



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



In the matter of:)
)
) ISCR Case No. 14-00880
)
Applicant for Security Clearance)

Appearances

For Government: Alison O'Connell, Esquire
For Applicant: *Pro se*

09/14/2015

Decision

RIVERA, Juan J., Administrative Judge:

Applicant illegally purchased and used drugs between 2008 and 2012. Part of his illegal drug-related behavior occurred after he was hired in 2010 by a federal contractor. Moreover, he falsified both his 2011 and 2012 security clearance applications (SCA) to conceal his history of drug-related behavior. He failed to mitigate the drug involvement and personal conduct security concerns. Clearance denied.

Statement of the Case

Applicant submitted SCAs on February 7, 2011, and September 7, 2012. The Department of Defense (DOD) issued him a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement) and Guideline E (personal conduct) on April 30, 2014.¹ Applicant answered the SOR on August 26, 2014, and requested a hearing before an administrative judge. The case was assigned to me on

¹ The DOD acted under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

March 20, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 23, 2015, scheduling a hearing for April 23, 2015. Applicant requested a delay, and on May 6, 2015, the hearing was rescheduled for May 22, 2015.

At the hearing, the Government offered five exhibits (GE 1 - 5). GE 1 through 3 were admitted without objection. GE 4 was admitted over Applicant's objection. GE 5 was marked and made part of the record, but was not considered as evidence. Applicant testified and submitted Applicant exhibit (AE) 1. DOHA received the hearing transcript (Tr.) on June 2, 2015.

Findings of Fact

In Applicant's response to the SOR, he admitted the factual allegations in SOR ¶¶ 1.a, ¶ 2.a (cross-alleging SOR ¶ 1 – Applicant admitted 1.a), 2.b through 2.d, 2.f, and 2.h, with comments. He denied the allegations in SOR ¶¶ 1.b, 1.c, 2. a (cross-alleging SOR ¶ 1 - Applicant denied ¶¶ 1.b and 1.c), 2.e, and 2.g. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence, I make the following additional findings of fact:

Applicant is a 27-year-old physical security guard employed with a federal contractor. He graduated from high school in 2005, and received a bachelor's degree in mass communications in 2010. Applicant has never been married. He has a four-year-old daughter for whom he provides support.

Applicant was hired by his current employer in November 2010, and submitted his first SCA in February 2011. In his response to Section 21 (Illegal Drugs), asking whether in the last year he had used any illegal substances, including marijuana, Applicant answered "no." He deliberately failed to disclose that he used marijuana once between January and April 2010. Section 21 also asked whether in the last seven years he had been "involved in the illegal purchase, manufacture, trafficking, production, transfer, shipping receiving, or sale of any . . . marijuana." Applicant answered "no," and he deliberately failed to disclose that he purchased marijuana three times between 2008 and April 2010. He also failed to disclose that he facilitated marijuana transactions for his college roommate at least five to ten times.

Applicant disclosed in his February 2011 SCA that he was fired from his job with a hardware retailer because he was involved in an argument with a coworker. He also disclosed that he was fired by a clothing retailer because he attempted to steal merchandise. He was prosecuted for attempted larceny and received probation before judgment.

In early 2012, while working for a federal contractor, Applicant applied for a position with a Government agency (Agency), and submitted a SCA in March 2012. On 7 and 21 May 2012, Applicant participated in polygraph-assisted interviews with Agency's investigators. During the May 7 interview, Applicant disclosed that he used marijuana twice – the first time in 2008, and the second time between January and April

2010. He stated that for the second occasion in 2010, he purchased marijuana from his roommate and shared the marijuana with a female friend. Applicant failed to disclose both instances of use and the purchase of marijuana in his February 2011 SCA and the Agency's March 2012 SCA.

At the start of his second Agency interview on May 21, 2012, Applicant reviewed the report of his May 7, 2012 interview, and indicated that it was complete and accurate, and he made no corrections. During his May 21st interview, Applicant disclosed that while in college, between the fall of 2008 and the spring of 2010, he resided with two friends who were friends with a drug dealer. One of Applicant's roommates sold marijuana out of their apartment. While in the apartment, Applicant handled money in drug transactions approximately five to ten times. Individuals would come to the apartment door and hand him money for his roommate. Once or twice, his roommate gave him a bag with marijuana for Applicant to give to the person at the door. (GE 4) Applicant also disclosed that twice in March 2012, he purchased a \$10 bag of marijuana from his roommate for a girl he was friends with. He purchased the marijuana because he liked the girl. He stated that he did not smoke any of the marijuana.

When asked by the Agency interviewer why he did not disclose the above marijuana-related behavior in his March 2012 SCA (submitted to the Agency), or during his May 7th interview, Applicant stated the he was concerned about possible negative repercussions in the security clearance process. (GE 4)

At his hearing, Applicant contradicted his two statements during the May 2012 Agency interviews. He denied knowing that his roommates were selling marijuana from their apartment. He claimed that he suspected they were doing it, but denied "really" knowing about it until he was close to graduating. He averred he wanted to get away from his roommates and move out of the apartment, and would have changed apartments if he had the money to do so. He stated that he was about six months from graduating when he found about his roommates selling marijuana, and stayed in the apartment because he did not have the money to move.

Applicant submitted another SCA in September 2012. (GE 1) In his response to Section 23 (Illegal Use of Drugs or Drug Activity), asking whether in the last seven years he had used any illegal substances, including marijuana, Applicant answered "no." He deliberately failed to disclose that he used marijuana three times between 2008 and April 2010. Section 23 also asked whether in the last seven year he had been "involved in the illegal purchase, manufacture, trafficking, production, transfer, shipping receiving, or sale of any . . . marijuana." Applicant answered "no," and he deliberately failed to disclose that he purchased marijuana twice in March 2012, and that he facilitated marijuana transactions for his roommate at least five to ten times between 2008 and 2010.

