



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



In the matter of:)	
)	
)	ISCR Case No. 12-02901
)	
)	
Applicant for Security Clearance)	

Appearances

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

06/26/2014

Decision

WHITE, David M., Administrative Judge:

Applicant regularly used marijuana for over 30 years, until testing positive for the drug at work. He also had an alcohol-related driving offense. The evidence is insufficient to mitigate resulting security concerns. Based upon a review of the pleadings, testimony, and exhibits, eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SF 86) on December 21, 2011. On December 30, 2013, the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guidelines H (Drug Involvement), J (Criminal Conduct), and E (Personal Conduct). 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 for Determining Eligibility for Access to Classified Information*, effective within the Department of Defense after September 1, 2006.

Applicant answered the SOR in writing (AR) on January 23, 2014, and requested a decision based on the administrative record. On February 6, 2014, Department

Counsel requested a hearing before an administrative judge pursuant to Directive ¶ E3.1.7, and notified Applicant of this request. Department Counsel was prepared to proceed on February 12, 2014. The case was assigned to me on February 18, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Video Teleconference Hearing on March 11, 2014, and I convened the hearing, as scheduled, on March 27, 2014. Applicant and the court reporter attended the hearing in person. Department Counsel participated from DOHA Headquarters by video teleconference. The Government offered Exhibits (GE) 1 and 2, which were admitted without objection. Applicant offered Exhibit (AE) A, which was admitted without objection, and testified on his own behalf. I granted Applicant's request to leave the record open until April 10, 2014, for submission of additional evidence. DOHA received the transcript of the hearing (Tr.) on April 4, 2014. On April 9, 2014, I granted Applicant's request to keep the record open until April 21, 2014. Applicant timely submitted AE B through D, which were admitted without objection and the record closed.

Findings of Fact

Applicant is a 48-year-old employee of a defense contractor, where he has worked since October 2005 as a metal fabricator. He attended high school through the eleventh grade. He never married, and has no children. He has no military service, and has not previously applied for or held a security clearance. (GE 1; Tr. 7-9.)

In his response to the SOR, Applicant admitted the truth of all allegations set forth in the SOR. Applicant's admissions, including his statements in response to DOHA interrogatories (GE 2), are incorporated in the following findings.

Applicant admitted that he has regularly used marijuana since age 14 (in 1980), describing his use as "about twice per month on average." (AR; GE 2.) He purchased the marijuana he used during that period. (AR.) He was cited for possession of marijuana in 1987 or 1988 and paid a fine. During September 2011, his employer required him to take a random urinalysis test. He was notified in October 2011 that his sample had tested positive for marijuana. As a result, he received a written reprimand and was suspended without pay from October 3, 2011, to November 3, 2011. He was not required to undergo counseling or treatment, and did not do so. (GE 2.) He testified that he stopped using marijuana after this incident, because he had purchased a home and "it's just not worth it." (Tr. 27, 35-36.)

During December 2003, Applicant attended a trade show and dined with the owner of the company for whom he worked as a truck driver. He drank enough to become intoxicated. The next day when he stopped at a weigh station, the inspecting official smelled alcohol on his breath. He was not considered to have been driving while intoxicated; but was not allowed to drive for 24 hours and was cited for an alcohol violation and fined \$400, which he paid. (AR; GE 1; GE 2; Tr. 36.)

Applicant provided the results of a random urinalysis test that he took during November 2013 that was negative for any drugs of abuse. (AE A.) A coworker who has

known Applicant for about eight years described him as a hard worker who can be counted on, and who is ethical with the exception of having failed a drug test. The coworker believed that Applicant “fully understands and is in fulfillment of the crucial requirement to remain drug free, knowing that federal law still mandates that Marijuana (and other) use is illegal.” (AE B.) A customer representative sent Applicant’s supervisor an email saying that Applicant was very professional and a pleasure to be around. (AE C.) Applicant received a certificate of appreciation from his employer on August 8, 2012, for providing outstanding support to a program designing and installing affordable green building materials. (AE D.)

Applicant requested that the record be left open to allow him to submit a statement of intent not to abuse drugs in the future, with automatic clearance revocation for any violation. He submitted other documents while the record remained open, but did not submit a statement or other evidence that he did not intend to abuse drugs in the future. He testified that he still associates with people with whom he has used marijuana, who have “been my friends forever.” (AE B through AE D; Tr. 38-40.)

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 (DCs) and mitigating conditions (MCs), which are to be 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 AG ¶ 2 describing the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 the 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 ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, “[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Section 7

of Executive Order 10865 provides: “[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

A person applying for access to classified information seeks to enter 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.

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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. The DCs supported by the evidence in this case are:

- (a) any drug abuse;
- (b) testing positive for illegal drug use; and
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant admitted to regularly purchasing and using marijuana from 1980 through September 2011, resulting in a positive urinalysis test in October 2011. He was cited and fined for marijuana possession in 1987 or 1988.

AG ¶ 26 provides conditions that could mitigate security concerns:

- (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; and,
 - (4) a signed statement of intent with automatic revocation of clearance for any violation;
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; 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 duly qualified medical professional.

Applicant's last known marijuana abuse was in September 2011. He admitted to regular use of that drug for more than 30 years, since age 14. He testified that he ended his drug abuse after his positive urinalysis test and resulting suspension. He failed to provide persuasive evidence of mitigation under AG ¶¶ 26(a) or (b), however, since he still associates with drug-abusing friends, provided no statement of intent to not abuse drugs in the future, and has not changed the environment where he regularly abused marijuana. His drug abuse did not involve prescription drugs, and he offered no evidence of drug treatment, so no mitigation under AG ¶¶ 26(c) or (d) was established.

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The DCs supported by the evidence in this case are:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant admitted to regular illegal use of marijuana over more than 30 years, and to an alcohol-related driving offense in 2003.

AG ¶ 32 provides conditions that could mitigate security concerns:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

As discussed above concerning guideline H, Applicant's drug use occurred over an extended period, and he offered insufficient evidence to support a conclusion that it is unlikely to recur. Mitigation under AG ¶ 32(a) therefore was not established. Applicant offered insufficient evidence to support mitigation under any of the other mitigating conditions, since he admitted the offenses, offered no evidence that he was coerced to commit them, and did not demonstrate rehabilitation.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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. 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 ¶ 16 describes conditions that could raise a security concern and may be disqualifying. Department Counsel asserted applicability of the catch-all provision under AG ¶ 16(c), and "possibly" (without evidence) that Applicant violated a written commitment to his employer under AG ¶ 16(f). I do not find that the evidence is insufficient for an adverse finding under any other guideline. Nor did Department Counsel provide any evidence of a relevant written commitment by Applicant. To the extent that appeal board precedent obligates the consideration of AG ¶ 15 concerns when such allegations appear in an SOR, I conclude that Applicant's conduct involved

questionable judgment and unwillingness to comply with rules and regulations against substance abuse. No pertinent Guideline E mitigating condition was established.

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):

- (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 guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant admitted to a long history of recreational drug abuse and a single minor alcohol-related driving offense. Although he claims to have stopped using marijuana after testing positive on a drug test, the evidence does not support a finding that continuation or recurrence are unlikely, or that behavioral changes demonstrate rehabilitation. Applicant is a mature and experienced individual who is accountable for his choices. Overall, the record evidence creates ongoing doubt as to Applicant's present eligibility and suitability for a security clearance.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant

Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	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.

DAVID M. WHITE
Administrative Judge