



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



In the matter of:)
)
) ISCR Case No. 14-00293
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

06/26/2014

Decision

O’BRIEN, Rita C., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated the security concerns raised under the guidelines for drug involvement and personal conduct. Accordingly, his request for a security clearance is denied.

Statement of the Case

On March 10, 2014, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) citing security concerns under Guideline H (drug involvement) and Guideline E (personal conduct) of the Adjudicative Guidelines (AG).¹ In his Answer to the SOR, Applicant admitted the allegations. He requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals (DOHA)

¹ Adjudication of the case is controlled by Executive Order 10865, as amended; DOD Directive 5220.6 (Directive), as amended; and the Adjudicative Guidelines, which supersede the guidelines listed in Enclosure 2 to the Directive. They apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

issued a Notice of Hearing on May 23, 2014, and I convened the hearing on June 17, 2014. I admitted three Government exhibits (GE 1-3) and one Applicant exhibit (AE A). I admitted Department Counsel's hearing exhibit list as HE I, and DOHA's discovery letter to Applicant as HE II. DOHA received the transcript on June 25, 2014.

Findings of Fact

Applicant's admissions are incorporated as findings of fact. After a thorough review of the pleadings and the record evidence, I make the following additional findings of fact.

Applicant is 27 years old, single, and has no children. He completed a bachelor's degree in 2010 and a master's degree in 2013. He has worked for a defense contractor since 2010. He was granted a secret security clearance in October of that year. In 2012, he applied for a top secret clearance. (GE 1-3; Tr. 19-20)

Applicant first smoked marijuana as a high school sophomore in 2004,² when he was 16 years old and visiting his brother at college. He testified that he smoked the second time in 2004 or 2005, when he was a junior or senior in high school. He also smoked while he was in college, 2006 through 2010. In his Answer, he estimated he used marijuana 7 to 12 times between 2004 and 2010. (Answer; GE 1; Tr. 18-22, 39)

After receiving a security clearance in October 2010, Applicant used marijuana three more times: in late 2010 with his brother at his brother's house; in February or March 2011 with his roommate and a friend; and in January 2012 with his girlfriend while visiting her at college. He testified he was aware that marijuana use was illegal. When questioned about whether he thought about his security clearance before using marijuana on these occasions, Applicant said that he had not been assigned to any projects that involved exposure to classified material at the time he used marijuana. However, he testified he did not use that fact to justify his actions at the time. He said, "I really didn't, I guess, gauge whether it was right or wrong. I just did it. I didn't think anything of it." (GE 3; Tr. 22-26)

At the hearing, Department Counsel questioned Applicant about his awareness of the requirement to avoid illegal drugs while holding a security clearance:

DEPARTMENT COUNSEL: After you were granted your clearance, you knew that it was contrary to the requirements of holding a clearance for you to use illegal drugs, correct?

THE WITNESS: Not necessarily. I know using illegal drugs is illegal, and that's basically what I know.

² In various documents, Applicant provided the dates of either 2003 or 2004 for his first use of marijuana. At the hearing, he clarified that he first used it in Spring of his sophomore year in high school, which was 2004. I have used this date as the start date of his marijuana use. (Answer; GE 1, 2; Tr. 36)

DEPARTMENT COUNSEL: Okay. But you answered questions about your drug use on your clearance application, correct?

THE WITNESS: Right. The questionnaire?

DEPARTMENT COUNSEL: Yes.

THE WITNESS: Yes.

DEPARTMENT COUNSEL: So you had some understanding that use of illegal drugs would be of concern with regard –

THE WITNESS: Right. So I knew you had to disclose it and which I did on my next questionnaire.

DEPARTMENT COUNSEL: Right. And so you knew that it was contrary to the requirements of a person holding a clearance for you to use illegal drugs, correct?

