



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



In the matter of:)	
)	
)	ISCR Case No. 09-01463
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Julie R. Mendez, Esquire, Department Counsel
For Applicant: *Pro se*

March 31, 2010

Decision

HENRY, Mary E., Administrative Judge:

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

Applicant executed and signed his Security Clearance Application (SF 86) on October 9, 2007. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines J and H on October 6, 2009. 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 adjudicative guidelines (AG) implemented on September 1, 2006.

Applicant acknowledged receipt of the SOR on October 14, 2009. He submitted a notarized, written response to the SOR allegations on November 19, 2009, and requested a decision on the written record in lieu of a hearing.

Department Counsel prepared a File of Relevant Material (FORM) and mailed Applicant a complete copy on December 15, 2009. Applicant received the FORM on December 28, 2009. He had 30 days from receipt to file objections and submit material in refutation, extenuation, or mitigation. He did not submit a response or additional evidence. DOHA assigned this case to me on March 22, 2010. The government submitted seven exhibits, which have been marked as Item 1-7 and admitted into the record. Applicant's response to the SOR has been marked and admitted as Item 3, and the SOR has been marked as Item 1.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a, 2.a, and 2.b of the SOR, with explanations. His admissions are incorporated herein as findings of fact. He also provided additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant, who is 21 years old, works as a technician on the information technology (IT) helpdesk for a Department of Defense contractor. Applicant began working for his employer in October 2007 on the helpdesk. His first supervisor described him as intelligent, hard-working, reliable, and conscientious. She opined that he was one of her valuable employees, who never lost his "cool" with customers, and could be counted on to "go above and beyond for a customer." When she accepted a manager position in another office, she requested that the office hire Applicant and it did. A coworker at Applicant's new office, describes him as a valued employee with great customer service skills. Applicant works well with his team members and his supervisor believes Applicant has good potential.¹

Applicant graduated from high school in May 2007. He is single and lives with his mother, whom he helps to support.²

Over New Year's 2008, Applicant attended a party with a friend and another casual friend. At this party, Applicant experimented with marijuana by taking two hits from a marijuana cigarette. He did not purchase the marijuana and did not know who provided the marijuana for the party. At another party in January 2008 with the same two friends, Applicant again experimented with marijuana. The marijuana made him more talkative, relaxed, and hungry, as well as dizzy and nauseous. He has not used marijuana since this time. He does not have any contact with these individuals and has not seen the casual friend since January 2008. He signed a statement of intent not to

¹Item 3, attachments.

²Item 4.

use any illegal drugs, including marijuana, and agreed to the revocation of his clearance for any violation.³

On March 14, 2008, Applicant completed his work for the day and started his drive home. His normal travel time to home took about 90 minutes. On this date, traffic congestion extended his commuting time an additional 30 to 60 minutes. Before he arrived home, Applicant stopped at a gas station. He pulled his car near the only available gasoline pump. Because the driver of the car behind him had parked his car in a manner which limited Applicant's access to the gasoline pump, Applicant signaled the driver twice to move his car back. The driver did not. When Applicant approached the driver in his car, he realized that the driver was talking on his cell phone. Applicant again asked the driver to move his car and the driver responded: "You can ask me nicely."⁴

Applicant's attitude towards the driver changed with this comment. Applicant again asked the driver to move his car since his was not purchasing gasoline and commented that the driver should watch how he was acting. Both became defensive and the incident escalated when the driver took off his seat belt. Applicant felt threatened by this behavior and returned to his car. He retrieved a small knife from his car's emergency kit and displayed it as he stood by his car, but made no oral threat to the driver. He denies an intent to use it; rather, he displayed it as a deterrent. Both he and the driver remained at their cars. He then realized he was not behaving any better than the driver and put his knife away. He completed his gasoline purchase and left.⁵

Shortly after leaving the gas station, the local police stopped Applicant. The police asked him about the incident with the driver and he provided his explanation of the events. The police arrested him and charged him with first degree assault, second degree assault, reckless endangerment because he displayed his knife in public, dangerous weapon - concealed (because he had a knife in his car), dangerous weapon with intent to injure, and possession of marijuana. The police searched his car after he gave consent and found marijuana. He denies the marijuana was his. Because he viewed the incident as an argument, he did not believe he would be arrested and was surprised when the police arrested him.⁶

The police took Applicant to the police station and detained him for several hours. He appeared before a judge, who released him without requiring that he post bail. Applicant hired an attorney to represent him. Applicant reported his arrest to his

³Item 3, with attachments; Item 6.

⁴*Id.*

⁵*Id.*

⁶*Id.*

facility security officer the same day. The facility security officer filed an incident report on March 18, 2008.⁷

In April 2008, one month after Applicant's arrest and before Applicant's trial, the prosecutor notified the court that the first degree assault charge was "*nolle prosequed*." Based on the recommendation of his attorney, Applicant voluntarily attended an anger management class and drug awareness class. At his trial in July 2008, Applicant pled guilty to reckless endangerment, a misdemeanor. The court placed the remaining four charges, second degree assault, dangerous weapon with intent to injure, dangerous weapon - conceal, and possession of marijuana, on the "STET" docket for 90 days. The court sentenced Applicant to 91 days in jail, suspending 90 days and crediting Applicant with 1 day served; fined him \$1,000 plus costs of \$57.50, then suspended \$750; directed 48 hours of community service; and placed him on 12 months probation. The trial summary indicated that Applicant would get probation before judgment (PBJ) after paying his fines and ACS (although undefined, this is probably community service). Applicant completed his community service between July 2008 and October 2008. He believes his case has been expunged, but has not provided proof nor has he provided proof that he completed his probation. Applicant states that he has learned from this incident and that his behavior on this occasion is out of character.⁸

Applicant does not have any other arrests. Applicant denies smoking marijuana while holding a security clearance. Based on the information in the record, it is unlikely that Applicant has been granted a security clearance. The record contains no evidence that Applicant has been diagnosed with a substance abuse problem related to his marijuana use.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used 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.

