



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



In the matter of:)	
)	
)	ISCR Case No. 08-08850
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel Crowley, Esq., Department Counsel
For Applicant: *Pro se*

May 12, 2010

Decision

HEINY, Claude R., Administrative Judge:

In November 2005, Applicant sold illegal drugs and four months later illegally sold two pounds of marijuana. He was sentenced to five years imprisonment. In July 2007, he left prison, having served 16 months. He remains on probation until 2011. His last use of marijuana was a month before the hearing. Applicant has failed to rebut or mitigate the Government’s security concerns under drug involvement, personal conduct, and criminal 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*

Statement of Reasons (SOR) on June 30, 2009, detailing security concerns under illegal drugs, personal conduct, and criminal conduct.

On August 19, 2009, Applicant answered the SOR, and requested a hearing. On December 22, 2009, I was assigned the case. On January 4, 2010, DOHA issued a Notice of Hearing scheduling the hearing, which was held on January 25, 2010.

At the hearing, the Government offered Exhibits (Ex.) 1 through 4, which were admitted into evidence. Applicant testified on his own behalf. The record was held open to allow additional information from Applicant. On February 26, 2010, additional material was submitted. Department Counsel had no objection to the material, which was admitted into the record as Ex. A. On February 2, 2010, the transcript (Tr.) was received.

Findings of Fact

In Applicant's Answer to the SOR, he admits the allegations in the SOR. He admitted the factual allegations, in ¶¶ 2.a and 2.b., but that his actions were unintentional. Applicant's admissions to the SOR allegations are incorporated herein. After a thorough review of the record, pleadings, exhibits, and testimony, I make the following additional findings of fact:

Applicant is a 24-year-old mail clerk who has worked for a defense contractor since October 2007, and is seeking to obtain a security clearance. Co-workers who know him state Applicant is kind hearted, trustworthy, diligent, loyal to his family and friends, has a strong work ethic, and is a team leader who displays integrity, responsibility, and ambition in his job. (Ex. A) During the summer, Applicant had a second job doing landscaping. (Tr. 30) In 2003, Applicant graduated from high school. (Tr. 36) He has taken some college classes. (Tr. 36)

In November and December 2005, Applicant used marijuana four times. On November 22, 2005, Applicant, then age 19, sold \$20 worth of crack cocaine to an undercover police officer. (Ex. 3, page 5 of 27) When arrested, Applicant had in his pocket the money the undercover officer had paid him and less than one gram of cocaine. Applicant was with another individual who Applicant stated he did not know until Applicant "started dealing." (Tr. 54) Applicant was arrested and charged with drug-manufacture/deliver controlled substance. In January 2006, he received deferred adjudication, was fined \$200, and was placed on two years probation. Applicant had to attend a six-week drug abuse class. He also had to wear an ankle bracelet. In November 2005, Applicant tested positive in a drug test. (Ex. 2) In March 2006, his deferred adjudication was revoked and he was sentenced to six months in jail.

In March 2006, the police arranged to buy two pounds of marijuana from Applicant for \$650. (Ex. 3, page 14 of 27) On March 7, 2006, Applicant sold the

Review Program (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG).

marijuana to an undercover police officer. Following a vehicle chase, Applicant was arrested. In the car was 17 grams of crack cocaine, 229 grams of marijuana, and 38 ecstasy tablets. (Ex. 3, page 15 of 27) At Applicant's residence, the police found, 55 grams of marijuana in the refrigerator, 4 grams in the sofa, and 7 grams in a basket. Also discovered were \$1,000 in cash in a shoe box, \$500 in a liquor box, and \$800 in other locations in Applicant's apartment. (Ex. 3, page 16 of 27)

Applicant was arrested and charged with the sale and delivery of marijuana. He was also charge with intent to deliver a controlled substance. He was convicted of both felonies after pleading guilty and was sentenced to five years confinement. In July 2007, Applicant left prison having served 16 months. (Ex. 4, Tr. 42) While incarcerated, he attended 18 drug-treatment counselings. (Ex. 2) He was placed on parole until 2011.