THE WITNESS: I wouldn't necessarily say that, no. I mean, I filled out the questionnaire. I answered the questions. I would have to look and see if it explicitly says -- I know that it's a conflict of interest. I would say that. (Tr. 24-25)

In about 2007 or 2008,³ a friend suggested that Applicant use Adderall, an amphetamine stimulant, to help him concentrate and prepare for an examination. He did not know it was a drug that was abused. The drug had not been prescribed for Applicant by a physician. He has not used it since that time. (Answer; GE 1; Tr. 15, 26-27)

Applicant's first security clearance application, in 2010, included the following question:

Section 23: Illegal Use of Drugs or Drug Activity

a. In the last seven (7) years [emphasis in original], have you illegally used any drugs or controlled substance, for example, cocaine, crack cocaine, THC (marijuana, hashish, etc.) narcotics (opium, morphine, codeine, heroin, etc.) stimulants (amphetamines, speed. . .) (GE 2)

Applicant answered "Yes" and listed one marijuana use in April 2004. He also noted,

Experimented with the drug by smoking it out of a bowl with my brother's college friends. The frequency of the activity was one time, and I used it

³ Applicant used both 2007 and 2008 as the possible dates for his one-time use of Adderall. (GE 1; Tr. 15, 26)

once. I experimented with the drug at a young age. Marijuana is not and has never been a part of my lifestyle, but I have tried it. (GE 2)

Applicant did not list any other uses between 2004 and 2010 “[d]ue to the fact that I did not know the exact instances of each event.” (Answer) He testified that, other than his first use in 2004, he did not remember the exact dates or frequencies of his use, and they were “few and far between.” Applicant decided to list the 2004 use he remembered, but not to give estimates for the dates of his other marijuana uses. He testified that he should have given approximate dates. He also did not list his use of Adderall because, at the time, “[I] was not aware that I was breaking any laws. . . “ and “[i]t was something that did not even cross my mind.” Applicant testified that he did not intend to conceal information or to provide false information on his 2010 application. He was granted a secret security clearance in October 2010. (Answer; GE 1; Tr. 15-17, 26-34, 40)

In his Answer, Applicant admitted to allegation 2.b, which alleged that when he completed his 2010 security clearance application, he deliberately falsified his answer regarding the extent of his marijuana use. When questioned at the hearing, Applicant denied that he deliberately falsified the information. (Answer; Tr. 40)

In September 2012, Applicant completed a second security clearance application. He noted in his Answer,

I was more conscientious and diligent with explaining that I used marijuana, using a realistic estimate across a definitive time period to account for everything, without having to definitize the exact dates for each occurrence. (Answer)

In response to the illegal drug use question in his 2012 application, Applicant answered that he smoked marijuana “[v]ery sparingly since high school” and listed 15 to 20 times as his total number of uses, with his last use in January 2012. He noted in the application that he smoked it with friends, usually at parties, but that he did not like smoking, and did not enjoy smoking marijuana. He said he purchased marijuana only one time, for his first use in 2004. Applicant also disclosed that he used marijuana while he held a security clearance, and that he misused Adderall. (GE 1; Tr. 21-22)

In 2007, Applicant underwent a drug test for a previous employer, but has not been tested since starting his current employment in 2010. He testified that his current employer’s drug policy is to test an employee only if his or her productivity declines. Because Applicant has no problems maintaining productivity, “It was never a concern, that I would ever be drug tested . . .” (Tr. 25-26)

Applicant testified that he has not used illegal drugs since 2012, and that he does not associate with anyone who uses illegal drugs. He has never received drug treatment or counseling. The record contains no information about whether or when Applicant

informed his facility security officer or supervisor about his illegal drug use, or his failure to fully disclose it on his security clearance application. (GE 1; Tr. 15)

Applicant submitted a 2013 reference from his company's manager of subcontracts administration. The manager states that Applicant quickly grasps the intricacies of complex processes, and is committed to excelling at tasks. He is a self-starter, with prospects to become a company leader. She recommended that he participate in a leadership development program. The letter was written before the SOR was issued, and it is unclear if the writer is aware of Applicant's illegal drug use. (AE A)

Policies

Each security clearance decision must be a fair and commonsense determination based on examination of all available relevant information, and consideration of the pertinent criteria and adjudication policy in the AG.⁴ Decisions must reflect consideration of the factors listed in ¶ 2(a) of the Guidelines, commonly referred to as the "whole-person" concept. The presence or absence of a disqualifying or mitigating condition does not determine a conclusion for or against an applicant. However, applicable guidelines are followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guidelines H (drug involvement) and E (personal conduct).

