



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



In the matter of:)
)
) ISCR Case No. 10-05750
)
Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esquire, Department Counsel
For Applicant: *Pro se*

September 22, 2011

Decision

RIVERA, Juan J., Administrative Judge:

Applicant, 23, has a three-year history of illegal marijuana purchase and use, highlighted by three brushes with the law: two for drug offenses and one for recklessly handling a firearm. He is currently on probation for the latter offense. He has not participated in substance-abuse counseling or treatment. He continues to associate with his marijuana-using friends and relatives. In light of his age and his failure to change his lifestyle, Applicant’s behavior continues to cast doubt about his reliability, judgment, and ability and willingness to comply with the law. Clearance denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on July 24, 2009. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant’s request for a security clearance.

¹ Required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; and Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as revised.

On March 24, 2011, DOHA issued Applicant a statement of reasons (SOR) indicating security concerns raised under Guidelines J (Criminal Conduct) and H (Drug Involvement) of the adjudicative guidelines (AG).²

On April 13, 2011, Applicant responded to the SOR allegations and requested a hearing before an administrative judge. The case was assigned to me on June 3, 2011, to determine whether a clearance should be granted or denied. DOHA issued a notice of hearing on June 17, 2011, and the hearing was convened as scheduled on July 7, 2011. The Government offered exhibits (GE) 1 through 5, which were admitted without objection, except for GE 5, which was admitted over Applicant's objection. Applicant testified, and he presented one exhibit (AE) 1, which was admitted without objection. DOHA received the transcript of the hearing (Tr.) on July 14, 2011.

Findings of Fact

Applicant admitted the factual allegations under SOR ¶ 1.a. He denied the remaining SOR allegations: ¶¶ 1.b, 1.c, 2.a, and 2.b. His admission is incorporated herein as a finding of fact. After a thorough review of the evidence of record, and having considered Applicant's demeanor and testimony, I make the following additional findings of fact.

Applicant is a 23-year-old employee of a Government contractor. He graduated from high school in 2006, and he attended college from 2006 until November 2009, when he was expelled because of his conviction for recklessly handling a firearm (SOR ¶ 1.b.) He has never been married, but has a three-year-old son living with him.

Applicant testified he started his illegal use of marijuana during his senior year of high school. He used marijuana socially with his friends once or twice during the week, and then during the weekends. (Tr. 50) His marijuana use increased while he was in college, where he routinely smoked marijuana approximately four to five times every week until March 2007. He purchased marijuana for his and his friends' consumption, but denied selling drugs.

In March 2007, Applicant was sitting in a car parked outside of a night club with some friends. Police officers intervened with them because of a complaint filed against the driver of the car almost hitting a pedestrian. During a subsequent search of the car occupants, a police officer found a small bag of marijuana in Applicant's jacket pocket. Applicant pled guilty to the illegal possession of marijuana charge, pursuant to a first offenders' diversion program. He was found guilty and required to serve one-year probation, to perform 24 hours of community service, and to pay a fine and court costs. His driver's license was suspended for six months. After fulfilling the terms of his probation, the possession of marijuana charge was dismissed.

² Adjudication of this case is controlled by the AG, implemented by the DoD on September 1, 2006.

Applicant claimed that he stopped using marijuana after the March 2007 incident. He was attending college under a scholarship program, and he was concerned about the termination of his scholarship and his expulsion from college, if he was involved again in any drug-related incidents.

In October 2009, Applicant was carrying a gun (registered to his brother) for his protection. He explained that he was afraid of the numerous robberies and assaults occurring in his college campus. While he was trying to store the gun in the car before going into a bar, the gun discharged, the bullet went through the window of the car, and it hit Applicant's friend in the stomach. When police officers approached him, Applicant threw the gun away into the bushes.

Applicant's wounded friend lied about how he got shot; however, the next day, Applicant went to the police station and confessed that he was the shooter. Applicant's friend died, but as a result of the hospital's negligence and not of the gun shot wound. On March 2010, Applicant was convicted of recklessly handling a firearm, a misdemeanor. (GE 5) He was sentenced to 12 months in jail, with three months suspended for five years, and to pay a fine.

