



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



In the matter of:)	
)	
)	ISCR Case No. 12-04322
)	
Applicant for Security Clearance)	

Appearances

For Government: Stephanie Hess, Esquire, Department Counsel
For Applicant: *Pro se*

03/25/2013

Decision

MASON, Paul J., Administrative Judge:

Applicant used marijuana on a monthly basis between 1998 and December 2005, when he received a security clearance and began his employment for a defense contractor. Though he used drugs on one additional occasion in April 2011, he had a good-faith belief that he did not possess security clearances while working for the commercial employer between 2009 and 2011. His good-faith belief caused him to incorrectly answer the drug use security clearance question on his security clearance form in January 2012. Applicant’s evidence in mitigation is sufficient to find in his favor under the drug involvement and personal conduct guidelines. Eligibility for access to classified information is granted.

Statement of the Case

Applicant completed and certified his Electronic Questionnaire for Investigations Processing (e-QIP) on January 11, 2012. He was interviewed by an investigator from the

Office of Personnel Management (OPM) on February 13, 2012. A summary of this interview appears in his notarized interrogatory answers dated October 22, 2012. Applicant initially did not agree with certain information in the summary and provided additional information that is not relevant. After providing information about his drug use and future intention not to use drugs, he agreed that the investigator's summary could be used at a hearing to determine his security suitability.

On November 14, 2012, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing security concerns under drug involvement (Guideline H) and personal conduct (Guideline E). 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) implemented by the Department of Defense on September 1, 2006. Applicant's notarized answer to the SOR was received on November 30, 2012.

The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on February 11, 2013, for a hearing on March 5, 2013. The hearing was held as scheduled. At the hearing, three Government exhibits (GE) 1-3 were admitted in evidence without objection. Applicant testified and presented no exhibits. DOHA received the transcript (Tr.) on March 14, 2013. The record closed on March 14, 2013.

Findings of Fact

The SOR alleges drug involvement and personal conduct. In his answer, Applicant admitted all allegations. He provided an attachment to his answer explaining the circumstances of his one-time use of marijuana in April 2011, while holding a security clearance.

Applicant is 32 years old and has been married since June 2011. He has a six-month-old baby. In December 2003, he received his bachelor's degree. In April 2008, he received a master's degree in network security. He has been working as an information assurance analyst for a defense contractor since January 2012.

SOR 1.a alleges that Applicant used marijuana while holding a secret clearance granted to him in October 2008 and an interim top secret security clearance granted to him in January 2011. In support of the allegation, the Government presented Applicant's security clearance history, which is revealed in the Joint Personnel Adjudication System (JPAS), a Government-wide system that tracks the status of security clearances for defense contractor personnel. Applicant's investigation and adjudication history reflects that he received a secret security clearance on October 16, 2008. He provided an attachment to his answer explaining that DOD adjudicators informed him the contractor who sponsored

his October 2008 clearance did not enter the appropriate information into JPAS when he terminated his employment with this sponsoring contractor in September 2009, and began employment with a commercial company working on strictly non-classified projects. Applicant believed he did not have a security clearance after September 2009. Since the commercial company had no facility security officer (FSO), the company had no way to determine if Applicant had a security clearance. Applicant worked for this company for three years. (SOR answer, attachment;¹ GE 1 at 14; Tr. 22-24)

JPAS shows that Applicant received an interim top secret clearance on January 21, 2011. (GE 3) He was unaware he had received a clearance. DOD adjudicators informed him that the sponsoring contractor was late in entering the appropriate information into JPAS indicating that Applicant never received a security clearance and was never employed by them. In addition, this sponsoring contractor was not awarded the contract. (SOR answer, attachment; GE 2 at 5; Tr. 24)

SOR 1.b alleges Applicant used marijuana with varying frequency from 1998 to 2005. In January 2012 (e-QIP) and October 2012 (interrogatory answers), he admitted using marijuana on a monthly basis between 1998 and his graduation from college in December 2003. He continued to use the drug monthly until he received a security clearance in December 2005. He used the drug one more time with friends at a bachelor's party on April 16, 2011, but he has used no drugs since then. He has no intention to use drugs in the future because he is most concerned about his career, his marriage, and his life. Applicant is certain his drug use is in the past. (GE 1 at 37-38, GE 2 at 4-5; Tr. 31-33, 36). I find that Applicant used no marijuana from December 2005 until his last use on April 16, 2011. (GE 2 at third page)

