



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



In the matter of:)	
)	
)	ISCR Case No. 07-15302
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Richard Stevens, Esquire, Department Counsel
For Applicant: Pro Se

October 21, 2008

Decision

HOGAN, Erin C., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP), on August 23, 2005. On June 3, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline J, Criminal Conduct, and Guideline E, Personal Conduct 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.

On June 18, 2008, Applicant answered the SOR and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on July 8, 2008. The case was assigned to me on August 1, 2008. DOHA issued a notice of hearing on August 13, 2008, and I convened the hearing as scheduled on September 10, 2008. The government called one witness and offered Exhibits (Gov Ex) 1 through 7, which were admitted without objection. Applicant testified on his own behalf, called one witness and submitted three documents which were marked as Applicant Exhibits

(AE) A – C and admitted without objection. DOHA received the transcript of the hearing (Tr) on September 22, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural Issue

On August 18, 2008, Department Counsel prepared a motion to amend the SOR and forwarded the amendment to Applicant. The motion to amend added subparagraphs 2.b, 2.c, and 2.d. On August 25, 2008, Applicant responded to the SOR amendments. There being no objection to the amendment from Applicant at hearing, the amendment was allowed in accordance with Enclosure 3, Additional Procedural Guidance, of the Directive, ¶ E3.1.17.

Findings of Fact

In his Answer to the SOR, dated June 18, 2008, Applicant admitted the factual allegations in ¶¶ 1.a – 1.e., and denied SOR ¶ 2.a. In response to the SOR amendment, dated August 18, 2008, Applicant denied SOR ¶¶ 2.b, 2.c, and 2.d.

Applicant is a 24-year-old systems engineer employed by a Department of Defense contractor seeking a security clearance. This is his first time applying for a security clearance. He has worked for his current employer for three years. He has a Bachelor's of Science degree in computer engineering technology. He is single and has no children. (Tr at 6-8; Gov 1.)

On August 23, 2005, Applicant completed an electronic questionnaire for investigations processing (e-QIP) in order to apply for a security clearance. Applicant answered "No" in response to "Section 23. Your Police Record: For this item report information regardless of whether the report in your case has been "sealed" or stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607. Have you ever been charged with or convicted of any offenses related to alcohol or drugs?" (Gov 1.)

On the same e-QIP application, Applicant answered, "No" in response to Section 24. Your Use of Illegal Drugs and Drug Activity. Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.) amphetamines, depressants (barbituates, methaqualone, tranquilizers, etc.) hallucinogenics (LSD, PCP, etc.), or prescription drugs?" (Gov 1.)

Applicant's background investigation revealed several arrests. In May 1999, he was charged with Possession of Drug Paraphernalia and Possession of Cannabis. He was 15 years-old at the time. He was caught with a bag of marijuana in his pocket at school. A friend had given it to him. A classmate saw the marijuana in his pocket and

told the teacher. The police were called and Applicant was arrested. After community service and teen court, the charges were expunged. Applicant claims he had never tried or taken drugs prior to this incident. He did not deliberately omit this arrest from his e-QIP application. He claims that he thought he did not have to list it because the case was expunged from his records because he was a juvenile at the time of his arrest. (Tr at 63; Gov 2; Gov 7; Answer to SOR.)

In 2003, he was given a verbal warning for trespass for drinking in a park after hours. In August 2004, he was charged with careless driving. He also had numerous traffic offenses that were not alleged in the SOR. (Tr at 63; Gov 6.)

On September 7, 2006, Applicant was observed by Officer M. to be driving erratically. Officer M. was driving his private owned car into work to start the evening shift. He called a patrol officer who was on duty in the area who pulled over Applicant's vehicle. After his car was pulled over, Officer M. approached Applicant's car. He explained the reason for the stop. Applicant was defensive and uncooperative. Officer M. noticed that Applicant and the inside of Applicant's car smelled heavily of burnt cannabis (i.e. marijuana). He asked Applicant if he had been smoking cannabis. Applicant replied, "Not today." (Tr at 28-29.)

