



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



In the matter of:)	
)	
SSN:)	ISCR Case No. 07-18554
)	
Applicant for Security Clearance)	

Appearances

For Government: Richard Stevens, Esq. Department Counsel
For Applicant: Ronald C. Sykstus, Esq.

October 27, 2008

Decision

MASON, Paul J., Administrative Judge:

Applicant submitted his Security Clearance Application (SCA), on July 7, 2007. On February 21, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under drug use (Guideline H). The action was taken pursuant to 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 made effective within the Department of Defense for SORs issued on or after September 1, 2006.

Applicant submitted his answer to the SOR on March 7, 2008. DOHA issued a notice of hearing on July 18, 2008, and the hearing was held on August 7, 2008. At the hearing, three exhibits (GE 1 through GE 3) were admitted in evidence without objection to support the government's case. Applicant testified, and called four witnesses. Five exhibits (AE) were admitted to support Applicant's evidence. AE F contains Applicant's answer to the SOR, a statement of intention not to use drugs in the future, and also a character statement from his supervisor who also testified. DOHA obtained a copy of

the hearing transcript on August 15, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

The SOR contains three allegations under the drug involvement guideline. Applicant admitted all allegations, but provided some minor changes to two the allegations. Under SOR 1.a., he thought he stopped using marijuana in October 2004, and was certain he stopped by January 29, 2005. He admitted SOR 1.b. as alleged. He admitted SOR 1.c., but opined he spent over \$50.00 but less than \$100.00 in marijuana purchases. See also, section 5 of GE 2. At the bottom of his answer (AE F) is an oath signed and notarized by him. The oath addresses his past marijuana use and intentions in the future not to use the drug.

Applicant is 23 years old, single, with no children. He graduated from high school in May 2003. He graduated from college in May 2007 with a Bachelor of Science degree in software engineering (AE B), with a very good scholastic average. (AE C) He has been working for his current employer since June 2007. He seeks a security clearance.

Drug Involvement

According to his security clearance questionnaire (SCA, GE 1), Applicant indicated he used marijuana from about September 2001 to approximately July 2005, estimating that he used the drug about 60 times during the period. In September 2001, he was about 16 years old. (Tr. 25) He used the drug with one to four individuals at different times. Three individuals either lived in the neighborhood and/or attended the same high school. One individual attended the first year of college with Applicant. In high school, Applicant used marijuana about 40 to 50 times until his parents were told by one of his friends in April 2002 (Tr. 28) that he was using marijuana. They imposed some type of discipline. (Tr. 29) Applicant indicated he did not use drugs from April 2002 until October 2003. (Tr. 30)

Applicant began college in August 2003, and resumed using marijuana in October 2003. He testified that he used marijuana about 10 to 20 times in college (Tr. 28), and stopped using the drug when he started applying for a cooperative position in the fall of 2004. (Tr. 23, 32) In response to section 8 of GE 2 (Interrogatory answers, notarized on January 29, 2008), Applicant stated, "I have not used marijuana since then (January 29, 2005, interview conducted by authorized investigator for the Department of Defense). See, GE 3. My dates might be inaccurate because I know I stopped during my sophomore (sic) year (8/2004-5/2005). I know I stopped before this interview though, because I stopped so that it wouldn't interfere with my co-op position." In his response to section 9 of GE 2 requesting that he explain why discrepancies appear in his previous statements about his purchase and use of marijuana, he indicated he knew he stopped in the fall of the 2004. He noted, however, that over time his estimates of use would vary.

GE 3¹ contains the interview of Applicant at his home on January 29, 2005. During this interview, Applicant was asked about his drug use. He stated his marijuana use was experimental, and he never bought or sold the drug. In addition, he stated he had not used the drug since April 2002, and had no intention of using it in the future. At the hearing, Applicant could not recall the January 29, 2005-interview, even after reviewing the exhibit. (Tr. 41, 42) Applicant was positive he was in school at the time and not at home on January 29, 2005 when the interview occurred. (Tr. 36, 48, 49) I do not find his responses credible.