Applicant has never misused prescription drugs. He has never been diagnosed as drug dependent or a drug abuser, and has never received treatment or counseling for drug use. He has never received disciplinary action for drug use. He no longer associates with drug users. (GE 1 at 38, GE 2 at 4-5)

SOR 2.a alleges that Applicant deliberately falsified material facts on his e-QIP dated January 11, 2012, when he answered "no" to a question under Section 23 (Illegal Use of Drugs or Drug Activity. Was your use while possessing a security clearance?) (e-QIP at 38) Though Applicant's answer to the question was false, I find the failure to disclose his one-

¹ The attachment to Applicant's answer contains relevant hearsay evidence of discussions he had with DOD adjudicators about his security clearance history. Though Applicant's interest in the outcome of this security clearance hearing must be considered, in view of the reliability and consistency of the hearsay evidence to other evidence in the record and the Defense Security Service (DSS) Internet site (www.dss.mil/disco/indust-disco-maintain) explaining operating procedures for maintaining personnel security clearances, and Applicant's favorable credibility at the hearing, the attachment is given considerable weight.

time use in April 2011 was not deliberate because he did not believe he had a security clearance after September 2009. I find his belief reasonable.

In response to the first question of the Section 23 module (e-QIP, January 11, 2012) requiring information about any drug use within the last 7 years, Applicant indicated he used marijuana about 12 times before December 2005. He used the drug once more at a bachelor's party in April 2011. He concluded his remarks to this question by stating, "I do not intend to use this drug in the future because the drug is not worth using. I am more concerned about focusing on my career, marriage, and life." (GE 1 at 38; Tr. 36)

Having carefully reviewed the record, including Applicant's demeanor and deportment during the hearing, I find that Applicant testified credibly. He used marijuana on a monthly basis from 1998 to December 2005, when he received his security clearance and began working on classified projects. He used the drug one additional time at a bachelor's party in April 2011. Because of his family and career, Applicant does not intend to use drugs in the future.

Policies

Each guideline under the AG lists potentially disqualifying conditions and mitigating conditions, which are required to be considered to the extent they apply in evaluating an applicant's eligibility for access to classified information. These guideline-conditions must be evaluated in the context of the whole-person concept, nine factors that bring together all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. Such decisions entail a certain degree of legally permissible extrapolation about the potential, rather than actual, risk of compromise of classified information.

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 for obtaining a favorable security decision.

Analysis

Drug Involvement

Paragraph 24 of the AG sets forth the security concern associated with 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 identifies three pertinent disqualifying conditions that could raise security concerns: (a) *(any drug abuse)*; (c) *(illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia)*; and (g) *(any illegal drug use after being granted a security clearance)*. Applicant possessed and used marijuana on a monthly basis from 1998 until he received a security clearance in December 2005. He used the drug once more at a bachelor's party in April 2011. While he used marijuana after being granted a security clearance in October 2008, he believed he no longer had a security clearance after he began working for a commercial company in September 2009, where he was employed for three years. AG ¶¶ 25(a) and 25(c) apply, but AG ¶ 25(g) does not apply.

Applicant used marijuana on one occasion in April 2011 after being granted an interim security clearance in January 2011. He was unaware he had been sponsored for an interim clearance because he was working for a commercial company with no access to JPAS. He was unaware he had received the interim clearance, and the sponsoring contractor never received the contract. AG ¶¶ 25(a) and 25(c) apply. AG 25(g) does not apply because I conclude Applicant did not know he had been granted an interim security clearance in January 2011.

The two pertinent mitigating conditions under AG ¶ 26 of the drug involvement guideline are: (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)*; and (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 are used, (3) an appropriate period of abstinence, and (4) a signed statement of intent with automatic revocation of clearance for any violation)*. AG ¶ 26(a) may apply when the drug use was not recent. Following his monthly use of marijuana from 1998 to December 2005, Applicant stopped using drugs for more than five years. His one-time use in April 2011 while holding a security clearance occurred almost two years ago, and under unusual circumstances that are unlikely to recur. He married in June 2011. He is the father of a six-month-old child. He understands that losing his family and career by resuming drug use is not worth the risk. AG ¶ 26(a) applies.