Officer M. informed Applicant that he had probable cause to search his car because the car smelled like burnt cannabis. Applicant replied, "That's impossible. I don't smoke weed in my car. I only smoke in my house." Upon search of Applicant's car, Officer M. noticed a green leafy substance on the driver's side on the floor mat. He noticed a pink-colored cigar tube on the floor of the passenger side of the car which was altered to be used as a device for smoking marijuana. The cigar tube had burnt black residue inside and small pieces of what appeared to be marijuana. The substance tested positive for marijuana in a subsequent field test. (Tr at 30 – 31; Gov 4.)

Applicant was arrested and charged with Possession of Marijuana, Possession of Drug Paraphernalia, and Careless Driving. There were no passengers in Applicant's car. Officer M. completed an arrest report within 30 minutes of the charging affidavit. Government Exhibit 4 is a copy of the report he prepared. (Tr at 31-32.) Applicant pled guilty to both charges and one charge was dropped. He was ordered to pay a \$150 fine and court costs of \$385.50. (Gov 5.)

On October 3, 2006, Applicant was interviewed by an investigator with the Office of Personnel Management pertaining to his security clearance background investigation. During this interview, he detailed his arrest history. He stated that he does not use drugs and has never used drugs. (Gov 2.)

An incident report, dated October 27, 2006, detailed Applicant's September 7, 2006, arrest for possession of marijuana. It is unclear who prepared the report but the report apparently summarizes a statement Applicant previously made. In the statement, Applicant states he was initially pulled over for careless driving. Marijuana was found on the passenger's side of the car and he was arrested for possession of marijuana.

Applicant claims the marijuana found in the car belonged to his friend, Mr. R., who left it in his car a few days earlier. Applicant apparently made the statement that he does not participate in the buying, taking, or selling any type of drugs and that he is willing to take a drug test to prove it. (Gov 3.)

Mr. R., Applicant's friend, testified. He claims he would often roll joints in Applicant's car prior to working out. He claims that the marijuana found in Applicant's car on September 7, 2006, was his. He claims that he is the only person that Applicant knows who uses marijuana. He has never seen Applicant smoke marijuana. Applicant always told him that he did not want marijuana in his car or in his house. In September 2006, he saw Applicant an average of once a week. He did not see him on the day he was arrested. When Applicant told him about the arrest, he knew it was his fault but did not come forward when Applicant appeared in court to admit the marijuana was his because he did not think it would do any good. Applicant never told him to appear with him in court to take responsibility for the marijuana. Mr. R. has been arrested for marijuana possession on three occasions. He was arrested a couple times in 2002. His most recent arrest was six months ago. The charges against him are still pending. He is going through drug court and hopes to have the charges dropped if he completes all the requirements. (Tr at 43-60.)

The Lab Manager where Applicant works states that Applicant has worked for him since November 2005. He has seen him progress from a college student to a well rounded mature and ethical engineer. He has handled classified information on a daily basis without incident. Applicant is a stellar performer and he recommends that his clearance be reinstated. (AE B.) Applicant's performance evaluations from 2005 to 2007, rate him as a "successful contributor." He is noted as a good team player with excellent verbal and written skills.

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.

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

Criminal Conduct

The security concern raised under the criminal conduct guideline is set forth in ¶ 30 of the Revised Adjudicative Guidelines:

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.

There are two Criminal Conduct Disqualifying Conditions (CC DC) which apply to Applicant’s case. CC DC ¶ 31(a) (a single serious crime or multiple lesser offenses) and CC DC ¶ 31(c) (allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted) apply with respect to Applicant’s 1999 arrest for Possession of Drugs, and Possession of Drug Paraphernalia and his arrest on September 7, 2006, for Possession of Marijuana, and Possession of Drug Paraphernalia. I find for Applicant with respect to the allegations in SOR ¶¶ 1.c,

1.d, and 1.e. While the incidents happened, the record evidence is unclear as to whether these were criminal offenses. These appear to be traffic offenses or citations as opposed to criminal offenses.

