



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



In the matter of:)	
)	
)	ISCR Case No. 07-01504
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Robert E. Coacher, Esquire, Department Counsel
For Applicant: Pro Se

April 28, 2008

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant's eligibility for access to classified information must be denied.

Applicant submitted his Security Clearance Application (SF 86), on January 31, 2003. On October 27, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J and 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 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 acknowledged receipt of the SOR on November 1, 2007. He answered the SOR in writing on November 15, 2007. Department Counsel was prepared to

proceed on December 10, 2007, and I received the case assignment on December 10, 2007. This case was reassigned to another administrative judge because of work load adjustments. The administrative judge scheduled this case for hearing on February 6, 2008. Subsequently, the administrative judge granted Applicant's request for a delay by Order dated January 29, 2008 and transferred the case to me. DOHA reissued a notice of hearing on February 19, 2008, and I convened the hearing as scheduled on March 10, 2008. The government offered three exhibits (GE) 1 through 3, which were received and admitted into evidence without objection. Applicant testified on his own behalf. He submitted three exhibits (AE) A through C, which were received and admitted into evidence without objection. DOHA received the transcript of the hearing (Tr.) on March 18, 2008. I held the record open until March 24, 2008, for Applicant to submit additional matters. On March 24, 2008, he submitted one exhibit, AE D, which was marked and admitted without objection. The record closed on March 24, 2008.

Procedural and Evidentiary Rulings

Notice

The file information indicates that Applicant received the hearing notice on February 25, 2008. I advised Applicant of his right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. At the hearing, Applicant affirmatively waived his right to the 15 days notice. (Tr. at 9.)

Findings of Fact

In his Answer to the SOR, dated November 15, 2007, Applicant admitted all the factual allegations of the SOR, with explanations. He also provided additional information to support his request for eligibility for a security clearance.¹

Applicant is a 37-year-old software engineer, who works for a Department of Defense contractor. He completed his security clearance application (SF-86) on January 31, 2003. Subsequent to completing his SF-86, the police arrested him on August 4, 2005 for the first time in his life.²

Applicant graduated from college with a bachelors degree in philosophy and computer science in 1997. He married in 1999 and has two children, a daughter, age 8 and a son, age 7. He and his wife separated in 2005 and are now divorced. His hobbies include indoor gardening, horticulture, hiking, skiing, and target shooting. He owns four guns, one an old .22 caliber rifle given to him by his grandfather and three properly licensed guns. Along with plants, he grows tomatoes and peppers indoors in his basement garden because his small yard lacks good soil and his two basset hounds run

¹Response to SOR.

²GE 1 (Applicant's security clearance application) at 1, 3; GE 3 (police arrest report).

in the yard. To grow his indoor garden, he purchased various lighting equipment, fans, a converter ballast, and a thermostat. He set up his garden in his basement in the same room where he kept his guns and computers. He kept the room locked to prevent his young children's access to the guns and computers. This area also included the furnace, hot water heater, cleaning supplies, vacuum cleaner and other household supplies. He primarily used the room, but his wife had access.³

In late June or early July 2005, Applicant observed a "mysterious" plant growing in his basement garden. He pulled the plant and threw it into a compost pile near an orange bucket in his basement. On July 20, 2005, his anniversary, he arrived home from work to find the house locked, his children crying in the driveway, and his wife not at home. By July 29, 2005, he realized he had serious problems at home. He took a week of leave from work to try and resolve the problems. During this week, he realized that his wife was having an affair. He confronted her and they argued vehemently. The police arrived. After some discussion, the police left. His wife left the family home and premise for awhile. She returned and attempted to remove the children from the home. Applicant tried to stop her. His wife left the premises, drove to the police station and swore out a complaint against him, asserting he had hit the car causing her to be afraid, but did not mention any specific threats of harm to her that evening or in the past. The police arrived at his house and arrested him, his first arrest for anything. His wife gave the police permission to search the house after telling the police he grew marijuana in the basement in a locked room to which he had the only key on a chain around his neck. She also told the police she did not go into the basement and Applicant had a drug habit.⁴

