



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



In the matter of:)	
)	
)	ISCR Case No. 08-05669
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Emilio Jaksetic, Esquire, Department Counsel
For Applicant: Pro Se

February 13, 2009

Decision

HOGAN, Erin C., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP), on January 18, 2008. On October 24, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline G, Alcohol Consumption, Guideline H, Drug Involvement, and Guideline J, Criminal 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 November 4, 2008, Applicant answered the SOR and requested a determination be made in his case without a hearing. On December 29, 2008, Department Counsel prepared a File Of Relevant Material (FORM). The FORM was mailed to Applicant on that same date. Applicant received the FORM on January 5, 2009. He had thirty days from the receipt of the FORM to submit additional matters. He timely submitted additional matters. On January 15, 2009, Department Counsel

indicated that they had no objection to the additional matters. The case was assigned to me on January 21, 2009. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

Findings of Fact

In his Answer to the SOR, Applicant admits to all of the allegations.

Applicant is a 22-year-old employee with a Department of Defense contractor seeking to update his security clearance. He is a systems administrator and has worked for his current employer since October 2007. He has a high school diploma and an associate of applied science degree. This is his first time applying for a security clearance. He is single and has no children. (Item 3)

Applicant started drinking alcohol when he was 16-years-old. The extent of Applicant's alcohol use was a few beers or a mixed drink. He drank alcohol at parties which occurred approximately every two weeks. He rarely drinks to intoxication. He still drinks alcohol occasionally at certain social events. (Item 4 at 8)

On September 10, 2005, Applicant was arrested and charged with Driving While Intoxicated. He was visiting his girlfriend who was a college student. He was driving her back to her dormitory after attending a party. He had drunk a few alcoholic drinks. He drove through a Virginia State Police checkpoint. The police officer smelled alcohol on his breath. Applicant was required to take a field sobriety test which he failed. A breathalyzer test revealed a BAC of .12. He pled guilty to an amended charge of Driving After Illegally Consuming Alcohol. He was ordered to pay a fine and court costs, his license was suspended for six months, and he was ordered to attend alcohol education classes. He completed the terms of his sentence. (Item 3, question 23; Item 4 at 7; Item 5)

In October 2005, Applicant received a citation for underage possession of alcohol. He was at a party at a friend's house. The neighbors called the police due to the noise. Applicant subsequently appeared in court, and was ordered to pay a fine and court costs. (Item 3, question 23; Item 4 at 3-4)

On October 8, 2005, Applicant was caught shoplifting a \$50 pair of earrings from a department store. He was charged with petit larceny and given a citation. He pled guilty and was ordered to pay a fine, court costs, and rehabilitation classes. (Item 3, question 23; Item 4 at 5-6; Item 6)

Applicant started to use marijuana in June 2004, at age 18. From June 2004 to June 2007, he used marijuana on at least ten occasions. He used marijuana with friends and at parties. Applicant sold marijuana during the time period that he used marijuana (June 2004 to June 2007). He purchased the marijuana from mutual friends or acquaintances and resold the marijuana to other acquaintances. He would not provide the names of the people from whom he purchased or to whom he sold

marijuana. The extent of Applicant's involvement in the purchasing and selling of marijuana is unknown. He claims his marijuana use had no impact on his work, school work, or family life. He stopped using marijuana in June 2007 because he "grew up." (Item 3, question 24; Item 4 at 9)

In July 2003, Applicant used cocaine on three occasions. He used cocaine with some of his high school friends at a party. He snorted a line of cocaine on each occasion that he used cocaine. (Item 3, question 24; Item 4 at 10)

In June 2003, Applicant used psilocybin, otherwise known as hallucinogenic mushrooms, on approximately three occasions. The first time he used was with some friends while attending a rock concert. He used hallucinogenic mushrooms once when he was alone. (Item 3, question 24; Item 4 at 10-11)

Marijuana, cocaine, and psilocybin are considered illegal drugs in the United States. (Item 10; Item 11; Item 12)

Applicant does not think his illegal drug use or his alcohol use have caused him any problems. His mother is aware of the full extent of his drug and alcohol use. He does not intend to use illegal drugs again. (Item 4; Applicant's Response to FORM, undated, received by DOHA, January 15, 2009)

In his response to the FORM, Applicant states September 2005 through December 2005 was a difficult time for him. He learned to be an adult during that period. He learned that it is not worth risking his future to drink and drive or to shoplift. He no longer drinks and drives. He understands it is a responsibility to drink. The shoplifting offense was a one-time incident and he knows that he made a mistake. He knew when he used marijuana, cocaine and psilocybin that they were illegal and dangerous. He claims that his use was experimental and he did not abuse drugs. He does not intend to use illegal drugs again. He has an amazing opportunity in his current job. He understands that obtaining and maintaining a security clearance will mean more responsibility. He believes he is ready for the opportunity. While his past mistakes do not make him a perfect candidate for a security clearance, he believes he has grown from his mistakes. (Applicant's Response to FORM)

Applicant was a teller at a local bank. The senior vice president of the bank has worked with Applicant over the past three years. She describes him as "a very fine young man of the utmost honesty and compassion." She states he has contributed a lot to making the bank a success. The assistant branch manager of the bank has worked with Applicant since April 2004. She states that Applicant was promoted to information technology assistant with the company because of his superior performance. The vice president of information technology has worked with Applicant in various capacities over the past three years. Applicant has worked directly for him for the past two years. Applicant demonstrates an eagerness and ability to learn new things. He shows a maturity and focus well beyond others in his age group. He highly recommends

Applicant for any position or endeavor he may seek to pursue. (Applicant's Response to FORM, attached reference letters)

Applicant's mother manages a gas station. Applicant worked for her at the gas station from June 1997 to August 2004. She states that Applicant works well with others. He was a natural at customer service and problem solving. He has excellent character and the natural ability to learn and adapt to changing environments. (Applicant's Response to FORM, attached reference letters)

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

Guideline G, Alcohol Consumption

The security concern relating to the guideline for Alcohol Consumption is set out in AG ¶21:

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual’s reliability and trustworthiness.

