



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



In the matter of:)
)
) ISCR Case No. 14-01862
)
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: Elizabeth L. Newman, Esq.

08/07/2015

Decision

MASON, Paul J., Administrative Judge:

Applicant's credible evidence in mitigation overcomes the security concerns related to his isolated drug use. Eligibility for access to classified information is granted.

Statement of the Case

Applicant completed and signed an Electronic Questionnaire for Investigations Processing (e-QIP), Government's Exhibit (GE) 1, on March 14, 2011. On September 5, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing security concerns under drug involvement (Guideline H). The action was taken pursuant to 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 (AG) implemented by the Department of Defense on September 1, 2006.

On October 22, 2014, Applicant submitted his notarized answer to the SOR. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 30, 2015, for a hearing on May 8, 2015. The hearing was held as scheduled. The Government's three exhibits (GE 1-3) and Applicant's two exhibits (AE A-B) were admitted into the record without objection. The record in this case closed on May 15, 2015, when the transcript was received.

Rulings on Procedure

The first page of GE 3, authored by the facility security officer (FSO) at Applicant's employer, is dated December 14, 2012. Another copy of the first page of GE 3 was used by Applicant's counsel during an examination of the FSO. The copy, which contains exactly the same information as the first page of GE 3, is dated December 19, 2012. After the parties agreed that both documents contained the same information, the one-page document dated December 19, 2012, was added to GE 3. I mistakenly indicated that with the addition of the December 19 document, the exhibit was four pages in length. The exhibit is five pages in length. (Tr. 82-85)

Findings of Fact

Applicant admitted the one SOR allegation that he used marijuana on at least two occasions after being granted a security clearance in May 2011. He indicated that his marijuana use was mitigated because he disclosed the drug use voluntarily during the security investigation. The use demonstrated poor judgment for which he is remorseful. Applicant agreed under penalty of perjury to have his security clearance revoked if he uses drugs in the future. (Answer to SOR)

Applicant is 45 years old. He has been married since November 1996. He has three children, a 12-year-old daughter, a 9-year-old son, and a 7-year-old son. In 1997, he received his bachelor's of science degree in information technology. He has been employed as a systems engineer with a defense contractor since June 2001. He is applying for his first security clearance. (GE 1 at 10-19; Tr. 12-15)

On March 14, 2011, Applicant completed and certified an e-QIP. In response to first four questions of Section 23 (Illegal Use of Drugs or Drug Activity), he answered: that he had not used drugs in the last seven years (23a.); that he had never used a controlled substance while possessing a security clearance (23b.); that he had not been involved in the illegal possession, purchase, trafficking, or sale of any controlled substance in the last

seven years (23c.); and that he had not received drug counseling or treatment for drug use in the last seven years (23d.). (GE 1 at 29)

On the next page of the e-QIP, the applicant is advised that affirmative answers to 23a.-23d. necessitate explanation of the date and details surrounding the use or activity. Applicant indicated that he had used marijuana 50 times between November 1987 and December 2000. In the additional comment section Applicant stated that:

Recreational use in college. Use on "get together" weekends (4 or 5x a year) with college friends. Stopped use around 2000 when (wife) and I decided to have kids. Now that most of us have wives/kids, the "get togethers" aren't so crazy anymore! Have used 1 or 2x a year on "guys only - no wives/kid" ski weekends in [ski location] over the last several years except last year, b/c we had our 2nd child and I did not partake in those weekends. (GE 1 at 30)

Applicant testified that he provided the foregoing information in the additional comment section of his March 2011 e-QIP, the first security form that he had ever completed, because he wanted to disclose the time period and surrounding circumstances of his drug use. He remembered that he stopped using marijuana in 2000 to eliminate one of the factors that may have hindered Applicant and his wife from having children. Between 2000 and 2010, he continued to socialize with some of his friends who used drugs, but he did not use the drug on those occasions. (Tr. 18, 21-23, 36-37)

In October 2011, Applicant and a group of his college friends were celebrating their 20th reunion at a college fraternity house. He vacillated somewhat in describing his *mens rea* and other factors that influenced him to use the marijuana with the group of friends. He had been fully engaged in the revelry earlier in the day by drinking beer at college reunion athletic events. However, he knew he should not have used the drug while holding a security clearance. (GE 3; Tr. 25, 26-27-30)

In March 2012, Applicant was on temporary duty at a quarterly business review seminar in the United States. His mother had just died and he was experiencing the stress of raising three young children. During a break in the activities at the seminar, he decided to visit a family friend at his home. After dinner, the friend handed Applicant a marijuana cigarette and he smoked part of it.¹ (GE 3; Tr. 29-30)

Applicant became concerned by his marijuana use in October 2011 and March 2012. He prepared a three-page statement which he gave to the FSO on or about December 14,

¹ Applicant was over 41 years old when he ingested the marijuana. (GE 1 at 5)

2012.² In the statement, he reported his marijuana use on those two occasions. He conceded that he knew that he could not use marijuana while possessing a security clearance, but did not apply his security knowledge when he used the drug. He repeatedly expressed his remorse and desired to reestablish the trust conferred in him by the Government and his employer when he was granted a clearance in May 2011. (GE 3; Tr. 34-36, 74-75)

