



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



In the matter of:)
)
) ISCR Case No. 07-18027
)
)
Applicant for Security Clearance)

Appearances

For Government: Francisco Mendez, Department Counsel
For Applicant: *Pro Se*

March 31, 2009

Decision

HEINY, Claude R., Administrative Judge:

From 2000 to 2008, Applicant illegally used marijuana, and since 2004, used it while holding a security clearance. When completing various security clearance applications, he failed to disclose his full arrest record and history of marijuana usage. Applicant has failed to rebut or mitigate the government’s security concerns under drug involvement and personal conduct. Clearance is denied.

Statement of the 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 a

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 guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Statement of Reasons (SOR) on October 30, 2008, detailing security concerns under drug involvement and personal conduct.

On October 30, 2008, Applicant answered the SOR, and requested a hearing. On December 15, 2008, I was assigned the case. On December 17, 2008, DOHA issued a notice of hearing scheduling the hearing which was held on January 8, 2009. At the hearing, the government offered Exhibits (Ex.) 1 through 9, which were admitted into evidence. Applicant testified on his own behalf and did not submit any exhibits. On January 26, 2009, the transcript (Tr.) was received.

Findings of Fact

Department Counsel's motion to withdraw the allegation set forth SOR ¶ 1.g was granted. In his Answer to the SOR, Applicant admits the remaining allegations.

Applicant is a 25-year-old administrative assistant / general clerk who has worked for a defense contractor since November 2002, and is seeking to keep a secret security clearance granted in May 2004. Applicant's supervisor states Applicant is in the top half of the eight contractors in his group. Applicant has provided invaluable service by restructuring the operational file system. (Tr. 48) His supervisor, after giving it long through, stated Applicant deserves a second chance.

In 2000, Applicant—then age 18—was found guilty of driving a vehicle while impaired by alcohol. (Ex. 2) His Blood Alcohol Content (BAC) was .11. Applicant pleaded guilty and was sentenced to probation before judgment and required to perform 24 hours of community service and attend alcohol abuse classes for two hours a week for six weeks. (Ex. 4)

Applicant used marijuana from 2000—when he was in the 10th grade—to May 2008. His use was once or twice a month and he sometimes went two or three months without using. (Tr. 35) From October 2004 until June 2008, Applicant worked at his current job and smoked marijuana occasionally. (Ex. 9, page 2) He acknowledges smoking marijuana while holding a clearance. (Tr. 28)

In August 2003 he was charged with possession of controlled dangerous substance (CDS) paraphernalia. He was in a park was with a group of four people passing around a cigarette. At the hearing, Applicant stated marijuana was not involved. He states the group was so poor that each person was unable to smoke their own regular cigarettes and had to pass the cigarette back and froth between them as they smoked it. (Tr. 42) When the police asked the men what they were doing, one said "smoking dope" and another stated he had some "weed" in his pocket. (Ex. 3, page 2) The charge was *nolle prosequi*.

In 2004, Applicant obtained a security clearance and continued to use marijuana. Applicant's company has a policy prohibiting illegal drug use. (Tr. 31) In March 2005, he was arrested and charged with possession of paraphernalia and possession of marijuana. He was stopped for doing 75 mph in a 55 mph zone. He passed a field sobriety test. Applicant told the officer he had smoked marijuana that morning. (Ex. 5,

page 2) A zip lock baggie containing marijuana was found under the passenger seat of the vehicle and a burnt marijuana cigarette in the glove box. (Ex. 5, page 3) The charges were placed on the Stet Docket and he was ordered to complete community service and complete a 12 hour substance abuse program. In March 2006, he completed the program. (Ex. 5)

On March 17, 2007, Applicant was arrested and charged with possession of a controlled dangerous substance and possession of drug paraphernalia. Applicant and a friend were sitting in a car parked in a handicap parking space without a handicap sticker. The car smelled of marijuana and Applicant stated to the officer that he had marijuana in his pocket. (Ex. 8, pages 3, 5 and Ex. 9, page 2) The possession of CDS charge was *nolle prosequi*. Applicant pleaded guilty to possession of paraphernalia and was granted probation before judgment with probation for three years.