Applicant appealed the conviction. At his hearing, Applicant claimed that his March 2010 conviction was set aside. He testified that on January 28, 2011, he again pled guilty to the charge of reckless handling of a weapon, but under a prosecution deferment program. He was placed on probation, required to remain on good behavior, to perform community service by counseling young adults, and to participate in psychological treatment. Pursuant to his current plea agreement, if Applicant complies with all the court's conditions, the charge could be dismissed as early as December 2011, or at the latest, in January 2013. (GE 5) Other than the fact that he appealed his conviction, Applicant presented no documentary evidence to corroborate his testimony.

In March 2010, Applicant parked his car in front of one of his friend's home. He and three of his friends were talking in the car when, for reasons not clearly explained, police officers intervened. During a subsequent search of the car, a police officer found a small residue of marijuana in the back seat of the car. Applicant and his three friends were charged with illegal possession of marijuana. According to Applicant, neither he nor the three occupants were smoking marijuana or had marijuana in their possession. No marijuana was produced by the prosecution at trial. Applicant was found not guilty of the charge of possession of marijuana.

At his hearing, Applicant admitted that one of the occupants of the car smoked marijuana with him when he was in high school. He also testified that he has occasional contact with other of his marijuana-smoking friends. Additionally, he has infrequent contact with an uncle and some cousins who currently smoke marijuana. Applicant has not participated in any substance abuse treatment or counseling. He has never been diagnosed as an illegal substance abuser.

Applicant takes responsibility for his mistakes. He expressed remorse for his past use of marijuana. He repeatedly stated that he has not used marijuana since March 2007. Applicant was hired by a Government contractor in May 2007 as a summer hire, and he is now a full-time employee. Because of his information technology position, he was granted access to classified information at the secret level in September 2009. Applicant likes his job. He is scheduled to deploy to Kuwait in support of deployed service members, and he needs a security clearance to retain his position.

Policies

The President of the United States has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AG are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable to reach his decision.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See *also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication that the Applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

The facts and circumstances raising security clearance concerns under Guidelines J and H are substantially the same, with some exceptions. For the sake of brevity, they will be articulated under the Guideline J discussion, and incorporated by reference into the discussions under Guideline H. The exceptions will be discussed in the pertinent guideline.

Guideline J, Criminal Conduct

Under Guideline J, the security concern is that 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.

Applicant’s illegal drug use spans from around 2005-2006 (at age 18) until March 2007. He used and purchased marijuana on a frequent basis during his senior year of high school and during his first year in college. He was convicted of possession of marijuana in March 2007. Although the state dismissed the charge through a first offender’s program, that does not diminish the seriousness of Applicant’s drug related behavior. He also was charged with possession of marijuana in March 2010, and acquitted of the charge. Notwithstanding, security concerns are not totally mitigated because at the time of the arrest, he was associating with his drug-using friends from high school. He also continues to associate with several family members who use marijuana. Applicant’s October 2009 conviction for recklessly handling a firearm is also not mitigated. He is currently on probation and will continue to be on probation until at

least December 2011, or January 2013, if he does not comply with the conditions of his probation.

Applicant claimed he stopped using marijuana in March 2007, because he was afraid of losing his scholarship and being expelled from college. He averred he has not used marijuana again, and he promised never to use illegal drugs ever again. Notwithstanding, Applicant continues the same lifestyle and associations that led to his illegal use of marijuana during high school and college.

Applicant's overall behavior raises security concerns under AG ¶ 31(a) "a single serious crime or multiple lesser offenses," AG ¶ 31(c) "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted," and AG ¶ 31(d) "individual is currently on parole or probation."

AG ¶ 32 lists four conditions that could mitigate the criminal conduct security concerns raised under AG ¶ 31:

(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.

