



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



In the matter of:)
)
) ISCR Case No. 06-26395
)
)
Applicant for Security Clearance)

Appearances

For Government: Daniel Crowley, Department Counsel
For Applicant: Raymond D. Kline, Esquire

December 17, 2008

Decision

HEINY, Claude R., Administrative Judge:

Applicant was cited for possession of marijuana in 2000 and 2006. He did not list the 2000 citation on his security clearance questionnaire because it had been dismissed and expunged and he did not believe he had to list it. Applicant has rebutted or mitigated the government’s security concerns under drug involvement, personal conduct, and criminal conduct. Clearance is granted.

Statement of Case

Applicant contests the Defense Department’s intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued to

¹ 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

Applicant a Statement of Reasons (SOR) on July 2, 2008, detailing security concerns under drug involvement, personal conduct, and criminal conduct.

On August 8, 2008, Applicant answered the SOR, and requested a hearing. On September 23, 2008, I was assigned the case. On September 29, 2009, DOHA issued a notice of hearing scheduling the hearing held on October 21, 2008. The government offered Exhibits (Ex.) 1 through 4, which were admitted into evidence. Applicant and his father testified on Applicant's behalf and submitted Exhibits A through C, which were admitted into evidence. On October 30, 2008, the transcript (Tr.) was received.

Findings of Fact

In his Answer to the SOR, Applicant denied the factual allegations in SOR ¶¶ 1.c, 2. a, and 3.c. He admitted the remaining factual allegations.

Applicant is a 27-year-old analyst who has worked for a defense contractor since April 2008, and is seeking to obtain a security clearance. Friends and co-workers state Applicant is a person of unquestioned dedication and loyalty. He is hard working, conscientious, diligent, industrious, trustworthy, intelligent, dedicated, competent, and a considerate young man. He accepts responsibility, uses excellent judgment in dealing with sensitive personnel information, and performs his work with speed, accuracy, and efficiency. (Ex. B)

Applicant was a good high school student graduating in the top 10% of his class. Applicant received academic scholarships for college. Applicant maintains good credit and has a credit score of 771. (Tr. 20, Ex. C)

From May 2000, when Applicant was 18 years old, through October 2000 and again in September 2006, he used marijuana. He did not use marijuana between 2001 and 2005. (Tr. 50) In September 2000, at the start of the college fall semester, Applicant was charged with possession of marijuana by the university police. (Ex. B, Ex. 2) He and his roommate had been smoking marijuana in their college dorm room. The university police discovered a small amount of marijuana in the room. (Tr. 33) Applicant was found guilty, sentenced to one year probation, 150 hours of community service, paid \$225, and his driver's license was restricted for six months. He was subject to random drug test for a year and was required to attend ten weeks of substance abuse meetings. (Tr. 50-51, 73) He was required to attend four AA meeting, which he found to be eye-opening. (Tr. 75)

In November 2001, following the completion of probation, the case was dismissed. (Tr. 33, Ex. B) He was dismissed from the university and the next semester attended community college.

In June 2001, Applicant—then age 19—was charged with, and later found guilty of, underage possession of alcohol. (Ex. 3) Applicant was at a state park fishing with his boss from a landscaping company. The park ranger saw a beer near Applicant. (Tr. 31) His boss told the park ranger the beer was his. Applicant was given and passed a breathalyzer test, but the ranger never-the-less ticketed Applicant. (Tr. 59) Applicant pleaded no contest, paid a \$30 fine, and performed 25 hours of community service at a homeless shelter. Applicant juggled his community service commitment with his school commitment and a part-time job. (Tr. 61)

In January 2006, Applicant obtained a bachelors of science degree. (Tr. 37) In September 2006, Applicant was again cited for possession of marijuana. (Ex. 4) Applicant was riding in a friend's car when his friend ran a stop sign. A search of the car discovered "a piece of marijuana" in a cigarette pack under Applicant's seat. (Tr. 69) Applicant acknowledge it was his and accepted responsibility. (Tr. 32) The day after receiving the citation, Applicant disclosed the incident to his company's security officer. (Tr. 107) Applicant's driver's license was restricted for six months and the disposition of his case was deferred to December 2007, at which time it was dismissed. For a six-month period Applicant was subject to random urinalysis screenings.

