



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



In the matter of:)	
)	
)	ISCR Case No. 12-03103
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Braden Murphy, Esq., Department Counsel
For Applicant: Charles Swift, Esq.

04/23/2013

Decision

WHITE, David M., Administrative Judge:

Applicant admitted frequent marijuana use during high school, and using it about once a year between 1993 and 2007. He also admitted using a small amount of cocaine offered by friends on two occasions between 2002 and 2008, one of which occurred while visiting another country. He has abstained from any drug abuse for five years, during which time he married, had a child, and changed his social environment. He does not intend to abuse drugs in the future, and an expert psychologist provided a positive prognosis. The evidence is sufficient to mitigate security concerns. Based upon a review of the pleadings, testimony, and exhibits, eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on October 6, 2011. On September 11, 2012, the Department of Defense issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guidelines H (Drug Involvement) 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 October 24, 2012, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on November 19, 2012. The case was assigned to me on November 28, 2012. DOHA issued a Notice of Hearing on December 10, 2012, setting the case for January 22, 2013. Due to the unavailability of Applicant's expert witness to appear on that date, I granted his request for a two-day continuance. DOHA issued an Amended Notice of Hearing on January 8, 2013, and I convened the hearing, as rescheduled, on January 24, 2013. The Government offered exhibits (GE) 1 and 2, which were admitted without objection, and Hearing Exhibit (HE) I, a list of Government exhibits. Applicant offered exhibits (AE) A and B, which were also admitted without objection and with his informed consent. Two witnesses and Applicant testified on his behalf. I granted Applicant's request to leave the record open until February 7, 2013, to permit submission of additional evidence. On February 1, 2013, Applicant submitted AE C, which was admitted without objection. DOHA received the transcript of the hearing (Tr.) on February 6, 2013, and the record closed as scheduled.

Findings of Fact

Applicant is a 36-year-old employee of a defense contractor for whom he has worked since January 2008. He is married and has one young child. He is a high school graduate, and earned about five semesters of college credit before leaving school to begin working as a computer systems engineer. He has no military service and has never held a security clearance. (GE 1; Tr. 54.)

In his response to the SOR, Applicant admitted the truth of all factual allegations in the SOR, with some additional explanation and clarification. Applicant's admissions are incorporated in the following findings.

Applicant began regular marijuana use around January 1992, while attending a boarding school for his first two years of high school. He continued such use after returning home to attend his local high school in his junior year and purchased marijuana during that period. During January 1993, he and a friend were arrested and charged for breaking into a building at a local community college. He revealed the extent of his marijuana use and, as a result, the judge or his parents or both directed him to attend an outpatient drug-treatment program. He attended and completed the program from January to September 1993, and tested positive on a drug test at the beginning of the program. After his treatment program, he smoked marijuana once or twice a year due to peer pressure when it was offered to him at parties or nightclubs. He last used marijuana in January 2007, when he decided to quit altogether after a friend

with whom he had smoked some fell off a boat and drowned. (AR; GE 1; GE 2; AE A; Tr. 60-72, 86-87.)

Applicant used cocaine experimentally on two occasions, also due to peer pressure when it was offered to him by friends. The first time was either in 2002 or 2006, at a nightclub during a trip to Peru. The second time was in a night club in Las Vegas during March 2008. Applicant did not plan to use cocaine on either occasion, but accepted and snorted one “line” each time when his friends encouraged him to do so. There was no police or other law enforcement involvement on either occasion. (AR; GE1; GE2; AE A; Tr. 66-68, 84-85, 91-92.)

Applicant and his wife met in 2008, and married in September 2009. She does not use any drugs and has never known him to do so since they have been together. They no longer associate with anyone who uses drugs. He did not tell her about the 2008 cocaine use, and testified credibly that he has not abused any drugs since then. He also testified credibly that he has no intention of ever abusing drugs in the future, feeling that nothing good ever comes of it and not wanting to risk doing anything that could hurt his wife or young daughter. (Tr. 36, 47-55, 67-73, 84-86, 90, 94-96.)

In January 2013, he was evaluated by a licensed clinical psychologist who specializes in substance abuse issues, and was diagnosed with “Psychoactive Substance Abuse NOS In Sustained Remission for four years.” The psychologist gave him a excellent prognosis for continued abstinence, stating that recurrence was “highly unlikely.” He said that Applicant’s occasional drug use between 1994 and 2008 would be called a period of partial remission with brief relapse, and that such activity was common during an early-life progressive process of recovery. (AE A; AE B; Tr. 26-45.)

Applicant signed and submitted a “Statement of Intent to Refrain from Illegal Drug Use.” The statement included his agreements to immediately report any drug abuse to his facility security officer, and to automatic revocation of his clearance without further process for any future drug abuse. (AE C.) He made a strong impression of being a mature and responsible individual who is candid about his past mistakes and sincere in his resolve not to repeat them. (Tr.)

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.

