



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



In the matter of:)	
)	
-----)	ISCR Case No. 09-00629
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff Nagel, Department Counsel
For Applicant: *Pro Se*

January 27, 2010

Decision

WESLEY, Roger C., Administrative Judge:

Statement of Case

On July 7, 2009, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on August 5, 2009, and requested a hearing. The case was assigned to me on September 1, 2009, and was scheduled for hearing on October 6, 2009. A hearing was held on the scheduled date for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, or deny Applicant's application for a security clearance. At hearing, the Government's case consisted of three exhibits. Applicant, in turn, relied on one witness (himself) and no exhibits. The transcript (Tr.) was received on November 9, 2009.

Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural Issues and Rulings

Prior to the close of the hearing, Applicant requested leave to supplement the record with documented court records pertaining to the status of his drug possession case, which is pending final disposition. For good cause shown, Applicant was granted seven days to October 14, 2009, to provide supplemental documentation. Applicant did not elect to supplement the record.

Summary of Pleadings

Under Guideline H, Applicant is alleged to have (a) been arrested in March 2008 for possession of a controlled substance (psilocybin), a felony, and possession of marijuana by driver; to which he pleaded guilty and received a deferred entry of judgment for count I (with count II dismissed) and was placed on three years probation and ordered to complete drug counseling, attend four 12-step meetings weekly, and pay a fine; (b) used psilocybin on at least one occasion in approximately May 2005; (c) purchased psilocybin on at least one occasion in approximately 2005; and (d) used marijuana at least three times from January 2004 to about August 2005. The same allegations were incorporated under Guideline J.

Under Guideline E, Applicant is alleged to (a) to have falsified material facts in his interrogatory answers, signed and notarized in April 2009, by answering no to a question inquiring about any prior purchases of illegal drugs and (b) be indebted to a local municipality for \$2,200 in accumulated parking tickets.

In his answer to the SOR, Applicant admitted to his drug-related allegations and his accumulated parking tickets, but denied any intention to falsify his interrogatory answers. In explanation, he claimed he did not fully understand the question and interpreted it to be questioning him about any drug sale or distribution.

Findings of Fact

Applicant is a 25-year-old engineer for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are incorporated herein and adopted as relevant and material findings. Additional findings follow.

Between 2004 and 2005 (while in college), Applicant used marijuana on three separate occasions after he had consumed excessive amounts of alcohol. He did not feel any affects from the marijuana he used (Tr. 53). He was valedictorian of his high school class and matriculated to a respected university after high school (see ex. 1). He was awarded a bachelors of science degree in engineering in 2007 (ex. 1; Tr. 43). Besides his use of marijuana in college, Applicant tried psilocybin mushrooms on one

occasion (see ex. 2; Tr.48).¹ He purchased the mushrooms from a woman he met in college. They made the exchange in a local park and used the mushrooms together in the park (Tr. 45-46). Applicant was aware at the time that the drugs he purchased and used were illegal (Tr. 47-48).

In March 2008, Applicant was arrested for (1) possession of psilocybin mushrooms and (2) possession of marijuana by driver. He pleaded guilty to the psilocybin possession charge in April 2008 and received a deferred entry of judgment on the charge, subject to his being placed on three years probation and ordered to complete drug counseling, attend four 12-step meetings, and pay a fine. The court dismissed the count I charge (see ex. 2).

Whether Applicant has completed the terms of his probation is unclear. Afforded an opportunity to supplement the record with updated probation documentation, he failed to do so. He assured he enrolled in an educational counseling program (including drug urinalyses) and a narcotics anonymous (NA) program. His documented treatment status report credits him with successfully completing the program's requirements in August 2008 (see ex. 2; Tr. 26-27). His completed requirements included 24 education classes and six outside NA meetings (ex. 2). Twice, he was tested for drugs while in the program, and the results were negative on each test (ex. 2). He indicated no awareness of awarded chips commemorating periods of assured abstinence, though, and provided no documentation of any awarded chips from his NA attendance (Tr. 34).

Since completing his required drug counseling program, Applicant has continued to attend 12-step classes weekly: two with his NA chapter and two with his alcoholics anonymous (AA) chapter (see ex. 2; Tr. 26-29). He does not have a sponsor, but he assures he will continue to attend these meetings in the future (Tr.). He insists he last used illegal drugs in August 2005 and expresses remorse for his past drug activity (Tr. 32-33). And he assures he has no intention of using illegal drugs in the future (see ex. 2; Tr. 68-69). Applicant's assurances are credible, and are accepted. Still, his court records indicate he was placed on three years of court-supervised probation, which still has over a year to run (see ex. 2). Afforded additional time to provide clarifying documentation about his probation status, Applicant failed to take advantage of the opportunity.

After using psilocybin mushrooms for the last time (May 2005), Applicant continued to carry a package of the drugs in his backpack for two additional years (Tr. 48-49). Applicant could not provide any clear reasons why he carried these drugs in his backpack for such an extended period of time (Tr. 49).

