



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



In the matter of:)
)
) ISCR Case No. 09-04554
SSN:)
)
Applicant for Security Clearance)

Appearances

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

October 20, 2010

Decision

HEINY, Claude R., Administrative Judge:

Applicant used cocaine, once in 2004, and again in 2005, and he used marijuana between January 2005 and January 2009. All his illegal drug use occurred while he was a college student. His last use was more than 17 months ago. Applicant has rebutted or mitigated the security concerns under drug involvement. Clearance is granted.

Statement of the Case

Applicant contests the Defense Department's (DoD) 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 (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

Statement of Reasons (SOR) on October 3, 2009, detailing security concerns under drug involvement.

On December 9, 2009, Applicant answered the SOR and requested a hearing. On June 4, 2010, I was assigned the case. On June 10, 2010, DOHA issued a Notice of Hearing for the hearing held on June 29, 2010.

At the hearing, the Government offered Exhibits (Ex.) 1 through 4, which were admitted into evidence without objection. Applicant submitted no exhibits, but did testify, as did his mother. On July 29, 2010, DOHA received the hearing transcript (Tr.).

Findings of Fact

In Applicant's Answer to the SOR, he admitted using and purchasing marijuana and cocaine in powder form, but denied using crack cocaine. I incorporate Applicant's admissions. 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 software engineer who has worked for a defense contractor since March 2009, and is seeking to obtain a security clearance.

In January 2005, while in college, Applicant started using marijuana and continued using it until January 2009, about once per month. He used marijuana in social settings with friends. (Tr. 18) He used marijuana only once when he was alone. (Tr. 21) From January 2008 through August 2008, Applicant did not use marijuana because he was working on an internship where drug testing occurred. (Applicant's Answer to the SOR) When the summer internship ended, Applicant returned to college and resumed smoking marijuana.

In January 2009, Applicant decided to stop all use of marijuana. He began his job search and realized many companies require drug testing. On two or three occasions, Applicant purchased five to ten dollars worth of marijuana. He last purchased marijuana in the fall of 2008. In December 2004 and August 2005, Applicant used cocaine. He used cocaine "just to try it." (Ex. 2) This was not crack cocaine but cocaine in a powder form. He has not used any illegal drug since leaving college.

In May 2009, when Applicant completed his Electronic Questionnaires for Investigations Processing (e-QIP), he listed both his marijuana and cocaine use. At the hearing, Applicant stated he found it necessary "to be honest and absolute in this process, and I have been since the first day." (Tr. 14) Now that he is out of college, he finds marijuana usage unacceptable. (Tr. 18) He intends to stay away from illegal drugs in the future. (Ex. 2) He no longer sees the individuals he previously smoked with. (Tr. 19) Marijuana use is no longer part of his lifestyle. (Tr. 24) Applicant realizes the Government has a strict intolerance position on marijuana use. He realizes the seriousness of marijuana use. (Tr. 26) Applicant stated in his answer to the SOR that all purchase or use of any illegal drugs would stop and any violation of such would result in automatic revocation of any security clearance he held. (Applicant's SOR Response)

Applicant has never received treatment or counseling for drug use and has never been diagnosed with drug abuse or drug dependency.

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 of 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 about 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

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; and

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

While a college student, Applicant experimented with cocaine twice—once in December 2004 and again in August 2005. From January 2005 until January 2009, he smoked marijuana with friends. His use averaged once a month. The disqualifying conditions listed in AG ¶¶ 25 (a) 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; and

(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;

Applicant's use of marijuana was during college and his use did not occur under unusual circumstances. Applicant no longer sees the individuals with whom he smoked

marijuana and is no longer a college student. Applicant had two experimental uses of cocaine. The last cocaine usage was approximately five years ago. I find his cocaine use not to be recent.

Applicant's last marijuana use was in January 2009, 17 months ago. 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

Because of his abstention from drug use for 17 months, and his recognition of the adverse impact on his life that illegal drug use could cause, the incompatibility of illegal use with his goals, and his stated desire never to use again, there is reasonable certitude that he will continue to abstain from drug use. Applicant did not attempt to hide his illegal usage. He disclosed it on his e-QIP and in his subject interview. His college drug use does not cast doubt on his current reliability, trustworthiness, or good judgment. Because he will not use illegal drugs in the future, confidence in his current reliability, trustworthiness and good judgment with respect to drug use is restored. The mitigating conditions listed in AG ¶ 26(a) apply.

The mitigating conditions under AG ¶ 26(b) apply. Applicant no longer associates with his college friends with whom he used marijuana. He is no longer a college student. He has refrained from all illegal drug use for 17 months. In his SOR response, he acknowledged his security clearance would be automatically revoked if he used illegal drugs again. These are all mitigating conditions listed in AG ¶ 26(b).

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

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

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. Applicant experimented with cocaine and used marijuana. All of his illegal drug usage occurred while he was in college. Applicant is now out of college, does not see his college friends, and no longer uses illegal drugs.

Applicant listed his illegal drug usage on his e-QIP and stated his intent to be honest about his usage. Due to Applicant's demeanor and how he responded during the hearing, I found his testimony to be credible and worthy of belief. His explanations regarding his college marijuana use and his assertion that he will not use it again are consistent and believable.

Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his drug involvement.

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, Drug Involvement: FOR APPLICANT

Subparagraphs 1.a—1.c: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

CLAUDE R. HEINY II
Administrative Judge