



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



In the matter of:)
)
) ISCR Case No. 12-11110
)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esq., Department Counsel
For Applicant: Kevin W. Kloster, Personal Representative

April 24, 2013

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant failed to mitigate the Drug Involvement and Personal Conduct security concerns. Drug Involvement security concerns arose out of Applicant’s marijuana use during the period of January 2003 to January 2007; and in September 2009 while holding a security clearance. Personal Conduct security concerns arose out of Applicant’s drug use, his answers to questions about his drug use on his March 2008 Electronic Questionnaires for Investigative Processing (e-QIP), and his disclosures about his drug use to an investigative agent. Eligibility for access to classified information is denied.

Statement of the Case

On November 27, 2012, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, Drug Involvement and Guideline E, Personal Conduct. The action was taken under Executive Order (EO) 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 after September 1, 2006.

Applicant answered the SOR on January 3, 2013, and requested a hearing before an administrative judge. The case was assigned to me on February 19, 2013. Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 19, 2013, and the hearing was convened as scheduled on April 8, 2013. The Government offered Exhibits (GE) 1 through 3, which were admitted without objection. The Applicant offered Exhibits (AE) A through D, which were admitted without objection. Applicant testified on his own behalf and called one witness. DOHA received the hearing transcript (Tr.) on April 17, 2013.

Findings of Fact

Applicant is a 30-year-old government contractor. He possesses both a bachelor's degree and a master's degree awarded by the same prestigious university. He has been married for seven years, and has a newborn daughter. (GE 1; GE 2; Tr. 48, 51.)

The SOR alleged that Applicant used marijuana from January 2003 to January 2007 and again in September 2009, after he was hired by a government contractor in March 2008 and granted a DOD Secret security clearance. The SOR also alleged that Applicant deliberately omitted, on his March 2008 e-QIP, his drug use from January 2003 to January 2007, and provided false answers regarding his September 2009 drug use during an interview with another government agency in October 2009. In his Answer and during his testimony, Applicant admitted all of the allegations contained in the SOR pertaining to his marijuana use, but denied intentionally falsifying his e-QIP or intentionally misleading the government agent concerning his marijuana use. (Answer; GE 1; GE 2; Tr. 53.)

Applicant testified that between the ages of 19 and 23 he infrequently experimented with marijuana during his college years from January 2003 to January 2007. He estimated that he used marijuana 10 to 12 times when he visited friends at other universities. He graduated with his master's degree in August 2007. He did not use marijuana from January 2007 through August 2009. (GE 1; Tr. 24-32.)

In March 2008, Applicant began employment with a government contractor. He completed an e-QIP on March 21, 2008, in connection with that position. The e-QIP asked: "Section 24: Your Use of Illegal Drugs and Drug Activity a. Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbituates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?" Applicant answered, "No." Applicant testified he does not recall indicating "No" to this question and indicated he did not intentionally provide false information. (GE 2; Tr. 37-38, 57-60.) Applicant was subsequently granted a Secret security clearance.

On June 16, 2009, Applicant completed a Questionnaire for National Security Positions, Standard Form 86 (SF 86) while applying for program access with another government agency. Section 23 asked Applicant: "In the last 7 years, have you illegally used any controlled substance, for example, cocaine, crack cocaine, THC (marijuana, hashish, etc.) narcotics (opium, morphine, codeine, heroin, etc.), stimulants (amphetamines, speed, crystal methamphetamine, Ecstasy, ketamine, etc.) depressants (barbituates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), steroids, inhalants (toluene, amyl, nitrate, etc.) or prescription drugs (including pain killers? Use of a controlled substance includes injecting, snorting, inhaling, swallowing, experimenting with or otherwise consuming any controlled substance." Applicant answered, "YES," and disclosed "very infrequent recreational marijuana use" from "1/2003-1/2007 (EST)." He submitted his application for program access in July 2009. He knew that he would be subject to a polygraph as a result of his application for program access. (AE 1; GE 3; Tr. 38-40, 60-62.)

In 2009 Applicant was interviewed by a government agent in connection with his application for program access after submitting his SF 86. The interview took place prior to Labor Day weekend in 2009.¹ During the interview, Applicant discussed his marijuana use from January 2003 to January 2007. (GE 3; Tr. 40-46.)

