

DATE: October 31, 2007

In re:

SSN: -----

Applicant for Security Clearance

)
)
)
) ISCR Case No. 07-00282
)
)
)

**DECISION OF ADMINISTRATIVE JUDGE
CHRISTOPHER GRAHAM**

APPEARANCES

FOR GOVERNMENT

Alison O'Connell, Esq., Department Counsel
Richard Stevens, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 26-year-old software developer employed by a federal contractor. Applicant was arrested or charged six times over a four-year period with various offenses, including: four times for possession of marijuana, twice for underage possession of alcohol, and twice for DWI. He admitted using marijuana from 1997 to 2004, a seven year period. He was a habitual user. Even though he went through rehabilitation, he continued to use marijuana and alcohol. He failed to mitigate the security concerns about criminal conduct. The government did not establish its case about personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On April 27, 2006, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) (SF 86).¹ The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, DOHA issued a Statement of Reasons (SOR) on June 27, 2007, detailing the basis for its decision – security concerns raised under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of the Directive. The President issued revised adjudicative guidelines (Guidelines) on December 30, 2005. DoD implemented them on September 1, 2006. Pending official amendment/reissue of DoD Directive 5220.6, the Guidelines are to be used in all cases when the SOR is dated on or after September 1, 2006. Because the SOR was issued after September 1, 2006, DoD policy requires that this case proceed under the revised guidelines.

Applicant answered the SOR in writing on July 16, 2007, and elected to have a hearing before an administrative judge. DOHA assigned the case to me on August 15, 2007, and issued a Notice of Hearing on August 21, 2007. I convened a hearing on September 19, 2007, to consider whether it is clearly consistent with the national interest to grant or continue Applicant's security clearance. The government offered nine exhibits, marked as Exhibits 1-9. Applicant offered four exhibits, marked as Exhibits A-D. All exhibits were admitted without objection. DOHA received the transcript (Tr.) on September 27, 2007.

FINDINGS OF FACT

Applicant admitted the allegations contained in SOR paragraph 1 and denied the allegations in paragraph 2. The admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 26-year-old software developer employed by a federal contractor.² He is single, earned a B.S. in Computer Science, has no prior military service, and this is his first application for a security clearance.³

¹Government Exhibit 1 (Electronic Questionnaire for Investigations Processing (e-QIP) (SF 86), dated April 27, 2006).

²Tr. at 14-15.

³*Id.*

Applicant was charged with possession of marijuana on November 28, 1999. As a first-time offender, he was placed on unsupervised probation until December 22, 2000.⁴

On January 25, 2000, he was charged with underage possession of alcohol and possession of marijuana. He was found guilty of minor in possession of alcohol, his driver's license was restricted for six months, he was ordered to complete 50 hours of community service, attend the Alcohol Safety Action Program (ASAP), and ordered to pay \$22 costs. On the possession of marijuana charge, he received a deferred disposition, paid court costs of \$235, and the charge was subsequently dismissed on May 17, 2001.⁵

On February 26, 2000, Applicant was arrested and charged with (1) possession of marijuana, (2) driving under the influence of drugs (marijuana), and (3) unlawful possession of alcohol. On counts (1) and (3), he received a deferred disposition, was ordered to attend the Alcohol Safety Action Program, and pay court costs of \$179 for count (1) and \$176 for count (3). All three charges were subsequently dismissed.⁶

Applicant successfully completed the ASAP program.⁷ He also completed 50 hours of community service.⁸

Applicant was arrested and charged with driving while intoxicated, first offense, on July 17, 2001. On January 30, 2002, the charge was *nolle prosequi*.⁹

On December 14, 2001, Applicant was charged with urinating in public. He was found guilty and ordered to pay a fine/fee of \$55.¹⁰

On October 26, 2003, Applicant was charged with (1) possession of marijuana and (2) possession/receiving stolen property. On March 23, 2004, count (1) was dismissed because the marijuana belonged to one of his roommates, who was a known drug dealer. He received a deferred disposition for count (2). He paid court costs \$176 on count (2), and the charge was subsequently

⁴*Id.* at 43-49.

⁵*Id.* at 20, 51-55.

⁶*Id.* at 55-61.

