



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



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| In the matter of: |) | |
| |) | |
| ----- |) | ISCR Case No. 10-06778 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Eric Borgstrom, Esquire, Department Counsel
For Applicant: Alan V. Edmunds, Esq.

May 25, 2011

Decision

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

On December 14, 2010, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) enumerating security concerns under Guideline E (Personal Conduct) and Guideline H (Drug Involvement). The action was taken under 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.

In a response dated January 6, 2011, Applicant admitted the single allegation raised under each guideline and requested a hearing before a DOHA administrative judge. The case was assigned to me on February 11, 2011. The parties agreed to a hearing date of March 31, 2011. A notice setting the hearing for that date was issued on March 15, 2011. I convened the hearing as scheduled.

Applicant gave testimony, introduced three witnesses, and offered 11 documents, which were admitted into the record without objection as exhibits (Exs.) A-K. Applicant was given until April 8, 2011, to submit any additional documents for consideration. Department Counsel offered two documents, which were admitted as

Exs. 1-2 without objection. Two additional documents were timely sent by Applicant to Department Counsel and forwarded to me without objection on April 7, 2011. The documents were accepted as Exs. L-M. The transcript (Tr.) of the proceeding was received on April 8, 2011, and the record was closed. Based on a thorough review of the testimony, submissions, and exhibits, I find Applicant met his burden of mitigating security concerns related to personal conduct and drug involvement. Clearance is granted.

Findings of Fact

Applicant is a 21-year-old information systems security engineer who has worked for the same defense contractor for over a year. He received a high school diploma, attended a post-secondary vocational school, and recently earned multiple security-based certifications in his field. He is single and has no children.

Born in 1989, Applicant completed high school in 2007. Shortly after his 18th birthday in 2007, he enrolled in a vocational college, where he studied for six months while working part-time in both the restaurant and information technology (IT) industries. He became a full-time IT consultant with a private IT company in 2008. In this position, he earned approximately \$25,000 to \$28,000 a year.

One early August night in 2009, when he was 19 years old, Applicant was working late on a project for one of his company's clients.¹ Concluding his work at around 3:00 a.m., he used the client's credit card to purchase and download digital software.² He did not have authorization to use the credit card for personal purchases. Applicant attributes his action to "bad judgment."³ About two days later, he informed the client of his unauthorized purchase.⁴ In October 2009, after receiving the credit card report, the client informed Applicant's employer of the purchase. Applicant confirmed the facts with his employer and requested the deduction of \$114 from his pay for the purchase. Consequently, restitution was made to the client and Applicant was terminated from his position.

From October 2009 until about January 2010, Applicant was unemployed. He accepted a position as a field technician in January 2010, which he left in March 2010 to start his current position. While interviewing with his current employer, Applicant informed the company of his earlier termination and accurately explained the

¹ Tr. 27. The incident appears to have occurred in early August 2009. See Tr. 28.

² Tr. 16-17. The software purchased was in the form of a video game or video game time, and cost about \$114.

³ Tr. 17.

⁴ Working on-site for the client, Applicant did not immediately inform his employer. He did not "really go to [his] headquarters that often," only "to pick up documents, insurance, stuff like that." His employer's headquarters were located in another part of town. Tr. 46.

circumstances.⁵ He also fully disclosed the circumstances of his earlier termination in completing his April 2010 security clearance application (SCA).⁶

In addition, Applicant used marijuana with varying frequency between about August 2007, when he turned 18 years old, and approximately January 2010, when he returned to the workforce after his termination. He returned to work resolved to make a career for himself. He estimated that he used marijuana about five times a month during this period. He sometimes purchased the drug from local acquaintances or friends living in the neighboring town.⁷ He usually used the drug at home. Applicant never tried any other illegal substances. He never arrived at work under the influence of marijuana.⁸ There is no suggestion that he was using marijuana at the time he downloaded video game software at his client's workplace, nor is there evidence his sporadic drug use was related to that incident.

