



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 07-06330
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Department Counsel
For Applicant: *Pro Se*

July 10, 2008

Decision

TESTAN, Joseph, Administrative Judge:

On September 21, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to applicant detailing the security concerns under Guidelines E and J. 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on October 11, 2007, and requested an Administrative Determination by an Administrative Judge (AJ). Department Counsel issued a File of Relevant Material (FORM) on November 8, 2007. Applicant did not file a response to the FORM. The case was assigned to me on May 29, 2008. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

Findings of Fact

Applicant is a 25 year old employee of a defense contractor.

Applicant used marijuana, with varying frequency, from 1999 through at least January 1, 2007. He also purchased it.

In about June 2002, applicant was arrested and charged with (1) Possession of Marijuana and (2) Underage Possession of Alcohol. He was placed in a Diversion Program and ordered to perform community service.

Applicant executed a Public Trust Position Application (PTPA) in September 2005 and a Questionnaire for National Security Positions (QNSP) in August 2007. Applicant admitted to marijuana use on both documents.

Applicant was interviewed by an OPM investigator in March 2007. During the interview, applicant stated he “has no current plans of stopping usage of marijuana. . . .”

Policies

The President has “the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position that will give that person access to such information.” (*Department of the Navy v. Egan*, 484 U.S. 518,527 (1988).) In Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch. The President authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” (Exec. Ord. 10865, Section 2.)

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline.

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. (Directive, Paragraph E3.1.14.) Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. (Directive, Paragraph E3. 1.15.) An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” (ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).) “Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.” (Directive, Paragraph E2.2.2.)

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to

classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. (Exec. Ord. 10865, Section 7.) It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

Analysis

Guideline H, Drug Involvement

The security concern for drug involvement is set forth in Paragraph 24 of the AG, and is as follows:

Use of an illegal 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.

Paragraph 25 describes conditions that could raise a security concern and may be disqualifying: Under Paragraph 25.a., "any drug abuse" may be disqualifying. Under Paragraph 25.c., "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution . . ." may be disqualifying. Under Paragraph 25.h., an "expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use," may be disqualifying. Applicant's use and purchase of marijuana, and his March 2007 statement that he has no current plans to stop using marijuana, raise these three disqualifying conditions.

In addition to the AG, current law specifically prohibits the granting of a security clearance to an "unlawful user of a controlled substance."¹ For purposes of this prohibition, an "unlawful user of a controlled substance" is a person who uses a controlled substance and has lost the power of self-control with reference to the use of the controlled substance, or is a person who is a current user of the controlled substance in a manner other than as prescribed by a licensed physician. Because the evidence does not support a finding that applicant has lost his self-control with respect to his marijuana use, or that he has used marijuana during the past year or so, I conclude he does not meet the definition of "an unlawful user of a controlled substance."

Paragraph 32 of the AG sets forth conditions that could mitigate security concerns. I considered each of them and conclude none apply.

"Whole Person" Analysis

Under the whole person concept, the AJ must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the circumstances. An AJ should consider the nine adjudicative process factors listed at AG Paragraph

¹At the time the SOR was issued, 10 U.S.C. 986 was the statute that prohibited an unlawful user of a controlled substance from holding a security clearance. On January 1, 2008, this statute was repealed by, and replaced with, 50 U.S.C. 435 (b). The new statute has the same prohibition.

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) 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 Paragraph 2c, the ultimate determination of whether to grant a security clearance must be an overall common sense 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. Applicant has used marijuana for many years. Although he has had the opportunity to foreswear future use of this illegal drug, he has chosen to do the opposite by stating, in effect, he will continue to use it. This reflects adversely on his current judgment and reliability. Based on the foregoing, I conclude that applicant failed to mitigate the security concerns arising from Guideline H.

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: AGAINST APPLICANT

Conclusion

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

JOSEPH TESTAN
Administrative Judge