Applicant has not used marijuana since March 2012, though he has continued to socialize once or twice a year with his college friends, including those that continue to use drugs. As he did in the period between 2000 and 2010, Applicant simply walks away from the situation or does not use marijuana with them. The only illegal drug he has used was marijuana. He has never been charged or convicted of a drug-related offense. He has never tested positive for drugs. Applicant provided three reasons why he will not use any drug in the future: (1) drug use is illegal; (2) drug use is unhealthy; and (3) drug use does not set an appropriate example for his three young children. (Tr. 30-32, 43-45, 54-56)

Character Evidence

Applicant's wife is a patent attorney with a government agency. She never saw him use marijuana, but he told her that he used the drug two times and decided to report it. He told her that he has no intention of using the drug in the future and she believes him because he is her husband and he has always been honest with her. (Tr. 60-65)

The intelligence community director with Applicant's employer testified that he and Applicant have worked together on a daily basis for five years. Applicant told the director about reporting his drug use to the FSO. The director does not believe Applicant will use illegal drugs in the future because he wants to establish the proper example at home and at work. (66-72)

The FSO at Applicant's employer testified that he has been in that position for about five and a half years. Applicant spoke about his marijuana use with the FSO in December 2012. He provided him with the three-page statement. (GE 3) The FSO counseled Applicant about security briefings and that drug use constituted a violation of security procedures. Then the FSO reported the violation to the manager of Applicant's employer. The FSO does not believe Applicant will use illegal drugs in the future because in the five and a half years that he has known Applicant, he has always been forthcoming and made the right decisions. In the 12 years that FSO has been in that position with this employer and preceding employers, unlike other individuals, Applicant was sincerely regretful for engaging in illegal drug use. (GE 3; Tr. 73-85)

² By the time he prepared the statement, he had decided to forego future drug use. (Tr 35)

In Applicant's performance evaluations, his manager noted that he could be relied upon to do the right thing for his team and the customer while producing outstanding results. (AE A, B)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. Each guideline lists potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant's eligibility for access to classified information.

The disqualifying and mitigating conditions should also be evaluated in the context of nine general factors of the whole-person concept so that all available information, past and present, favorable and unfavorable, is a part of the decision for or against an applicant's security clearance application. Such decisions entail a certain degree of legally permissible extrapolation as to the potential, rather than actual, risk of compromise of classified information.

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 applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion of establishing that it is clearly consistent with the national interest to grant him a security clearance.

Analysis

Drug involvement

Paragraph 24 of the AG sets forth the security concern for 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 to comply with laws, rules and regulations;

The pertinent disqualifying conditions under AG ¶ 25 that may be disqualifying are:

(a) any drug use;³ and

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

(g) any illegal drug use after being granted a security clearance

AG ¶¶ 25(a), (c), and (g) apply to Applicant's illegal drug involvement in October 2011 and March 2012, after being granted a security clearance in May 2011. The Government has established a case of illegal drug involvement under the three disqualifying conditions.⁴ The other disqualifying conditions do not apply.

The mitigating conditions under AG ¶ 26 that apply are:

(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 are used, (3) an appropriate period of abstinence, and a signed statement of intent with automatic revocation of clearance for any violation.

Since 2000, Applicant used marijuana on two isolated occasions about five months apart in 2011 and 2012. His last use of the drug was more than three years ago. In December 2012, he voluntarily disclosed his use to his FSO and the intelligence director. Based on their more than five-year professional relationship with Applicant, they believe he will abstain from all illegal drug use in the future. His wife does not believe he will use illegal drugs in the future because he has always been honest with her.

In his answer to the SOR in October 2014, Applicant signed a statement of intent with automatic revocation of his clearance for any violation. Though some of his drug-using college friends still use drugs at these yearly activities that he attends, he has extricated himself from drug environment by walking away when possible or simply by not using illegal

³ Drug use is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction. (AG ¶ 24(b))

⁴ Though unalleged in the SOR, Applicant's use of marijuana about 50 times between 1987 and 2000 has contextual relevance: in assessing Applicant's overall credibility; in deciding whether a particular provision of the Directive applies; and as evidence for the whole person analysis.

drugs. His dedication to being a suitable role model for his children cannot be questioned. AG ¶ 26(a) and AG ¶ 26(b) apply.

Whole-Person Concept

I have also weighed this case in the context of nine factors of the whole-person concept. These factors are set forth in 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 the participation was 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 a commonsense judgment based on careful consideration of the guidelines and the whole-person concept.

Applicant is 45 years old. He has been married for 19 years and has three children. He used drugs on an occasional basis from 1987 to 2000. He stopped because he wanted to increase the chances of having children. He testified that he used no drugs for ten years until yielding to temptation in October 2011 and March 2012. The perturbing aspect of the use was that it occurred after he was granted access to classified information. However, in light of the isolated scope of the drug use, the passage of more than three years since Applicant's last use, and his signed statement of intent with automatic revocation, I am completely confident he will not return to illegal drug use in the future.

Applicant has been consistently candid about his drug use during the security investigation process. In his March 2011 e-QIP, he voluntarily disclosed a full account of his drug use, even though the account was outside the seven-year window of Section 23. After using the marijuana on two isolated occasions in 2011 and 2012, while possessing a security clearance, he voluntarily furnished a detailed statement to his FSO explaining the poor judgment he demonstrated for using the marijuana. Applicant is well respected by the intelligence director and the FSO. Having evaluated Applicant's drug involvement in the context of the whole-person concept, his evidence in mitigation successfully overcomes the security concerns based on the drug involvement guideline.

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 (Drug Involvement): FOR APPLICANT

Subparagraph 1.a: For Applicant

Conclusion

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

Paul J. Mason
Administrative Judge