In April 2003, Applicant completed a Security Clearance Application, Standard Form (SF) 86. (Ex 1) He answered "no" to question 24, which asked him if he had every been charged with or convicted of any offense related to alcohol or drugs even though he had been found guilty of driving a vehicle while impaired by alcohol. He answered "no" to question 27, which asked him if from the age of 16 or in the last seven years, he had illegally used any controlled substance to include marijuana.

In August 2006, Applicant completed an Electronic Questionnaires for Investigations Processing (e-QIP).(Ex. 6) In response to question 23, his police record, he listed a 2002 DUI, but not his August 2003 arrest for possession of CDS paraphernalia or his 2005 arrest for possession of paraphernalia and marijuana. At the hearing, Applicant stated it was an accident that he left out the 2003 arrest and the March 2005 arrest had skipped his mind when he completed the form. (Tr. 28) In response to question 24, his use of illegal drugs and drug activity, he listed marijuana use 10 times during July and August, 2000 and not thereafter.

During February and March 2007, Applicant was interviewed by a DoD investigator, (Ex. 7) Applicant stated he had used marijuana from July 2000 to the summer of 2001, but failed to disclose his full history of marijuana use. He did so because he was worried about the effect the truth would have on his clearance. (Tr. 32) Applicant stated he used marijuana 10 times during the period. (Ex. 7, page 5) Applicant told the investigator he listed August 2000 as his stop date because he used infrequently after that date. (Ex. 7, page 5) In March 2007, Applicant stated he had no intention of using illegal substances in the future.

Applicant last used marijuana Memorial Day weekend 2008. (Tr. 30) Applicant is willing to submit to random drug screening. In June 2008, he made a decision not to use marijuana again and to disassociate himself from his friends who use. In August or September 2008, he was offered marijuana and declined. Applicant acknowledges he has made bad decisions in the past to smoke marijuana while holding a clearance. At the hearing, (Tr. 19-20) he stated,

Falsifying information in reference to my marijuana use was a terrible decision I chose to make because I was scared that it would affect my

clearance process in a negative way but I never considered what would happen if I was to get caught in the act.

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 to obtain 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.

Applicant used marijuana from 2000—when he was in the 10th grade—to June 2008. His use was once or twice a month, although he sometimes went two or three months without using. From October 2004 until June 2008, Applicant held a clearance at his current job and smoked marijuana occasionally. He acknowledges smoking marijuana while holding a clearance. In 2003, Applicant was charged with possession of CDS paraphernalia. In 2005, he was charged with possession of paraphernalia and possession of marijuana. He told the police officer he had smoked marijuana that day. In 2007, he was arrested for possession of a CDS and possession of drug paraphernalia. At the time of arrest, Applicant informed the police officer he had marijuana in his pocket. (Tr. 28) AG ¶ 25a, 25c, and 25g apply.

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 used marijuana when he held a security clearance. He held a clearance at the time of his 2005 and 2007 arrest. The 2007 arrest occurred the day after he completed an interview with a DoD investigator about his illegal drug usage. The disqualifying condition of using illegal drugs while holding a clearance makes no distinction between using at work or while off-duty. Illegal drug use is illegal drug use no matter where it occurs.

None of the mitigating factors apply to Applicant's use of illegal drugs. AG ¶ 26a does not apply because the behavior did not happen long ago. His last use was less than one year ago. He used it over an eight year period, sometimes using it two or three times a month. His use was not infrequent. There is no evidence his use occurred under circumstances that are unlikely to recur or do not cast doubt on the individual's current reliability, trustworthiness, or good judgment.

AG ¶ 26b does not apply because there is no demonstrated intent not to abuse drugs in the future. Applicant states he will not use marijuana in the future; however he made a similar statement during his DoD interview just before his 2007 arrest. He may refrain from marijuana usage in the future, he may not. It is too soon to tell. He states he has disassociated himself from those individuals that still use illegal drugs. The seven month period of abstinence is not appropriate period of abstinence when balanced against his use over an eight year period.

AG ¶ 26c does not apply because use of prescription drugs was not an issue. AG ¶ 26d does not apply because there was no satisfactory completion of a drug treatment program.

Applicant used marijuana after obtaining a security clearance, after completing his 2003 SF 86, after completing his 2006 e-QIP, after three arrests, and after a DoD

interview about his illegal marijuana usage. Even though he held a clearance, he lacked the knowledge that his illegal use marijuana was inappropriate and incompatible with holding a clearance or the fortitude not to use. Either way, he fails to display the reliability and trustworthiness necessary to obtain access to our country's secrets. His continued marijuana use over an eight year period raises questions about his ability or willingness to comply with laws, rules, and regulations.

