



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-00984

Appearances

For Government: Andrew Henderson, Esq., Department Counsel

For Applicant: Robert Schultz, Personal Representative

07/29/2016

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant mitigated the security concerns regarding his use of drugs. Eligibility for access to classified information is granted.

History of Case

On September 23, 2015, the Department of Defense (DoD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons why DoD adjudicators could not make the affirmative determination of eligibility for a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AGs) implemented by DoD on September 1, 2006.

Applicant responded to the SOR on October 22, 2015, and requested a hearing. The case was assigned to me on March 9, 2016, and was scheduled for hearing on

April 28, 2016. At hearing, the Government's case consisted of two exhibits (GEs 1-2). Applicant relied on one witness (himself) and four exhibits (AEs A-D). The transcript (Tr.) was received on May 12, 2016.

Summary of Pleadings

Under Guideline H, Applicant allegedly (a) used marijuana from April 1994 to May 2013 on several occasions for recreation purposes and (b) used cocaine on a few occasions from approximately June 2008 to May 2010. No further details are alleged.

In his response to the SOR, Applicant admitted to casual use of marijuana from April 1994 to May 2013 and to casual cocaine usage from June 2008 to May 2010. He claimed he told an interviewing agent three years previous of his casual, infrequent use of marijuana and his intention never to use the drugs again. He claimed he has abstained from all illegal drug use since May 2013, and intends never to use illegal substances in the future. He claimed, too, he is a reliable, punctual, and creative engineer and wishes to continue doing so until retirement. And he claimed he wants to make his father (a longtime DOD employee) proud of him.

Findings of Fact

Applicant is a 40-year-old web developer for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Background

Applicant never married and has no children. (GE 1) He claimed no post-high school educational credits and no military service.

Applicant has been employed by his current employer as a web developer since June 2013. (GE 1) He was employed by another web developer between May and June 2013 before resigning on a mutual understanding that his skill sets were not strong enough to complete the tasks expected for his position. Prior to a brief period of unemployment, he held web-designer positions for other companies between October 2010 and March 2013. (GE 1) He has never held a security clearance. (GE 1; Tr. 24)

Drug history

While in high school in April 1994, Applicant was introduced to marijuana by his high school friends. (GEs 1-2) He used marijuana infrequently (about 30 times in all between April 1994 and May 2013 in social situations) before quitting his use of the substance altogether in May 2013. (GE 2; Tr. 22-23) He first tried marijuana out of curiosity at social functions. (GEs 1-2; Tr. 22-23) He has never had a positive drug test or been ordered, or volunteered, to participate in drug counseling. (GE 2; Tr. 23) He is committed to avoiding marijuana use in the future and has abstained from marijuana use since May 2013. (GEs 1-2) His close friends and family are aware of his past drug use, and he cannot be blackmailed or coerced. (GE 2)

Besides marijuana, Applicant also tried cocaine on a few occasions at parties with high school friends between June 2008 and May 2010. He ceased all use of cocaine in May 2010 and is committed to avoiding any further use of the substance and situations where he might be exposed to cocaine use by friends and acquaintances. (GEs 1-2; Tr. 26-28, 30-34)

In his letter of April 2016, Applicant reaffirmed his commitment to avoid all involvement with illegal drugs, to include his knowingly being in the presence of others who are in the possession of illegal drugs. (AE D; Tr. 26) In his drug certification, he affirmed his understanding that should he break his commitment to avoid all involvement in illegal drugs, even once, he risks loss of his security clearance. (AE D) Applicant's assurances are credible and accepted. Based on Applicant's credible assurances of his future intentions to abstain from drug use and situations where drugs might be used by others, his accounts and assurances are accepted.