(a) Drugs are defined as mood and behavior altering substances, and include:

(1) 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

(2) inhalants and other similar substances;

(b) 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 ¶ 25 describes conditions that could raise a security concern and may be disqualifying. The DCs raised by the evidence in this case include:

(a) any drug abuse (see above definition);

(b) testing positive for illegal drug use;

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

(d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence.

Applicant admittedly purchased and used marijuana on a regular basis during the early 1990s while in high school. He successfully completed an outpatient drug-treatment program between January and September 1993, after testing positive for drug abuse at the start of the program. From then until January 2007, he used marijuana once or twice per year when it was offered to him by friends during social gatherings. In either 2002 or 2006, and in 2008, he consumed a small amount of cocaine at the urging of friends on two occasions. He has not abused any drug since that time. He does not recall his exact diagnosis from 1993, but his 2013 diagnosis was “Psychoactive Substance Abuse NOS in Sustained Remission for four years,” and would have been “In Partial Remission with Brief Relapse” between 1993 and 2008. Accordingly, I find that the abuse diagnosis dates back to his period of regular use before January 1993. These facts support application of the foregoing DCs, and shift the burden to Applicant to prove mitigation of resulting security concerns.

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;
- (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 abuse of marijuana primarily occurred about 20 years ago, with only brief relapses once or twice per year until January 2007. On that last occasion, a friend of his died and he considers her marijuana use to have been a contributing factor in her accidental death. He has not abused any drug since March 2008, and his evaluating psychologist considers his infrequent use from 1993 until then, including his minor experimentation with cocaine, to be indicative of a normal course of recovery. He no longer attends parties involving illegal drug use and presented compelling evidence that drug abuse is unlikely to recur. Substantial mitigation under AG ¶ 26(a) was accordingly established.

Applicant no longer associates with the former friends or engages in recreational activities where peer pressure to use drugs might exist. He has been abstinent since March 2008, married a woman who uses no drugs, and had a child who is important to him. He also submitted a statement of intent to never abuse drugs in the future with automatic revocation for any violation. These facts establish additional mitigation under AG ¶ 26(b).

The drug abuse in this case did not involve prescription drugs, so AG ¶ 26(c) has no application to this decision. Applicant successfully completed an outpatient drug-treatment program in 1993, and had only brief relapses between then and 2008. A highly qualified substance abuse expert diagnosed him to be in full remission for four years, and offered an excellent prognosis of "highly unlikely" recurrence. Applicant thus demonstrated significant mitigation under AG ¶ 26(d).

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. The DC alleged by the Government and supported by some evidence is:

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Applicant engaged in a pattern of behavior involving questionable judgment and unwillingness to comply with rules and regulations that, if known, could have affected his personal and professional standing. His cocaine use in Peru was illegal, but occurred in a private setting with the knowledge only of the friends who offered him the drug. That minimizes, but does not eliminate the possibility that such conduct could serve as a basis for exploitation or pressure. Security concerns under AG ¶ 16(e) were raised by these facts.

AG ¶ 17 describes conditions that could mitigate security concerns under the Personal Conduct guideline. The MCs established by the evidence in this case are:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant proved mitigation under AG ¶ 17(c) for the same reasons set forth above concerning AG ¶ 26(a). The only evidence of his past drug abuse came from his honest admissions. He successfully completed eight months of outpatient treatment during 1993, with only occasional brief relapses between then and 2008. Since 2008, he has married and started a family, completely changing the environment and

circumstances under which he formerly engaged in casual drug abuse. A well-qualified medical professional opined in January 2013 that his behavior of concern is highly unlikely to recur, and I agree with that prognosis. Applicant accordingly established significant mitigation under AG ¶ 17(d). Finally, Applicant's honest disclosure of his past drug abuse to his wife, his employer, and the Government eliminated his potential vulnerability for exploitation, manipulation, or duress from attempts to conceal it. This demonstrates mitigation under AG ¶ 17(e).

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 had a significant drug abuse problem in high school more than 20 years ago. His drug use between 1993 and 2008 was casual and infrequent, but of potential concern as a reflection of disregard for known legal obligations. He decided more than five years ago that he had no further use or desire for illegal drugs, and demonstrated a substantial period of abstinence since then. He also married a woman with similar beliefs, had a child, and started a responsible job. He demonstrated his present maturity and rehabilitation, while honestly acknowledging his past mistakes, which minimizes any potential for coercion or duress. After 1993, his only motivation for his occasional drug abuse was peer pressure from friends with whom he no longer associates or cares to impress. The likelihood of recurrence of drug abuse or other forms of irresponsibility is remote.

Overall, the record evidence creates no doubt as to Applicant's present eligibility and suitability for a security clearance. He fully met his burden to mitigate the security concerns arising from his past drug involvement and personal conduct.

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:	FOR APPLICANT
Subparagraphs 1.a through 1.e:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a and 2.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

DAVID M. WHITE
Administrative Judge