The Government produced substantial evidence by way of exhibits and testimony to raise the CC DC ¶¶ 31(a) and 31(c). The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns (Directive ¶E3.1.15). An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government (See ISCR Case No. 02-31154 at 5 (App. Bd. September 22, 2005).)

The following Criminal Conduct Mitigating Conditions (CC MC) potentially apply to Applicant's case:

CC MC ¶ 32(a) (so much time has elapsed since the criminal behavior happened, or it happened under such circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment) does not apply with respect to Applicant's September 2006 arrest. Applicant was arrested after becoming employed with a Department of Defense contractor. Not enough time has passed since his arrest to mitigate the concerns raised. Applicant's statements are inconsistent with the testimony of Officer M., the arresting officer. Questions remain about his trustworthiness and judgment based on his conflicting statements to the officer and his testimony at hearing. I find for Applicant with respect to the May 1999 arrest because it occurred over nine years ago when Applicant was in high school.

CC MC ¶ 33(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) has the potential to apply. While it has been two years since Applicant's arrest in September 2006, concerns remain based on Applicant's failure to accept responsibility for his actions. He maintains that the marijuana found in the car belonged to his friend, Mr. R. Although Mr. R. testified that his marijuana was found in Applicant's car, his credibility is in question due to the fact that he did not come forward to state the marijuana was his during Applicant's criminal court proceeding. Mr. R. has a history of criminal conduct as well, having been arrested three times on marijuana possession charges.

Of the three individuals who testified during the hearing, I find the testimony of Officer M. the most credible. When he approached Applicant in his car on the day of the arrest, he observed the smell of burnt cannabis. No one else was in Applicant's car. Even if the marijuana in Applicant's car belonged to Mr. R., it does not explain the smell of burnt cannabis in Applicant's car on the night of his arrest – a good indicator that marijuana was recently smoked. When Officer M. asked Applicant whether he used marijuana – Applicant replied "Not today." Applicant further claimed that he only smokes marijuana in his residence. While Applicant has a good employment record, his lack of

truthfulness about his September 7, 2006 arrest and his marijuana use remains a concern.

Applicant has not mitigated the criminal conduct concern.

Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶15:

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.

Applicant's omissions on his August 23, 2005, e-QIP application raises the potential application of Personal Conduct Disqualifying Condition (PC DC) ¶ 16(a) (deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities). With respect to omitting his May 1999 arrest in response to question 23(d) on his e-QIP application, I find Applicant's omission was deliberate. Applicant claims that he did not think that he had to list his 1999 arrest because it occurred when he was still a juvenile and it was expunged from his criminal record. The plain language of question 23(d) asks: "Have you ever been charged with or convicted of any offenses related to alcohol or drugs?" The question further states, "For this item report information regardless of whether the report in your case has been 'sealed' or stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607." Applicant is a college graduate. It is unlikely that he misunderstood the plain language of the question. I find Applicant deliberately omitted his May 1999 arrest for possession of marijuana in response to question 23(d).

I find Applicant did not falsify his answer to question 24, regarding illegal use of drugs and drug activity. While Applicant was arrested for and possessed Marijuana in 1999, there is nothing in the record evidence which implicates Applicant's use of marijuana since the age of 16 or within the seven years prior to Applicant completing his e-QIP application on August 23, 2005. Applicant admits to possessing the marijuana when he was arrested in 1999, he denies using marijuana. There is no evidence in the record contradicting Applicant's denials of marijuana use within seven years prior to completion of his e-QIP application.

There is substantial evidence to support Applicant's use of marijuana in September 2006. Officer M. noticed the smell of burnt marijuana when he approached Applicant's car on the date of his arrest which is strong evidence supporting that marijuana was recently smoked. Applicant was alone in the car. He later told Officer M. that he usually smoked marijuana at his residence. For these reasons, I conclude he provided false information to the OPM investigator during his October 3, 2006, interview when he claimed he had never used any illegal drugs. This conduct raises PC DC ¶ 16(e) (deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, or competent medical authority or other official government representative). Applicant's claims that he never used marijuana conflicts with the facts that led to his arrest on September 7, 2006.

