



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



In the matter of:)
)
) ISCR Case No. 07-17028
)
)
Applicant for Security Clearance)

Appearances

For Government: John Bayard Glendon, Esquire, Department Counsel
For Applicant: *Pro Se*

November 10, 2008

Decision

RIVERA, Juan J., Administrative Judge:

Applicant failed to mitigate his long-term abuse of marijuana and his criminal misconduct. Clearance is denied.

Statement of the Case

On April 11, 2006, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP).¹ On July 31, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified and revised.² The SOR alleges security

¹ GE 1. He also submitted a Security Clearance Application (SF 86) on January 24, 2005 (GE 2).

² On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guideline to all adjudications and other determinations made

concerns under Guideline H (Drug Involvement) and Guideline J (Criminal Conduct). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant answered the SOR on August 19, 2008, and requested a hearing before an Administrative Judge. The case was assigned to me on September 3, 2008. The Notice of Hearing was issued on September 17, 2008, convening a hearing on October 14, 2008. The hearing was convened as scheduled. The Government presented nine exhibits, marked GE 1-9. GEs 1-5 were admitted without objection. Applicant objected to GEs 6-9 on the basis that the documents were too old and not relevant. I found the documents relevant and material to Applicant's security clearance adjudication and admitted them over Applicant's objection (Tr. 26-30). Applicant testified on his own behalf, and presented no documents. DOHA received the transcript (Tr.) on October 22, 2008.

Findings of Fact

Applicant admitted all the SOR allegations. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant is a 33-year-old information technology support technician.³ He has never been married and has no children. He attended college from June 2000 to May 2002. It is not clear from the record whether he received his Associate's degree. He also completed several information technology certifications to stay current in his field.

After college, in 2002, Applicant was hired by a defense contractor and received interim access to classified information at the secret level (Tr. 6). He continuously held that interim access to classified information to the day of his hearing. He has been working for his current employer, a defense contractor, since 2005.

Applicant's security clearance concerns arose primarily out of his long time and extensive illegal use of marijuana. He started using alcohol and marijuana at age 14 (Tr. 32). From age 16 to 19, he used marijuana daily (Tr. 51). In July 1993, he was arrested and charged with misdemeanor Theft. The charge was placed on a Stet docket. In November 1994, at age 19, he attempted to enlist in the U.S. Army; however, he failed

under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006.

³ GE 1 is the source for the facts in this paragraph, unless stated otherwise.

a urinalysis test and was rejected (Tr. 80). Thereafter, he continued to abuse marijuana daily until 1997 (Tr. 56).

In October 1995, Applicant was arrested and charged with Possession with Intent to Distribute Marijuana. The charge was placed on a Stet docket. In May 1996, he was arrested and charged with Possession with Intent to Distribute Marijuana and Possession of Controlled Dangerous Substance, both felonies. He was convicted of the later offense and sentenced to pay a \$1,450 fine (\$1,000 suspended), and one-year supervised probation. The terms of the probation were later modified to 90 days unsupervised probation to allow Applicant to enlist in the U.S. Navy (Tr. 81).

He enlisted in the U.S. Navy in April 1997. He testified “[I] kind of stopped, sort of” using marijuana while in the Navy (Tr. 51, 54). In 1998, he tested positive twice for use of marijuana (Tr. 59). While in the Navy, he used marijuana approximately twice every three months (Tr. 57). He was diagnosed as alcohol dependent and underwent substance abuse counseling (Tr. 48). In May 1998, he received non-judicial punishment under Article 15, UCMJ, and was later administratively discharged from the Navy. His service was characterized as “other than honorable.” After his discharge, he again started to use marijuana frequently (Tr. 58).

Applicant attended the Jobs Corps and college from 1999 to 2002 (GE 1). While in college he used marijuana approximately three times a month (Tr. 61). From 2002 to 2007, he used marijuana approximately twice a month (Tr. 63-64). Applicant claimed that since 2007, he has used marijuana only three times (Tr. 64). In January 2007, he was arrested while smoking marijuana in the street. He was charged and convicted of Possession of marijuana. He was sentenced to 60 days community service, required to participate in an eight week drug counseling class (Narcotics Anonymous (NA), and placed on one-year probation (Tr. 68-69). He used marijuana again on February 21, 2007, while participating in a poker game (Tr. 38). The last time he used marijuana was on July 4, 2008, while celebrating Independence Day with a group of friends in the Nation’s capital (Tr. 36, 65, 73).

Applicant stated he has never used any other illegal drugs (Tr. 55). He used marijuana because it calmed him down, and helped him to stay focused and to study (Tr. 32, 43). He was aware it is illegal to use marijuana, but it was cheaper than buying prescription medications. He believes he is not a bad person, and claimed not to sell drugs (Tr. 47). He testified he is not a security risk, and that he would never betray the United States. He considers himself to be trustworthy and a good, reliable worker.