Applicant no longer maintains relationships with those individuals through whom he acquired marijuana or used the substance. In 2010, he purchased his own home, where he lives about an hour away from his former residence.⁹ In over a year, he has not frequented establishments or attended gatherings where, to his knowledge, illegal drugs were being used. Applicant fully disclosed his past drug use on his April 2010 SCA, which he gave to his security officer upon completion.¹⁰

Applicant's current supervisor is a former government manager (GS-15) with 36 years experience and who supervised 300 people with security clearances working on military installations.¹¹ In that capacity, he took his responsibility to insure that national security was never breached very seriously. He is experienced in the handling of new employees. He was not surprised that an individual of Applicant's age had used marijuana before he started working for his present employer. The supervisor stressed that he is more concerned with a younger person's behavior as an employee than he is with matters concerning their earlier comportment. With his mentoring experience in "developing young people and keeping them on the straight and narrow," the supervisor noted that he works with Applicant everyday.¹² After considering Applicant's work, his interaction with senior peers, and their personal interaction, he feels confident that

⁵ Tr. 19, 39-40, 63-64. See also Ex. L (Letter, dated Apr. 1, 2011) referencing Ex. K (Letter, dated Mar. 24, 2011).

⁶ Ex. 1 (SCA, dated Apr. 12, 2010) at 17 of 37.

⁷ Tr. 41, 90.

⁸ Tr. 42.

⁹ Tr. 43-44.

¹⁰ Ex. 1, *supra*, note 6 at 33 of 37.

¹¹ Tr. 64.

¹² Tr. 69.

Applicant is trustworthy.¹³ The supervisor has noted Applicant's maturation since starting his current job, and stated that keeping his job is "absolutely" important to Applicant.¹⁴

Applicant's mother is convinced that Applicant will never repeat the type of behavior at issue.¹⁵ Applicant is committed to his job and his career.¹⁶ He signed a statement of intent that he will not use drugs in the future, noting that any future violation would lead to the automatic revocation of any security clearance granted.¹⁷ His statement also affirms that he will not associate with those who use illegal drugs in the future.¹⁸ Although he had already chosen to eschew interaction with drug users, he also voluntarily disassociated himself from one former acquaintance when interviewers suggested the acquaintance could raise concerns.¹⁹ Applicant appreciates the fact that he will lose his job if he loses his security clearance, noting it is a strong incentive to comport himself appropriately.²⁰

Over the past year-and-a-half, Applicant has matured considerably.²¹ He is now 21 years of age and has gained considerable life experience. He often socializes with his elders. He recently bought his own home. As a new homeowner, domestic projects consume much of his free time. For companionship, he recently bought a dog, with which he spends a lot of time. He and his mother visit about every two weeks. Applicant now considers himself as having a career, as opposed to a job. He appreciates the fact he now earns approximately \$55,000 per year working in a position he enjoys. Applicant is highly valued as an employee and recently received a raise.²² In the past year, Applicant completed multiple advanced certifications in work-related areas and is planning to pursue a bachelor's degree in the near future.²³ He credibly regrets his past drug use and the incident with his former client's credit card. He has been forthcoming

¹³ Tr. 69-70.

¹⁴ Tr. 70.

¹⁵ Tr. 56-57. Applicant's mother noted that when Applicant received the SOR, Applicant "was totally destroyed." When asked whether "the maintenance of his job at this point is pretty much a guarantee that [Applicant's] going to keep his nose clean," Applicant's mother responded by stating, "Absolutely."

¹⁶ Tr. 73.

¹⁷ Tr. 20; Ex. E (Statement, dated Mar. 22, 2011).

¹⁸ *Id.*

¹⁹ Tr. 43-44.

²⁰ Tr. 73-74.

²¹ *See also* Tr. 30-31, 56, 70.

²² *See* Tr. 24, 48-52, 58-70; Exs. A-C, F, and K, generally.