Shortly after the interview, Applicant took a trip out of state to visit a friend for Labor Day weekend. During that trip, he used marijuana on three consecutive evenings. He possessed a Department of Defense security clearance at the time of this marijuana use. He acknowledged that he knew it was a violation of federal law, national security regulations, and his company's policies to use marijuana, but that he "was just not thinking about it, and [he] wasn't considering the consequences." (Tr. 30-34, 50, 64-65.)

In October 2009, a government agent contacted Applicant and questioned him further about his marijuana use from January 2003 to January 2007. Applicant discussed his January 2003 to January 2007 marijuana use with the agent during the conversation. He testified that near the end of their conversation he volunteered the additional information that he smoked marijuana two to four times between September 4, 2009, and September 8, 2009. (Tr. 41-45.)

As a result of his marijuana use, his application for program access with another government agency was denied based solely on his drug involvement. He was notified of the denial by letter dated January 20, 2010. The letter of denial also indicated:

During your September 2009 background investigation, you reaffirmed you used marijuana 10 times total between January 2003 and January 2007. You said the marijuana you used was provided by friends and that you did not purchase it. You mentioned that you received a "Baggie" of marijuana as a wedding gift in 2005 and that you and your wife smoked it together. You also stated that you stopped using marijuana because you

¹ The exact date of the first interview was not specified. There were no written records of this interview offered into evidence.

knew it was irresponsible to break the law and because you were getting an important job. You said you had no intentions of using illegal drugs in the future.

During an October 2009 telephone interview with a security representative you initially reaffirmed your illegal drug use as listed on your S[F] 86 and discussed during your BI. However, after you were advised there may be additional security processing to include a polygraph examination, you changed your dates and amounts of illegal drug use. You added that you smoked marijuana two to four times between 04 September and 08 September 2009. When you were asked why you used marijuana while holding a security clearance, you stated that you believe smoking marijuana is harmless although "irresponsible." (GE 3.)

Applicant's Secret security clearance was also suspended. Applicant waited one year and reapplied for a security clearance. He completed an e-QIP on March 1, 2011. On the e-QIP, he disclosed marijuana use from January 2003 to January 2007, and September 4 through September 7, 2009, as discussed above.² (GE 1, GE 3.)

Applicant testified he is "older and wiser" now. He acknowledged the seriousness of his transgressions. On December 31, 2012, he signed a statement of intent not to abuse any drugs in the future. He testified that he has not used any illegal substances since Labor Day weekend in 2009. Applicant no longer associates with marijuana users. He testified that if he discovered any friends or acquaintances using marijuana, he would immediately leave the premises. (Tr. 26, 34-35.) He explained his 2009 use, noting:

I just think that, you know, the first few years that I came out here, it may not have just sunk in to me at the time how egregious an error like that would be. I never sought it out really. I found myself in that situation, and I, you know, obviously acted on it, and it was a huge mistake. Through all of this, as a lesson learning and just life i[n] general, I know now how stupid that was and how foolish. I wouldn't say that I'm anywhere close to as naive as I was back then. (Tr. 33-34.)

Applicant is well respected by those who know him, as verified by the witness who testified on his behalf. Additionally, Applicant presented letters of recommendation that attest to the high quality of his character. Applicant is credited for exhibiting a sterling record of discretion, trustworthiness, and integrity through the eyes of his co-workers, over the past few years. He has been awarded a number of "spot awards" and was nominated for an individual achievement award for his exceptional work performance. Further, witnesses verify that his personal life is now consistent with his work life. (Tr. 82-89; AE C; AE D.)

² Applicant's March 1, 2011 e-QIP uses the date of September 7, 2009, instead of September 8, 2009, as set out above. This minor discrepancy is not alleged to raise security concerns.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used 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, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching 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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable clearance 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 the applicant may deliberately or inadvertently fail to protect or 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 EO 10865 provides that adverse 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 for access to classified or sensitive information).

Analysis

Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to 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.

I have considered all of the evidence in this case and the disqualifying conditions under Drug Involvement AG ¶ 25, and the following are potentially applicable:

- (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 use after being granted a security clearance.

The Government presented sufficient information to support all of the factual allegations under Guideline H (SOR ¶¶ 1.a.-1.b.). Applicant used marijuana from January 2003 to January 2007; and during September 2009 while holding a security clearance. The facts established through the Government's evidence and through Applicant's admissions raise security concerns under all of the above disqualifying conditions.