Applicant has sufficiently demonstrated that he no longer associates with drug users. He does not want to jeopardize his family and career by using drugs again. He has not used drugs since April 2011. While the record does not contain a signed statement of intent

with automatic revocation, Applicant's stated intent to refrain from future drug use is confirmed by his statements in January 2012 (e-QIP), February 2012 (interview summary), October 2012 (interrogatory answers), and his credible testimony. AG ¶ 26(b) applies.

Personal Conduct

The security concern for personal conduct is set forth in AG ¶ 15:

AG ¶ 15. 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 other failure to cooperate with the security clearance process.

AG ¶ 16 contains two pertinent disqualifying conditions that may be applicable: (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)*; and (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 the person may not properly safeguard protected information. This includes but is not limited to consideration of . . . (3) a pattern of dishonesty or rule violations . . .)* Though Applicant's response to the drug question under Section 23 was incorrect, I conclude he believed in good-faith that he no longer had his October 2008 security clearance after he began working for a commercial company in September 2009. Similarly, he believed that he did not have a security clearance in January 2011. His good-faith belief precludes a finding he deliberately failed to disclose information of using drugs while possessing a security clearance. AG ¶ 16(a) does not apply.

Applicant's use of drugs in April 2011 would constitute a violation of using drugs while possessing a security clearance. However, Applicant did not know he had received a security clearance in January 2011 because he never worked for the sponsoring contractor. The sponsoring contractor never received the contract. AG ¶ 16(d) does not apply to Applicant's one-time use of drugs in April 2011.

The two pertinent mitigating conditions, AG ¶ 17(a) and AG ¶ 17(b), are not applicable because I have determined that Applicant's failure to disclose his drug use was unintentional.

Having determined that Applicant believed he no longer had a security clearance after switching to the commercial company in September 2009, and never being notified of the interim clearance in January 2011, AG ¶¶ 17(c) and 17(d) do not apply.

Assuming that there is a rule violation based on Applicant's questionable judgment in using drugs while possessing an interim security clearance after the passage of more than five years, his evidence in mitigation would overcome the violation with the mitigating evidence presented under AG ¶ 17(c) (*the offense is so minor, or so much time has passed, or the behavior is 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 and good judgment*); and AG ¶ 17(d) (*the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate stressors, circumstances, or factors that caused untrustworthy, unreliable or other inappropriate behavior, and such behavior is unlikely to recur*). AG ¶ 17(c) is applicable for the same reasons that have been discussed under AG ¶ 26(a) of the drug involvement guideline. Applicant's complete acknowledgment of his drug use invokes AG ¶ 17(d). His recognition of the importance of his family and career justifies complete confidence that his past drug use will not recur. AG ¶¶ 17(c) and 17(d) apply.

Whole-Person Concept

In evaluating Applicant's security clearance worthiness, I have examined the evidence under the disqualifying and mitigating conditions of the drug involvement and personal conduct guidelines. I have also weighed the circumstances within the context of nine variables known as the whole-person concept. In evaluating the relevance of an individual's conduct, the administrative judge should consider the following factors set forth in 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 the participation was 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 decision of whether the granting or continuing eligibility for a security clearance is clearly consistent with the interests of national security must be a judgment based on common sense after a careful review of the guidelines, which are to be evaluated in the context of the whole-person concept.

Applicant's drug use has been discussed under the drug involvement and personal conduct guidelines. Though he used drugs in April 2011 after being granted a security clearance, he did not know he had a clearance because he never was notified, and the sponsoring contractor never received the contract. Applicant has not used illegal drugs since a bachelor party in April 2011. He married in June 2011, and he and his wife are raising a young child. He convinced me that his family and career are more important than engaging in future drug use. Having weighed and balanced all the evidence under the disqualifying and mitigating conditions, and in the context of the whole-person concept, Applicant has mitigated the security concerns under drug involvement and personal conduct. See AG ¶ 2(a)(1)-2(a)(9).

Formal Findings

Paragraph 1 (Guideline H):	FOR APPLICANT
Subparagraphs 1.a-1.b:	For Applicant
Paragraph 2 (Guideline E):	FOR APPLICANT
Subparagraphs 2.a-2.b:	For Applicant

Conclusion

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

Paul J. Mason
Administrative Judge