Applicant's explanation of the March 2006 arrest follows. An individual unknown to him asked him if he knew anyone who sold marijuana. The individual, an undercover police officer, stated he was looking to buy three pounds of marijuana. Applicant needed money for his upcoming trial expenses related to his November 2005 arrest. (Tr. 55) Applicant exchanged telephone numbers with the individual and went to an acquaintance Applicant knew sold marijuana. The acquaintance put marijuana in a backpack and both drove to meet the individual wanting to buy the marijuana. Applicant states he was unaware the backpack contained anything but marijuana. The bag also had cocaine in it.

On April 17, 2008, Applicant completed an Electronic Questionnaires for Investigations Processing (e-QIP). In section 23, he was asked about his police record. He was specifically asked if he had ever been charged with or convicted of any offense related to alcohol or drugs. He answered "yes," and listed his March 2006 arrest, conviction, and incarceration, but failed to list his November 2005 arrest. (Ex. 1) He had been told his sentences would run concurrently and the two actions were being treated as one case so he simply listed the most recent conviction. (Tr. 47)

In section 24, he was asked about his illegal drug use and activity. He was specifically asked if, during the previous seven years, he had ever been involved in the illegal purchase, manufacture, trafficking, production, transfer, shipping, receiving, or sale of any narcotic, depressant, stimulant, hallucinogen, or cannabis for his own intended profit or that of another. Applicant asserts he misunderstood the question. (Tr. 48) He answered "no" to the question, but indicated he had used marijuana four times in 2005. (Ex. 1)

In November 2009, Applicant again used marijuana. (Tr. 46, 68) As a condition of parole, Applicant is subject to periodic drug tests. In December 2009, about a month before the hearing, Applicant tested positive for illegal drugs. He used marijuana to see if he wanted to continue using drugs. He has decided not to continue using illegal drugs. Applicant asserts he made mistakes because he was young and has changed his lifestyle. He also asserts the criminal conduct occurred during a six to eight-month period in his life, which has not recurred. (Ex. 27) Applicant no longer associates with

those individual he saw before his incarceration. He now stays with a friend in a quiet area of town. (Tr. 35) He is currently attending church. (Tr. 52) He plans to attend college classes in the fall of 2010. (Tr. 43) He hopes to open his own business. (Tr. 44)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered 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 overarching adjudicative goal is a fair, impartial, and commonsense 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 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 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

Revised adjudicative guideline (AG) ¶ 24 articulates the security concerns relating 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. Those that are potentially applicable are:

- (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;

In 2005, Applicant used marijuana and started dealing in illegal drugs. In November 2005, he was arrested for selling cocaine to an undercover police officer. In March 2006, he was arrested for selling two pounds of marijuana to a police officer. At the time of the arrest, the police discovered 17 grams of crack cocaine, 229 grams of marijuana, and 38 ecstasy tablets. At Applicant's residence, the police found, additional marijuana located in the refrigerator, the sofa, and various other places in Applicant's apartment plus \$2,300 in cash. Applicant was sentenced to five years imprisonment, served 16 months, and left prison in July 2007. In December 2009, in a periodic drug test required as a condition of his parole, Applicant tested positive for marijuana. AG ¶¶ 25 (a), 25(b), and 25 (c) 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.

None of the mitigating factors apply. AG ¶ 26(a) Applicant's use of marijuana was recent, having occurred one month before the hearing. His marijuana use did not occur under unusual circumstances and his use casts doubt on his reliability, trustworthiness, and good judgment. Applicant no longer sees the individuals with whom he was arrested and now lives in a different area. However, in viewing these factors the period of abstinence can not be ignored.

Applicant's last marijuana use was one month before his hearing. There are no "bright line" rules for determining when conduct is "recent." The determination must be based "on a careful evaluation of the totality of the record within the parameters set by the directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation."² One month is not a significant period of abstinence.

AG ¶ 26(c) does not apply because prescription drugs were not abused. Even though Applicant has received counseling related to drug usage, AG ¶ 26(d) does not apply because he has used marijuana since his treatment. Finally, there is no favorable prognosis by a duly qualified medical professional.

Personal Conduct

Revised adjudicative guideline (AG) ¶ 15 articulates the security concerns relating to personal conduct:

² ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

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.