A security clearance decision is intended only to resolve the question of whether it is clearly consistent with the national interest⁵ for an applicant to receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the Applicant to refute, extenuate, or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁶ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust. Therefore, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment and trustworthiness of one who will protect the national interests as her or his own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government.⁷

⁴ Directive. 6.3.

⁵ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁶ See *Egan*, 484 U.S. at 528, 531.

⁷ See *Egan*; AG ¶ 2(b).

Analysis

Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern about 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 considered the following disqualifying conditions listed at AG ¶ 25:

- (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.

Between 2004 and 2012, Applicant used marijuana 15 to 20 times, despite the fact that he was aware that marijuana use was against the law. He purchased marijuana in 2004. After graduating from college in 2010, he accepted a position with a defense contractor, and was granted a security clearance. Subsequently, he possessed and used marijuana three times between 2010 and 2012, while he held a secret security clearance. He also possessed and used a prescription medication, without a prescription. AG ¶¶ 25(a), (c), and (g) apply.

The following mitigating conditions are relevant under 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;
- (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; and

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended.

Applicant's last marijuana use occurred in January 2012. Some mitigation applies based on Applicant's abstention from marijuana use for the past 2.5 years. However, he used marijuana at social gatherings; these are not unusual circumstances, but common situations that are likely to recur. Moreover, Applicant's decision to knowingly violate the law by using an illegal drug, and to use an illegal drug while holding a security clearance, raises serious concerns about his trustworthiness and judgment. AG ¶ 26(a) does not apply to Applicant's marijuana use.

As to Adderall, Applicant's use was not prescribed by a medical professional. However, AG ¶ 26(c) applies in part because his use of Adderall has ended. In addition, he was unaware that his use was illegal. He used it once, and has not used it in the past six years. AG ¶ 26(a) applies to his use of Adderall. I find for the Applicant on SOR ¶ 1.c.

Applicant receives some credit for abstaining from marijuana use since 2012. He also testified he no longer associates with anyone with whom he used marijuana in the past. However, the mitigation available under AG ¶ 26(b)(1) is limited because he may continue to be in contact with some people with whom he used marijuana. The record does not indicate if Applicant maintains a relationship with the girlfriend with whom he shared his most recent use of marijuana in 2012. However, two of his marijuana uses occurred with his brother, a family member with whom he is likely to maintain contact. Applicant did not submit a statement of intent to avoid future use of illegal drugs. AG ¶ 26(b) applies in part.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern about personal conduct:

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.

Under AG ¶ 16, the following disqualifying conditions are relevant:

(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

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.

Under Guideline E, the Government alleges that Applicant used an illegal drug, and used it while he held a security clearance. It also alleges that he knowingly falsified his security clearance application in 2010 when he (1) disclosed only one marijuana use in 2004, instead of 7 to 12 uses between 2004 and 2010; (2) failed to list his misuse of Adderall in 2008.

Applicant testified that he listed only his 2004 use of marijuana on his first security clearance application because, other than that date, he could not remember the other dates he had used it. Applicant's explanation is not credible. He was an educated man at the time he completed his 2010 security clearance application. The application instructed him to "[p]rovide the date(s) of use or activity . . ." The software allowed him to enter explanatory comments. Applicant used this capability to add numerous comments to other answers in his application.

In regard to his drug use, Applicant commented, "The frequency of the activity was one time, and I used it once." This affirmation that he used it only once belies his claim that he omitted the other instances because he forgot the dates. The plain meaning of his statement is that he used marijuana only in 2004, rather than the 7 to 12 times he had actually used marijuana between 2004 and 2010. Applicant's statement that he used marijuana once, six years in the past, was less damaging than the actual 7 to 12 uses that occurred at a time closer to when he completed the application. In fact, based on this misrepresentation, Applicant's clearance was granted. I conclude that he deliberately failed to disclose his multiple uses of an illegal drug between 2004 and 2010. AG ¶ 16(a) applies. However, I accept Applicant's explanation that he did not list his Adderall use on his application because he did not realize it was illegal.