Applicant acknowledges his decision to used marijuana after completing his security clearance applicant was a "stupid decision." (Tr. 49) Applicant has regretted his decision "every day since." (Tr. 49)

In February 2006, Applicant completed an Electronic Questionnaires for Investigations Processing (e-QIP). Applicant listed the June 2001 underage possession of alcohol, but failed to list his September 2000 conviction for marijuana possession.

Applicant's father retired from the Air Force as a lieutenant colonel (05) after 22 years. His father works for a defense contractor and holds a clearance. Applicant and his father discussed listing the dismissed drug charges on Applicant's e-QIP. (Tr. 28, 34) After talking with his father, Applicant did not list the arrest because it had been expunged from his record. (Tr. 47) Applicant's father does not believe his son's was deliberately lying in his response. In October 2006, when interviewed, Applicant disclosed the September 2006 citation to the interviewer. The interviewer was unaware of the incident. (Tr. 35, 85)

In response to Question 24 of the e-QIP, Applicant listed use of marijuana 10 times during 2000. Between his first use to his 2006 arrest, Applicant had use marijuana approximately 10 times. He did not use marijuana between 2001 and 2005. Applicant stated that using marijuana is detrimental to growth and leads down the wrong path. (Tr. 39) In the past, he made stupid decisions by using it when it was offered. He no longer associates with people who use marijuana. (Tr. 42, 71) Applicant is willing to submit to random urine screens. (Tr. 29, 39)

Applicant's father believes, regardless of the outcome of this proceeding, that the proceeding has had a "profound effect" on his son. (Tr. 100) His son has learned the gravity of the situation, and the proceeding will continue to have an influence and effect on his son.

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 the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and common sense 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 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 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

Drug Involvement

AG ¶ 24 expresses the security concern pertaining to drug involvement: 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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying:

- (a) any drug abuse;
- (b) testing positive for illegal drug use;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;
- (d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;
- (e) evaluation of drug abuse or drug dependence by a licensed clinical social worker who, is a staff member of a recognized drug treatment program;
- (f) failure to successfully complete a drug treatment program prescribed by a duly qualified medical professional;
- (g) any illegal drug use after being granted a security clearance; and
- (h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

From May 2000 to October 2000, when Applicant was 18 years old, and again in September 2006, he used marijuana. Between his first use to his 2006 arrest, Applicant had use marijuana approximately 10 times. There was no use between 2001 and 2005. His use, though infrequent, led to two citations for marijuana possession; once in 2000

and again in 2006. His most recent use occurred after he had completed his e-QIP seeking a security clearance.

AG ¶ 25(a) drug use and AG ¶ 25(c) purchase, apply. AG ¶ 25(g) illegal drug use after have being granted a security clearance does not apply because, even though he had started the process to obtain a security clearance, he had not been granted a clearance.

AG ¶ 26 provides conditions that could mitigate security concerns:

(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;

(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;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and,

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant last used marijuana two years ago. Applicant characterized his 2006 use as a "stupid decision," which he has regretted "every day since." Applicant does not intend to use illegal drugs in the future. Although he has not signed an affidavit stating he would submit to drug testing and any drug use would result in the loss of his clearance, but did state he would submit to random urine tests.

Applicant used marijuana ten times over a six year period. His use was infrequent. It has been more than two years since his last marijuana use. There are no "bright line" rules for determining when conduct is "recent." The determination must be based "on a careful evaluation of the totality of the record within the parameters set by the directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the

Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation."²

Because of his abstention from drug use for two years, his recognition of the adverse impact drug abuse on his life, and the profound effect this procedure has had on him, there is reasonable certitude that he will continue to abstain from drug use. Applicant did not attempt to hide his 2006 citation for illegal usage. The following day, he reported the incident to his company's security office. Applicant did not use marijuana from 2001 to 2005 and used it once in 2006. His marijuana use does not cast doubt on his current reliability, trustworthiness, or good judgment. Because he will not use illegal drugs in the future, confidence in his current reliability, trustworthiness and good judgment with respect to drug use is restored. AG ¶ 26(a) applies.