²³ Ex. H (Statement, undated) at 2.

about both issues throughout. He submitted a laboratory report showing negative drug testing results from March 2011.²⁴

Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions. 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. 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 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.

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 Department Counsel. . . ." ²⁵ The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant.²⁶

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 about 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 loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites

²⁴ Ex. D (Test results, dated Mar. 18, 2011).

²⁵ See *also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

²⁶ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

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.”²⁷ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.²⁸

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

Analysis

Guideline E – Personal Conduct

Security concerns arise from matters of personal conduct because “conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness, and ability to protect classified information.”²⁹ In addition, “any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process” is of special interest.³⁰

The single allegation raised under this guideline concerns Applicant’s 2009 termination from employment after the theft of \$114 from a former client. Personal Conduct Disqualifying Condition AG ¶ 16(d) (credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of (1) untrustworthy or unreliable behavior . . . and (2) evidence of significant misuse of Government or other employer’s time or resources) apply. Consequently, the burden is on Applicant to raise any mitigating conditions.

Applicant informed his employer’s client of his theft about two days after the fact. Although Applicant failed to report his theft immediately after he downloaded the video purchased, it was downloaded at 3:00 a.m. There is insufficient information to discern whether more immediate reporting was impractical (*e.g.*, it was performed after a late

²⁷ *Id.*

²⁸ *Id.*

²⁹ AG ¶ 15.

³⁰ *Id.*

Friday night of work) or whether the delay belies an initial attempt to conceal. What is clear, however, is that by the time the issue became relevant to investigators, Applicant had reported the incident to the client, made restitution, advised his prospective employer of both his act and his subsequent termination, and detailed the incident on his SCA. To that extent, AG ¶ 17(a) (the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts) applies.

Although the amount at issue is only \$114, the August 2009 theft betrayed the trust established between Applicant, his employer, and the client. It occurred less than two years ago. However, Applicant, then 19 years old, quickly notified the client of his isolated lapse in judgment, giving it notice and reason to check its billing for evidence of the act. In being immediately terminated by his employer for the theft despite his attempt to work things out directly with the client, Applicant's appreciation of the gravity of his offense was accentuated and an important life-lesson was well learned.

It is highly unlikely that such an act will be repeated by Applicant, especially given his subsequent maturation and the fact he now fully appreciates that even a minor infraction in the future would jeopardize, if not terminate, his career.³¹ Moreover, Applicant has been fully forthcoming about the incident and his termination ever since. Furthermore, he has demonstrated sound judgment and reliability in all other aspects of his life since returning to the workforce. Such judgment and reliability was confirmed by his work superiors and was apparent in his highly credible testimony. In light of these unique facts, I find that AG ¶ 17(c) (the offense is so minor, or so much time has passed, or the behavior is so infrequent or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment), AG ¶ 17(d) (the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other or inappropriate behavior, and such behavior is unlikely to recur), and AG ¶ 17(e) (the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress) apply.

Guideline H - 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.³² "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., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens) and inhalants and other

³¹ Indeed, it is notable that the teenaged Applicant came forward on his own volition to the client, rather than wait and see if the charge would be noticed.

³² AG ¶ 24.

substances.³³ “Drug abuse” is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.³⁴

Applicant admitted he used marijuana, an illegal drug, between August 2007 and January 2010. He also admitted that he purchased the substance for his own consumption at times during that period. Therefore, Drug Involvement Disqualifying Conditions AG ¶ 25(a) (any drug abuse) and AG ¶ 25(c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia) are raised. With disqualifying conditions raised, the burden shifts to Applicant to mitigate related security concerns.

Applicant used marijuana after completing high school in 2007 and before demonstrating his resolve to start a professional career in January 2010. While it is a habit he is not likely to resume, as discussed below, there is insufficient evidence to raise Drug Involvement Mitigating Condition 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).