⁷Item 5; Item 6.

⁸Item 3; Item 5; Item 6.

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.

Under Directive ¶ E3.1.14, the government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” An applicant has the ultimate burden of persuasion for 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 an 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 J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct, “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 ¶ 31 describes conditions that could raise a security concern, and the following may be disqualifying in this case:

- (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; and

(e) violation of parole or probation, or failure to complete a court-mandated rehabilitation program.

The police arrested and charged Applicant with multiple offenses related to an argument with another individual at a gas station and with possession of marijuana after finding marijuana in his car. Applicant also admitted using marijuana in early January 2008. AG ¶¶ 31(a) and 31(c) apply. While Applicant has not provided documentation that his probation has ended, the court sentenced him to 12 months beginning in July 2008. Given the record does not contain any evidence that he violated the terms of his probation, I find that he is not currently on probation.

AG ¶ 32 provides conditions that could mitigate security concerns, and the following may apply in this case:

(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; and

(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.

The police arrested Applicant two years ago. Since then he has not been involved in any other criminal incidents. The circumstances surrounding his arrest could occur again given that the incident with the driver occurred at the end of a long work day and after being stuck in rush hour, which resulted in frayed nerves and impatience. Applicant was not pressured into his actions; rather he reacted to a perceived threat. There is some evidence of rehabilitation as he indicates that he has learned a valuable lesson from this incident. In addition, his supervisor and now manager praises his work ethic and customer service skills. AG ¶¶ 32(a) and 32(d) have partial applicability in this case.

Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining 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.

(a) 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;

(b) 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 ¶ 25 describes conditions that could raise a security concern and the following may be disqualifying in this case:

(a) any drug abuse (see above definition); and

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant smoked a marijuana cigarette on two occasions in January 2008 while attending parties with friends. Because he held the marijuana cigarette to smoke it, he possessed marijuana. The police found marijuana in his car after a search. Applicant has not been diagnosed with a substance abuse problem. AG ¶¶ 25(a) and 25(c) apply in this case.

Applicant's use of marijuana is limited. He has not smoked marijuana in two years nor has he seen one friend with whom he smoked the marijuana since January 2008, and he no longer associates with the other friend involved in his marijuana use. He signed a statement of intent not to use illegal drugs and agreed to the automatic revocation of his security clearance if he did. Through these actions, Applicant has demonstrated an intent not to use any drugs in the future. He has mitigated the security concerns about his past drug use under AG ¶ 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) and AG ¶ 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).

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 an applicant's conduct and all relevant 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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant smoked marijuana on two social occasions, but has not used marijuana since. He recognizes that drug use is inappropriate and has agreed not to use illegal drugs in the future. He does not associate with the friends with whom he smoked marijuana and does not intend to do so in the future. His agreement to the automatic revocation of his security clearance should he use illegal drugs in the future shows his understanding of the consequences of any future drug use.

After a long workday and a long-time in rush hour traffic, Applicant became involved in a incident with a man at a gas station. Applicant perceived the removal of the seatbelt by the driver as a threat and reacted to his perception by taking a small knife from his car and displaying it. He used poor judgment and showed his lack of maturity when he made this decision. He realized that he was acting improperly and put the knife away. Nonetheless the police arrested him and charged him with five criminal acts related to his conduct, which he immediately reported to his security officer. He did not resist arrest and pled guilty to the misdemeanor offense of reckless endangerment. He completed his probation and has not been involved in any other criminal activity. Pulling a knife during the course of an argument raises serious questions about

Applicant's judgment. He was only 19 years old at the time, and thus, he lacked appropriate insight into the negative consequences of his conduct. His age and immaturity contributed to this bad decision. Applicant is now two years older and seems to have learned from this incident. I did not have the opportunity to assess his sincerity and credibly at a hearing, and am unable, at this time, to conclude that he has matured enough to not react in a similar manner under similar circumstances. I believe he needs more time to show his ability to make mature and reasoned decisions, as well as demonstrate that he has learned from this incident.⁹ For these reasons, I find that Applicant has not mitigated the government's security concerns about his criminal conduct.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his past drug use, but has not mitigated the government's security concerns about his 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 J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2 Guideline H:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant

⁹Of course, my recommendation to approve Applicant's clearance in the future is not binding on the government. If Applicant's company sponsors him for a clearance one year after the date of this decision, approval of a clearance at that time will be based on all the facts and circumstances at that point in time. An administrative judge does not have authority to commit the government to approval of a clearance at some future date. See *generally* ISCR Case No. 08-07540 at 2 (App. Bd. Jan. 8, 2010); ISCR Case No. 04-03907 at 2 (App. Bd. Sep. 18, 2006) (stating, "The Board has no authority to grant [a]pplicant a conditional or probationary security clearance to allow [him or] her the opportunity to have a security clearance while [he or she] works on [his or] her financial problems." and citing ISCR Case No. 03-07418 at 3 (App. Bd. Oct. 13, 2004)).

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.

MARY E. HENRY
Administrative Judge