



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



In the matter of:)	
)	
)	ISCR Case No. 07-07927
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Emilio Jaksetic, Esquire, Department Counsel
For Applicant: *Pro Se*

January 29, 2008

Decision

LAZZARO, Henry, Administrative Judge

Applicant failed to mitigate the security concern caused by his deliberate falsification of a security clearance application he submitted in January 2007.

On September 18, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.¹ The SOR, which is in essence the administrative complaint, alleges security concerns under Guidelines H (drug involvement), J (criminal conduct) and E (personal conduct). Applicant submitted an undated response to the SOR that was not accepted by DOHA because it was considered to be incomplete. He submitted a second response to the SOR, dated October 15, 2007, that was accepted by DOHA as a complete response. The two responses are being considered herein as a consolidated response without objection by Department Counsel or Applicant. Applicant admitted the SOR allegations contained in

¹ This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

subparagraphs 1.a, 1.b, 1.d and 2.a, denied the allegations contained in subparagraphs 1.c, 3.a, 3.b and 3.c, and requested a hearing.

The case was assigned to me on November 20, 2007. A notice of hearing was issued on November 29, 2007, scheduling the hearing for December 17, 2007. The hearing was conducted as scheduled. The government called one witness and submitted three documentary exhibits that were marked as Government Exhibits (GE) 1-3, and admitted into the record without objection. Applicant testified and submitted two documentary exhibits that were marked as Applicant Exhibits (AE) 1-2, and admitted into the record without objection. The transcript was received on January 4, 2008.

Procedural Matters

During the hearing, Department Counsel moved to amend the SOR by striking the date "March 1, 2007" in SOR subparagraphs 3.a, 3.b and 3.c and substituting therefore the date "January 25, 2007." After hearing arguments and testimony on the motion (Tr. pp. 61-80) and without objection from Applicant, I granted the motion and made the requested amendment on the face of the SOR.

Findings of Fact

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, testimony and exhibits, I make the following findings of fact:

Applicant is a 27-year-old single man who has been employed as a scheduling specialist by a defense contractor since December 2006. From August 2005 until December 2006, he worked as a program scheduler consulting with the defense contractor. He was employed as a project manager/staff geologist from October 2003 until July 2005. Applicant graduated from high school in 1999. He attended college from 1999 until May 2003, when he was awarded a degree in environmental science. Applicant worked as a laborer while in college.

Applicant used and purchased marijuana on a fairly regular basis during his first two years in college. In March 2001, while on spring break during his second year of college, Applicant used marijuana in a foreign country where the use of marijuana is legal. Applicant moved out of the dormitory where he lived during the first two years of college shortly after the trip to that foreign country and stopped using marijuana completely thereafter. He estimates he used the marijuana on about a weekly basis during the two years he resided in the dormitory and acknowledged he occasionally shared the marijuana he purchased with friends.

Applicant was charged with tampering with a fire call box and possession of marijuana by campus police after they searched the room he shared with another student. The room search resulted from the improper activation of a fire alarm which was attributed to Applicant and his roommate. Applicant appeared in a civilian court, was ordered to complete 20 hours community service by a judge, and the charges were thereafter dismissed.

Applicant executed and submitted a Questionnaire for National Security Positions (E-Quip) on or about January 25, 2007. In response to applicable questions, he failed to disclose he had used marijuana and had been arrested within the preceding 7 years as required.

Applicant's explanation in his SOR response and in his testimony for not disclosing the marijuana use was because he believed more than seven years had passed since his last use. His explanation for not disclosing the arrest in the SOR response and in his testimony was because he did not believe the offenses had occurred within the preceding 7 years or that he had been charged with an offense since the marijuana was not his and the charges were dismissed.