⁷*Id.* at 21; Applicant's Exhibit A (Letter from Probation Counselor, dated September 29, 2000) at 1.

⁸Applicant's Exhibit B (Letter from Charitable Organization, dated July 24, 2000) at 1-2.

⁹Tr. at 63-65.

¹⁰*Id.* at 18, 65-66.

dismissed.¹¹ The stolen property was a stop sign that another roommate displayed on the townhouse wall.¹²

On an Electronic Questionnaire for Investigations Processing (e-QIP), executed by Applicant on April 27, 2006, he was asked to disclose any illegal drug use in the last seven years or since age 16 (Section 24). He answered, “Yes”, that he had used marijuana from August 1999 to September 2003, and then he continued to use marijuana post rehabilitation on three occasions, from September 2003 through February 2004.¹³ He started using marijuana in high school, in 1997, and was a heavy user of marijuana while in college. All of these incidents occurred while he was a college student. He has not used marijuana since college (February 2004), and he stated his intent not to use marijuana in the future.¹⁴

Applicant successfully completed a drug rehabilitation program while in college.¹⁵ He still consumes alcohol.¹⁶ Character witnesses testified to his integrity, work ethic, honesty, and that they have not seen him use drugs since college days.¹⁷

POLICIES

In an evaluation of an applicant’s security suitability, an administrative judge must consider the “Adjudicative Guidelines for Determining Eligibility For Access to Classified Information” (Guidelines). In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into Disqualifying Conditions (DC) and Mitigating Conditions (MC), which are used to determine an applicant’s eligibility for access to classified information.

These guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process.¹⁸ An administrative judge’s over-arching adjudicative goal is a fair, impartial and common sense decision. Because the entire process is a conscientious scrutiny of a number of variables known as the “whole person concept,” an administrative judge considers all

¹¹*Id.* at 17-18, 68-73.

¹²*Id.* at 17, 21-23.

¹³*Id.* at 25-26; Government Exhibit 1, *supra*, note 1, at 25-26.

¹⁴Tr. at 26.

¹⁵Applicant’s Exhibit C (Letter from Program Facilitator, dated April 13, 2000) at 1.

¹⁶*Id.* at 29.

¹⁷*Id.* at 82-96.

¹⁸Guideline ¶ 2.

available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.¹⁹

Specifically, an administrative judge should consider the nine adjudicative process factors listed at Guideline ¶ 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.”

Since the protection of the national security is the paramount consideration, the final decision in each case is arrived at by applying the standard that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.”²⁰ 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.

In the decision-making process, facts must be established by “substantial evidence.”²¹ The Government initially has the burden of producing evidence to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant’s access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to present “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision.”²² The burden of disproving a mitigating condition never shifts to the Government.²³

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

¹⁹Guideline ¶ 2(c).

²⁰Guideline ¶ 2(b).

²¹“Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge’s] finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620 (1966). “Substantial evidence” is “more than a scintilla but less than a preponderance.” *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

²²Directive ¶ E3.1.15.

²³*See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005) “The Administrative Judge considers the record evidence as a whole, both favorable and unfavorable, evaluates Applicant’s past and current circumstances in light of the provisions of the Directive, and decide[s] whether Applicant has met his burden of persuasion under Directive ¶ E3.1.15.” ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

confidence in individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an 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.

The scope of an administrative judge's decision is limited. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism.²⁴

CONCLUSIONS

Personal Conduct

Guideline ¶ 15 of the new adjudicative guidelines sets out the security concerns covered by the Personal Conduct guideline.

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. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Under Guideline ¶ 16 (c) a disqualifying condition may arise where there is "credible adverse information in several adjudicative issue areas *that is not sufficient for an adverse determination under any other single guideline . . .*" Also, paragraph 16(d) applies where there is "credible adverse information that *is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination. . .*" (Emphasis added.)

