



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



In the matter of:)	
)	
-----)	ISCR Case No. 09-02059
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

March 17, 2010

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant completed a security clearance application (e-QIP) dated October 7, 2008. On September 28, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) enumerating security concerns arising under Guideline H (Drug Involvement) and Guideline E (Personal Conduct). 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, which are effective for SORs issued after September 1, 2006.

In a March 6, 2009, response, Applicant admitted the three allegations raised under Guideline H, but denied the two allegations set forth under Guideline E. DOHA assigned the case to me on December 1, 2009. Department Counsel and Applicant agreed to a hearing date of January 22, 2010. A notice of hearing was issued to that effect on December 16, 2009. Due to a winter storm emergency, the hearing was rescheduled for February 9, 2010. I convened the hearing as rescheduled. Applicant gave testimony and offered two documents which were accepted into the record without

objection as exhibits (Exs.) A-B. Applicant was given through February 19, 2010, to submit any additional materials. Department Counsel offered five documents, admitted as exhibits (Exs.) 1-5 without objection. The transcript (Tr.) of the proceeding was received on February 18, 2010. On February 19, 2010, Applicant submitted five additional documents through Department Counsel. Department Counsel forwarded those materials without objection on March 16, 2010, after his receipt of a sixth document which had been anticipated. Those six documents were accepted into the record as Exs. C-H and the record was closed. Based on a review of the testimony, submissions, and exhibits, I find Applicant failed to meet his burden regarding the drug involvement security concerns raised. Security clearance is denied.

Findings of Fact

Applicant is a 24-year-old operations support team technician who was recruited by his present employer, a defense contractor, in October 2008. He started work approximately two months later. Applicant currently has an interim security clearance, which was granted in July 2007. He is single.

From August 2000 through June 2004, Applicant attended a technical school that offered both a secondary education program and a vocational technical component. Upon graduation in June 2004, he received both a high school diploma and a certificate of achievement for the vocational field in which he was enrolled. While a student, between about July 2002 and April 2003, Applicant used marijuana, an illegal drug. Marijuana is the only illegal drug Applicant has used. He used it about seven or eight times during that time period, then quit abusing the substance.

In July 2008, about a year after he was granted a security clearance, Applicant was particularly unhappy with his former employment situation. One day, he went to his apartment after a particularly difficult work day and his roommate offered him some marijuana to relieve the stress. He accepted.¹ That month, he used marijuana about two or three times. He then quit using the substance.

On September 13, 2008, Applicant was pulled over by police for driving with a broken headlight. The officer asked him if there was anything in the car the officer should know about. Applicant volunteered that he had marijuana with him that he had purchased for an upcoming birthday. The yet unused quantity of marijuana was seized. He was told to fix his light and proceed home. Because he was not given a ticket or citation for the marijuana at that time, he was unclear as to what, if any, charges might be forthcoming.²

On October 7, 2008, Applicant started the paperwork to join his current employer. He completed an e-QIP. On Section 23 (Your Police Record), Applicant

¹ Applicant has never gone to work under the influence of marijuana. Tr. 34.

² Tr. 30. Ex. 4 (Criminal Justice Information) notes that Applicant was "arrested or received 2008/09/13," with two drug-related charges noted. There is no evidence that any charges were levied at the time Applicant was stopped or that a formal arrest occurred, although Ex. 5 (Court Summary) notes a 09/13/2008 "arrest."

denied having been charged with or convicted of any felony offense, denied that there were any charges pending against him for a criminal offense, and denied having been arrested for, charged with, or convicted of any other offense in the preceding seven years. To the best of his understanding and knowledge at the time, this was true. He did, however, admit having been charged with or convicted of any offense(s) related to alcohol or drugs, citing to an alcohol-related eventually dropped to a citation for disorderly conduct in 2007. On Section 24 (Your Use of Illegal Drugs and Drug Activity), he admitted illegally using a controlled substance since the age of 16 or in the last seven years. He explained that he had used marijuana about seven times between July 2002 and April 2003. Applicant did not mention his July 2008 marijuana use.

In explaining why he did not mention the July 2008 marijuana use or the September 2008 traffic stop on the e-QIP, Applicant states: "I knew I had the charges coming, but I was trying to get [the e-QIP] done and out of the way. I knew that you could make additions to [it] if you received information that you did not know at the time. And so I was going to throw the charges and the [July 2008] uses on there then."³ At the time, he "just kind of rushed through because [he] wanted to get the applicatory [sic] process started as quick as possible."⁴ When asked whether he neglected to note the July 2008 marijuana use on his October 2008 e-QIP because he forgot in his haste or was intentionally waiting to add it later, Applicant stated, "I think it may have been a little of both because I was rushing through it. . . . I knew in my head I'd probably have to be resubmitting it because of receiving the charges. . . so I don't believe I checked everything as well as I should have, or else it would have been on there."⁵

When he arrived home very late that night, Applicant received a notice containing a summons and information charging him with Possession of Marijuana and Use/Possession of Drug Paraphernalia. Early the following morning, on October 8, 2008, he immediately called his future employer's security officer, explained the situation, and asked how he could resubmit his e-QIP with additions. He also informed his program manager of the facts. He then prepared an amended e-QIP for submission that noted the July 2008 marijuana use and the recently received criminal charges.

