



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



In the matter of:)
)
) ISCR Case No. 15-04223
)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: *pro se*

November 4, 2016

Decision

MOGUL, Martin H., Administrative Judge:

On December 18, 2015, the Department of Defense (DoD) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline H for Applicant. The action was taken under 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), effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant replied to the SOR (RSOR) in writing on January 5, 2016, although the RSOR is incorrectly dated as January 5, 2015, and he requested that his case be decided by a hearing before an Administrative Judge. I received the case assignment on March 30, 2016. DOHA issued a notice of hearing on that date, and I convened the hearing as scheduled on April 20, 2016.

At the hearing, the Government offered Exhibits 1 through 3, which were received without objection. Applicant testified on his own behalf, and submitted no documents. An additional witness testified on behalf of Applicant. The record was kept

open until April 29, 2016, to allow Applicant to submit additional evidence. Two letters that were timely received, have been identified and entered into evidence without objection as Exhibits A and B. DOHA received the transcript of the hearing (Tr) on April 28, 2016. Based upon a review of the pleadings, exhibits, and the testimony of Applicant and the other witness, eligibility for access to classified information is granted.

Findings of Fact

In his RSOR, Applicant admitted all three SOR allegations, 1.a. through 1.c. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, and the testimony of Applicant and the second witness, and upon due consideration of that evidence, I make the following additional findings of fact:

Applicant is 23 years old. He is unmarried, and he has no children. Applicant received a Bachelor of Science degree in Mechanical Engineering in September 2014, after attending college from 2010 through 2014. Applicant is employed by a defense contractor, and he seeks a DoD security clearance in connection with employment in the defense sector. (Tr at 35-36.)

Guideline H - Drug Involvement

The SOR lists three allegations (1.a., 1.b., and 1.c.) under Adjudicative Guideline H.

1.a. The SOR alleges that Applicant, "used marijuana with varying frequency from approximately September 2010 until at least approximately December 31, 2013." Applicant admitted this allegation in his RSOR, and he wrote, "No additional use has happened since December 31, 2013 and I do not plan, nor will I, use marijuana again."

At the hearing, Applicant reiterated that his last use of marijuana was on December 31, 2013. He testified that he never used marijuana in high school, and his first usage of marijuana occurred during his first week in college on September 2010. Applicant summarized his marijuana use as once or twice a month during his freshman year, increasing to once or twice a week during his sophomore year, and in his junior year Applicant used marijuana one last time on December 31, 2013. (Tr at 33-37.)

Applicant explained that he had used marijuana one time in January 2013, but then after not using it for 11 months, he was at a New Year's Eve party with friends, and some people stepped outside to use marijuana and he joined them. He testified that he immediately, "kind of felt this sinking feeling in his stomach, and knew that I had done something extremely wrong, which was part of the compelling reason why I felt I needed to report this information so when I had the opportunity, I did." He reported the marijuana use as soon as he returned to his job. (Tr at 38-41.)

1.b. The SOR alleges that Applicant used marijuana, as set forth in subparagraph 1.a., above, after he had been granted a Department of Defense Industrial Security Clearance on August 29, 2013. Applicant admitted this allegation in his RSOR, and he wrote, "This occurred while I was debriefed after my summer internship."

Applicant testified that he only used marijuana on one occasion, on December 31, 2013, after he was granted a security clearance, Applicant indicated that at the time, he did not understand "the gravity of my actions." (Tr at 41-42.)

1.c. The SOR alleges that Applicant purchased marijuana on at least one occasion in 2011. Applicant admitted this allegation in his RSOR, and he wrote, "I admit to purchasing marijuana, but it was one occasion in September 2010." He spent between \$10 and \$20. (Tr at 43-44.)

Applicant testified that a month before the hearing he had been at a location staying with friends, and some of them were using marijuana. He had no desire to use the marijuana, and he excused himself and left the room. He also stated that he had not been aware that these friends used marijuana, and he would not be staying with them in the future. (Tr at 46-48.)

Finally, Applicant talked about some of the things he does now to stay busy, and not have too much time to contemplate using drugs. They include: being busy at work, playing volleyball, becoming active with a church group, travelling between work sites, and playing board games. (Tr at 48.) He also confirmed that he has disassociated himself from the environment and the people with whom he used to use marijuana. (Tr at 53.)

Mitigation

As reviewed above, one witness testified on Applicant's behalf. The witness is a co-worker of Applicant at his present employment, who has known Applicant, at the time of the hearing, for one year and 10 months. He testified that Applicant always followed very carefully all of the rules of the company, especially the security rules, and he is a dedicated worker. He was surprised and somewhat disappointed when he learned about Applicant's marijuana use, but he does not believe Applicant will use marijuana again, because he is in "a good place" at work surrounded by good people with more responsibility. (Tr at 21-29.)

Applicant also submitted a signed a statement of intent in which he wrote, "I, [Applicant] do not intend to use illegal drugs again and understand that any violation of this intent is grounds for immediate revocation of my clearance." (Exhibit A.) He also submitted a letter, dated April 22, 2016, and signed by both of Applicant's parents, in which they acknowledged that Applicant had informed them he had "dabbled in the use of marijuana during his early college undergraduate years." They further wrote, "though we are disappointed he made this choice, we believe that he has not engaged in such

behavior since 2013, he engaged himself in a circle of peers who made better choices, and has learned the consequences of his choice.” (Exhibit B.)

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 over-arching 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.

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.” 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. . . .” The applicant 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. Decisions include, by necessity, consideration of the possible risk 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.

Section 7 of Executive Order 10865 provides that 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 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 judgement and because it raises questions about a person’s ability or willingness to comply with laws, rules and regulations.

With respect to Guideline H, the Government has established its case. Applicant’s improper and illegal drug abuse, specifically the use of marijuana as recently as December 31, 2013, while he was holding a DoD security clearance, is of great concern, especially in light of his continued desire to have access to the nation’s secrets. Applicant’s overall conduct pertaining to his illegal substance abuse clearly falls within Drug Involvement ¶ 25(a) “any drug abuse;” and (c) “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.” ¶ 25(g) is also applicable because of Applicant’s “illegal drug use after being granted a security clearance.”

However, I find credible his testimony and his written statement that he intends to abstain from using marijuana or any illegal drug in the future. I also considered that Applicant used an illegal drug only one time after he had been granted a security clearance, and that he felt so bad about it that he self-reported the incident as soon as he had the opportunity to do so.

Therefore, I conclude that ¶ 26(a) is applicable since “the behavior . . . was so infrequent” and “happened under such circumstances that it is unlikely to recur.” Also, ¶ 26(b) “a demonstrated intent not to abuse any drugs in the future,” including (3) “an appropriate period of abstinence;” and (4) “a signed statement of intent with automatic revocation of clearance for any violation,” are applicable and mitigating.

In this case, the Government has met its initial burden of proving that Applicant has used illegal drugs under Guideline H. Applicant, on the other hand, has introduced persuasive evidence in rebuttal, explanation, or mitigation, which is sufficient to overcome the Government’s case against him. Accordingly, Guideline H of the SOR is concluded 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 the Applicant’s

conduct and all the 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. Based on all of the reasons cited above as to why the mitigating conditions are applicable and controlling, I find that the record evidence leaves me with no significant questions or doubts as to Applicant's eligibility and suitability for a security clearance under the whole-person concept. For all these reasons, I conclude Applicant has mitigated the security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	FOR APPLICANT
Subparagraph 1.a.:	For Applicant
Subparagraph 1.b.:	For Applicant
Subparagraph 1.c.:	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.

Martin H. Mogul
Administrative Judge