



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 07-05683
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Francisco Mendez, Esquire, Department Counsel
For Applicant: *Pro Se*

February 12, 2008

Decision

CURRY, Marc E., Administrative Judge:

On, October 10, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline F. The action was taken 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR on October 30, 2007, and requested a hearing. The case was assigned to another administrative judge on December 6, 2007. DOHA issued a notice of hearing on December 18, 2007 scheduling it for January 10, 2008. The case was transferred to me on January 9, 2008, and I convened it as scheduled. During the hearing, I received six Government exhibits, one Applicant exhibit, and Applicant's testimony. DOHA received the hearing transcript (Tr.) on January 18, 2008. Based upon

a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

In his Answer, Applicant admitted all of the SOR allegations except subparagraphs 3.a and 3.b.

Applicant is a 30-year-old, single man who earned a bachelor of science degree in marketing and international business in 2000. Since 2003, he has worked for a defense contractor as a pricing analyst.

Between 1995 and 2003, Applicant smoked marijuana approximately 15 times (Tr. 18). He stopped around the time he obtained his current job. At that time, he was informed of his company's drug policy.

On January 20, 2006, Applicant was arrested and charged with driving under the influence of alcohol (DUI). After spending the night in jail, he was released pending a hearing scheduled for March 14, 2006. At the hearing, he was found guilty, sentenced to 10 days in jail to be served on weekends, fined, and ordered to attend a 10-week alcohol-awareness program.

During Applicant's intake interview with the alcohol-awareness program coordinator, he disclosed that he had smoked marijuana on one occasion in February 2006, between the DUI arrest date and the DUI trial (Tr. 14). Consequently, he was ordered to take a drug test. He failed, testing positive for marijuana, and was then ordered to meet with a drug counselor (Answer at 1). After one meeting, the drug counselor decided he did not need additional drug counseling (Tr. 44).

Applicant subsequently completed the alcohol-awareness program, as ordered. It consisted of group counseling approximately once per week, and 16 Alcoholic's Anonymous sessions (Tr. 36). Before the DUI arrest, Applicant had never been arrested. He has not been arrested since then.

At the time of Applicant's DUI arrest, he had not smoked marijuana in nearly three years. Since the February 2006 relapse, he has neither used it, nor associated with people who use it (Tr. 17).

In March 2006, Applicant completed a security clearance application. In response to the question of whether he had used illegal drugs within the past seven years, he answered "Yes," and disclosed his marijuana use between 1995 and 2003. He did not disclose the February 2006 marijuana use. He also answered "No" to the question of whether he had ever used drugs while possessing a security clearance. The

government had granted applicant a security clearance¹ approximately three months before his marijuana relapse (Exhibit 2 at 7).

Applicant met with a security clearance investigator in December 2006 (Exhibit 3). He voluntarily disclosed the February 2006 marijuana usage (*Id.* At 2).

Policies

When evaluating an applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 common sense 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. 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 as to obtaining a favorable security decision.

Analysis

Guideline H, Drug Involvement

Under this guideline, "use of an illegal 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." Here, Applicant's marijuana use from 1995 through 2003, his 2006 recurrence after being granted a security clearance, and his subsequent failed drug test trigger the application of AG ¶ 25(a), "any drug use," AG ¶ 25(b), "testing positive for illegal drug use," and AG ¶ 25(g), "any illegal drug use after being granted a clearance."

¹The record contains no evidence of the clearance level, or whether or not it was an interim clearance.

Applicant has not used marijuana since 2006, and he no longer socializes with people who use it. AG ¶ 26(b)(1), “a demonstrated intent not to abuse any drugs in the future, such as [a] disassociation from drug-using associates and contacts,” applies.

Although Applicant has only used marijuana once in the past five years, I was not persuaded that AG 25(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,” applies. According to the Appeal Board, “[e]lapsed time between an applicant’s last drug use and a Judge’s decision must be evaluated in light of the record as a whole” (ISCR Case No. 06-18905 (App. Bd. November 16, 2007) at 3). Here, Applicant used marijuana after being granted a security clearance, and while a DUI trial was pending. Under these circumstances, it is too soon to ascertain whether Applicant will remain marijuana-free. He has not mitigated the drug involvement security concern.

Guideline H, Personal Conduct

Under this guideline, “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.” Here, Applicant’s omission of his one-time 2006 marijuana use raises the issue of whether AG ¶ 16(a), “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities,” applies.

Applicant asserts the omission was not intentional. He disclosed his marijuana use that occurred between 1995 and 2003, and described it in detail. Although he omitted the 2006 use, he voluntarily disclosed it to a security clearance investigator 10 months later. Under these circumstances, his assertion that the omission was unintentional is credible. AG ¶ 16(a) does not apply. Applicant did not intend to falsify his security clearance application.

Guideline J, Criminal Conduct

Under this guideline, “criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness” (AG ¶ 30). Also, “by its very nature, it calls into question a person’s ability or willingness to comply with laws, rules and regulations” (*Id.*). Here, Applicant’s DUI conviction and his security clearance omission raise the issue of whether AG ¶ 31(a), “a single, serious crime or multiple lesser offenses,” applies. Applicant did not intentionally falsify his security clearance application, therefore, he did not violate 18 U.S.C. §1001. His DUI arrest and conviction was isolated, and he completed the terms of the sentence. AG ¶ 30(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,” applies.

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 the 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) 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.”

Applicant’s DUI conviction no longer poses a security concern. Although he deserves credit for eventually disclosing his February 2006 marijuana recurrence, it continues to pose a security concern. Applicant’s marijuana use through 2003 could arguably be attributed to youth and immaturity. However, the recurrence occurred when he was 28 years old, six years after finishing college, three years after he had begun working for a defense contractor, and approximately one year after he had been granted a security clearance. Although he seemed sincerely remorseful at the hearing, it is too soon to conclude under these circumstances that his marijuana use will no longer be an issue in the future. Evaluating this case in light of the whole person concept, I conclude he has not mitigated the drug involvement security concern.

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:	AGAINST APPLICANT
Subparagraphs 1.a - 1.c:	Against Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraphs 2.a - 2.b:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraphs 3.a - 3.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

MARC E. CURRY
Administrative Judge