



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



In the matter of:)
)
) ISCR Case No. 10-10086
)
)
Applicant for Security Clearance)

Appearances

For Government: Marc G. Laverdiere, Esquire, Department Counsel
For Applicant: *Pro se*

September 21, 2011

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant smoked marijuana at times weekly from about January 2007 to April 2009. From September 2009 to December 2009, Applicant used marijuana and nitrous oxide weekly. He also experimented with LSD, Concerta, Ambien, and amyl nitrate at different times that fall. Applicant stopped his drug use in December 2009, with the exception of abusing Concerta and ecstasy once each in February 2010. He does not intend to abuse any illegal drug in the future. Clearance granted.

Statement of the Case

On April 5, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline H (Drug Involvement), which provided the basis for its preliminary decision to deny him a security clearance. DOHA took action under 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) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR allegations on April 26, 2011, and he requested a hearing. On June 3, 2011, the case was assigned to me to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for him. I scheduled a hearing for June 30, 2011. At the hearing, which was convened as scheduled, three Government exhibits (GE 1-3) and three Applicant exhibits (AE A-C) were entered into evidence. Applicant also testified, as reflected in a transcript (Tr.) received on July 12, 2011.

Findings of Fact

The SOR alleged that Applicant used ecstasy once in February 2010 (SOR 1.a), Concerta monthly from September 2009 to February 2010 (SOR 1.b), nitrous oxide about once weekly from September 2009 to December 2009 (SOR 1.c), marijuana once to twice weekly from January 2007 to December 2009 (SOR 1.d), LSD twice between October 2009 and December 2009 (SOR 1.e), Ambien two or three times from September 2009 to November 2009 (SOR 1.f), and amyl nitrate twice between August 2009 and September 2009 (SOR 1.g). Applicant admitted the alleged drug use without explanation. His admissions are incorporated as findings of fact. After considering the pleadings, exhibits, and transcript, I make the following additional findings of fact.

Applicant is a 23-year-old student pursuing his doctorate degree in computer engineering. (GEs 1, 3.) He has consulted part-time for a defense contractor since about June 2010. (GE 1; Tr. 32.) He seeks his first security clearance. (GE 1.)

Applicant started college (college #1) in January 2005, when he was only 16. (Tr. 32-33.) He spent a year, from September 2006 to June 2007, as an exchange student at college #2, where he is presently pursuing his graduate studies. In January 2007, while at college #2 living in a dormitory, Applicant was given some marijuana by his then roommate. (Tr. 33.) He began smoking marijuana, for the most part weekly. In August 2007, he returned to college #1 to finish his undergraduate degree. He continued his weekly marijuana use. While studying abroad from May to August 2008, Applicant spent a couple of days in the Netherlands in July 2008. He purchased marijuana from cafes, including in baked goods. On his return from his foreign study program, he was awarded his bachelor's degree from college #1. In September 2008, Applicant returned to college #2 to finish his studies for an undergraduate degree in computer engineering. He smoked marijuana about weekly, purchasing it on occasion from a friend. On one occasion, Applicant baked brownies containing marijuana and shared them with his friends in his coed fraternity. (Tr. 34-35.) He again purchased and used marijuana while on a one-week pleasure trip to the Netherlands in April 2009. (GE 3.) Applicant engaged in no illegal drug use from May 2009 until September 2009, as he had no contact with his marijuana supplier during that time. (GE 3.)

In May 2009, Applicant was given a conditional job offer by a government agency, which required him to obtain a security clearance. (Tr. 43.) Applicant completed a security clearance application on which he disclosed his illegal drug involvement. (Tr. 45.) He withdrew his name from consideration for the job in favor of a graduate research position at college #2. (GE 1.) Applicant was never informed by the government agency whether he passed its background check. He assumes he did not. (Tr. 45.)

