



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



In the matter of:)	
)	
[Name Redacted])	ISCR Case No. 14-04492
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O’Connell, Esquire, Department Counsel
For Applicant: *Pro se*

05/22/2015

Decision

HOGAN, Erin C., Administrative Judge:

Applicant submitted an application for a security clearance (e-QIP) on June 18, 2014. On October 31, 2014, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, Drug Involvement. 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) implemented within the Department of Defense on September 1, 2006.

On November 24, 2014, Applicant answered the SOR and requested his case be decided on the written record. Department Counsel prepared a File of Relevant Material (FORM) on February 27, 2015. The FORM was forwarded to Applicant on March 23, 2015. Applicant received the FORM on March 26, 2015. He had 30 days to submit a response to the FORM. He did not submit matters in response to the FORM. On May 12, 2015, the FORM was forwarded to the Hearing Office and was assigned to me on May 13, 2015. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is granted.

Rulings on Evidence

Item 6 of the FORM is a portion of the Report of Investigation (ROI) from the background investigation of Applicant. The three-page document is a summary of an interview of Applicant on July 16, 2014, in conjunction with his background investigation. DoDD 5220.6, enclosure 2, ¶ E3.1.20 states, "An ROI may be received with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence." (see ISCR Case No. 11-13999 (App. Bd., February 3, 2014).

Although Applicant, who is representing himself, has not raised the issue via an objection, I am raising it *sua sponte* because Item 6 is not properly authenticated. Applicant's failure to mention this issue in a response to the FORM is not a knowing waiver of the rule because he more than likely was unaware of the rule. Waiver means "the voluntary relinquishment or abandonment – express or implied – of a legal right or advantage, the party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it." *Black's Law Dictionary*, 1717 (Bryan A. Garner ed., 9th ed., West 2009).

Applicant was not expressly informed of the requirement in ¶ E3.1.20 of the Directive that an ROI may be received with an authenticating witness. I cannot conclude he expressly waived this rule. He did not respond to the FORM. In accordance with the Directive, enclosure 2, ¶ E3.1.20, Item 6 is not admissible and will not be considered in this Decision.

Findings of Fact

In his answer to the SOR, Applicant admits to all of the allegations in the SOR. (Item 3)

Applicant is a 22-year-old employee of a Department of Defense contractor. This is his first time applying for a security clearance. He received his bachelor's degree in May 2015. He is single and has no children. (Item 5)

Guideline H – Drug Involvement

In response to Section 23: Illegal Use of Drugs or Drug Activity on his e-QIP application, Applicant listed that he used marijuana from November 2008 to April 2014. He indicated that he used moderately or frequently for about a year in 2008 (about once or twice a week). He stopped using in 2009 about two months before graduating from high school. His most recent use was at a friend's graduation party in April 2014. (Item 5 at 21)

In his response to the SOR, dated November 24, 2014, Applicant admits the allegations in the SOR. He states that his actions when younger no longer reflect his values or opinion of acceptable behavior for himself. His marijuana use in April 2014 was a single lapse of good judgment. He has no intention of using marijuana again. He no longer has contact with his friends with whom he used marijuana. If in April 2014, he

was aware that he would be employed in a position that may require a security clearance, he would have exercised better judgment. He is aware that marijuana use is a violation of Federal law. He has no interest in willingly disregarding laws or regulation in the future. He understands the use of mind-altering drugs could lead to situations that compromise National Security. If granted a security clearance, he would take it seriously and would not willingly perform any action that may lead to compromise of classified information. (Item 3 at 2)

Policies

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 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 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.

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.

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 applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion as to obtaining a favorable security 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 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.

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).

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.

The guideline notes several disqualifying conditions that could raise security concerns. I find the following drug involvement disqualifying conditions apply to Applicant’s case.

AG ¶ 25(a) (any drug abuse); and

AG ¶ 25(c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia).

Applicant used marijuana with varying frequency from November 2008 to April 2010, and then used one more time in April 2014. He used marijuana on a recreational basis. AG ¶ 25(a) applies. AG ¶ 25(c) also applies because Applicant occasionally possessed marijuana.

The Government’s substantial evidence and Applicant’s own admissions raise security concerns under Guideline H, Drug Involvement. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶ E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. September 22, 2005))

Guideline H also includes examples of conditions that could mitigate security concerns arising from drug involvement. The following mitigating conditions potentially apply to Applicant's case:

AG ¶ 26(a) (the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment); and

AG ¶ 26(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; and (4) a signed statement of intent with automatic revocation of clearance for any violation).

AG ¶ 26(a) applies because more than one year has passed since Applicant's last illegal use of marijuana. His use in April 2014 was in Applicant's words "a single lapse in judgment." He previously stopped using marijuana four years earlier in 2010. Most of Applicant's illegal drug use occurred when he was in high school or college. Upon graduation from college, he is focused on his career. He was forthcoming when disclosing his illegal drug use on his security clearance application and apologizes for his behavior. Applicant appears to understand the security concern involving illegal drug use. It is unlikely that he will jeopardize his future by returning to illegal drug use.

AG ¶ 26(b) applies because Applicant has not used illegal drugs for over a year. He no longer associates with his friends who use marijuana and has no intent to contact them in the future. His illegal drug use occurred during high school and college. He has matured and is focused on his future. While he did not provide a signed statement of intent to refrain from illegal marijuana use with the understanding that his security clearance will be automatically revoked for any violation, he did mention that he has no intention of demonstrating poor judgment in this manner again in his response to the SOR. His response to the SOR reveals that he understands the security concerns raised by illegal drug use. Applicant met his burden to mitigate the security concerns raised under Guideline H, Drug Involvement.

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 relevant 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. In addition to Applicant's illegal drug use, I considered he fully disclosed his illegal drug use on his security clearance application. More than one year has passed since his last use of marijuana. He had not used marijuana for four years prior to that time. Applicant understands the consequences that additional illegal drug use may have on his future. He met his burden to overcome the security concerns raised by his illegal drug use when he was a high school and college student.

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
Subparagraph 1.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.

ERIN C. HOGAN
Administrative Judge