



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



In the matter of:)	
)	
)	ISCR Case No. 15-02684
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: Ryan C. Nerney, Esquire

February 16, 2017

Decision

MOGUL, Martin H., Administrative Judge:

On December 14, 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 12, 2016, and he requested that his case be decided on the written record in lieu of a hearing. Department Counsel then made a request that the case be decided by a hearing before an Administrative Judge. (Directive, Additional Procedural Guidance, ¶ E3,1,7.). I received the case assignment on May 23, 2016. DOHA issued a notice of hearing on June 16, 2016, and I convened the hearing as scheduled on July 20, 2016.

At the hearing, the Government offered Exhibits 1 and 2, which were received without objection. Applicant testified on his own behalf, and submitted Exhibits A

through F, which were also received without objection. DOHA received the transcript of the hearing (Tr) on July 27, 2016. Based upon a review of the pleadings, exhibits, and the testimony of Applicant, eligibility for access to classified information is granted.

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 upon due consideration of that evidence, I make the following findings of fact:

Applicant is 22 years old. He is unmarried, and he has no children. Applicant received a Bachelor of Science degree in Aerospace Engineering in May 2016. Applicant is employed as an electronics engineer by a defense contractor, and he seeks a DoD security clearance in connection with employment in the defense sector. (Tr at 19-22.)

Guideline H - Drug Involvement

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

1.a. The SOR alleges that Applicant, "used Cocaine twenty times from 12/2012 to 4/2014." Applicant admitted this allegation in his RSOR, and he wrote that he both purchased it and had it given to him.

At the hearing, Applicant testified that his cocaine usage was recreational, and began when he was 19 years old. He stated that he used it at parties because it was fun. When he began working as an intern at his present company in 2014, he realized the potential negative consequences of drug use, and he made a decision to not use cocaine in the future. (Tr at 23-27.)

1.b. The SOR alleges that Applicant, "used Marijuana three times from 9/2012 to 4/2014." Applicant admitted this allegation in his RSOR, and he wrote that he "smoked marijuana much more than three times and tried edibles four times. I would estimate that during this time period I smoked marijuana one hundred and fifty times."

Applicant testified that he used marijuana in social settings with many other fellow college students, and he stopped in 2014, when his schooling became more demanding with finals, then he went home for the summer, and finally he began his internship. (Tr at 26-28.)

1.c. The SOR alleges that Applicant, "used Ecstasy two times and Mushrooms five times from 4/2012 to 11/2013." Applicant admitted this allegation in his RSOR, and he wrote, he "used ecstasy "six to seven times during this period. I also sold ecstasy once for gain of twenty dollars."

Applicant testified that he used Ecstasy and mushrooms when he was at an outdoor concert. He estimated that he last used Ecstasy in the summer of 2013 and mushrooms in November 2013. (Tr at 29-30.)

1.d. The SOR alleges that Applicant, “sold and purchased Marijuana for personal consumption from 3/13 to 11/13.” Applicant admitted this allegation in his RSOR, and he wrote, “I only sold marijuana on three occasions gaining 30 dollars.”

Applicant testified that a roommate of his would sell marijuana, and on two occasions Applicant would help the person by taking payments for the drug sale, for which Applicant would be paid \$10, and one time he sold his own marijuana. Applicant also purchased the marijuana that he used. (Tr at 30-32.)

Applicant wrote in his RSOR,

I did go through two experimental years in college where I took recreational drugs. I believe it is in my favor that throughout this experimental phase I never developed any psychological or physical dependence. During this time, I did not realize the negative effects these choices would have on my future. If I had known I would be given the opportunity to work for a corporation that makes the United States of America a better place I would never had made the choices I did. I honestly regret my past decisions and if I could take them back I would, but all I can do now is show honesty, take responsibility, and continue with steps necessary to have a better life. I want to pursue my future career as an Aerospace Engineer by working to develop systems to make my country a safer place. I want this so I can make not only myself, but my family proud.

He also averred,

Since I gained my internship in April 2014 I have taken several steps to try mitigate my past transgressions. I have completely stopped associating with people in my past that have encouraged these actions, I have moved in with fellow academically driven Aerospace Engineering students who do not participate in poor behavior, I have maintained and excelled at my internship for nearly two years, I have maintained a positive and stable lifestyle, I have recently achieved my highest collegiate GPA of 3.96, and most importantly I have not taken any drugs since April of 2014.

Applicant testified that he has never used any illegal substance since he began working at his current employer in June 2014. He also reiterated that he no longer associates with any of the people with whom he used illegal drugs. (Tr at 33-37.)

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

Applicant submitted several documents in mitigation. These included, but were not limited to: a signed statement of intent in which he wrote that he would never use or possess illegal drugs in the future, or be around or involved with any person who used illegal drugs. He consents to automatic revocation should he violate illegal drug use or possession laws (Exhibit C); the result of a drug assessment by a Licensed Social Worker, who opined that Applicant has “a very low probability of a substance abuse disorder” (Exhibit A); the result of a negative drug test administered on June 24, 2016 (Exhibit B); and three very positive character letters (Exhibit E).

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 and cocaine as recently as April 2014, 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.”

However, I find credible Applicant’s 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 only used illegal drugs while he was a student in college, and testified credibly that he has matured, and now realizes the importance of abstention of any illegal drugs if he wants to obtain a security clearance.

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, and the positive character letters written on behalf of Applicant, 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
Subparagraph 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.

Martin H. Mogul
Administrative Judge