Applicant was interviewed by an investigator from the Office of Personnel Management (OPM) on May 4, 2007. At that time, when asked why he did not list the arrest in the E-Quip, Applicant stated:

. . . he felt that it was trivial and that it was - - because he was cited by campus police and not the regular police department he didn't feel that it actually counted and didn't want to jeopardize his job or plans over something trivial. (Tr. pg. 36)

He went on further to tell the investigator:

. . . he did not list these charges on his SF-86 because he did not want to run the risk of being declined for a job or clearance based on charges that he did not consider to be "real" charges, and therefore did not list them. (GE 3)

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the disqualifying conditions and mitigating conditions for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guidelines H (drug involvement), J (criminal conduct) and E (personal conduct), with their disqualifying and mitigating conditions, are most relevant in this case.

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an

applicant.² The government has the burden of proving controverted facts.³ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁴ although the government is required to present substantial evidence to meet its burden of proof.⁵ “Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.”⁶ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁷ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁸

No one has a right to a security clearance⁹ and “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹⁰ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.¹¹

Analysis

Guideline H, Drug Involvement; and Guideline J, Criminal Conduct

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. Likewise, criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness; and, by its very nature, calls into question a person’s ability or willingness to comply with laws, rules and regulations.

Applicant purchased, used and shared marijuana with friends on a regular basis between 1999 and 2001. He was charged with possession of marijuana and tampering with a fire call box in March 2001, and was required to perform community service after which

² ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

³ ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

⁴ *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

⁵ ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

⁶ ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

⁷ ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

⁸ ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

⁹ *Egan*, 484 U.S. at 528, 531.

¹⁰ *Id* at 531.

¹¹ *Egan*, Executive Order 10865, and the Directive.

the charges were dismissed. Under guideline H, disqualifying conditions (DC) 25(a): *any drug abuse*; and 25(c): *illegal drug possession, including . . . purchase, sale, or distribution* apply. Under guideline J, DC 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* apply.

Applicant's only use, purchase or sharing of marijuana occurred when he was a young college student. His testimony strongly suggests he made a conscious choice to stop using the substance when he moved out of his college dormitory in the spring of 2001, and he has abided by that decision ever since. The fire alarm offense occurred what is now almost 7 years ago and appears to be an isolated incident that is unlikely to recur. Under Guideline H, mitigating conditions (MC) 26(a): *the behavior happened so long ago . . . 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*; and 26(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* apply. Under Guideline J, MC 32(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*; and 32(d): *there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse of restitution, job training or higher education, good employment record, or constructive community involvement* apply.

Applicant's drug abuse and relatively minor criminal conduct both occurred when he was a young college student away from home for the first time. Shortly after being arrested and required to perform community service he apparently matured and realized it was time to avoid those types of misconduct which could jeopardize his future. The mitigating conditions that exist under Guideline H and Guideline J are sufficient to overcome the security concerns that existed under those guidelines and they are found for Applicant.

Guideline E, Personal Conduct

Personal conduct is always a concern 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. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any failure to cooperate with the security clearance process.

Applicant's explanations for not listing his marijuana use and arrest in the 2007 E-quip he submitted are not credible. He began college in 1999, used marijuana regularly until sometime in the spring of 2001, and was charged with the possession of marijuana and the fire alarm offense in March 2001. Seven years prior to the submission of the E-quip, Applicant was a freshman just starting his second college semester. It is unreasonable for him to assert he believed his two years of regular and somewhat

extensive marijuana abuse, his arrest, and his decision to move out of the dormitory and stop using marijuana all occurred during his first semester of college.

Totally believable is the testimony and report of the OPM investigator that Applicant told her he was concerned about the impact truthful reporting of his past conduct might have on his ability to obtain a security clearance and maintain his employment. DC 16(a): *deliberate omission, concealment, or falsification of relevant facts from any personal 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. I have considered all mitigating conditions under Guideline E, and find none apply.

The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶¶ 6.3.1 through ¶¶6.3.6 of the Directive, and the applicable disqualifying conditions, Applicant has failed to mitigate the security concern caused by his personal conduct. He has failed to overcome the case against him in this regard or satisfy his ultimate burden of persuasion. Guideline E is decided against Applicant. It is not clearly consistent with the national interest to grant Applicant 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
Subparagraphs 1.a-d:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraphs 3.a-c:	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 a security clearance for Applicant. Clearance is denied.

Henry Lazzaro
Administrative Judge