The guideline notes several disqualifying conditions that could raise security concerns. I find the following Alcohol Consumption Disqualifying Conditions (AC DC) apply:

AC DC ¶22(a) (alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent) applies because Applicant was charged with alcohol-related offenses on two separate occasions. He was arrested for DWI on September 10, 2005. He was cited for underage possession of alcohol in October 2005.

The guideline also includes examples of conditions that could mitigate security concerns arising from alcohol consumption.

Alcohol Consumption Mitigating Condition (AC MC) ¶23(a) (so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment) applies. More than three years have passed since Applicant was charged with the alcohol offenses. He has completed all of his court-ordered duties. His current level of alcohol use does not raise issues pertaining to his judgment, reliability and trustworthiness. He is of legal age to drink alcohol and understands the gravity involved with drinking and driving.

Applicant’s current level of alcohol use no longer raises a security concern. Guideline G is found for Applicant.

Guideline H, Drug Involvement

The security concern relating to the guideline for Drug Involvement is set out in AG ¶24:

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.

Drugs are defined as mood and behavior altering substances, and include: (1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances. AG ¶24(a).

Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction. AG ¶24(b).

The guideline notes several disqualifying conditions that could raise security concerns. I find Drug Involvement Disqualifying Condition (DI DC) ¶25(a) (any drug abuse) and DI DC ¶25(c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia) apply to Applicant's case. Applicant admits to illegally using marijuana on at least ten occasions between June 2004 and June 2007. He illegally used cocaine and psilocybin on several occasions in the summer of 2003. He admits to purchasing and selling marijuana to other individuals over a three year period.

Since Applicant admitted the SOR allegations and the government produced substantial evidence by way of exhibits to raise disqualifying conditions, 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 (DOHA Appeal Board Decision, September 22, 2005))

The guideline also includes examples of conditions that could mitigate security concerns arising from drug involvement. The following have the potential to apply to Applicant's case:

Drug Involvement Mitigating Condition (DI MC) ¶26(a) (the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment)

DI MC ¶26(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.)

While Applicant states that he has matured and no longer uses illegal drugs, his last use occurred less than two years ago, just six months prior to the submission of his application for a security clearance. Applicant's illegal drug use occurred over a period of several years. He used three different illegal drugs (i.e. marijuana, cocaine, and psilocybin) on numerous occasions. His drug use cannot be considered experimental. While it has been several years since he last used cocaine and psilocybin, he last used marijuana in June 2007. His marijuana involvement is further aggravated by the fact he purchased and sold marijuana to other individuals. The record is unclear as to the extent that Applicant purchased and sold marijuana. The record is unclear as to whether Applicant still socializes with the acquaintances with whom he purchased, sold and used illegal drugs.

None of the mitigating conditions under drug involvement apply. Applicant has the burden to mitigate the concerns raised under drug involvement. He has not met his burden to mitigate the security concerns raised under drug involvement because Applicant's use of illegal drugs occurred on numerous occasions over a five year period. He not only used illegal drugs but also purchased and sold marijuana. Considering the extent of his illegal drug use and that his last use of illegal drugs occurred less than two years ago, there is insufficient evidence in the record to mitigate the concerns raised under drug involvement. Guideline H is found against Applicant.

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 three arrests in 2005 for Driving While Intoxicated, Underage Possession of Alcohol, and Petit Larceny.

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)

CC MC ¶32(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)

While Applicant has not been arrested since 2005 and has completed the terms of his court-ordered sentences, his criminal behavior continued until June 2007. By his own admission, Applicant purchased, used and sold marijuana up until that time. The purchase, sale and use of marijuana is illegal. The criminal conduct is not diminished because Applicant was never arrested. While Department Counsel did not cross allege this conduct under criminal conduct, it is conduct that can be evaluated when considering mitigation of the criminal conduct concern.

More than three years have passed since Applicant's last criminal charge occurred. However, Applicant stopped using, purchasing and selling illegal drugs less than two years ago. Not enough information was provided about the extent of Applicant's involvement with the illegal purchase and sale of marijuana to conclude this is no longer an issue. While several of these offenses were minor, Applicant committed numerous criminal offenses over a five-year period. There is not enough information in the record to conclude Applicant mitigated the criminal conduct concern.

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. Applicant did not provide information

pertaining to his work performance in his current job, but I considered the favorable statements from his co-workers at his former places of employment. Applicant's recent alcohol use no longer raises a concern under alcohol involvement. The alcohol consumption concerns are mitigated. However, Applicant did not mitigate the security concerns raised under 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 G:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant
Subparagraph 2.d:	Against Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	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.

ERIN C. HOGAN
Administrative Judge