On or about December 22, 2008, Applicant was sentenced to a six month Addiction Diversionary Program (ADP) and ordered to pay a fine as a result of the charges. He completed the program successfully and paid the fine.⁶ He also completed a drug counseling program on March 16, 2009.⁷ On or about June 2, 2009, both charges were *nolle prossed*. The charges were then expunged.⁸

³ Tr. 22.

⁴ Tr. 25.

⁵ Tr. 28-29.

⁶ Tr. 31-33.

⁷ Ex. H (Notice of Treatment Termination, dated Mar. 16, 2009).

⁸ Tr. 31.

Today, Applicant no longer lives with his former roommate or interacts with the former friend who sold him marijuana. He avoids going to functions where people use illegal drugs.⁹ In his spare time, he plays video games and socializes with friends. Since July 2008, he has actively declined offers to use marijuana from peers.¹⁰ At work, he is doing well and is well regarded. He has never been cited for any security violations. Applicant does not have the stress he encountered working for his former employer.¹¹ Noting that “[i]t’s not really worth risking a career over,” he has no intention to use drugs in the future.¹² Applicant has signed a statement indicating his intent to refrain from future drug use with a clause indicating he will comply with an automatic revocation of any security clearance should he again use drugs.¹³ Moreover, having recently discovered he is the father of a baby, he intends to refrain from drugs and keep a clean record in the hopes of eventually obtaining custody of the child.¹⁴

Policies

When evaluating an applicant’s suitability for a security clearance, an 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. These guidelines are not inflexible rules of law. 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. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the “whole person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

The government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by

⁹ “I got my partying phase out of the way when I was younger.” Tr. 36.

¹⁰ Tr. 45-47.

¹¹ Tr. 41.

¹² Tr. 38.

¹³ Ex. D (Statement).

¹⁴ Tr. 57.

Department Counsel. . . .”¹⁵ The burden of proof is something less than a preponderance of evidence.¹⁶ The ultimate burden of persuasion is on the applicant.¹⁷

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 applicant’s loyalty. See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information). “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹⁸ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.¹⁹

Based upon consideration of the evidence, Guideline H (Drug Use) and Guideline E (Personal Conduct) are the most pertinent to this case. Conditions pertaining to these adjudicative guidelines that could raise a security concern and may be disqualifying, as well as those which would mitigate such concerns, are set forth and discussed below.

Analysis

Guideline H – Drug Use

Under Guideline H, 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.²⁰ “Drugs” are defined as mood and behavior altering substances, and include drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended, (*e.g.*,

¹⁵ See *also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

¹⁶ *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

¹⁷ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ AG ¶ 24.

marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens) and inhalants and other substances.²¹ “Drug abuse” is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.²² Here, Applicant admits using marijuana between July 2002 and April 2003. He also admits he used marijuana while holding a security clearance in July 2008, and was sentenced for Possession of Marijuana and Use/Possession of Drug Paraphernalia in December 2008. Therefore, Drug Involvement Disqualifying Condition (DI DC) AG ¶ 25(a) (“any drug abuse”), AG ¶ 25(c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia), and ¶ 25(g) (any drug use after being granted a security clearance) apply. With disqualifying conditions thus raised, it is Applicant’s burden to mitigate security concerns.

Applicant’s drug use has been intermittent. He has quit using the illegal drug twice in the past seven years. He quit using marijuana in 2003, after using it for about a year. He quit using the illegal drug again in July 2008. By September 2008, however, he had purchased marijuana. He admitted to its possession and the possession of drug-related paraphernalia. This most recent use and possession of marijuana occurred after he was granted an interim security clearance. Legal issues involving the use and possession of illicit drugs aside, his 2008 use and possession of marijuana were clear violations of the prohibition against illegal drug use by those maintaining a security clearance. Although he completed a drug awareness and drug counseling, Drug Involvement Mitigating Condition (DI MC) 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”) does not apply.

Applicant has been drug-free for under two years. He notes that he now eschews the use of marijuana. He stresses that he has changed his friends. His former roommate has moved. He does not attend parties or functions where drugs are used, stating that he has passed his youthful “partying phase.”²³ He has changed his habits and hangouts. He expressed his intent not to use drugs in the future. Applicant acknowledges that future drug use could and would jeopardize his professional ambitions. He notes that it is his intent to eschew drugs in the hopes of obtaining custody of his child. He also signed a statement with automatic revocation of clearance for any future drug-related violation. DI MC 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) applies. None of the remaining mitigating conditions are applicable.

²¹ *Id.* at AG ¶ 24(a)(1-2).

²² *Id.* at AG ¶ 24(b).