Considering the record as a whole, I find that none of the Guideline J mitigating conditions fully apply. Not enough time has passed for me to conclude that his questionable behavior is unlikely to recur, and there is no clear evidence of successful rehabilitation. He did not participate in substance abuse counseling, and he continues to associate with his drug-using friends and relatives. Moreover, Applicant is currently under probation. At this time, Applicant's evidence is not sufficient to establish that he has the ability and willingness to comply with laws, rules, and regulations. His past questionable behavior still casts doubts on Applicant's reliability and judgment.

Guideline H, Drug Involvement

AG ¶ 24 articulates the security concern about 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.

Applicant illegally used and purchased marijuana, with varying frequency, from 2005 until March 2007. In March 2007, Applicant was convicted of illegal possession of marijuana. Although the state disposed of the charge through a first offender's program, that fact does not diminish the seriousness of Applicant's drug-related behavior. Applicant claimed he stopped using marijuana in March 2007, because he was afraid of losing his scholarship and being expelled from college. Notwithstanding his marijuana possession conviction, Applicant continues to associate with his marijuana-using friends and relatives and to live the same lifestyle that led to his use of marijuana. His association with drug-using friends led to him being charged with possession of marijuana in March 2010. He was acquitted of this charge.

AG ¶ 25 describes eight conditions related to drug involvement that could raise a security concern and may be disqualifying. Three drug involvement disqualifying conditions raise a security concern and are disqualifying in this particular case: AG ¶ 25(a): "any drug abuse"³ and AG ¶ 25(c): "illegal drug possession . . . purchase, sale, or distribution."

AG ¶ 26 provides four potentially applicable drug involvement mitigating conditions:

- (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.

³ AG ¶ 24(b) defines "drug abuse" as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction."

AG ¶ 24(a) defines "drugs" as substances that alter mood and behavior, including: (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.

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

For the same reasons discussed previously under Guideline J, incorporated herein, I find that none of the Guideline H mitigating conditions fully apply. Applicant's abuse of drugs spans a period of three years. He continues to associate with his marijuana-using friends and relatives and to live the same lifestyle that led to his use of marijuana. Not enough time has passed for me to conclude that his questionable behavior is unlikely to recur. His behavior still cast doubts on Applicant's reliability and judgment.

Considering his continued association with drug-using friends and relatives, Applicant did not demonstrate his intent not to use drugs in the future. Considering the totality of the circumstances, I also find there has not been an appropriate period of abstinence. Applicant did not participate and is currently not attending any drug aftercare treatment program, and there is no favorable diagnosis and prognosis by a duly qualified medical professional. Applicant's favorable evidence, at this time, is not sufficient to mitigate the Guideline H security concerns.

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.

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. AG ¶ 2(c).

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is 23 years old. He put himself through college for three years with the assistance of a scholarship until he was expelled as a result of his conviction for recklessly handling a firearm. Most of his questionable behavior occurred while he was attending high school and his freshman year at college. He stopped using marijuana after his March 2007 conviction for possession of marijuana. He was concerned further drug-related incidents would disqualify him for his scholarship and would get him expelled from college. He is now employed with a Government contractor and he wants to develop a career. These factors show responsibility, good judgment, and some mitigation. He expressed remorse for his past questionable behavior, and promised not to use illegal drugs ever again.

Notwithstanding, Applicant has not participated in substance abuse counseling or treatment. His continued association with his drug-using friends and relatives do not convince me that he has changed his lifestyle. He presented no evidence of a recent diagnosis and a favorable prognosis. In light of Applicant's age, lifestyle, and association with drug users, Applicant's promise not to use illegal drugs in the future at this time is not sufficient to show it is unlikely his questionable behavior will recur.

On balance, I conclude that Applicant's favorable evidence is insufficient to mitigate the security concerns arising from his drug involvement and criminal conduct. Moreover, Applicant is currently under probation for his conviction for recklessly handling a firearm. Overall, the record evidence fails to convince me of Applicant's eligibility and suitability for a security clearance.

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
Subparagraphs 1.a - 1.c:	Against Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraphs 2.a and 2.b:	Against Applicant

Conclusion

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 eligibility for a security clearance for Applicant. Eligibility for a security clearance is denied.

JUAN J. RIVERA
Administrative Judge