Applicant admitted deliberate falsification in his Answer. However, at the hearing, he denied deliberately falsifying information. Based on my assessment of the evidence and Applicant's credibility, I do not accept his denial at the hearing. The Appeal Board has held,

Although it was legally permissible for Applicant to offer testimony and other evidence to explain away or recant his admission . . . [t]he Judge was not compelled to accept Applicant's explanation or recantation of his admission. It was legally permissible for the Judge to consider Applicant's explanation or recantation of that admission in light of the record evidence as a whole and her assessment of the credibility of Applicant's testimony.⁸

After Applicant was granted a secret security clearance in 2010, he used marijuana three times between 2010 and 2012. Use of an illegal drug after being granted a security clearance demonstrates untrustworthiness, poor judgment, and an unwillingness to comply with rules and regulations. AG ¶ 16(c) applies.

Guideline E contains factors that can mitigate disqualifying conduct. The following conditions under AG ¶ 17 are relevant:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

(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.

The record contains no evidence that Applicant attempted to inform his supervisor, facility security officer, or other official that he had used an illegal drug while holding a security clearance, or that he had not been candid on his 2010 security clearance application. AG ¶ 17(a) does not apply.

The mitigation discussed under Guideline H, AG ¶ 26(a), is essentially the same as that under Guideline E, AG ¶ 17(c). For the same reasons listed there, AG ¶ 17(c) does not apply. In addition, under AG ¶ 17(c), Applicant's conduct in using an illegal drug, and in particular, doing so while holding a security clearance, cannot be considered minor. The fact that, at the time he used marijuana while holding a security clearance, he was not assigned to projects involving classified information, is not relevant. Once an applicant receives a security clearance, he or she may be granted access to classified information at any time, and thus must uphold the obligations of security clearance holders at all times. Applicant's conduct constituted a breach of the obligations imposed on security clearance holders, and raises serious doubts about his reliability, judgment, and trustworthiness. AG ¶ 17(c) does not apply.

⁸ ISCR Case No. 03-01009 at 3 (App. Bd. Mar. 29, 2005).

Whole-Person Analysis

Under the whole-person concept, an administrative judge must evaluate the applicant's security eligibility by considering the totality of an applicant's conduct and all the circumstances. An 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the cited guidelines, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant's history includes positive factors that weigh in his favor, including abstinence from marijuana use for more than two years, his educational achievements, his professional accomplishments, and his laudatory recommendation from a current manager at his company.

However, the negative evidence weighing against granting Applicant a security clearance is more substantial. Applicant used an illegal drug; he used it while holding security clearance; and he falsified information he provided to the Government on his security clearance application. Applicant's conduct is not mitigated, despite being granted a security clearance in 2010. That clearance was granted based on information that minimized the extent of his illegal drug use and placed it six years in the past.

Within one to two months of receiving his security clearance in 2010, Applicant used marijuana again. His conduct shows that he has repeatedly put his own wishes ahead of his duty to obey the law and to meet his obligations as a security clearance holder. Those who hold security clearances enter into a fiduciary relationship with the Government based on trust. Applicant's illegal conduct while holding a security clearance does not demonstrate the trustworthiness and good judgment required in those granted access to classified information.

A fair and commonsense assessment of the available information shows Applicant has not satisfied the doubts raised about his suitability for a security clearance. For these reasons, I conclude he has not mitigated the security concerns arising from the cited adjudicative guidelines.

Formal Findings

Formal findings on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a – 1.b	Against Applicant
Subparagraph 1.c	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a – 2.b	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to allow Applicant access to classified information. Applicant's request for a security clearance is denied.

RITA C. O'BRIEN
Administrative Judge