After Applicant received his B.S. in computer engineering from college #2 in June 2009, he began graduate studies toward a doctorate degree in computer engineering. (GEs 1, 3.) Over the fall semester of 2009, Applicant felt stressed by the rigors of his graduate program, which required independent research as well as academic study. (Tr. 41.) He resumed his involvement with marijuana, and he experimented with other controlled substances. He inhaled amyl nitrate twice at two different off-campus parties between August and September 2009. From September to November 2009, he took non-prescribed Ambien two or three times for insomnia. He took non-prescribed Concerta, a drug similar to Ritalin, to “power through” his academic workload about once a month between September 2009 and February 2010. Friends provided him the Concerta and Ambien from their prescriptions. Applicant also inhaled nitrous oxide to get “high” on a weekly basis, including with his present girlfriend, from about September 2009 and December 2009. His girlfriend bought the drug online. Applicant ingested LSD twice between October and December 2009. He used the LSD with his girlfriend at her apartment when she provided it to him. On the other occasion, Applicant gave a friend some marijuana in return for LSD. (GEs 1, 2, 3; Tr. 36-39.)

Applicant resolved in December 2009 to abstain from all illegal drug involvement in the future. He decided to become more serious about his academic studies and his future. He also wanted to move on from the company that he had been keeping (“I didn’t feel like the company I was with was good company.”). (Tr. 42.) Yet he experimented once with ecstasy, which was given to him by his girlfriend at an off-campus party. He had not previously tried the drug and thought it “sounded fun.” (Tr. 43.) He also ingested Concerta at least once in February 2010. (GEs 1, 2, 3.)

In April 2010, Applicant began part-time consultant work for a defense contractor. On July 1, 2010, he completed an Electronic Questionnaire for Investigations Processing (e-QIP). He disclosed his illegal drug involvement between January 2007 and February 2010 in response to question 23 concerning any illegal use of a controlled substance in the last seven years. (GE 1.)

From June 2010 to mid-August 2010, Applicant resided in another area of the country, at some distance from college #2, while consulting full-time for the defense contractor. On August 5, 2010, Applicant was interviewed about his illegal drug involvement by an authorized investigator for the Office of Personnel Management (OPM). He admitted that he was still associating with friends, including his present girlfriend, with whom he had used illegal drugs in the past or from whom he had obtained illegal drugs. Applicant denied any intent or desire to use any controlled dangerous substances. (GE 3.)

As of mid-January 2011, Applicant denied that he was associating with persons known by him to use illegal drugs, or that he was frequenting any places where he had reason to believe drugs were being used. (GE 2.) As of June 2011, he had distanced himself from his former drug-using associates (Tr. 25, 41), with the exception of two friends (including his girlfriend), who he claims changed their behavior and are no longer using illegal drugs in response to his decision to stop his involvement. (Tr. 26.)

Applicant did not develop a psychological or physiological dependency to any of the controlled substances that he abused. (Tr. 24, 27.) He did not allow his drug involvement to affect his academic performance. He attributes his past drug use to social immaturity. (Tr. 25.)

Applicant informed his girlfriend on multiple occasions that it is not in the best interest of his career or his future for him to use illegal drugs. (AE A.) He told her that if she wanted to continue to use illegal drugs, she could not be around him when she did so. He believes that she stopped using illegal drugs. They get together four or five nights a week, and Applicant has seen no evidence of her abusing illegal drugs. (Tr. 54.) About a year ago, she moved away from the college campus. (Tr. 55.) As of July 1, 2011, Applicant was moving to her present locale, about 15 minutes down the road from her. (Tr. 49.)

Applicant's girlfriend does not believe that he would again become involved with illicit drug activities. To her knowledge, he has distanced himself from the persons and places where he was prone to using illegal substances in the past. (AE A.) On June 30, 2011, Applicant executed a signed statement of intent to refrain from any illegal use of controlled substances in the future with the understanding that his clearance would automatically be revoked for any violation. (AE B.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has 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). 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 are required to 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 overall 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 that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to 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 *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Drug Involvement

The security concern for drug involvement is set out in AG ¶ 24:

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.