Character References and Certifications

Applicant is well-regarded by his managers who have worked with him for over two years. (AE A) Both credit him with working with government officials of their primary client to produce mission-critical pieces of software data. (AE A) They characterize him as a reliable, hardworking employee who has always had the interests of their client at heart. His program manager described Applicant as a diligent, professional, and trustworthy individual with a conscientious attitude for meeting deadlines. (AE A)

A close friend since high school, who is employed by a DOD agency and interfaces with Applicant on a regular basis, credited Applicant with being responsible, resourceful, and an asset to his company. (AE A) Other friends who have known Applicant have always found him in their professional dealings to be honest, trustworthy, dedicated, and dependable, in addition to being creative, intelligent, even-tempered, and highly skilled. (AE A)

Applicant earned a number of training certificates for 2016. (AE B) His performance evaluations for 2016 credited him with successful performance ratings in all of the identified categories. (AE C)

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering security clearance cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information.

The AGs include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns." They must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated

disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c)

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the revised AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person.

The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk. The following AG ¶ 2(a) factors are pertinent: (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.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Drug Involvement

The Concern: 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 ¶ 24.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. *See United States, v. Gaudin*, 515 U.S. 506, 509-511 (1995). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a

security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. “[S]ecurity-clearance determinations should err, if they must, on the side of denials.” See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Between April 1994 and May 2013, Applicant used marijuana infrequently in social situations (approximately 30 times in all). He also tried cocaine on a few occasions between June 2008 and May 2010, before ceasing his use of all illegal drugs.

On the strength of the evidence presented, two disqualifying conditions of the Adjudicative Guidelines for drug abuse are applicable: DC ¶ 25(a), “any drug abuse,” and ¶ 25(c), “illegal possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.” Judgment concerns exist over Applicant’s past drug use. He has over three years of demonstrated abstinence.

Considering Applicant’s limited use of marijuana and cocaine over a number of years and demonstrated abstinence since May 2013, enough time has elapsed to facilitate safe predictable judgments that he will not return to illegal drug use in the foreseeable future. Pertinent mitigating conditions covered by AG ¶ 24 are available to Applicant. MC ¶ 24(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 MC ¶ 24(b), “a demonstrated intent not to use any drugs in the future, such as (1) disassociation from drug-using associates and contacts; (2) changing and avoiding the environment where drugs are used; (3) an appropriate period of abstinence; and (4) a signed statement of intent with automatic revocations of clearance for any violation,” apply to Applicant’s limited and aged use of marijuana and cocaine.

Since Applicant ceased using drugs (in May 2010 for cocaine and May 2013 for marijuana) over six years have elapsed for his cocaine use and over three years for his marijuana use. When combined with considerable periods of abstinence from illegal drug use and a demonstrated intent not to use illegal drugs in the future at the risk of losing his clearance, it is unlikely that he will resume his use of illegal drugs in the foreseeable future.

Applicant is credited with good judgment and reliability by his current managers and friend employed by DOD who has worked closely with Applicant for a number of years. Safe predictable judgments, accordingly, can be made about his ability to avoid recurrent drug involvement.

From a whole-person perspective, Applicant has established independent probative evidence of his limited use of illegal drugs (marijuana and cocaine) and the unlikelihood of ever resuming his use of the substances in the foreseeable future. He has provided endorsements from his managers and close friends (one of whom is employed by a DOD agency who interfaces with him) to soften or mitigate any of the drug and judgment concerns associated with his past use of marijuana and cocaine. Applicant's own acknowledgment of poor judgment and disassociation of contacts with the former high school friends with whom he shared drugs in social situations help to reinforce favorable conclusions about his overall judgment, reliability and trustworthiness.

Taking into account all of the facts and circumstances surrounding Applicant's isolated drug use and judgment lapses, Applicant mitigates security concerns related to his drug use. Favorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a and 1.b of Guideline H.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE H: (DRUG INVOLVEMENT): FOR APPLICANT

Sub-paras. 1.a-1.b: FOR APPLICANT

Conclusions

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is granted.

Roger C. Wesley
Administrative Judge

