



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



In the matter of:)
)
) ISCR Case No. 12-03923
)
Applicant for Security Clearance)

Appearances

For Government: Tovah A. Minster, Esquire, Department Counsel
For Applicant: *Pro se*

11/23/2012

Decision

DUFFY, James F., Administrative Judge:

Applicant mitigated the security concerns arising under Guideline H (Drug Involvement). Clearance is granted.

Statement of the Case

On September 4, 2012, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline H. DOHA acted under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) implemented on September 1, 2006.

The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue Applicant's security clearance. On September 19, 2012, DOHA received Applicant's Answer to the SOR. On October 4, 2012, Applicant elected to have his case decided on the written record in lieu of a hearing. On October 4, 2012, Department

Counsel compiled her File of Relevant Material (FORM) that contained documents identified as Items 1 through 6.

On October 4, 2012, DOHA forwarded to Applicant a copy of the FORM with instructions to submit any additional information and objections within 30 days of its receipt. On November 2, 2012, Applicant submitted his response to the FORM. Department Counsel had no objection to his response. The case was assigned to me on November 20, 2012. Items 1 through 6 and Applicant's response to the FORM are entered into the record.

Findings of Fact

Applicant is a 27-year-old employee of a federal contractor. He has worked for his current employer since November 2011. He graduated from high school in 2004. He earned a bachelor's degree in 2009 and a master's degree in 2011. He is applying to become a graduate student in a doctorate degree program for a very specific scientific field. He has never been married and has no children. This is the first time he has applied for a security clearance.¹

The SOR alleged that Applicant used marijuana from about January 2005 to August 2011, and that he purchased marijuana. In his Answer to the SOR, Applicant admitted both allegations and indicated that he last purchased marijuana in June 2011. His admissions are incorporated as findings of fact.²

Applicant submitted a security clearance application on December 6, 2011. In that application, he disclosed that he used marijuana from January 2005 to August 2011. He described this conduct as "Recreational Use Only, Infrequent Use (weekend or during school breaks), ~ 60 uses over 6 years." He also stated,

I will not use controlled substances in the future because I do not want to limit my future career opportunities . . . and security clearance possibilities. Therefore I have discontinued all drug use in order to fulfill my responsibilities as a law abiding U.S. citizen. Finally, I am well aware that the risks of drug use (unlawfulness, health, financial) far outweigh the perceived recreational benefits.

He also disclosed that he purchased drugs from July 2005 to January 2011, and that he never sought counseling or treatment as a result of his use of marijuana. He has no criminal record.³

¹ Item 6.

² Items 1 and 4.

³ Item 1.

In his response to the FORM, Applicant again admitted to the allegations in the SOR and indicated that his use of marijuana occurred while he was attending undergraduate and graduate school. Those schools are located in a state that is far away from where he currently lives and works. He also stated:

Continued usage of marijuana would only absolutely hinder my plans for a bright future or career. Since ceasing to use marijuana I have distanced and disassociated myself from drug-using associates (moved away from [the state where those schools are located]), I have changed and avoided the environment where drugs are abused . . . and I have abstained from marijuana for >14 months. Drug abuse is in my past and I want to keep it that way. I will not abuse drugs again because I have reached a new turning point which has opened up exciting new opportunities and possibilities in my life. I am sorry that I had used drugs in the past and understand how naïve, foolish, and irresponsible I was. I am embarrassed and ashamed of the conduct and regret it fully. I will sign this letter at the bottom to formalize my intent to never abuse drugs in the future.⁴

Policies

The President of the United States has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, to reach his decision.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and

⁴ Response to FORM. In the response, Applicant indicated that he provided a curriculum vitae (CV), but it was not attached to that document.

endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

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.

I have considered all of the evidence in this case and the disqualifying conditions under AG ¶ 25 and find the following are potentially applicable:

(a) any drug abuse; and

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

Applicant admitted that he used marijuana from January 2005 to August 2011, and that he purchased marijuana from July 2005 to June 2011. This evidence is sufficient to raise the above disqualifying conditions.

The following mitigating conditions under AG ¶ 26 are potentially applicable:

(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; and

(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.

Applicant admitted that he used marijuana recreationally approximately 60 times over a six year period. During that period, he was 19 to 25 years old. His drug use occurred while he was attending undergraduate and graduate school. He has not used marijuana in over 14 months.

Applicant completed graduate school in 2011. He has moved far away from the state in which his undergraduate and graduate schools were located. He stated that he has disassociated himself from drug-using individuals. He obtained his current job in November 2011 and submitted his security clearance application in December 2011. This is his first job since he finished graduate school. He signed a letter formalizing his intent to never abuse drugs in the future. Although that letter may not formally constitute a "Statement of Intent" because it does not acknowledge that any future illegal drug use would result in an automatic revocation of his security clearance, it is, as a practical matter, the equivalent of such as a statement. He acknowledged that future illegal drug use would derail his career aspirations.

Applicant's use of marijuana was a youthful indiscretion. He is now well aware of its negative consequences. He has made lifestyle changes that have taken him away from the college drug scene. A sufficient period of abstinence has elapsed that demonstrates he put the illegal use of marijuana behind him. His abuse of illegal drugs occurred under circumstances that are unlikely to recur. I find that AG ¶ 26(a) and 26(b) 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):

(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 relevant facts and circumstances surrounding this case. I have incorporated my comments under Guideline H in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a young man who is starting his professional career. His disclosure of his illegal drug use on the security clearance application is a good indicator that he is a man of character. He acknowledged that he made mistakes by using marijuana while in school and regrets that conduct. He has matured and put his illegal drug use behind him. Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the Drug Involvement security concerns.

Formal Findings

Formal 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
Subparagraphs 1.a – 1.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.

James F. Duffy
Administrative Judge