



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



In the matter of:)
)
) ISCR Case No. 12-04061
)
Applicant for Security Clearance)

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: Konrad B. Jarzyna, Esq.

02/15/2013

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated drug involvement security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On September 21, 2012, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, drug involvement. The action was taken under Executive Order (EO) 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) implemented by the Department of Defense on September 1, 2006.

Applicant answered the SOR on October 15, 2012, and requested a hearing before an administrative judge. The case was assigned to me on December 4, 2012. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on December 11, 2012, scheduling the hearing for January 7, 2013. The hearing was convened as scheduled. Government Exhibits (GE) 1 and 2 were admitted into

evidence without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through E, which were admitted without objection. DOHA received the hearing transcript (Tr.) on January 15, 2013.

Findings of Fact

Applicant is a 45-year-old employee of a defense contractor. He has worked for his current employer since 2007. He served on active duty in the U.S. military from 1987 until he was honorably discharged in 1995. He served in the National Guard from 2006 until he was honorably discharged in 2004. He held a security clearance in the military, but it lapsed upon his discharge. He has not held a clearance while working for his current employer. He attended technical school for a short period, but did not obtain a degree. He has been married for more than 20 years, and he has a 20-year-old child.¹

Applicant has suffered chronic shoulder pain since about 1992. He has been in therapy for bipolar disorder and depression for several years, and he is on medication. Applicant's chronic pain added to his depression. In about 2008, Applicant had a reunion with other military veterans and several of the veterans told him they used marijuana for their pain. Applicant started smoking marijuana as self-medication for his pain in about December 2009. He would smoke the marijuana at home in the evenings to assist in alleviating his pain and to help him sleep. The marijuana also helped him with the side effects of his bipolar medication. He also occasionally smoked marijuana at the home of the person from whom he bought the marijuana. Applicant always purchased his marijuana from the same individual. In the fall of 2011, the individual was going through a custody case. He told Applicant that he was going to kill his ex-wife. Applicant reported the information to the police. Applicant was not required to testify at criminal proceedings, but the ex-wife subpoenaed him to testify at the custody hearing. Applicant has not had a relationship with the individual since he reported the individual to the police.²

Applicant last smoked marijuana in December 2011. His company wanted him to apply for a security clearance, and he realized that using illegal drugs was inappropriate and inconsistent with holding a security clearance. Applicant had severe pain in January 2012. His family physician was on vacation, so he went to the hospital emergency room. The hospital doctor noted that the pain appeared to be emanating from the vertebrae in the neck, as opposed to the shoulder. The doctor recommended an MRI, acupuncture, and chiropractic care. He was also prescribed pain medication. The MRI revealed that his problem was not his shoulder, but the neck and spine. The subsequent treatment, focusing on the neck, has been successful, and Applicant has not had significant pain in six to seven months. He has not had to take prescription pain medication during that period.³

¹ Tr. at 15-17, 31-34, 50-51; GE 1.

² Tr. at 18-23, 29-36, 39-43, 49-50; Applicant's response to SOR; GE 1, 2; AE A, E.

³ Tr. at 21, 42-43; Applicant's response to SOR; GE 1, 2.

Applicant revealed his marijuana use when he submitted his Questionnaire for National Security Positions (SF 86) in January 2012. He also discussed it with the investigator during his background interview in February 2012.⁴

Applicant sees a psychiatrist every three months and a therapist once a month for his bipolar disorder and depression. The psychiatrist has adjusted his medication, and Applicant feels better. He has not received substance abuse counseling, but he has discussed his marijuana use with his therapist.⁵

Applicant is aware that his marijuana use was wrong, against his employer's policy, and illegal. He credibly testified that he will not use illegal drugs again. He no longer associates with the person who sold him the marijuana or, to his knowledge, anyone else who uses illegal drugs. He is willing to sign a statement of intent that he will not use marijuana in the future, with automatic revocation of his clearance for any violation.⁶

Applicant served in Operation Desert Storm while he was in the military, and he also deployed to Bosnia for peacekeeping operations. He submitted several letters and documents attesting to his excellent job performance, dedication, reliability, professionalism, work ethic, trustworthiness, leadership, and integrity.⁷

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 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, administrative judges apply the guidelines 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.

⁴ GE 1-2.

⁵ Tr. at 26-27, 33-34, 38-39, 46; Applicant's response to SOR; GE 1, 2.

⁶ Tr. at 27-28, 37-38, 43, 47-50, 56; Applicant's response to SOR; GE 1, 2.

⁷ Tr. at 16, 51-52; AE B-D.

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.”

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the 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.” The applicant 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. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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

The security concern for drug involvement is set out in AG ¶ 24:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. Two are potentially applicable in this case:

- (a) any drug abuse;⁸ and

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

⁸ Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

Applicant's possession and use of marijuana are sufficient to raise AG ¶¶ 25(a) and 25(c) as disqualifying conditions.

AG ¶ 26 provides conditions that could mitigate security concerns. The following 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 smoked marijuana as self-medication for his chronic pain and to help him with the side effects of his bipolar medication. His company wanted him to apply for a security clearance, and he realized that using illegal drugs was inappropriate while holding a security clearance. At about the same time, he reported his marijuana supplier to the police for making death threats against the supplier's ex-wife. He has not used illegal drugs since December 2011. His pain is under control, and his bipolar medication has been adjusted. He clearly, unequivocally, and credibly committed to remaining drug-free. He is willing to sign a statement of intent that he will not use marijuana in the future, with automatic revocation of his clearance for any violation. I find that he demonstrated an appropriate period of abstinence and that illegal drug use is unlikely to recur. AG ¶¶ 26(a) and 26(b) are applicable.

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

I have considered Applicant's honorable military service and his favorable character evidence. Applicant exhibited poor judgment and a disregard for the law when he used illegal drugs. However, I am convinced that he has put his inappropriate and illegal behavior behind him and it will not recur.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated drug involvement security concerns.

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:	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.

Edward W. Loughran
Administrative Judge