I find for Applicant with respect to SOR ¶ 2.d. This allegation alleges that Applicant provided false information to his employer on October 27, 2006, by stating that he had not previously participated in using illegal drugs. The evidence in support of this allegation is an Incident Report that was entered into Joint Personnel Adjudication System (JPAS). I do not find the Incident Report to be reliable because it is not signed. The author of the report is unknown. The record is not authenticated. Applicant did not testify to the accuracy of the document. The Government did not meet its burden with regard to the allegation in SOR ¶ 2.d.

It is noted that the summary of Applicant's interview with an OPM investigator on October 3, 2006 is also unsigned and unsworn (the statement is relevant to SOR ¶ 2.c). The identity of the author of the summary of the interview is not apparent. While it may seem contradictory to conclude the government met its burden with respect to SOR ¶ 2.c but not ¶ 2.d, Applicant was sent a copy of the October 3, 2006 summary of interview. He had the opportunity to review the document. He had the opportunity to make changes to the document. Upon review of the document, he found the document to be an accurate summary of what occurred during the interview. (Gov 2.) Applicant was not given the same opportunity with respect to the Incident Report. (Gov 3.)

PC DC 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) applies to Applicant's case. It is reasonable to conclude that Applicant did not want to admit that he used marijuana after being hired with a defense contractor because of the adverse affect it might have on getting a security clearance as well as the potential that he could lose his job for illegal drug use.

The personal conduct concern may be mitigated. The following Personal Conduct Mitigating Conditions (PC MC) potentially apply:

PC MC ¶ 17(a) (the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts) does not apply because Applicant did not disclose the omission of his 1999 arrest for possession of marijuana before being confronted with the facts.

PC MC ¶ 17(c) (the offense is so minor, or so much time has passed, or the behavior is infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment) does not apply. If Applicant had been more honest about his marijuana use, this mitigating condition may have been applicable. However, instead of accepting responsibility for his past actions, Applicant denies using marijuana on September 7, 2006. He went to great lengths to have his friend lie for him by claiming the marijuana that was found in Applicant's car was his. His friend's statements do not explain why Officer M. smelled marijuana smoke when he approached Applicant's car. Nor does his friend's testimony explain Applicant's statement to Officer M. that he smokes marijuana in his residence. Applicant's dishonesty casts doubt on his reliability, trustworthiness, and good judgment.

PC MC ¶ 17(e) (the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress) does not apply. Applicant's misrepresentations about his marijuana use makes him vulnerable to exploitation, manipulation, or duress. His repeated denials despite evidence to the contrary support the premise that he has something to hide.

None of the other PC MCs are relevant to the facts of Applicant's case. He has not mitigated the concerns raised under personal conduct.

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 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. I considered Applicant's favorable work history and his record of no subsequent criminal conduct over a period of two years. However, not enough time has passed to mitigate the concerns raised under Guideline J. Applicant had worked for a defense contractor for nine months prior to his September 2007 arrest. He submitted his security clearance application in August 2005. The extensive questions about illegal drug use should have put him on notice that illegal

drug use is a security concern. He deliberately omitted his May 1999 arrest for Possession of Drugs/Possession of Drug Paraphernalia on his August 2005 e-QIP application. There is overwhelming circumstantial evidence that Applicant used marijuana prior to being arrested on September 7, 2006. His repeated denials of drug use despite evidence to the contrary, raise questions about his trustworthiness. He did not meet his burden to mitigate the concerns raised under personal conduct.

Overall, the record evidence leaves me with doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under criminal conduct, and personal 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: AGAINST APPLICANT

Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant

Paragraph 2, Guideline E: AGAINST APPLICANT

Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For Applicant
Subparagraph 2.c:	Against Applicant
Subparagraph 2.d:	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.

ERIN C. HOGAN
Administrative Judge