



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-02227

Appearances

For Government:

Andrew Henderson, Esquire, Department Counsel

For Applicant:

Arran Treadway, Esquire
Claery & Green LLP

July 29, 2016

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigation Processing (e-QIP) on September 29, 2014. (Government Exhibit 1.) On October 26, 2015, the Department of Defense issued a Statement of Reasons (SOR) detailing the security concerns under Guideline H (Drug Involvement) concerning Applicant. 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) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on December 17, 2015 (Answer), and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on January 20, 2016. This case was assigned to me on March 15, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on March

18, 2016. I convened the hearing as scheduled on April 19, 2016. The Government offered Government Exhibits 1 and 2, which were admitted without objection. Administrative notice was taken of Government Exhibit 3, which was admitted over Applicant's objection. (Transcript 60-61.) Applicant submitted Applicant Exhibits A through C, which were admitted without objection, and testified on his own behalf. Applicant asked that the record remain open until May 3, 2016, for the receipt of additional documents. Applicant's Exhibit D was received in a timely manner and admitted into the record without objection. DOHA received the transcript of the hearing (Tr.) on April 26, 2016. The record closed on May 3, 2016. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

Applicant is 32, and single. He has a Ph.D in engineering. He is employed by a defense contractor and seeks to obtain a security clearance in connection with his employment. Applicant admitted all the allegations in the SOR, with explanations. Applicant's admissions are incorporated into the following findings of fact.

Paragraph 1 (Guideline H, Drug Involvement)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he used illegal drugs. Applicant used and purchased marijuana with varying frequencies from 2002 through approximately 2013. In addition, the Applicant used and purchased Ecstasy from 2008 through 2009, and one time in 2012. Applicant also testified that he knew purchasing marijuana and Ecstasy was criminal conduct. (Tr. 34-35.)

Applicant began using marijuana in 2002, when he was a sophomore in college. He continued to use it approximately twice a month until 2013, when he was in post-graduate school getting his Ph.D. According to Applicant he used marijuana approximately twice a month at parties as a way to relax from his engineering studies. (Tr. 15-16, 31-33, 50-51.)

As stated, Applicant stopped using marijuana in 2013, about a year before he received his doctorate. At that time Applicant was beginning to think about his career after school. He found out from other people that the best jobs require a security clearance. He stated, "And after consulting some friends who have gone through that [security clearance] process, they made me aware about you had to state your drug history and any type of criminal history. So, that's when I immediately stopped taking any sorts of drugs." The impact that Applicant's continued drug use could have on his employability was a major reason that he stopped using marijuana. He also has a considerable amount of student loans and was concerned about his ability to pay them back. (Tr. 17-19, 42, 45, 52-55.)

Applicant used Ecstasy with friends at rave parties in 2008 and 2009. During that period he used it about ten times. He used it one additional time at a party in 2012. He stopped using Ecstasy because of concerns about the drug's affect on his health. (Tr. 23-24, 30-31, 43; Government Exhibit 2 at 2.)

Applicant stated that he was fully aware of the impact his drug use could have on him. He stated, "I never took it in times when it would affect my academic performance, especially when I was teaching because I didn't want to show up to class, in front of my students, looking strung out or anything. I always, you know, took these drugs in times where I had free time." (Tr. 23-25, 37-38, 44.)¹

As he has grown older, and has a responsible job, Applicant has found himself moving away from his old friends. He stopped associating with the people he used drugs with years ago. He looks back on his drug use with a sense of regret stating, "it really exemplifies the foolishness that I've done in the past." (Tr. 26, 43-44, 50-51.)

Applicant emphasized his truthfulness during the complete security clearance investigation process. He testified, "So, . . . it is shameful for me to state all these things I truly regret now, but I simply wanted to be honest about my past behavior." (Tr. 29, 36-37, 42-43, 58; Government Exhibits 1 and 2.)

Three negative drug tests from 2016 were submitted by Applicant. (Applicant Exhibits B, C, and D.) He took them to "exemplify that I have been clean." (Tr. 19, 39, 58.)

Mitigation

Applicant had a successful college career in a very demanding subject. He authored several journal articles, and was on the Dean's List. During his academic career he conducted research with the Federal Government as well, but he did not require a security clearance. (Tr. 19-22, 24-25, 45-47.)

Applicant has worked for his current employer since September 2014. Accordingly, as of the date of the hearing he had received a single employee performance evaluation. That evaluation indicates Applicant met standards for his position. (Applicant Exhibit A.)

Policies

Security clearance decisions are not made in a vacuum. 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

¹See Government Exhibit 3.

mitigating conditions, which are to be used as appropriate 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(a) describing 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. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that, "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of 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, "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, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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. Security clearance decisions include, by necessity, consideration of the possible risk that 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.

Finally, as emphasized in Section 7 of Executive Order 10865, "Any 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." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Paragraph 1 (Guideline H - Drug Involvement)

The security concern relating to the guideline 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. 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; Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

I have considered the disqualifying conditions under AG ¶ 25 and especially considered the following:

(a) any drug abuse; and

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

Applicant admitted the occasional use of marijuana over a period of approximately ten years, ending in 2013. He used Ecstasy during 2008 and 2009, then once more in 2012. He was in college during the entire time he used drugs, and stopped when he was informed that drug use was incompatible with holding a security clearance.

I have studied all of the mitigating conditions under AG ¶ 26 and especially considered the following:

(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 stopped using marijuana about two and half years before the record closed. Applicant freely admitted at the hearing that his conduct was foolish, and he looks back on it with regret. It is obvious that as he grew up, continued with his studies, and looked to his future, he discovered that continued drug use was not the road to success.

In addition to two and a half years of continued abstinence, Applicant discontinued contact with drug-using associates. As a professional, he is in an entirely different environment. Under the particular circumstances of this case, his repeated and credible testimony that he would no longer use drugs in the future is the functional equivalent of a signed statement of intent. He clearly understands the negative impact that any further drug use would have on his future.

Applicant offered sufficient evidence that would support mitigation under AG ¶¶ 26 (a), and (b). Paragraph 1 is found for Applicant.

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 applicant's conduct and all the circumstances. 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. 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Under AG ¶ 2(a)(3), Applicant's conduct is not recent. Based on the state of the record, I find that there have been permanent behavioral changes under AG ¶ 2(a)(6). Accordingly, at the present time, I find that there is little to no potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)), and that there is also little to no possibility of recurrence (AG ¶ 2(a)(9)).

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his drug use.

On balance, it is concluded that Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

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 through 1.d:

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.

WILFORD H. ROSS
Administrative Judge