AG ¶ 26(b) applies because he has stated he will not use illegal drugs in the future. He has demonstrated his intent not to abuse drugs in the future by the passage of two years since his last use.

AG ¶ 26(c) does not apply because abuse of prescription drugs was not a problem. AG ¶ 26(d) has limited applicability because he did complete a ten week drug

² ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge's decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle changes and therapy. For the recency analysis the Appeal Board stated:

Compare ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) ("The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.") (citation format corrections added).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, considered the recency analysis of an administrative judge stating:

The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

abuse treatment program, there has been no recurrence of abuse, but there is no favorable prognosis by a duly qualified medical professional.

Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct, which is conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information.

Applicant used marijuana after having started process to obtain a security clearance shows poor or questionable judgment. Under AG ¶ 16 conditions that could raise a security concern and may be disqualifying include AG ¶ 16(d) "credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information."

In completing his e-QIP, Applicant listed his underage possession of alcohol charge, but failed to list his possession of marijuana in the college dormitory. Failing to list the 2000 possession of marijuana incident does not prove the Applicant deliberately failed to disclose information about his illegal drug use. The Applicant has denied intentional falsification. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for a security clearance is a security concern. However, every inaccurate statement is not an intentional falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully.

Applicant was told the charge in this incident had been dismissed and his record expunged. Applicant was unsure if he needed to report the 2000 incident. He discussed it with his father, an individual who had experience completing security clearance applications. After hearing his testimony, observing his demeanor, and evaluating all the evidence of record, I found his testimony credible on the falsification issue. I am satisfied he did not intentionally falsify his e-QIP.

Having previously found for Applicant as to his marijuana abuse, I find no additional disqualifying or additional security concerns under the personal conduct guideline. I find for Applicant as to SOR ¶ 2.

Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct, "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its

very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.”

Applicant used marijuana in 2000 and in 2006. AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. AG ¶ 31(a) “a single serious crime or multiple lesser offenses,” and AG ¶ 31(c) “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted,” apply.

Applicant’s marijuana use was infrequent. He has a good employment record, acknowledged using marijuana was a bad decision and leads down the wrong road. Applicant’s last use was two years ago and his use prior to that was eight years ago. AG ¶ 32(a) “so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment,” applies.

Applicant is hard working, conscientious, and diligent young man. He accepts responsibility, uses excellent judgment in dealing with sensitive personnel information. AG ¶ 32(d) applies when there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement. AG ¶ 32(d) applies.

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. In 2000, as a college student

Applicant smoked marijuana in his dorm room and was found guilty of possessing marijuana. Six years later, Applicant made a regrettable decision to again possess marijuana, which he recognizes was a stupid decision. He no longer uses marijuana or associates with those that do. At age 19 he was fishing in a state park and was cited for possession a beer while underage. His boss tried to tell the ranger it was his beer, but Applicant received the citation. Applicant is now 27, it is impossible for him to again be charged with being underage and in possession of alcohol.

Applicant is hard working, diligent, and responsible. His friends and co-workers praise his character and dedication. When he completed his e-QIP he thought he did not have to list his 2000 possession charge because it was dismissed and his record expunged. He now knows better. 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 mitigated the security concerns arising from his drug involvement, personal conduct, and criminal conduct.

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, Drug Involvement: FOR APPLICANT

Subparagraph 1.a – 1.d: For Applicant

Paragraph 2, Personal Conduct: FOR APPLICANT

Subparagraph 2.a: For Applicant

Paragraph 3, Criminal Conduct: FOR APPLICANT

Subparagraph 3.a – 3.c: 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.

CLAUDE R. HEINY II
Administrative Judge