In this case, SOR the allegations in paragraphs 1 are the basis for the allegations under the guideline for Personal Conduct, which was the evidence of criminal activity, including use of marijuana, minor in possession of alcohol, DWI, and possession of stolen goods. However, each incident of criminal activity could support a basis for disqualification under Guideline J (Criminal Conduct). Thus, none of the evidence raises separate security concerns under the guideline for personal conduct, unless Guideline ¶ 16 (e) personal conduct, or concealment of information about one's conduct, that "creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing" is applicable. Applicant disclosed his criminal activity on his security clearance application. This shows Applicant is not vulnerable to exploitation.

The government may allege Guideline ¶ 16(g) association with persons involved in criminal activity, referring to one of his roommates involved in the 2003 incident, *supra*. However, there is no evidence that this individual has been involved in any criminal activity since the incident in 2003. Therefore, the government failed to establish a case under Guideline E.

²⁴Executive Order 10865, § 7.

Criminal Conduct

Guidelines ¶ 30. The Concern. 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.

Guidelines ¶ 31. Conditions that could raise a security concern and may be disqualifying include:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant admitted his criminal conduct, which mainly involved alcohol and/or drugs. He denied that this conduct was in violation of Guideline J (Criminal Conduct.). Even if the charges were dismissed after probation, they fall within Guidelines ¶ 31(c). The government established its case.

Guidelines ¶32. Conditions that could mitigate security concerns include:

- (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;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) evidence that the person did not commit the offense; and
- (d) 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.

Guidelines ¶32 (b) and (c) do not apply. Applicant was not coerced into smoking marijuana, and he admitted his criminal activity.

Applicant was arrested or charged six times over a four-year period with various offenses, including: four times for possession of marijuana, twice for underage possession of alcohol, and twice for DWI. He admitted using marijuana from 1997 to 2004, a seven year period. The use was frequent and substantial during college. He was a habitual user. Even though he went through rehabilitation, he continued to use marijuana and alcohol. The documents he placed into evidence concerning his rehabilitation efforts are dated in 2000 and 2001. He continued use until 2004. He admitted living with a drug dealer. Applicant's conduct demonstrated blatant disregard of rules and regulations, by his use of illegal drugs, and he demonstrated a disregard for the court system. After being placed on probation, as part of its first offense he was arrested one month subsequent and was placed on probation, and arrested again one month after that. Even living with a drug dealer shows

poor judgment. The behavior was frequent and consistent, and his pattern of offenses were not minor, when viewed in their totality. It has only been three years since Applicant's last use of marijuana, and that did not happen under unique circumstances. He admitted remaining friends with people from college, including his roommate who was a drug dealer. He has made efforts to be rehabilitated, but those efforts failed in the past. Successful rehabilitation is not limited to those factors set out in Guidelines ¶32 (d). What is missing is evidence of satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, such as participation in meetings of Narcotics Anonymous or a similar organization without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional who is a staff member of a recognized drug treatment program.

Character witnesses testified to his integrity, work ethic, honesty, and that they had not seen him use drugs since college.

Whole Person Analysis

In addition to the enumerated disqualifying and mitigating conditions, I have considered the general adjudicative guidelines related to the whole person concept under Guidelines ¶ 2(a). I considered his age, his education, his employment, and what might motivate him to engage in criminal activity. Applicant's conduct was irresponsible. I am concerned that lacking any substantial evidence of rehabilitation, Applicant has not been drug-free a sufficient period of time. His continued association with a known drug dealer is problematic.

The United States has a duty to protect itself from unauthorized disclosures of sensitive information and places the utmost trust in those persons to whom it grants access to sensitive information. Applicant has demonstrated a lack of judgment and a casual attitude toward the law. Has he the sufficient maturity to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests? The totality of the record raises reasonable and persistent doubts about Applicant's ability to protect classified information and to exercise that requisite good judgment. I conclude that Applicant should not continue to have access to classified information.

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 E: | FOR APPLICANT |
| Subparagraph 1.a: | For Applicant |
| Subparagraph 1.b: | For Applicant |
| Subparagraph 1.c: | For Applicant |
| Subparagraph 1.d: | For Applicant |
| Subparagraph 1.e: | For Applicant |
| Subparagraph 1.f: | For Applicant |
| Subparagraph 1.g: | For Applicant |

Paragraph 2. Guideline J:

AGAINST APPLICANT

Subparagraph 2.a:

Against Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Christopher Graham
Administrative Judge