



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



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| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 10-06282 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Gina L. Marine, Esq., Department Counsel
For Applicant: *Pro se*

April 28, 2011

Decision

HEINY, Claude R., Administrative Judge:

Applicant used marijuana from August 2005 through January 2010 and had two arrests for open container in 2007 and 2010. Applicant has mitigated the security concerns under drug involvement and criminal conduct. Clearance is granted.

Statement of the Case

Applicant contests the Department of Defense’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 Statement of Reasons (SOR) on December 10, 2010, detailing security concerns under Guideline H, Drug Involvement, and Guideline J, Criminal Conduct.

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).

On January 4, 2011, 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 February 1, 2011. The FORM contained five attachments (Items 1-5). On February 8, 2011, 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.

Applicant's response to the FORM was undated. Department Counsel did not object to the response, which was admitted into the record. On March 21, 2011, I was assigned the case.

Findings of Fact

In Applicant's Answer to the SOR, he admitted all of the factual allegations in the SOR, and his admissions are incorporated herein. After a thorough review of the pleadings and exhibits, I make the following findings of fact.

Applicant is a 23-year-old information assurance engineer who has worked for a defense contractor since March 2010. He seeks to obtain a security clearance. In April 2010, Applicant completed an Electronic Questionnaires for Investigations Processing (e-QIP). In response to a question in Section 23, Illegal Use of Drugs, he stated he had used marijuana between August 2005 and January 2010 as follows:

Recreational smoking From Fall 2005–Spring 2006 A few times a week
From Fall 2006–2007 Bi-Weekly From Fall 2007–Spring 2008 Less than
once a week From Spring 2008–Fall 2009 Infrequent Once in 2010. (Item
4)

In May 2010, during his personal subject interview, Applicant related his use of marijuana during college and the four occasions he used marijuana following college graduation in May 2009. (Item 5) His last use was in January 2010. In April 2010, he moved to a new state and started working for his current employer. (Item 4)

In the fall of 2005, when Applicant enrolled at a state university, he first used marijuana. From the fall of 2005 through spring 2008, he used marijuana twice weekly, while in the dormitory or at his fraternity house. (Item 5) During his last year in school, fall 2008 through May 2009, his marijuana use decreased to once a week. From May 2009 through January 2010, he used marijuana four times with his brother. (Item 5) He has never purchased marijuana. He has no intention of using marijuana or any other illegal drug in the future.

In 2007, Applicant received a citation for drinking a can of beer on the beach, which was illegal. (Item 5) He paid a fine and court costs of \$150. In July 2010, he was cited for having an open container and paid a fine. The record contains no additional information about his second citation except that it occurred in the city where his

university was located. Applicant does not drink to the point of intoxication nor has he been told he was drinking too much.

In his FORM response, Applicant states he has not used marijuana in the past 14 months, he moved to a new state, no longer associates with those with whom he smoked marijuana, and intends to never use marijuana again. He is willing to take random drug tests to prove he no longer uses illegal drugs.

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 interests of 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 (EO) 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

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: (a) any drug abuse.

From August 2009 to January 2010, Applicant used marijuana. The disqualifying condition in AG ¶ 25(a) applies.

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;

(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 used marijuana as a college student and four times following graduation. His last use was eight months after graduation. Since his last usage, he has moved to a new state and started his current job. It has been 14 months since his last use of marijuana. Applicant does not intend to use illegal drugs in the future and signed a statement reflecting his intent. (FORM Response) The statement stated he would

submit to random drug testing to prove he has stopped using marijuana. The mitigating condition listed in AG ¶ 26(b)(4) applies.

Security concerns can be mitigated based on AG ¶ 26(a) by showing that the drug offenses happened so long ago, were so infrequent, or happened under such circumstances that they are unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment. 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

Applicant's last marijuana use was in January 2010, more than 14 months ago. The mitigating condition listed in AG ¶ 26(a) fully applies despite Applicant's last illegal drug use being relatively recent. His overall illegal drug use occurred primarily while he was in college (August 2005 to May 2009). He did use four times following graduation. His past drug use does not cast doubt on his current reliability, trustworthiness, or good judgment. He has left school and obtained his first career job. He realizes the adverse impact on his life of drug abuse. I believe his illegal drug use will not recur. These conditions, together with his stated intent never to use marijuana again, provide

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

confidence that his current reliability, trustworthiness, and good judgment with respect to drug use is restored.

AG ¶ 26(b) lists four ways Applicant can demonstrate his intent not to abuse illegal drugs in the future. He has disassociated from his drug-using college acquaintances. However, his four uses of marijuana following graduation occurred with his brother and there is no indication he no longer associates with his brother, but he has also made a decision not to use marijuana in the future. The mitigating condictions in AG ¶ 26(b)(1) and (2) apply.

In conclusion, Applicant's motivation to stop using drugs is evident. He understands the adverse results from drug abuse. He has shown or demonstrated his previous marijuana usage primarily while in college is not a bar to his access to classified information.

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 two conditions that could raise a security concern and may be disqualifying, ¶ 31(a), "a single serious crime or multiple lesser offenses," and ¶ 31(c), "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted."

In July 2007 and July 2010, Applicant was cited for having an open container of alcohol. He was fined for each citation. These are minor offenses, but they do provide some information about an Applicant's character and adherence to rules. AG ¶¶ 31(a) and 31(c) apply with respect to Applicant's conduct resulting in the citations.

AG ¶ 32 provides two conditions that could potentially mitigate security concerns:

(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;

(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.

Applicant accepted responsibility for his misconduct and paid the fines for the two citations he received for having open containers of alcohol. He acknowledged his July 2007 citation on his April 2010 e-QIP. The second citation occurred after he had

completed his e-QIP. His second citation occurred in the same location where he attended college. The record contains no additional evidence as to the facts and circumstances surrounding his second citation. The citations appear to be minor and resulted only in fines. His marijuana usage was not included under criminal conduct.

Applicant's two citations do no cast doubt on his reliability, trustworthiness, or good judgment. The mitigation condition in AG ¶ 32(a) applies. In completing his e-QIP he listed both his marijuana usage and open container violation. He did not try to hide this conduct. There are only two citations for conduct that occurred three years apart and, as such, are considered "isolated." They do not cast doubt on Applicant's current reliability, trustworthiness, and good judgment.

Since Applicant's last marijuana usage and the first citation, Applicant has obtained a full-time career job. He accepted responsibility for his misconduct and has paid the fines and court costs.

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 is 23 years old. He last used marijuana when he was 22 years old. He no longer associates with those he smoked with in college. Now that he is in the workforce, and no longer in school, the consequences of drug abuse will be much more severe. Leaving college life and obtaining full-time employment often has a maturing effect on an individual's alcohol use and elimination of marijuana use. Applicant was truthful and forthright in revealing his drug abuse on his security clearance application and during his May 2010 interview. There is no evidence of disciplinary problems at his current employment.

Applicant's marijuana usage and open contain violations are fully mitigated for the reasons previously discussed. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has mitigated the security concerns pertaining to drug involvement and 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, H, Drug Involvement: FOR APPLICANT

 Subparagraph 1.a: For Applicant

Paragraph 2, J, Criminal Conduct: FOR APPLICANT

 Subparagraphs 2.a and 2.b: For Applicant

Conclusion

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

CLAUDE R. HEINY II
Administrative Judge