The investigation summary (GE 3) also includes interviews of Applicant and other individuals. Two of those people interviewed were identified by Applicant at the hearing as having used marijuana with him in high school. Those same two individuals are referenced several times in Applicant's security clearance questionnaire. (SCA, GE 1)

Unlike the January 29, 2005-interview, Applicant recalled traveling in March 2005 for three interviews to an agency of the Department of Defense, at a location in the Middle Atlantic region over a three-day period. He recalled fielding questions about his drug use and information about possible employment. However, he recalled no details of the interviews at the hearing.

At the bottom of the page of Applicant's answer to the SOR (AE F) is a notarized statement regarding his past drug use, and future intentions regarding drug use. Applicant stated:

I used marijuana when I was young and in school, and I [no] longer use it. I stopped over three and a half years ago and have not used it since and have had no desire to use it since. I am no longer associated with the people that I used it with in the past, and none of the people I associate with now use marijuana. I am willing to take any additional steps to prove that I am capable fo the responsibilities of a security clearance. I agree to not use marijuana in the future, and understand that doing so will be an automatic revocation of my clearance. (AE F)

After learning about Applicant's drug use in April 2002, his father had a discussion with Applicant about his drug use. His father got the impression that Applicant's use was a "one type thing." (Tr. 78) The father also believed that Applicant's drug use stopped after he was grounded in April 2002. (Tr. 79) The first time Applicant's father found out about Applicant' drug use in college was after he had been denied a security clearance a year or more before the hearing. (Tr. 80) After Applicant returned from the Middle Atlantic interviews in March 2005, his father thought Applicant would be getting the job he had interviewed for. (Tr. 80-81) Regarding Applicant's friend who used marijuana with him in high school, his father has known this friend since Applicant

¹ The exhibit is a case summary prepared on February 23,, 2005 by an authorized investigator for the Department of Defense. The exhibit contains Applicant's interview, verification of his education, and interviews with other individuals.

was in the third grade, and is aware that Applicant and the friend go to movies together. (Tr. 85)

Character Evidence

Applicant's minister testified he knows Applicant's family, and met Applicant in 1993. The minister worked with Applicant in religious education activities and a youth program. According to the minister, Applicant is a truthful person who made a mistake by yielding to peer group pressure.

Applicant's supervisor, a principal engineer, interviewed Applicant in May 2007, and became his supervisor after Applicant was hired in June 2007. Applicant has performed exceptionally well in software development, testing and support. His supervisor recalled that Applicant's drug test results were negative when he was initially hired. (Tr. 60)

Applicant's father was surprised to learn Applicant used marijuana in college because Applicant never presented problems for his parents. Furthermore, Applicant told them he does not lie because that makes him feel bad. (Tr. 75) Applicant's father testified that his family has been living at the same address for 10 years. (Tr. 71)

Applicant's former high school principal, who has known Applicant since 2000, recalled Applicant was a fine student. The principal hired Applicant in 2007 to provide computer support at the school. The principal provided Applicant with a key to enter the school after hours to handle the computer issues. (Tr. 90) The principal first learned of Applicant's drug use approximately two weeks before the hearing. (Tr. 96)

AE A is Applicant's resume. Applicant received his college degree in May 2007. (AE B) AE C is Applicant's college transcript. Applicant's performance evaluation for the period June to August 2007 reflects an "exceeds requirements" rating. (AE D) AE E is a character statement from a neighbor who has lived across the street from Applicant for the past 10 years. This neighbor believes Applicant is a well-mannered person who deserves a security clearance.

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 flexible rules of law. Recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's ultimate adjudicative goal is a fair, impartial and common sense decision. According to the AG, the entire process is a

careful, thorough evaluation 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. If doubt lingers regarding an applicant’s security worthiness, that doubt must 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 is not restricted to normal duty hours. Rather, the relationship is an-around-the-clock responsibility between an applicant and the federal government. 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.

Analysis

Drug Involvement (DI)

24. *The Concern.* “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 or regulations.” ¶ 24

Applicant’s drug involvement falls within the scope of DI disqualifying condition (DC) 25.a. (*any drug abuse*) and DI DC 24.c. (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*) based on Applicant’s marijuana use and purchase of the drug. Applicant used the drug (with sporadic purchases) on 40 to 50 occasions from September 2001 until he was reprimanded by his parents in April 2002, after they were informed of Applicant’s marijuana use by someone in the neighborhood. Significantly, during the discussion with his father in April 2002, while admitting his drug use, Applicant was not candid about the full scope of his use. Even after his parents

disciplined him in April 2002, he resumed marijuana use in October 2003, using the drug 10 to 20 times until late 2004. His father did not find out about Applicant's subsequent marijuana use in college until 2006 or 2007.