¹

Mushrooms are the street name for psilocybin or psilocin, which is a Schedule (Sch.) 1 Controlled Substance under the Controlled Substances Act contained in 21 U.S.C. § 812(c). See *United States v. Hussein*, 351 F.3d 9, 16 (1st Cir. 2003) (mushrooms are a plant which may contain the Schedule 1(c)(15) and 1(c)16 controlled substance psilocybin or psilocyn).

Asked to respond to written interrogatories from DOHA, Applicant answered “no” to questions inquiring about his purchase of psilocybin mushrooms in April 2009 (ex. 2). He attributes his omission to a mistaken understanding about the meaning of the term “purchase” (Tr. 57, 63-68). Since he only intended to share the mushrooms with his girlfriend, he did not think the question applied to him (Tr. 64).

After admitting to his accumulated parking violations, Applicant has recently inquired of the court about them (Tr. 54-56). He must resolve them before he can register his vehicle, and he assures he will pay his outstanding tickets (Tr. 68). He provides no time lines for resolving his parking tickets, though, and no documentation of any efforts to date in addressing them.

Applicant has not provided any documentation from the court regarding his March 2008 deferred adjudication status. He continues to be on probation, absent court-approved relaxation of probation terms. Nor has Applicant provided any documented chips commemorating any sustained periods of abstinence. Whether he is entitled to any sobriety chips from NA or AA is unclear at this time.

Applicant did not provide any character references or evidence of performance evaluations from his employer. At this point, it is not clear how Applicant is regarded by his supervisors and coworkers and members of his community.

Policies

The revised Adjudicative Guidelines (AGs) list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include “[c]onditions that could raise a security concern and may be disqualifying” (disqualifying conditions), if any, and many of the “[c]onditions that could mitigate security concerns.” These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c).

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the revised AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Drug Involvement

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, and regulations. AG ¶ 24.

Criminal Conduct

The Concern: 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. AG ¶ 30.

Personal Conduct

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, 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. AG ¶ 15.

Burden of Proof

By virtue of the precepts framed by the revised Adjudicative Guidelines, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons; and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation of the Government's case. Because Executive Order 10865 requires that all security clearances be clearly consistent with the national interest, "security-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Over a two-year period (between 2004 and 2005), Applicant used marijuana and psilocybin mushrooms intermittently (at least on three occasions) in social situations with friends and made at least one purchase of psilocybin in 2005 for sharing with his friends. More recently (in March 2008), he was arrested for possession of psilocybin, and he subsequently pleaded guilty to the charge. The presiding court accepted his guilty plea and entered an order of deferred judgment, conditioned on Applicant's satisfying court-imposed conditions (completion of drug counseling, attendance of four 12-step meetings, and payment of a fine) during a three-year period of probation. Whether Applicant has been credited by the court with satisfying all of its imposed conditions is unclear.

Based on the developed record to date, Applicant remains on probation, and security concerns over his past drug involvement persist under both Guidelines H and J. Security concerns are also raised initially under Guideline E over his omitting his psilocybin purchase from his responses to DOHA interrogatories and his prior accumulation of unpaid parking tickets.

Drug Involvement and criminal conduct concerns

Applicant's past involvement with illegal drugs raises initial security concerns over risks of recurrence, as well as judgment issues. On the strength of the evidence presented, several disqualifying conditions of the Adjudicative Guidelines for drug abuse are applicable: DC ¶ 25(a), "any drug abuse," and DC ¶ 25(c), "illegal possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia."

Judgment concerns exist over Applicant's past use of illegal drugs, his drug-related possession arrest and ensuing guilty plea and his still uncertain satisfaction of court-imposed probation conditions. Applicant's actions are expressly covered by Guidelines H and J. Besides the disqualifying conditions covered by the drug involvement guideline, Applicant's drug activities are covered by the criminal conduct guideline as well. DC ¶ 31(a), "a single serious crime or multiple lesser offense," and DC ¶ 31(c), "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted," apply to Applicant's situation.

While Applicant has made some noticeable gains in avoiding illegal drugs this past year, his efforts are for the most part lacking in specificity and documentation. Whether he has complied with all of the court's probation conditions is unclear, and he remains on probation for the foreseeable future. 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," is disjunctive and can be partially applied to Applicant's situation. Applicant's stated intent not to abuse drugs in the future has some application as well. Available considerations under ¶ 26(b) include "(3) an appropriate period of abstinence," and "(4) a signed statement of intent with automatic revocation of clearance for any violation."

Because of Applicant's lack of any endorsements from colleagues and friends familiar with his current lifestyle, current probation situation, and absence of any documented assurances he no longer is involved with illegal drugs, mitigation is difficult to establish. MC ¶ 26(b)(1), "disassociation from drug-using associates and contacts," and MC ¶ 26(b)(2), "changing or avoiding the environment where drugs were used," have only limited application without supporting documentation. In fairness to Applicant, he exhibited candor at his hearing about his past drug use and purchase and his associations with persons who have used the substance.