In April 2008, Applicant completed his e-QIP. He did not list his November 2005- drug arrest because it and his March 2006 drug arrest were handled as a single matter. He listed the more recent of the arrests. I find for him as to SOR ¶ 2.a. However, this only explanation for failing to lists his arrest in response to section 24 of the e-QIP was he misunderstood the question. I find against Applicant as to SOR ¶ 2.b. None of the following mitigating factors apply.

AG ¶ 17 provides conditions that could mitigate security concerns:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) 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;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant did not make a prompt, good-faith effort to correct the omission (AG ¶ 17(a)) nor did he receive bad advice from a reliable source (AG ¶ 17(b)). AG ¶ 17(c) – 17 (g) do not apply on their face.

Criminal Conduct

Under the Criminal Conduct Guideline, the security eligibility of an applicant is placed into question when an applicant is shown to have a history or pattern of criminal activity which creates doubt about his 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 ¶ 31 describes conditions that could raise a security concern and may be disqualifying. Those conditions that are potentially applicable are:

- (a) a single serious crime or multiple lesser offenses;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;
- (d) individual is currently on parole or probation;
- (f) conviction in a Federal or State court, including a court-martial of a crime, sentenced to imprisonment for a term exceeding one year and incarcerated as a result of that sentence for not less than a year. Unless the person receives a waiver, a person who has been convicted in a Federal or State court, including courts martial, sentenced to imprisonment for a term exceeding one year and incarcerated for not less than one year, may not be granted or have renewed access to classified information.

Applicant was convicted of felony drug offenses and sentenced to five years incarcerations. He served 16 months. He is on probation until 2011. AG ¶¶ 31 (a), 31(c), 31(d) and 31(f) apply.

AG ¶ 32 provides conditions that could mitigate security concerns:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) evidence that the person did not commit the offense;

(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; and,

(e) potentially disqualifying conditions (b) and (f) above, may not be mitigated unless, where meritorious circumstances exist, the Secretaries of the Military Departments or designee; or the Directors of Washington Headquarters Services (WHS), Defense Intelligence Agency (DIA), National Security Agency (NSA), Defense Office of Hearings and Appeals (DOHA) or designee, has granted a waiver.

Applicant most recent arrest was approximately three years ago. He left prison in July 2007. AG ¶ 32(a) does not apply because the conduct did not occur under such unusual circumstances that it is unlikely to recur or does not cast doubt on Applicant's reliability, trustworthiness, and good judgment. Insufficient time has passed since his last use of marijuana.

AG ¶ 32(b) does not apply because Applicant was not pressured or coerced into committing the act. Applicant was out of work and turned to drug dealing to make money. Many unemployed people do not become drug dealers. AG ¶ 32(b) does not apply because Applicant committed the offenses.

There is some evidence of rehabilitation. He no longer associates with those with whom he was arrested. He has a steady, full-time job and works a second, part-time job. His work performance appears to be outstanding. He is attending church. All these factors are evidence of rehabilitation. But AG ¶ 32(d) also considers the passage of time without recurrence of criminal activity. However, Applicant's most recent illegal use of marijuana was one month prior to his hearing.

Further, Applicant was sentenced to five years imprisonment and served 16 months. When an applicant has been convicted and sentenced to imprisonment for a term exceeding one year and incarcerated as a result of that sentence for not less than a year the disqualifying condition can not be mitigated unless Applicant is granted a waiver. The evidence is insufficient to warrant a waiver.

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.

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. During a six to eight month period in 2005 and 2006, Applicant was a drug dealer. In November 2005, Applicant sold illegal drugs and four months later sold two pounds of marijuana. The amount of money seized at the time of the March 2006 arrest suggests that the selling of drugs was a lucrative activity for Applicant. In July 2007, he left prison and in October 2007, obtained his current job. He is making changes for the better in his life. However, his last use of marijuana was a month before the hearing. It is too soon to say illegal drugs are no longer a part of his life. He remains on probation until 2011. He was not completely honest when he completed his April 2008 e-QIP.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his drug involvement, personal conduct, 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, Illegal Drug Usage: AGAINST APPLICANT

Subparagraph 1.a – 1.c: Against Applicant

Paragraph 2, Personal Conduct: AGAINST APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: Against Applicant

Paragraph 3, Criminal Conduct: AGAINST APPLICANT

Subparagraph 3.a: 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