During his hearing, Applicant repeatedly promised to stop using marijuana (Tr. 32-35, 89). Now that he is aware of the serious security clearance concerns it raises, and the possibility of losing his job, he promised to never use marijuana again (Tr. 32.) He needs his job and believes using marijuana is not worth losing his job. Applicant testified that the only way he would use marijuana again is “if they make it legal – I would just be the happiest person in the world,” or if he moves to Canada (Tr. 67-67).

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 controlling 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.

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by "substantial evidence,"⁴ demonstrating, 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 produce 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." Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).⁵

⁴ See Directive ¶ E3.1.14. "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). "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).

⁵ "The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

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* Executive Order 12968 (Aug. 2, 1995), Section 3.

Analysis

Guideline H, Drug Involvement

AG ¶ 24 articulates the government’s security concern under this guideline:

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.

Applicant’s 19 years of frequent illegal use of marijuana raise security concerns under AG ¶ 25(a): “any drug abuse,” AG ¶ 25(b): “testing positive for illegal drug use,” AG ¶ 25(c): “illegal drug possession, including . . . purchase, sale, or distribution,” AG ¶ 25(d): “diagnosis . . . of drug dependence,” and AG ¶ 25(g): “any illegal drug use after being granted a security clearance.”

I specifically considered all Guideline H mitigating conditions and conclude that none apply. Considering the record evidence as a whole, I find Applicant’s illegal marijuana use to be frequent and recent. Applicant’s promises to stop abusing marijuana in the future are not persuasive in light of his 19-year record of frequent marijuana abuse. Moreover, he continued his illegal use of marijuana even after facing marijuana related criminal charges four times. Applicant failed to establish that his questionable behavior is not likely to recur. AG ¶ 26(a) and AG ¶ 26(b) do not apply. He presented some evidence of drug abuse counseling or attendance in a rehabilitation program; however, he continued to abuse marijuana after such counseling. AG ¶ 26(d) does not apply.

Considering the record evidence as a whole, I conclude Applicant’s behavior shows questionable judgment and leaves doubt about Applicant’s ability or willingness to comply with laws, rules, and regulations.

Guideline J, Criminal Conduct

Under Guideline J, the security concern is that 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 ¶ 30.

Applicant was charged with misdemeanor Theft in 1993. He was charged with drug related offenses, including two felony charges, in 1995, 1996, 1998, 2007 and 2008.⁶ Moreover, since he was 14 years old, he has been repeatedly and intentionally violating the law with his frequent illegal use of marijuana. Applicant's overall behavior raises security concerns under Criminal Conduct disqualifying conditions 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.”

AG ¶ 32 lists four conditions that could mitigate the criminal conduct security concerns raised under AG ¶ 31. After considering all the mitigating conditions, I find that none apply. Applicant's illegal use of marijuana extends from around 1989 to July 4, 2008, thus, his illegal behavior is recent. He presented no credible evidence of successful rehabilitation.

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.

⁶ Applicant disclosed the 2007-2008 marijuana offenses at his hearing. They were not alleged in the SOR and cannot be used as grounds to deny Applicant under Guideline J. However, I am required to consider Applicant's overall questionable behavior when evaluating the seriousness of the conduct alleged in the SOR to determine factors such as the extent to which his behavior is recent, the likelihood of recurrence, and his rehabilitation. ISCR Case No. 04-09959 at 3 (App. Bd. May 19, 2006).

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. AG ¶ 2(c).

Applicant's educational achievements and record of employment for a government contractor weighs in his favor. He promised to abstain from any illegal drug use and to make changes in his lifestyle. These factors show some responsibility, rehabilitation, and mitigation. Other factors tend to mitigate concerns such as his counseling, expressed remorse, and job performance.

The evidence against mitigating Applicant's conduct is overwhelming. Several factors weigh against mitigation including the nature and seriousness of the offenses, and his age and education. He has a significant history of frequent and recent illegal drug abuse. Applicant was well aware of the illegality of using marijuana and the adverse legal consequences for his actions. Notwithstanding his brushes with the law, he continued his illegal drug abuse at least until July 4, 2008. I note that since 2002, he had interim access to classified information at the secret level. Applicant's overall behavior casts serious doubts about his judgment, reliability, and willingness to comply with laws, rules and regulations.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he failed to mitigate the security concerns pertaining to drug involvement 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, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a - 1.d:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraphs 1.a - 1.e	Against Applicant

Conclusion

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

Juan J. Rivera
Administrative Judge