuana daily from May 2002 to February 2010; (b) used cocaine once a month biweekly from April 2008 to August 2009; (c) purchased marijuana from approximately August 2006 to February 2010; and (d) distributed marijuana for sale in July 2008.

In his response to the SOR, Applicant admitted to daily marijuana use after December 2005, but not during his football seasons. He admitted to monthly cocaine use from April 2007 to August 2008, but disputed the dates of usage alleged in the SOR. Applicant admitted to distributing marijuana in July 2008 to fund his marijuana usage.

Findings of Fact

Applicant is a 24-year-old mechanic for a defense contractor who 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 been married and has no children. (GE 1) He claims no military service. (GE 1) Applicant attended a local community college between August 2008 and May 2009. (GE 1; Tr. 35) He earned an advanced degree from an accredited trade school in aviation mechanics in August 2011. (GE 1; Tr. 36)

Applicant's drug history

Applicant was introduced to marijuana in February 2002 and smoked it daily after December 2005, but never during football seasons. (GE 2; Tr. 24, 32) He used cocaine from April 2007 to August 2008 to medicate his sinus problem, but never became addicted to the drug. (GE 2; Tr. 18-19, 27-28)

Applicant stopped using drugs in February 2010 after he enrolled in flight school. (Tr. 20, 25-27) Except for one isolated instance of cocaine use in October 2010, he has never returned to drug use of any kind since February 2010. (GE 2; Tr. 19, 29-31) When tested for drugs in a scheduled drug test in September 2011, he produced negative test results. (Tr. 21)

Applicant purchased marijuana mostly for his own personal use between August 2006 and February 2010. (GE 2) On several occasions in July 2008, he sold marijuana in large quantities to fund his own drug use. (Tr. 19-20, 26)

Neither Applicant's sister nor brother-in-law use marijuana anymore. (Tr. 31) And he no longer associates with friends who use marijuana. (Tr. 31) Applicant has no interest in resuming drug use. He has never received any drug counseling (Tr. 38), and he has never been randomly tested for drugs.

Endorsements

Applicant did not provide any endorsements or personnel assessments. Local references are listed in his security clearance application. (GE 1)

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.

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 mechanic for a defense contractor who presents with a history of marijuana and cocaine use, and some history of purchases and sales of marijuana to reduce his marijuana expenses associated with his own use. Principal security issues in this case center on Applicant’s use of marijuana and cocaine for substantial periods between May 2002 and October 2010. These concerns raise trust questions covered by Guideline H. Additional security concerns are raised over Applicant’s purchase and sale of marijuana.

Between May 2002 and October 2010, Applicant used marijuana regularly. He used cocaine as well between April 2007 and August 2008. Also, he purchased marijuana for a number of years for his personal use, and briefly distributed the drug for profit in July 2008 to help sustain his marijuana use. Applicant’s admissions to using, purchasing, and distributing 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 involvement are applicable: Disqualifying Condition (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.”

To his credit, Applicant ceased his drug use and drug purchases in February 2010. Except for one slip in October 2010, he has avoided any recurrent drug involvement of any kind since February 2010, and has disassociated himself from any old friends who use illegal drugs. Applicant has not taken advantage of any drug counseling, though, and has abstained from illegal substances for less than three years. His efforts to date merit some application of several of the mitigating conditions: MC ¶ 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;” 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.”

From a whole-person perspective, Applicant has provided no probative support from any of his supervisors, coworkers, and friends. His progress to date in avoiding illegal drugs is encouraging. However, it is still too soon to be able to make safe predictive judgments about his overall honesty, trustworthiness, and understanding of DOD policy constraints on the use of illegal substances.

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

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: AGAINST APPLICANT

Subparas. 1.a through 1.d: Against 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