I have considered all of the evidence in this case and the mitigating conditions under Drug Involvement AG ¶ 26, and the following are potentially applicable:

- (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 were used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant has worked hard to excel in his career. Since his last marijuana use, over three-and-a-half years ago, Applicant has matured. He now has a young daughter and is dedicated to his family. He has ceased association with any friends that continue to use illegal substances. He avoids environments where illegal drugs are used, and he has signed a statement of intent with automatic revocation of clearance for any

violation. He performs well at work, as attested to by those that know him best. He has not used any type of legal or illegal intoxicant since 2009. He pledged to not allow drugs to interfere with his job or future. These mitigating conditions apply, but are outweighed by other evidence in this case.

Applicant used marijuana infrequently from 2003 to 2007, and again over Labor Day weekend in 2009 while possessing a security clearance. In September 2009 Applicant told the investigating agent that he “stopped using marijuana because [he] knew it was irresponsible to break the law and because [he was] getting an important job.” He also indicated he “had no intentions of using illegal drugs in the future.” Shortly after making these statements he used marijuana on multiple occasions. More than two years passed between his marijuana use in January 2007 and his use in September 2009. He made a conscious choice to use marijuana again, despite his responsibilities that existed at the time to his job and wife. Given these facts, I cannot afford much weight to his signed statement without the passage of additional time and a demonstrated commitment to remaining drug free.

Guideline E, Personal Conduct

The security concern for the Personal Conduct guideline is set out in 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 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially 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;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative; and

(e) personal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person’s personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for

exploitation or pressure by the foreign security or intelligence service or other group.

Applicant was repeatedly dishonest about the full extent of his marijuana use. He deliberately omitted his January 2003 to January 2007 marijuana use on his March 2008 e-QIP. He also intentionally failed to disclose his September 2009 marijuana use in a timely manner when he was interviewed about drug use in October 2009. He did not disclose the information until he was advised that he would likely have to take a polygraph in the future. He knew his actions were illegal, a violation of security policies, and in violation of his employer's policies. He substituted his own misguided judgment that "smoking marijuana is harmless," and in doing so, he demonstrated that he lacked the good judgment to comply with rules and regulations that are counter to his desires. The above disqualifying conditions apply.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (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;
- (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 inappropriate behavior, and such behavior is unlikely to recur; and
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant corrected the omission of his January 2003 through January 2007 marijuana use on his March 2008 e-QIP by disclosing it on his June 2009 SF 86. He did so before being confronted with facts concerning his marijuana use, but his disclosure was not timely. It took place over a year after the initial falsification. I find that AG ¶ 17(a) does not apply to Applicant's March 2008 falsification. In Applicant's October 2009 discussion with the government agent, he initially did not disclose his September 2009 marijuana use. However, he eventually chose to disclose it during that same conversation. His disclosure to the agent was prompt and before he was confronted with facts to the contrary. AG ¶ 17(a) is applicable, in part.

Applicant's eventual disclosures of his marijuana use do not mitigate the concerns relating to his poor judgment and vulnerability to coercion. He made poor decisions to violate laws, security procedures, and company policies because he did not agree with them. Applicant exhibited a pattern of exercising poor judgment in using

marijuana with a security clearance after indicating to a Government agent that he would not use the drug again. He failed to produce sufficient evidence that similar lapses in judgment are unlikely to recur, without the passage of more time or other evidence that demonstrates trustworthiness and good judgment. AG ¶¶ 17(c) and 17(d) are not applicable.

Applicant has earned an excellent reputation for honesty and trustworthiness at work. However, not enough time has passed to know whether Applicant could again be tempted to violate laws or other rules for his own personal benefit, as he did when he knowingly used marijuana after being granted a security clearance. AG ¶ 17(e) does not apply.

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 relevant 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) 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant is highly respected by those who know him. He has not used marijuana since September 2009. He has divulged information about his drug use, although not always in an expedient manner. He has signed a written statement that he will not use illegal substances in the future. However, he broke a similar vow to abstain from drug use in the past. Not enough time has passed since Applicant's drug use in 2009 to permit a finding that future drug use is unlikely to occur.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the Drug Involvement and Personal Conduct security concerns.

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
Subparagraph 1.a-1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a-2.c:	Against Applicant

Conclusion

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

Jennifer I. Goldstein
Administrative Judge