At his hearing, Applicant denied knowingly purchasing marijuana for his female friend. He claimed that twice he gave her \$10 for food, and unbeknown to him, she used the money to purchase marijuana. He claimed he found out about her use of the money

to purchase marijuana after the second time it happened. Applicant testified that he no longer associates with her because of her use of marijuana.

Section 25 (Investigations and Clearance Record) of the September 2012 SCA asked Applicant whether the Government had ever investigated his background. Applicant answered “no,” and deliberately failed to disclose that his background was investigated by the Agency in early 2012. When asked at the hearing why he failed to disclose the Agency’s background investigation, Applicant denied knowing that he was investigated by the Agency.

Applicant expressed remorse and regret for his involvement with illegal drug users. He testified that he grew up and has lived around marijuana users since he was in high school, but that he has always avoided that environment whenever possible. He stated that he is not interested in using illegal drugs or being around people who use illegal drugs. He is currently dedicated to his daughter, work, and coaching soccer. He no longer associates with any illegal drug users.

Applicant’s supervisor considers him to be a good employee and person. He displays a positive attitude, has a good work ethic, and shows up for work on time. Applicant is also respectful to his supervisor and co-workers. Applicant’ supervisor considers him to be a loyal citizen and employee. He favorably recommended Applicant’s eligibility for a clearance.

Policies

Eligibility for access to classified information may be granted “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The

applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their 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. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Drug Involvement

AG ¶ 24 articulates the security concern concerning drug involvement:

[u]se 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.

Applicant illegally used marijuana at least three times and facilitated marijuana transactions for his roommates five to ten times between 2008 and 2010. He purchased marijuana twice in March 2012.

AG ¶ 25 describes two drug-involvement disqualifying conditions that raise a security concern and may be disqualifying in this particular case: “(a) any drug abuse;” and “(c) illegal drug possession.” AG ¶¶ 25(a) and 25(c) apply. Applicant disclosed his illegal drug-related behavior during an Agency’s interviews in May 2012. He also admitted part of his drug-related behavior in his responses to DOHA interrogatories, in his SOR response, and at his hearing.

AG ¶ 26 provides potentially applicable drug involvement mitigating conditions:

(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;
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and
- (d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

None of the above drug-involvement mitigating conditions fully apply, and do not mitigate the security concerns. Applicant's most recent drug-related behavior occurred in 2012, as such it could be considered not recent. I also considered Applicant's claims that he has disassociated from his drug-using associates, friends, and contacts; and that he has changed his lifestyle with respect to illegal drug use. He claimed that he is now dedicated to his daughter and his work.

Notwithstanding, Applicant failed to establish that his drug-related behavior is unlikely to recur, and his evidence is insufficient to establish his successful rehabilitation. At his hearing, Applicant contradicted his prior statements to an Agency's investigators, and minimized the extent of his drug-related behavior. Applicant's testimony lacks credibility when considered in light of the evidence as a whole. His lack of credibility cast doubts on his testimony about his rehabilitation, efforts to distance himself from illegal drug users, and permanent lifestyle changes to prevent any future illegal drug abuse.

Furthermore, Applicant's drug-related behavior, in conjunction with his numerous false statements (as discussed under the personal conduct guideline), demonstrate his inability or unwillingness to comply with laws, rules, and regulations. Serious doubts remain about his trustworthiness and judgment.

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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.

The SOR alleges two disqualifying conditions under 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; 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 that 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.

Applicant deliberately failed to disclose in his 2011 and 2012 SCAs to the DOD his illegal drug-related behavior between 2008 and 2012, and that the Government investigated his background in 2011-2012. His falsifications were intentional and designed to conceal information from the Government so that he could obtain or retain a security clearance. Additionally, he was fired from his employment in 2007 and 2008 because of misconduct. AG ¶¶ 16(a) and (d) are applicable.

AG ¶ 17 describes seven conditions that could mitigate security concerns including:

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

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully.

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

For the same reasons discussed above under Guideline H, incorporated herein, none of the mitigating conditions apply. Applicant engaged in illegal drug-related behavior between 2008 and 2012. Moreover, he was clearly made aware of the Government's security concerns about his failure to disclose his drug-related behavior in his 2011 SCA, his March 2012 SCA (to the Agency), and during the Agency's May 2012 interviews. Notwithstanding, Applicant again failed to disclose his drug-related behavior in his September 2012 SCA submitted to the DOD. Additionally, he failed to disclose that the Agency had investigated his background in 2011-2012.

Applicant's omissions were deliberate and made with the intent to conceal relevant, material information from the Government. Moreover, during his hearing, Applicant minimized the extent of his drug-related behavior and contradicted his prior statements to an Agency's investigators. Applicant's testimony lacks credibility when considered in light of the evidence as a whole. His lack of credibility cast doubts on his testimony about his rehabilitation, efforts to distance himself from illegal drug users, and permanent lifestyle changes to prevent any future illegal drug abuse. His falsifications (which constitute felony offenses) raise unresolved questions about his reliability, trustworthiness, and ability to protect classified information. Personal conduct concerns are not mitigated.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c). I have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant, 27, has been working for his employer since November 2010. He has a four-year-old daughter. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude Applicant

failed to mitigate the security concerns pertaining to drug involvement and personal conduct.

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
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Subparagraphs 1.a through 1.c:	Against Applicant
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Paragraph 2, Guideline E:	AGAINST APPLICANT
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Subparagraphs 2.a through 2.h:	Against Applicant
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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. Clearance denied.

JUAN J. RIVERA
Administrative Judge