



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



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| In the matter of: |) | |
| |) | |
| ----- |) | ISCR Case No. 14-04214 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

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

June 3, 2015

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP), on July 31, 2013. (Government Exhibit 1.) On October 21, 2014, 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 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 on September 1, 2006.

Applicant answered the SOR in writing on November 20, 2014 (Answer), and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on February 3, 2015. This case was assigned to me on February 18, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on February 24, 2015. I convened the hearing as scheduled on April 8, 2015. The Government offered Government Exhibits 1 and 2, which were admitted without objection. Applicant testified on his own behalf, and submitted Applicant Exhibits A through E, also without objection. Applicant requested that the record remain open until

April 24, 2015, for receipt of additional documentation. DOHA received the transcript of the hearing (Tr.) on April 16, 2015. Applicant elected not to submit any additional evidence. The record closed on April 24, 2015. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

Applicant is 31, married, and expecting his first child. He has a bachelor of science degree. (Applicant Exhibit D.) He is employed by a defense contractor, and seeks to obtain a security clearance in connection with his employment.

Paragraph 1 (Guideline H, Drug Involvement)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has used marijuana, and that he purchased it during the same time. Applicant admitted both allegations in the SOR, and submitted additional information supporting his request for a security clearance.

Applicant began using marijuana in high school, around 1998 or 1999. Applicant attended a junior college, and then a university, from 2001 to 2011. During college his use increased to at least once a day until 2009 or 2010. His use then began tapering off. Applicant estimated his use as being at least 500 times. The last time he used marijuana was August 1, 2013, the day after completing his e-QIP. Applicant admits that he also purchased marijuana during the entire time he was using it. (Government Exhibit 1 at Section 23; Government Exhibit 2 at 2-6, 17-19; Tr. 35-39.)

In his e-QIP Applicant stated about his future drug use, "As of now, I intend to use in the near future for reasons described above (habitually - though without having a documented medical condition, it's intended use is to decrease stress levels, and provide a better night's rest)." (Government Exhibit 1 at Section 23.) He testified that, upon reflection, he recognized the stupidity of continuing drug use. Applicant stated he has not used marijuana since August 1, 2013, and has repeatedly emphasized the point that he will not use marijuana again. (Answer; Government Exhibit 2 at 5, 18; Tr. 39-40.)

Applicant submitted a negative drug test taken by him on February 13, 2015. Applicant has a history of stopping drug use before being drug tested for a job, then returning to marijuana use afterwards. He did this before starting his current employment in 2011, as well as at least two other jobs. He testified that quitting because he is applying for a security clearance is different. He said, "This is something for my country, the nation, and not to be cliché, but it's something that is going to affect me for a long-term period of time, the rest of my life, possibly. . . . It's a milestone. So, there's a big difference in me with respect to that - - my previous history." (Government Exhibit 2 at 17; Tr. 29-30, 34-35, 49-50.)

Mitigation

Applicant indicated that being an expectant father has changed his perspective. He stated, "I am a different man than what I was." (Applicant Exhibit E; Tr. 32-33.)

Applicant submitted a letter of recommendation from the president and CEO of his employer. (Applicant Exhibit C.) The president states, "[Applicant] has great potential with our company and he has always been a responsible and trustworthy employee." Applicant also submitted a letter from his immediate supervisor, the vice president for business development. (Applicant Exhibit D.) This writer states that Applicant is an "intelligent, reliable and trustworthy employee." The strength of these letters is lessened, however, by the fact that Applicant did not tell these people that he used marijuana while employed with them. Applicant testified, "I actually did not say that I was using it as recently. When I told them about it, I said I quit thereafter college. So, I wasn't specific." Applicant was given an opportunity to expand the record in this area. (Tr. 46-47.) As stated, he chose not to submit additional documentation.

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 (AG). 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 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. 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 the 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;

- (c) illegal drug possession, including . . . purchase; and

(h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

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 has not overcome the Government's case. Applicant used marijuana at least 500 times between 1998 and August 1, 2013. He purchased it during that entire period. His use was not infrequent, ending less than two years ago. AG ¶ 25(a) and 25(c) have application to this case.

He has always been truthful with DoD about his use, and repeatedly stated that he will not use marijuana in the future. However, it is not clear that he has been as truthful with his current employers, which leaves him vulnerable to coercion or pressure. In addition, it needs to be stated that he has a history of stopping drug use before taking new jobs requiring drug tests, and resuming afterwards. AG ¶ 25(h) has application in this case. Looking at the entire record, Guideline H is found against 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 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 must 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 relevant facts and circumstances surrounding this case. The discussion under Guideline H, above, applies here as well. This is a very close case. As stated, Applicant used marijuana many times in the recent past. It is also obvious that he has begun to mature and change his ways, but there are doubts about his veracity that must be found against him based on the available evidence. Therefore, looking at the current record, I cannot find that there have been permanent behavioral changes under AG ¶ 2(a)(6). Accordingly, I find that there is the potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)); and that there is not a low likelihood of recurrence (AG ¶ 2(a)(9)).

Overall, the record evidence leaves me with serious questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his drug involvement. Accordingly, the evidence supports denying his request for a security clearance.

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:

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| Paragraph 1, Guideline H: | AGAINST APPLICANT |
| Subparagraphs 1.a and 1.b: | Against Applicant |

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

WILFORD H. ROSS
Administrative Judge