GE 3 includes Applicant's interview on January 29, 2005, in which he stated he never purchased marijuana, and he quit using the drug in April 2002.² Applicant's supposed inability to recall the interview, and belief he was at school at the time are not persuasive because the explanations are not credible. The record provides substantial evidence that Applicant was not candid with his father about his marijuana use. He displayed this same lack of candor with the government on January 29, 2005 by not providing a complete account of his drug use which did not end until at least the fall of 2004.

Applicant's misrepresentation to his father in April 2002 and during most of his college days, and his misrepresentations to the government on January 29, 2005, also undercut the credibility of his sworn statement made on March 7, 2008. The record contains several references indicating that Applicant still associates with a few of the same individuals he used the marijuana with in high school.

Whether any of the mitigating conditions under the DI guideline apply depend on the facts and circumstances of a particular case. The first two DI mitigating conditions are potentially applicable to circumstances of this case. The passage of more than three years (almost four years) would usually afford a sufficient basis to apply DI mitigating condition (MC) 26.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*) in Applicant's favor. However, the passage of time does not apply as his marijuana use was much more than experimental. The level of use and Applicant's misrepresentations about his use still cast doubt on his honesty and trustworthiness. DI MC 26.a. is inapplicable.

DI MC 26.b. ((1) *disassociation from drug-using associates and contacts*, (2) *changing or avoiding the environment where drugs are used*; (3) *an appropriate period of abstinence*; (4) *a signed statement of intent with automatic revocation of clearance for any violation*) is inapplicable because of Applicant's lack of forthrightness during the security investigation. Applicant's disassociation from drug users has not been sufficiently demonstrated. There is no evidence concerning a change in environments where drugs are not used. In light of Applicant's undermined credibility, the passage of more than three years, along with Applicant's sworn statement regarding his past marijuana use and intention not to use in the future, do not overcome the negative evidence under the DI guideline.

² Although the exhibit is a report of investigation (ROI) and hearsay, it is a business record containing investigative results prepared by an authorized investigator for the Department of Defense. The exhibit contains information that is reliable based on its internal consistency and the fact that most of the information within the exhibit can be independently authenticated by other government exhibits and testimony. The exhibit was admitted without objection. (Tr. 99)

Whole Person Concept (WPC)

The AG indicates the ultimate determination of whether to grant a security clearance must be an overall common sense judgment based upon careful consideration of the whole person concept. Nine general policy factors define the WPC. They are: (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 the participation is voluntary; (6) the presence or absence of rehabilitation; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and, (9) the likelihood of continuation or recurrence.

Applicant began using marijuana when he was a 16-year-old teenager. He used the drug more than experimentally from September 2001 to April 2002. He concealed the full scope of his marijuana use from his father for a long time, even though his father believes Applicant gets mad when he commits an act of dishonesty. In January 2005, Applicant, age 19, provided material misinformation to the government, giving the impression that he never purchased marijuana, and stopped using the drug in April 2002, after his father disciplined him.

Applicant's character evidence demonstrates he achieved good grades in college. His job evidence shows that he is performing well at work. His minister has enjoyed working on religious projects with Applicant. His neighbor has found him to be a well-mannered person who deserves a security clearance. His former high school principal considers Applicant a reliable and trustworthy individual. However, the same type of trustworthiness that Applicant demonstrated to the principal must also be demonstrated to the government. Applicant's lack of candor with the government still raises residual, trustworthiness concerns that have not been mitigated. Applicant has failed to meet his ultimate burden of persuasion under the DI guideline. Subparagraphs 1.a. through 1.c. of the SOR are found against Applicant.

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, Guideline H): AGAINST APPLICANT

Subparagraph 1.a.	Against Applicant
Subparagraph 1.b.	Against Applicant
Subparagraph 1.c.	Against 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.

Paul J. Mason
Administrative Judge