Under the National Defense Authorization Act for the Fiscal Year 2008, Public Law 110-181, codified in 50 U.S.C. § 435c, an unlawful user of marijuana may not be granted a security clearance. 50 U.S.C. § 435c (b) uses the present tense, making it applicable only if the person "is" an unlawful user or "is" an addict. See ISCR Case No. 03-25009 (App. Bd. Jun. 28, 2005). Based on the evidence, I conclude Applicant is disqualified as an unlawful user of marijuana. He has used it for most of his adult life. He last used it seven months prior to the hearing. I am satisfied Applicant is a present user of marijuana within the meaning of 50 U.S.C. § 435c. Applicant is disqualified from being granted a clearance.

Personal Conduct

The Directive sets out various factors relevant to an applicant's personal conduct that may be potentially disqualifying. Paragraph 15 of the Adjudicative Guidelines (AG) states a concern where there 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. 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 AG ¶ 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" and ¶ 16 (b) "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative"

Applicant's false answer on his SF 86, e-QIP, and his response during his DoD interview concerning his history of marijuana use and arrest history tends to show questionable judgment, unreliability, and a lack of trustworthiness. I find ¶¶ 16 (a) and 16 (b) apply.

On his 2003 security clearance application, Applicant deliberately failed to report his driving a vehicle while impaired by alcohol arrest in response to question 24 and his use of marijuana in response to question 27. On his 2006 security clearance application, he failed to list two arrests related to illegal drug usage in response to question 23 and provided false information concerning his marijuana usage in response to question 24 by stating he had used marijuana only ten times. In his 2007 DoD

interviews, he provided false information about his illegal drug usage stating his last use was in the summer of 2001.

Applicant has offered no credible explanation for his failure to disclose his arrests and illegal drug usage on his SF 86, e-QIP, and interview. His assertion that he was not being deceptive is unpersuasive. Applicant had knowingly used an illegal drug on multiple occasions. Applicant should have been especially attuned to these questions because of his arrests and his company's policy against illegal drug usage. I find Applicant deliberately falsified his answer on his the security clearance applications and during his DoD interview.

Under the Directive, an applicant may mitigate the security concerns arising from questionable personal conduct under certain circumstances. AG ¶17 provides conditions that could mitigate personal conduct security concerns, including AG ¶ 17(a): "if a person "provides the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts." I find this mitigating factor does not apply. Applicant has not met his burden of proving that he made good-faith efforts to correct the omissions in his security clearance application and interview, or that his efforts were prompt.

AG ¶ 17 (f) provides mitigation where "the information was unsubstantiated or from a source of questionable reliability." Applicant's wrongful use of marijuana and arrests are substantiated by his admissions. The information was pertinent to a determination of his judgment, trustworthiness, and reliability. I find this mitigating factor does not apply.

AG ¶ 17 (c) provides mitigation where "the offense is so minor, or so much time has passed, or the behavior is so 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." The security clearance applications at issue were executed in 2003 and 2006, and his interview occurred in 2007, all of which are recent. The available evidence shows Applicant gave false answers on the security clearance application, gave false information three years later on another security clearance application, and gave false information a year thereafter during his DoD interview. This was not a single, isolated incident. I conclude this potentially mitigating condition does not apply. I also considered carefully the other potentially mitigating conditions and conclude they do not apply.

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. An 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. Applicant is 25 years old and sufficiently mature to make prudent decisions when responding to questions about his illegal drug history and arrest record. When he completed his security clearance applications he was afraid the truth might adversely impact his job. The government expects and demands truthful responses to questions even when those responses might be adverse or detrimental to the individual seeking to obtain a clearance.

To conclude, Applicant did not present sufficient evidence to explain, extenuate, or mitigate the drug involvement or personal conduct security concern. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, the whole-person concept was given due consideration and that analysis does not support a favorable decision.

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: AGAINST APPLICANT

Subparagraph 1.a-g: Against Applicant

Paragraph 2, Personal Conduct: AGAINST APPLICANT

Subparagraph 2.a-f: Against Applicant

Conclusion

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

CLAUDE R. HEINY II
Administrative Judge