At the closing of the record, Applicant continues to be on probation from his 2008 plea arrangement and has provided no documentation of his completion of any drug education or treatment program. Too much is unknown about Applicant's abstention efforts to warrant safe predictions he will not resume his involvement with illegal substances in the foreseeable future. So, while Applicant's assurances that he has no intention of ever resuming his use of marijuana, or any illegal substance, in the future, are entitled to some weight, they cannot be totally separated from the recurrence risks that face Applicant for so long as he continues to be on probation without any documented dismissal of the deferred charges or evidence of his continuing participation in his NA/AA meetings.

From a whole person perspective, Applicant has established some probative evidence of his overall honesty, trustworthiness, and understanding of DoD policy constraints on the use of illegal substances. Still of some concern, though, are Applicant's recent drug possession plea and his current probation status. Without any endorsements from persons familiar with his work and community activities, or continued participation in NA/AA meetings, he is not able to surmount justified concerns associated with his past drug activities. In Applicant's case, more documentation of his abstention efforts is required before he can be credited with mitigating security risks associated with his past drug and criminal involvement.

Considering the record as a whole, at this time there is too little seasoning of Applicant's mitigation efforts to avert foreseeable risks of recurrent illegal drug use. Taking into account all of the facts and circumstances surrounding Applicant's drug use and associated judgment lapses, Applicant fails to mitigate security concerns related to

his drug use and associated criminal conduct. Unfavorable conclusions warrant with respect to the allegations covered by Guidelines H and J.

Personal Conduct concerns

Trust concerns over Applicant's judgment, reliability and trustworthiness are raised under Guideline E as the result of his answering in the negative to an interrogatory question inquiring about his past drug purchases. Applicant attributed his negative answer to his misunderstanding of the meaning of the term "purchase." By claiming he never purchased illegal drugs, he meant only that he had never bought drugs for profit or distributed drugs. He did not consider his sharing the expense of psilocybin with his girlfriend to be a purchase. Applicant's explanation, considering the circumstances surrounding the furnished information at the time, is a plausible interpretation and credible enough to avert inferences of falsification.

However, Applicant's failure to address \$2,200 worth of accumulated parking tickets raises security concerns about his judgment, reliability, and trustworthiness that cannot be mitigated without some documented showing on his part that he has addressed his parking tickets. Applicant has not provided any evidentiary proof in the hearing or after the hearing that he has paid the tickets or otherwise resolved any of them with the courts or parking enforcement officials.

Appraised by themselves, Applicant's accumulation of unpaid parking tickets is not sufficiently security-significant to warrant the denial of a security clearance. When considered contextually with his use of illegal drugs, his unpaid tickets become more security-significant. Considered together, they reflect a continuing pattern of disregard of published rules and policies that bear on his demonstrated willingness to adhere to rules and guidelines designed to protect classified information.

So, under Guideline E, core judgment and trustworthiness concerns covered by D.C. ¶ 16(d), "credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information," have some applicability to this case. These concerns cannot be isolated from his past use of illegal drugs.

For his candid acknowledgment of his parking tickets and expressed commitment to address them, Applicant is entitled to take some advantage of MC ¶ 17(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," of the mitigating conditions in the personal conduct guideline. Without some evidence of addressing his tickets, though, he may not take full advantage of this mitigating condition.

Whole-person assessment does not enable Applicant to surmount related concerns about his judgment and trustworthiness attributable to his past failures to address the large number of parking tickets he accumulated. While he established some probative evidence of his overall judgment and trustworthiness, his education and professional achievements are not enough to overcome concerns raised by his parking ticket accumulations when considered, not independently, but in concert with his prior abuse of illegal drugs.

To be sure, Applicant's reasons for not addressing his parking tickets sooner with his available resources are not fully apparent. And because motivation is never easy to objectively establish, the placement of reasonable time lines on clearance applicants to test and absolve them of recurrence risks makes safe and practical sense when balancing the interests of protecting national security with the interests of those who seek access to the nation's secrets. This balance has been carefully weighed and must be resolved against Applicant on the strength of the evidence developed in this record.

Taking into account all of the facts and circumstances surrounding Applicant's accumulation of unpaid parking tickets, Applicant fails to mitigate Guideline E security concerns related to his demonstrated judgment lapses associated with his failure to address these tickets. Favorable conclusions warrant with respect to his drug purchase omission in his interrogatory response.

In reaching my decision, I have considered the evidence as a whole, including each of the E2(a) factors enumerated in the Adjudicative Guidelines of the Directive.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE H: (DRUG INVOLVEMENT): AGAINST APPLICANT

 Subparas. 1.a through 1.d: Against Applicant

GUIDELINE J: (CRIMINAL CONDUCT): AGAINST APPLICANT

 Subpara. 2.a: AGAINST APPLICANT

GUIDELINE E: (PERSONAL CONDUCT): AGAINST APPLICANT

 Subpara. 3.a: For Applicant

 Subpara. 3 .b: Against Applicant

Conclusions

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 Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge

