



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



In the matter of:)
)
-----) ISCR Case No. 14-03302
)
Applicant for Security Clearance)

Appearances

For Government:
Jeff A. Nagel, Esquire, Department Counsel

For Applicant:
Ryan C. Nerney, Esquire
The Edmunds Law Firm

December 17, 2015

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigation Processing (e-QIP) on March 6, 2013. (Government Exhibit 1.) On September 4, 2014, the Department of Defense issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H (Drug Involvement) and K (Handling Protected Information) 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 October 26, 2014 (Answer), and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on March 24, 2015. This case was assigned to me on March 31, 2015. The

Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 11, 2015. I convened the hearing as scheduled on June 16, 2015. The Government offered Government Exhibits 1 through 3, which were admitted without objection. Applicant testified on his own behalf, and he submitted Applicant Exhibits A through H, which were also admitted without objection. Applicant requested that the record remain open for submission of additional evidence. His counsel timely submitted Applicant Exhibits I (additional letters of recommendation), J (resume of the doctor who prepared Applicant Exhibit H), and K (Applicant's biography). Department Counsel had no objection and the exhibits are admitted. DOHA received the transcript of the hearing (Tr.) on June 24, 2015. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

Applicant is 48, single, and has a bachelor's degree. He is employed by a defense contractor and seeks to retain a previously granted security clearance. Applicant admitted all the allegations of the SOR. He also provided additional information to support his retention of a security clearance.

Paragraph 1 (Guideline H, Drug Involvement)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he used the inhalant amyl nitrite, and marijuana, while holding a security clearance.

Applicant admitted using the inhalant amyl nitrite from January 2010 through December 2012.¹ Applicant stated that he used amyl nitrite about 20 to 30 times during this period. He was in an intimate relationship during this period and his partner introduced him to the inhalant, and persuaded Applicant to use it as part of their

¹There was considerable discussion in the hearing as to whether Applicant was using amyl NITRATE or amyl NITRITE, and whether amyl NITRITE use is illegal. (Tr. 42-43, 47-48, 50-52, 70-71, 84-89.) Guideline H specifically refers to inhalant use as being a security concern, regardless of the legality of the use. (See also Drug Enforcement Administration, *Drugs of Abuse*, "Chapter 11: Inhalants," 78-79, http://www.dea.gov/pr/multimedia-library/publications/drug_of_abuse.pdf (2015).) Throughout this decision, I will use amyl NITRITE to refer to the inhalants used by Applicant.

The street drugs identified as "poppers" refer to several alkyl esters of nitrous acid. The alkyl esters relevant to this discussion, amyl, . . . are always allied with nitrous acid, making them nitrites, not nitrates - - - which derive from nitric acid. Both nitrates and nitrites are used in medical treatment as vasodilators. Drugs in the nitrate family are not used in recreational drugs but are usually administered in tablet form as heart medication. Nitrite "poppers," on the other hand, are packaged in small glass vials and are sold in liquid form. (ISCR Case No. 01-14406 at fn.4 (December 8, 2003) (ANTHONY, J., Administrative Judge).) (Emphasis in original.)

relationship. Applicant's relationship with this person ended in December 2012. (Tr. 42-52, 71-77.)

In August 2012 Applicant used marijuana on a single occasion while with friends. Applicant had previously used marijuana once in college in the 1990s. On the occasion at issue the marijuana was provided to Applicant in an edible form. (Tr. 52-53, 78-81.)

Applicant used marijuana, and amyl nitrite, after being granted a security clearance in 2010. (Government Exhibit 1 at Section 23; Tr. 53-54.)

Applicant has not used amyl nitrite or marijuana since December 2012 and evinces a credible intent not to use marijuana, any other illegal drug, or inhalants, in the future. He submitted a signed statement of intent with automatic revocation of clearance for any violation. (Applicant Exhibits A and B; Tr. 55-56, 81-83.)

Paragraph 2 (Guideline K, Handling Protected Information)

The Government alleges in this paragraph that the Applicant is ineligible for clearance because he mishandled classified information.

On April 5, 2013, Applicant went to a government installation. While there he reviewed classified information at a secured facility. Among the documents reviewed by Applicant were two documents that were classified "Confidential." This was the first time that Applicant had seen or handled Confidential documents. He knew the rules concerning transportation of documents with higher classification markings (Secret and Top Secret). Before leaving the facility he asked the person manning the desk at the secure facility what procedures he needed to follow in order to transport the documents back to his office. This person did not inform Applicant that he could not transport the documents because he was not a designated classified information courier. Based on a false impression that he could do so, Applicant took the two Confidential documents back to his office. Once back at the office Applicant scanned one of the documents into an unclassified network and sent it to two other cleared employees. One of these people, his supervisor, informed Applicant that he should take the documents to the security office and ask for clarification of what he should do with the documents. (Government Exhibits 2, 3; Applicant Exhibit C; Tr. 58-63, 91-106.)

Based on his supervisor's advice, Applicant took the documents to the security office. That office took possession of the documents at that time. When subsequently interviewed by the facility security officer, Applicant revealed that he had scanned and emailed one document. Applicant received a reprimand from his employer because of this security infraction. He also received remedial security training from the facility security officer, in accordance with his employer's security policies and procedures. Applicant found the additional training very worthwhile from his perspective. He stated, "[It] was made really clear to me that yes, it's good to ask the client and get their input and guidance, and then also call the corporate office and tell them what's going on and what the client said, before I take any action, before I leave any restricted space." There

have been no further security incidents. (Government Exhibits 2, 3; Applicant Exhibit C; Tr. 63-70.)

Mitigation

A coworker of Applicant's testified on his behalf. The witness has known Applicant for about three years. He was Applicant's technical lead for a time and had input into Applicant's evaluations. The witness has knowledge of the allegations against Applicant and finds him to be a trustworthy person worthy of access to classified information. (Tr. 13-32.)

Applicant is a respected worker and colleague. His performance evaluations from 2011 through 2014 reflect that he consistently meets or exceeds expectations. (Applicant Exhibit F.)

Applicant submitted several letters of recommendation. He is described by one of the writers, a personal friend, as a person who is "honest and hardworking," and a person of "integrity." (Applicant Exhibit G.) He submitted additional letters from professional associates who are also friends, including one who is the command security manager for a major military installation. Applicant is described as a "mentally mature person." The writers, who indicate in their letters knowledge of the allegations against Applicant, all describe him as a trustworthy person who has learned from his mistakes and can be trusted with access to classified information. (Applicant Exhibit I.)²

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 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.

²See also Applicant Exhibits H and J.

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

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

I have considered 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 used marijuana once in 2012. He also used the inhalant amyl nitrite about 20 to 30 times over a three year period, ending in 2012. Both of these events happened when he was holding a security clearance. Both of the disqualifying conditions have application to this case.

Applicant has, however, overcome the Government's case. His use of both substances was infrequent. The most recent inhalant and marijuana use happened almost three years ago, and it is very unlikely to recur. He credibly states that he will not abuse marijuana or other drugs in the future. Guideline H is found for Applicant.

Paragraph 2 (Guideline K - Handling Protected Information)

The security concern relating to Handling Protected Information is set out in AG ¶ 33:

Deliberate or negligent failure to comply with rules and regulations for protecting classified or other sensitive information raises doubt about an individual's trustworthiness, judgment, reliability, or willingness and ability to safeguard such information, and is a serious security concern.

I have considered the disqualifying conditions under AG ¶ 34 and especially considered the following:

(c) loading, drafting, editing, modifying, storing, transmitting, or otherwise handling classified reports, data, or other information on any unapproved equipment including but not limited to any typewriter, word processor, or computer hardware, software, drive, system, gameboard, handheld, “palm” or pocket device or other adjunct equipment; and

(g) any failure to comply with rules for the protection of classified or other sensitive information.

I have also considered the mitigating conditions under AG ¶ 35 and especially considered the following:

(a) so much time has elapsed since the behavior, or it has happened so infrequently or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment; and

(b) the individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities.

Applicant mishandled Confidential information on a single occasion over two years ago. This occurred, at least in part, because Applicant was unfamiliar with procedures to be followed when dealing with documents at that level of classification. He has received substantial remedial security training, which he obviously has taken to heart. Applicant has mitigated the single allegation under this guideline. Paragraph 2 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 relevant 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. My comments under Guidelines H and K, above, should be viewed under the whole-person concept as well. Applicant's conduct was not appropriate for a security clearance holder. However, under AG ¶ 2(a)(3), Applicant's conduct under both guidelines is not recent, last occurring over two years ago. 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 potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)), and that there is also little likelihood 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 and mishandling of protected information.

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 Paragraphs 1 and 2 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 ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	FOR APPLICANT
Subparagraphs 1.a through 1.c:	For Applicant
Paragraph 2, Guideline K:	FOR APPLICANT
Subparagraph 2.a:	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