Under AG ¶ 24(a), drugs are defined as “mood and behavior altering substances,” and include:

- (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),¹ and
- (2) inhalants and other similar substances.

¹Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act, are contained in 21 U.S.C. § 812(c).

Under AG ¶ 24(b), drug abuse is defined as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.” Potentially disqualifying condition AG ¶ 25(a), “any drug abuse,” applies because Applicant abused marijuana from January 2007 to April 2009, and marijuana, LSD, amyl nitrate, nitrous oxide, Ambien, Concerta, and ecstasy between August 2009 and February 2010. AG ¶ 25(c), “illegal drug possession, including cultivation, processing, manufacture, purchase, sale or distribution; or possession of drug paraphernalia,” is also established in that he purchased marijuana and provided the drug in baked goods to his friends.

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,” does not apply. He abused marijuana for the most part weekly, and although he resolved in December 2009 to stop his illegal drug involvement, he abused ecstasy at a party and took non-prescribed Concerta as recently as February 2010.

Concerning AG ¶ 26(b), “a demonstrated intent not to abuse any drugs in the future,” can be shown by “(1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; or (4) a signed statement of intent with automatic revocation of clearance for any violation.” Applicant asserts in mitigation under AG ¶ 26(b) that he “no longer associate[s] with those who do drugs nor frequent[s] places where they are done” (Item 2), that he has abstained since February 2010, and that he executed a signed statement of intent required under AG ¶ 26(b)(4). Applicant is still in the college environment, although he is apparently no longer associating with the particular fraternity on campus involved in his past drug use. (Tr. 41.) Applicant’s girlfriend provided a notarized statement corroborating his abstention since February 2010, in which she stated:

I have no reason to believe that he would ever be involved in such activities again, and furthermore, have taken notice of the fact that he no longer associates with the people with whom, or in the places in which, he was prone to doing so, further distancing himself from such a culture and moving on in what he has told me is a more positive direction in his life, and a more sustainable one. (AE A.)

Conspicuously absent from her statement is any reference to her own drug involvement, although it could be inferred that she has ceased using illegal drugs as well, given her assertion that Applicant does not currently associate with drug abusers. Applicant testified that the two persons from his drug-abusing past, with whom he still had contact (his girlfriend and a male friend), may have been using illegal drugs as of August 2010, but he was not sure (“I was not sure if some of the people with whom I still associated still used drugs and I preferred not to lie and say—No.”). (Tr. 47.) To Applicant’s knowledge, they were not abusing any illegal drugs as of June 2011. (Tr. 48.) If Applicant’s girlfriend is still abusing illegal drugs on occasion, she is apparently respecting his wishes and not using them in his presence. The regularity of Applicant’s marijuana abuse from January 2007 to December 2009 suggests a high level of enjoyment of the drug, even if he never became

addicted psychologically or physiologically. However, his present abstention has been of sufficient duration to demonstrate his intent to maintain a drug-free lifestyle. Moreover, Applicant's candor about his illegal drug involvement throughout the clearance investigation and adjudication lends credibility to his stated intent to refrain from all illegal drug abuse. He appears to understand the inappropriateness of his illegal drug use, which can reasonably be attributed to youthful immaturity. Applicant is not likely to jeopardize his future by resuming illicit drug activity. The drug involvement concerns are mitigated.

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 his conduct and all relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(a).² In making the overall commonsense determination required under AG ¶ 2(c), I have to consider Applicant's poor judgment in abusing controlled substances, including taking prescription drugs illegally. While any illegal drug involvement is not condoned, Applicant's youth is an extenuating factor, and his candor about his drug abuse shows that his representations can be trusted. Applicant demonstrated through his abstinence, and through his avoidance of those environments and associates conducive to illegal drug use, that he has put his drug involvement behind him. At this time, it is clearly consistent with the national interest to grant Applicant eligibility 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 H: FOR APPLICANT

 Subparagraph 1.a-1.g: For Applicant

²The factors under AG ¶ 2(a) are as follows:

(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.

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.

Elizabeth M. Matchinski
Administrative Judge