²³ At the same time, however, Applicant notes that he has declined offers to use marijuana in the past year, undermining application of DI MC AG ¶ 26(b)(1).

Applicant quit using drugs in 2003. He again quit using marijuana in 2008. He completed the ADP and drug counseling programs successfully. He has also been drug-free for approximately 20 months. However, he was caught with marijuana and drug paraphernalia during a traffic stop about 18 months ago. Especially troubling is the fact that during his last marijuana use and when he was stopped by police, he had a security clearance. Applicant was credible and there is no reason to doubt his sincerity with regard to changes he has made in his life or his reasons for now quitting drugs for good. His prior lapses, the recency of his last use and possession of marijuana, and his use of marijuana while holding a security clearance, however, require additional time for him to demonstrate both his intentions regarding future drug use and his actual ability to permanently refrain from marijuana. Therefore, despite his rehabilitative efforts, drug use security concerns remain unmitigated.

Guideline E – Personal Conduct

Under Guideline E, “conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.”²⁴ The SOR at ¶ 2.a alleges that Applicant falsely and deliberately omitted information regarding Applicant’s September 13, 2008, arrest and eventual charges of Possession of Marijuana and Use/Possession of Drug Paraphernalia.²⁵ Given the lack of evidence that Applicant was formally arrested on September 13, 2008, and in light of his highly plausible testimony that he did not learn what the actual charges were until after completing the e-QIP, there is insufficient evidence of falsity or concealment to raise a personal conduct disqualifying condition.

On Section 24 of the October 2008 e-QIP, however, Applicant consciously declined to disclose his July 2008 marijuana use. Such an omission raises Personal Conduct Disqualifying Condition ¶ 16(a) ([the] deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities). With a disqualifying condition raised, the onus shifts to Applicant to mitigate related security concerns.

Applicant’s explanation as to why he did not include information regarding his July 2008 marijuana use is inconsistent and somewhat convoluted. He simultaneously attributes his failure to disclose that drug use to: 1) his haste in completing the application and starting the application process, 2) his failure to double check his answers, and 3) his intent to later supplement his e-QIP with all 2008-related information once he received formal charges regarding his traffic stop. The intent required to sustain the third reason set forth would logically undermine the lack of thought required to sustain his first two reasons. While his inconsistent thinking stretches credulity, it does not necessarily prove intentional fraud. Regardless, he

²⁴ AG ¶ 15.

²⁵ SOR allegation ¶ 2.a.

alerted his security officer of the 2008-related facts first thing the following morning after receiving his summons late that night. He also alerted his program manager. Consequently, his error was corrected within hours, not days or weeks, and it was long before anyone would have caught his failure to disclose. Therefore, AG ¶ 17(a) (the individual made prompt, good faith efforts to correct the omission, concealment, or falsification before being confronted with the facts) applies.

As noted, he informed his superior of the 2008 drug-related facts after he alerted his security officer of those same facts. He has since been fully forthcoming regarding his past drug use, traffic stop, summons, sentence, and all aspects related to the September 2008 incident. Such facts raise AG ¶ 17(e) (the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

In light of the questions posed, Applicant had a plausible basis for not reporting his September 2008 traffic stop on his e-QIP. Regarding his neglect in noting his July 2008 drug use, he should at least be commended for disclosing the information quickly, even if his initial reason for not detailing it is dubious. Regardless, Applicant took expedient and appropriate corrective measures which, in light of these unique circumstances, mitigate personal conduct security concerns.

Whole Person Concept

Under the whole person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the circumstances. An 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 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, as well as the "whole person" factors. Applicant is an intelligent young man with many good qualities. Professionally, he is well-regarded and at the beginning of what will no doubt be a successful career. He has, however, used marijuana, an illegal substance. His drug use has been erratic, but minimal. It has continued, however, over repeated time periods over the past seven years. Specifically, he has unsuccessfully quit using drugs twice. His first attempt while in school was subsequently followed by a 2008 lapse, which occurred when he was

working and in his early 20s. His July 2008 attempt to quit was followed by the September 2008 purchase of marijuana. Of special concern is the fact that during the 2008 events, he was maintaining a security clearance. His use and possession of drugs at that time constitute clear violations of the terms under which he had been granted a security clearance and warrants heightened scrutiny.

Applicant's explanation regarding his omissions on the October 2008 e-QIP is sufficient to mitigate personal conduct security concerns. His drug use, however, does not mitigate drug-related security concerns. While he may have been drug free since July 2008, he possessed marijuana as recently as September 2008. More importantly, he did so while holding a security clearance. While his expressed commitment to staying drug free and his reasons for future abstinence may be credible, and his candor regarding his past drug use highly appreciated, insufficient time has passed to mitigate drug use security concerns arising from the 2008 drug-related incidents noted. More time is needed to test his resolve and demonstrate his ability to comport his conduct to that expected of one possessing a security clearance. Clearance is denied.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For 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 a security clearance. Clearance is denied.

ARTHUR E. MARSHALL, JR.
Administrative Judge