The police initiated a search of Applicant's residence. The police located a key to the locked basement room to the right of the stairs. The police also observed a locked room next to the utility closet. The police located a key in the area to open this room. Applicant did not provide the police with the keys. The police viewed and removed the following items from the room: two .22 caliber rifles, one .45 caliber pistol, one AR 15 rifle, ammunition, acurite thermostat, hydrofarm ventilation fan, hydrofarm grow light, a second light with convertible ballast, two glass pipes, light bulbs, white ventilation fan, two white PVC hydroponic irrigation systems (one in basement and one in the yard), roll of reflective backing paper, and one large suspected marijuana plant in orange bucket. He attributes the presence of this plant to his wife or her friends.⁵

The police charged Applicant with domestic violence/child abuse, offenses related to marijuana, false imprisonment, harassment and possession of drug paraphernalia. At his preliminary hearing, the prosecutor informed the court that the

³GE 1, *supra* note 2, at 2, 6, 8; Tr. 28-29, 32, 37-39, 44-45, 63-67.

⁴GE 2 (Answers to interrogatories, verify statement to investigator) at 3-4; GE 3, *supra* note 2, at 4, 6-10; Tr. 33-35, 47.

⁵GE 3, *supra* note 2, at 13-22; Tr. 37-44.

State intended to proceed forward on charges of marijuana cultivation, special offender,⁶ and false imprisonment. The State declined to proceed on the remaining charges. The special offender law carries a mandatory minimum sentence of eight years in jail, if convicted. The court issued a restraining order against Applicant and released him from jail. At the same time, his employer placed him on unpaid administrative leave pending an investigation. He later resigned. He now works for another Department of Defense contractor.⁷

On September 22, 2005, Applicant filed for divorce and filed a request for a temporary restraining order (TRO) against his wife based on physical violence against him by her and violence against the children. In his request, Applicant advised the court that there was a restraining order against him for domestic violence and false imprisonment. The court granted him the TRO and full custody of his children. In October 2005, the court directed parenting time for his wife. Applicant and his wife agreed to joint custody as part of their divorce agreement. Their divorce became final in June 2006.⁸

Applicant retained counsel to represent him in his criminal case. In September 2005, the court determined that Applicant's case was a drug referral case. The county drug screener evaluated Applicant, and concluded that Applicant did not need drug treatment. The drug screener recommended a deferred judgment. There are no records of this meeting.⁹

Applicant, through his attorney, entered into plea negotiations with the prosecutor because of his children, career and lack of a criminal history. Applicant wanted to proceed to trial to prove his innocence. His attorney recommended against a trial because of the special offender charge. His attorney viewed a trial as very risky. Applicant agreed to a plea agreement whereby he would plead guilty to one count of marijuana cultivation, a felony; the State would dismiss the remaining charges; and a deferred judgment. The State agreed that his records would be sealed at the conclusion of the deferred judgment time and he could again own firearms when he completed the deferred judgment time.¹⁰

⁶At the hearing, Applicant explained his understanding of the special offender charge under State law. This particular charge accompanies a drug charge when drugs and firearms are found in a search. The legislature originally designed the law to target street drug dealers who carried weapons. Prosecutors use the law as a "tool" to obtain pleas from defendants. Tr. 50.

⁷GE 2, *supra* note 2, at 3-4; GE 3, *supra* note 2, at 23; AE B (Court docket sheet on criminal case) at 2; Tr. 48-49.

⁸AE A (Court documents).

⁹AE B, *supra* note 7, at 3; AE D (Letter, dated March 24, 2008); Tr. 54.

¹⁰AE B, *supra* note 7, at 3; Tr. 51, 53, 55-56.

Applicant appeared in court on February 6, 2006. In accordance with the terms of the plea agreement, he entered a temporary plea of guilty. In his allocution to the court, he pled guilty to providing expertise in marijuana cultivation. The court deferred conviction and judgment for two years. If he did not have any other arrests in the two year period of time, his temporary plea would be withdrawn and the case dismissed. If the police arrested him again, the court would convict him and impose sentence on this charge. The court fined him and directed he perform 24 hours of community service. He completed all the terms of the deferred sentence.¹¹ On January 31, 2008, the court withdrew his guilty plea and dismissed the case. On March 3, 2008, the court directed that his records be sealed.¹²

Applicant agreed to this plea bargain based on his attorney's strong recommendation against proceeding to trial. Applicant sought to move forward with his life and needed to be present to raise his children. He did not believe he should leave his children solely in the care of his wife.¹³

Applicant admits he used marijuana up to 10 times between 1995 and 2000. He last used marijuana in March 2000. He does not intend to use marijuana in the future, as he would set a poor example to his children. He believes use of marijuana is self-destructive behavior.¹⁴

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.

