



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



In the matter of:)
)
) ISCR Case No. 08-00956
)
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: *Pro Se*

October 21, 2008

Decision

RIVERA, Juan J., Administrative Judge:

Applicant failed to mitigate Guideline H (Drug Involvement) security concerns. Clearance is denied.

Statement of the Case

On May 10, 2007, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP).¹ On June 5, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, 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 Item 4.

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). 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.

On June 11, 2008, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing (Item 3). A complete copy of the file of relevant material (FORM), dated July 29, 2008, was provided to him, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant answered the FORM on August 27, 2008. His answer included a Statement of Intent, dated August 29, 2008, in which Applicant promised to abstain from all use of marijuana or any other illegal drugs. The case was assigned to me on September 29, 2008.

Findings of Fact

Applicant admitted the two 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 24-year-old computer engineer.³ He attended college from September 2002 to March 2007, and earned a Bachelor's degree in computer engineering. He has been a part-time graduate student in electrical engineering since the fall of 2007. From 2001 to early 2007, Applicant worked part-time as a web developer and programmer. In April 2007, he was hired by his current employer, a defense contractor. He has never been married and has no children. He did not serve in the military. While in college during 2003–2004, Applicant was convicted twice at a municipal court for underage consumption of alcohol. He was fined and required to perform community service both times.

Applicant started using marijuana in August 2004. He used marijuana intermittently until March 2007 (Item 4, section 24). During this period, he used marijuana approximately 30 times in a variety of environments such as in party-like situations and when alone to enhance his senses while listening to music. He purchased marijuana from close friends twice, but claimed he has never sold it. He paid \$45 for one quarter ounce of marijuana on both occasions (Item 6).

Applicant stated he has never used any other illegal drugs. He has never received any treatment of counseling as a result of his marijuana use (Item 6). His

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. The revised Adjudicative Guidelines are applicable to Applicant's case.

³ Items 4 and 5 are the source for the facts in this paragraph, unless stated otherwise.

parents are aware of his two convictions for underage drinking as well as his use of marijuana. Applicant acknowledged he knew the use of illegal drugs, including marijuana, is inappropriate for a responsible adult, especially for someone with access to classified information. He stopped using marijuana in March 2007, and promised never to use illegal drugs again (Items 4 and 6).

Applicant willingly used marijuana when the opportunity arose.⁴ He acknowledged that his decisions to purchase and use marijuana were both illegal and dangerous to him, and reflect poor judgment. Applicant justified his past use of marijuana on the fact that he “disagreed strongly with the prohibition of using [an] ostensibly harmless drug as marijuana.” He was “operating under the philosophy that “an unjust law is no law at all.”

Applicant acknowledged he was wrong in his justification for using marijuana and that he was simply breaking the law. He claimed he now has a different perspective and respect for the law. To show he has matured, he noted he was candid and truthful on his answers to the e-QIP. He disclosed all his past use of marijuana because of his belief in the importance of complete openness in issues pertaining to national security.

Applicant stated that since March 2007, his personal situation and attitude toward the use of drugs have changed significantly. He noted that since he stopped using marijuana he changed his lifestyle and his environment. He stopped attending college parties and meeting with people who use illegal drugs. He explained this was the result of his move to another residence (9 miles away from his previous residence) after finishing college and his increased job responsibilities. He “now believes that using marijuana would be negligent to his present responsibilities, ethically wrong due to the breaking of the law, and dangerous due to the potential consequences (e.g. legal repercussions).” He loves the United States dearly and averred that under no circumstance would he betray his country.

Applicant stated that after he began his marijuana abstinence, on several occasions he has been in an environment in which marijuana was used. He believes that in the future he could find himself in a similar environment when he is around his long-time grade school and college friends. In Applicant’s own words:

All the people with whom I used to use marijuana and who still use it themselves, are very close friends who I have known either since grade school or for many years since I first came to [city] to attend college. To me their marijuana use, though I no longer agree with it, is their choice and does not affect on who they are. That being the case, disassociation has not been demonstrated because I am unwilling to end these highly valued friendships for the sole purpose of avoiding potentially negative consequences to my career. Furthermore, for the aforementioned

⁴ Applicant’s response to the FORM is the source for the facts in the following paragraphs unless otherwise stated.

reasons, avoidance of these environments and people is unnecessary and would not affect my continued abstinence.

Applicant's response to the Form, at 5 and 6.

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,"⁵ 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."

⁵ 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).

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).⁶

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

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the relevant security concern is under Guideline H (Drug Involvement). AG ¶ 24 articulates the government’s security 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, and regulations.

Applicant’s frequent use and purchase of marijuana from August 2004 to March 2007, raised security concerns under AG ¶ 25(a): “any drug abuse,” and AG ¶ 25(c): “illegal drug possession, including . . . purchase,” apply.

I specifically considered all Guideline H Mitigating Conditions (MC) and conclude that none fully apply.⁷ Considering the record evidence as a whole, I find Applicant’s

⁶ “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).

⁷ AG ¶ 26. Conditions that could mitigate security concerns include: (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; (4) a signed statement of intent with automatic revocation of clearance for any violation; (c)

marijuana use frequent and relatively recent. I also find Applicant failed to establish that his questionable behavior is not likely to recur. AG ¶ 26(a) does not apply.

Applicant has not used marijuana since March 2007 and promised several times never to use illegal drugs ever again. He even signed a statement agreeing to an automatic revocation of his security clearance for any further illegal use of drugs. Notwithstanding, I find Applicant's promises are not persuasive for several reasons. Applicant continues to associate with friends who he knows are long-time marijuana users, and he is not avoiding environments where marijuana is likely to be used.

Although he professed to have rejected marijuana, Applicant has not fully accepted the validity of the government's rationale for prohibiting its use. He considers his friends' use of marijuana as "their choice." He is unwilling to end his "highly valued friendships" with known illegal drug users for the sole purpose of avoiding potentially negative consequences to his career. AG ¶ 26(b) does not apply. He presented no evidence of drug abuse counseling or attendance in a rehabilitation program. AG ¶ 26(d) does not apply.

Applicant received favorable mitigating credit for not using marijuana since March 2007 and for signing a statement of intent never to use illegal drugs again. Considering the record evidence as a whole, however, I conclude Applicant's behavior shows questionable judgment and leaves doubt about Applicant's ability or willingness to comply with laws, rules, and regulations.

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.

abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; (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.

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 good employment for a government contractor weighs in his favor. He promised to abstain from any illegal drug use and has initiated some changes in his lifestyle. These factors show some responsibility, rehabilitation, and mitigation.

The evidence against mitigating Applicant's conduct is more substantial. He has a significant history of frequent illegal drug abuse. Applicant was well aware of the illegality of using marijuana and the adverse legal consequences for his actions. Although he stopped using marijuana in 2007, he continued his association with known illegal drug users and frequented environments where the use of illegal drugs was likely. He is unwilling to fully disassociate himself from friends who are illegal drug users. His behavior weighs against finding that he will not use marijuana in the future, that he is rehabilitated, and that he has good judgment. In sum, his favorable evidence is not adequate to fully resolve the security concerns. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has not fully mitigated the security concerns pertaining to drug involvement.

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.b:	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