



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



In the matter of:)
)
) ISCR Case No. 09-07919
)
)
Applicant for Security Clearance)

Appearances

For Government: Candace L. Garcia, Esquire, Department Counsel
For Applicant: *Pro Se*

January 31, 2011

Decision

HEINY, Claude R., Administrative Judge:

From March 2006 until May 2009, Applicant used marijuana while he was in college. During the same period, he used Ritalin, Focalin, and Adderall without a prescription. Since leaving college, he no longer associates with individuals using illegal drugs and has stated he will not use illegal drugs or legal drugs illegally in the future. Applicant has mitigated the security concerns under drug involvement. Clearance is granted.

Statement of the Case

Applicant contests the Department of Defense's (DoD) intent to deny 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 Statement of Reasons (SOR) on April 9, 2010, detailing security concerns under drug involvement.

On April 23, 2010, Applicant answered the SOR and elected to have the matter decided without a hearing. Department Counsel submitted the Government's case in a File of Relevant Material (FORM), dated July 14, 2010. The FORM contained seven attachments. On July 22, 2010, Applicant received a copy of the FORM, along with notice of his opportunity to file objections and submit material to refute, extenuate, or mitigate the potentially disqualifying conditions.

Responses to the FORM are due 30 days after receipt of the FORM. Applicant's response was due on August 21, 2010. As of October 6, 2010, when I was assigned this case, no response had been received.

Findings of Fact

In Applicant's Answer to the SOR, he stated the information presented in the SOR was a misinterpretation of the information he had provided. He neither admitted nor denied the allegations in SOR; he merely restated his drug usage. I incorporate Applicant's statement. After a thorough review of the record, pleadings, and exhibits, I make the following findings of fact.

Applicant is a 23-year-old CSS technician² who has worked for a defense contractor since July 2009, and is seeking to obtain a security clearance. Applicant attended college from September 2005 through May 2009. In May 2009, he obtained his bachelor's degree. From March 2006 to May 2009, he used marijuana. On occasion during the same period, he used Focalin, Ritalin, and Adderall, without required prescriptions. In the spring of 2006, he purchased marijuana.

Ritalin, Focalin, and Adderall are all stimulant drugs, which increase alertness, concentration and overall cognitive performance. They improve attention and concentration, and help to avoid distractions.

Applicant used Focalin as a study aid in May and December 2008, and in March and May 2009, during final exam weeks and while writing his thesis. In May 2006, he used Ritalin once during exam week. He used Adderall once during exam week in December 2007 and once exam week in December 2008.

In July 2009, Applicant completed an Electronic Questionnaires for Investigations Processing (e-QIP). (Item 4) In response to question 23, he listed marijuana use between March 2006 and May 2009. He listed Ritalin and Focalin use during exams during the period of May 2006 through May 2009.

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

² The record fails to explain or define "CSS Technician."

During a September 2009 subject interview (Item 5), Applicant stated he had used marijuana eight or nine times between March 2006 and May 2009. He obtained the marijuana from friends and on five occasions purchased small amounts (under a gram) of marijuana. During the interview, he stated he had used Focalin about 15 times, Ritalin once or twice, and Adderall three or four times to keep him awake and focused while in college. He obtained these prescription drugs from fellow students who had prescriptions for them. His use occurred from May 2006 to May 2009, while he was attending college. His intention is not to use marijuana or unprescribed drugs in the future. He stated had he taken a lighter college course load and drank more coffee he could have excelled on his college exams and thesis paper without having to use his classmates' prescribed medication. (SOR Answer)

Applicant no longer associates with illegal drug users, has not had a positive drug test, has never been diagnosed as being drug dependant or a drug abuser, and has not received any drug treatment. (Item 5) He has no plans to use illegal drugs in the future and regrets his past illegal drug 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 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. 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, 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 of 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 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 of 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

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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Those conditions which apply include:

- (a) any drug abuse;

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

Between March 2006 and May 2009, when he graduated from college, Applicant used marijuana, Ritalin, Focalin, and Adderall. He had no prescription for any of the drugs. During the same period, he made five small purchases of marijuana for his own use. AG ¶ 25(a) drug use and AG ¶ 25(c) purchase, apply.

AG ¶ 26 provides conditions that could mitigate security concerns. Those conditions which may apply are:

- (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;

Applicant last used marijuana in May 2009, approximately a year and a half ago. Applicant regrets his past drug use. Since leaving college, he no longer associates with drug-using individuals.

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.”³

³ In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge's decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle changes and therapy. For the recency analysis the Appeal Board stated:

Compare ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) (“The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.”) (citation format corrections added).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, considered the recency analysis of an administrative judge stating:

The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year

Applicant has abstained from drug use for a year and a half year, his drug use occurred while he was in college, and the illegal use of prescription drugs occurred during exam weeks or when writing his thesis. These are events unlikely to recur. He fully disclosed his drug use on his e-QIP. He no longer associates with college students or his friends from college. He asserts he will not use illegal drugs in the future. There is reasonable certitude that he will continue to abstain from drug use. The mitigating conditions in AG ¶ 26(a) and AG ¶ 26(b) apply.

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 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant used marijuana infrequently in college and also used stimulants during exam weeks. Since leaving college, he no longer associates with illegal drug users and it is his stated intent not to use drugs in the future. Additionally, when questioned about his illegal drug usage on his e-QIP, he was forthcoming and listed his usage.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude he has 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:

from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

Paragraph 1, Drug Involvement: FOR APPLICANT

Subparagraphs 1.a – 1.e: 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