Applicant no longer associates with those who use drugs and eschews those venues where drugs might be either present or in use. When it was suggested that one nominal associate might be sufficient to raise security concerns, he volitionally ceased his relationship with that person. AG ¶ 26(b)(1) (disassociation from drug-using associates and contacts) and AG ¶ 26(b)(2) (changing or avoiding the environment where drugs were used) apply.

At present, Applicant has been drug free for nearly a year and a half. While this is not generally a significant amount of time, it is a significant period for one who is only 21 years old. Moreover, when this period of abstinence is taken in conjunction with both his obvious desire to succeed in his chosen profession and his efforts to disassociate himself from drug use, it is also a sufficient period of time to outweigh the less than two-and-a-half year period during which he casually used marijuana between the ages of 18 and 20. I find that Applicant has demonstrated his resolve to remain drug free. AG ¶ 26(b)(3) (an appropriate period of abstinence) applies.

At the hearing, Applicant made credible statements regarding his reasons for quitting marijuana and for refraining from its use in the future. In addition, Applicant introduced highly positive witnesses who confirmed Applicant’s resolve to quit marijuana and maintain the standards expected of one pursuing a security clearance. He is prized as an employee, he values his position, and he will not do anything in the future that might jeopardize his career or his future. He signed a statement of intent with automatic revocation of clearance for any future drug-related violations and expressed a clear understanding of both its meaning and its significance. Therefore, AG ¶ 26(b)(4)

³³ *Id.* at ¶ 24(a)(1-2).

³⁴ *Id.* at ¶ 24(b).

(a signed statement of intent with automatic revocation of clearance for any violation) applies. None of the other mitigating conditions are applicable to this case.

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). Under AG ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based on 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. Multiple facts speak in Applicant's favor. He is a mature, credible, and articulate 21-year-old man. He earned a high school diploma, recently completed competitive certifications, and is planning to pursue a bachelor's degree. He is a valued employee who recently received a raise. He has earned the respect of his supervisor, a seasoned manager. Applicant recently bought his first home and a dog. He maintains a close relationship with his mother.

Although he used marijuana from the time he was about 18 until he was 20, he quit using the substance when he decided to pursue a career seriously. When he misused his employer's client's credit card for a \$114 personal purchase, he informed the client of his misuse with sufficient speed to enable the client to track the purchase. He made restitution for the purchase. When Applicant interviewed for his present position, he fully disclosed the circumstances surrounding his earlier termination. He fully disclosed those same circumstances, as well as his past drug use, when he completed his SCA, thus providing the Government with notice of the issues. Now 21 years old, he has matured greatly and proven to be an excellent employee.

There is no direct nexus between Applicant's \$114 theft, termination, or past drug use, except to the extent that all three reflect poorly on his judgment and reliability. His timely admission and restitution to his former employer's client help to ameliorate the extent of Applicant's misdeed at his former workplace. That incident and its repercussions proved to be a valuable learning experience for the then-19 year old Applicant, from which he has learned much about responsibility and the exercise of mature judgment. He is highly unlikely to repeat such an act. Rather, his experience has given him a better appreciation of behaving maturely, responsibly, and professionally. The same can be said for his past marijuana use, a habit he will not reacquire given all he has too lose.

At 21, Applicant is at an important and early stage to redeem his reputation, and to assume adult-level responsibility. He has made notable strides to do both. His mother and his superior support Applicant's credible and genuine assertion that he has matured and that he will not perform any acts that might jeopardize his career in the future. Applicant fully understands that his actions do have circumstances, is contrite

about his past, and is demonstrably willing to comport his behavior appropriately in the future. I have no concerns that future actions will give rise to additional issues regarding drug involvement or personal conduct. I find that Applicant has mitigated personal conduct and drug involvement security concerns. Clearance is granted.

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 E: FOR APPLICANT

Subparagraph 1.a: For Applicant

Paragraph 2, Guideline H: FOR APPLICANT

Subparagraph 2.a: For Applicant

Conclusion

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

ARTHUR E. MARSHALL, JR.
Administrative Judge