¹¹During the two years, Applicant did not even have a traffic stop. Tr. 57.

¹²AE B, *supra* note 7; Tr. 54-56.

¹³Presently, Applicant intends to seek full custody of his children. AE D (Correspondence from Applicant) at 3.

¹⁴GE 1, *supra* note 2, at 11; Tr. 58.

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

Guideline J, 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.”

AG ¶ 31 describes two conditions that could raise a security concern and may be disqualifying in this case:

(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.

As a result of an argument with his wife, the police arrested Applicant and charged him with domestic violence, offenses related to marijuana, false imprisonment, harassment, and possession of drug paraphernalia. At his preliminary hearing, the prosecutor formally charged him with marijuana cultivation, special offender and false imprisonment. Applicant subsequently entered a temporary plea of guilty to the marijuana cultivation charge. The government has established the above disqualifying conditions.

AG ¶ 32 provides three conditions that could mitigate security concerns in Applicant's case:

- (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;
- (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.

Applicant's first and only arrest occurred less than three years ago as a direct result of a verbal argument with his wife. Prior to his arrest, he had not been involved with the criminal justice system for any reason. The State chose not to proceed with an indictment on several of the charges made by the police. From this, I draw an inference that Applicant did not commit the crimes of domestic violence and harassment. However, because of the marijuana cultivation charge, the possession of drug paraphernalia charge, a lesser crime, may have been included in the more serious charge. Since his first and only arrest in 2005, he has not been arrested by the police for any criminal conduct or traffic violations. When he completed the terms of his deferred judgment three months ago, his temporary guilty plea was withdrawn and the marijuana cultivation case was dismissed. Based on this action by the court, he has no criminal conviction and sentence. His felony guilty plea was never completely adjudicated. Applicant is well-educated and works steadily. He is actively involved with his children. The above mitigating conditions are applicable. Applicant's marijuana cultivation offense is duplicated in the Guideline H allegation. Because of this duplication, I find for Applicant under Guideline J.

Guideline H, 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.”

(a) 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;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

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

(a) any drug abuse (see above definition); and

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

Appellant used marijuana sporadically in college and shortly thereafter. Less than three years ago, the police arrested and charged him with possession of drug paraphernalia, marijuana offenses, and the State proceeded forward on a marijuana cultivation charge after the police found a large marijuana plant in his basement. The above disqualifying conditions are applicable in this case.

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;

Appellant's arrest for marijuana cultivation was less than three years ago, when he was 34 years old. His story that he raises garden plants in a dark, locked room in his basement and the marijuana plant found in the basement was a surprise to him is not credible. Rather, his conduct raises concerns that he was cultivating marijuana in his basement as his former spouse alleged, and he plead guilty to in court. He has not provided any corroborating evidence which would show that he, in fact, raises garden vegetables and house plants in this room. At the hearing, he credibly testified that he had no future intent to be involved with drugs because he wanted to set a good example for his children and he did not want to be involved in the criminal justice system again. The record contains no evidence that he associates with or has associated with drug users. AG ¶¶ 26(a) and (b) have some application.

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) 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. Applicant's problems with the criminal justice system began when he asked his wife for a divorce, which led to a vehement argument between the two and his arrest for a multitude of criminal offenses. The State decided not to pursue most of the original charges, a decision indicative of the lack of evidence to prove their case. Most troubling is the issue of marijuana cultivation. While Applicant denies he was growing marijuana in the basement, I find his story about growing an indoor garden in a locked, darkened room insufficiently credible to meet his burden of proof. He was 34 years old when the police arrested him for marijuana cultivation. He was old enough to understand the serious consequences of such conduct. He learned a difficult lesson as a result of his conduct and has complied with the terms of his plea agreement. He, however, has not accepted responsibility for the presence of marijuana in his home and his knowledge of the same.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his drug involvement, although he has mitigated his 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, Guideline J:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For 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.

MARY E. HENRY
Administrative Judge