



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
[Name Redacted]) ISCR Case No. 14-01113
)
)
Applicant for Security Clearance)

Appearances

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

04/19/2016

Decision

HOGAN, Erin C., Administrative Judge:

Applicant submitted an application for a security clearance (e-QIP) on October 16, 2013. On May 30, 2015, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, Drug Involvement; and Guideline E, Personal Conduct. The action was taken under Executive Order 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) implemented within the Department of Defense on September 1, 2006.

On June 17, 2015, Applicant answered the SOR and requested his case be decided on the written record. Department Counsel prepared a File of Relevant Material (FORM) on January 15, 2016. The FORM was forwarded to Applicant on January 19, 2016. Applicant received the FORM on January 28, 2016. He had 30 days to submit a response to the FORM. He timely submitted a response to the FORM on February 10, 2016. Department Counsel did not object to Applicant's response to the FORM. On February 24, 2016, the FORM was forwarded to the Hearing Office and was assigned to me on March 1, 2016. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

Findings of Fact

In his answer to the SOR, Applicant admits to the allegations in SOR ¶¶ 1.a – 1.h and denies the allegation in SOR ¶ 2.a. (Item 3) I incorporate Applicant's admissions as facts. After a thorough review of the pleadings, exhibits, and submissions, I make the following additional findings of fact.

Applicant is a 28-year-old employee of a Department of Defense contractor. He was hired in October 2013 and has been employed with his company since November 2013. This is his first time applying for a security clearance. He is a high school graduate, completed some college credits, and received a degree from a technical program. He is single and has no children. (Item 4; Item 5)

Guideline H – Drug Involvement

Applicant started using illegal drugs at the age of 17. He used marijuana on a daily basis from 2005 to July 2012. He would smoke one marijuana cigarette a day. He used Oxycontin on several occasions without a prescription between 2005 and 2008. On average, he would take one Oxycontin pill three times a week. He denies being involved in the sale, distributing or manufacture of Oxycontin. From 2007 to 2008, he used heroin on various occasions. (Item 5 at 5-6; Item 6 at 2)

In October 2007, Applicant voluntarily enrolled in a substance abuse treatment program. His presenting problem was the use of Heroin/Oxycontin. It was noted that he had been arrested within the past 30 days on a charge of "Interfering w/Police." The intake interview indicated that Applicant used heroin on 20 of the previous 30 days. The amount used was four bags. His date of last use was three days before entering treatment. He also used other opiates on one occasion within the last month. Applicant indicated that he had spent \$500 on drugs within the past 30 days. His use of illegal drugs caused trust issues. (Item 9)

In response to the question "Has Your Use of Substances Caused Any Negative Consequences in Your Life?" Applicant listed "Yes" under the sub-question "Financial" and stated "I was dealing." He also listed "Yes" under the sub-question "Physical" and stated "Withdrawals." He said "I will try to get out of AA/NA what I can." He also wrote, "I do not have a higher power." In another section of the intake interview the counselor wrote that Applicant "Started using at 16, was dealing Oxy's beforehand." It was also noted that Applicant has a court date in 30 days and that he will need a letter for the court after completion of the program. (Item 9) Applicant attended his first inpatient rehabilitation program for less than one month. He claimed the treatment did not help him. (Item 5 at 6)

In May 2008, Applicant was arrested for possession of marijuana. Applicant stated that the charge was reduced to misdemeanor "Creating a Public Disturbance." (Item 5 at 4-5; Item 8 at 2)

From June 2008 to August 2008, Applicant enrolled himself in an inpatient substance abuse treatment program that was located out of state. He was treated for

Opioid Dependence and Cannabis Abuse. No records from Applicant's inpatient treatment were provided. Applicant claims the treatment changed his life. He claims he has not used illegal drugs after completing treatment in 2008. Since that time, he has maintained full-time employment and completed a technical training program to become a welder. (Item 3; Item 5 at 6)

In July 2012, Applicant was cited for Possession of Marijuana. In a personal subject interview conducted on January 7, 2014, Applicant indicated that he was at a party in the woods when police arrived on the scene. Applicant told police he had some marijuana in his pocket. The police officer issued him a ticket for Possession of Marijuana, less than one gram. Subject mailed in the ticket and paid a \$150 fine. (Item 5 at 5)

He was cited for possession of marijuana again on December 24, 2013. He was driving in car with his friend when he was pulled over by police. Upon a search of his car, police found marijuana. Applicant claims that it was the same marijuana that was the issue in the July 2012 incident. He was given another ticket and fined \$150, which he intended to pay on January 14, 2014, when he gets paid. (Item 5 at 5)

On May 29, 2014, Applicant authenticated the summary of the personal subject interview, dated January 7, 2014, and adopted it as accurately reflecting his interview. (Item 5 at 9) In his response to the SOR, dated June 17, 2015, Applicant claims that the marijuana found in his vehicle during the July 2012 incident did not belong to him. He also claims that marijuana in his car on the occasion of his citation on December 24, 2013, did not belong to him either. (Item 3)

Applicant was not arrested for Possession of Marijuana in the incidents on July 2012 and December 2013. The state where he resides decriminalized the possession of small amounts of marijuana in July 2011. He was issued the equivalent of a traffic citation and fined. The statute reads as follows:

Sec. 21a-279a. Penalty for illegal possession of small amount of cannabis-type substance. (a) Any person who possesses or has under his control less than one-half ounce of a cannabis-type substance, as defined in section 21a-240, except as authorized in this chapter, shall (1) for a first offense, be fined one hundred fifty dollars, and (2) for a subsequent offense, be fined not less than two hundred dollars or more than five hundred dollars.

(b) The law enforcement officer issuing a complaint for a violation of subsection (a) of this section shall seize the cannabis-type substance and cause such substance to be destroyed as contraband in accordance with law.

(c) Any person who, at separate times, has twice entered a plea of nolo contendere to, or been found guilty after trial of, a violation of subsection (a) of this section shall, upon a subsequent plea of nolo contendere to, or

finding of guilty of, a violation of said subsection, be referred for participation in a drug education program at such person's own expense.

(Hearing Exhibit I)

On February 25, 2013, Applicant had his hair tested for drugs. No cocaine metabolites, opiates, phencyclidine, amphetamines, barbituates, benzodiazepines, methadone, propoxyphene were detected. He was not tested for tetrahydrocannabinol (THC) which is a metabolite of marijuana. (Item 11) Applicant did not provide a recent evaluation and prognosis of his substance abuse problem by a duly qualified medical professional. His current prognosis is unknown.

Guideline E – Personal Conduct

In response to Section 23: Illegal Use of Drugs or Drug Activity on his October 16, 2013 e-QIP application, Applicant listed that he used opioids on a weekly basis from June 2007 to June 2008. He did not list his marijuana use from 2005 to July 2012 nor his heroin use from 2007 to 2008. SOR ¶ 2.a alleges Applicant deliberately failed to report his marijuana and heroin use on his e-QIP application. In response to questions in Section 22: Police Record of the e-QIP application, Applicant listed a May 2008 arrest for Creating a Public Disturbance/Possession < 1 Gram of Marijuana, and a July 2012 Possession of Marijuana Offense. (Item 4)

In his response to the SOR, dated June 17, 2015, Applicant explains that he believed the term opiod included heroin. Heroin is an opiate. When explaining the omission of his marijuana use, he claimed that he did not believe the question referred to marijuana use, "I was just thinking Drugs." He claimed he did not think he intentionally omitted his heroin or marijuana use as they are referenced in other parts of the security clearance questionnaire. (Item 3)

Applicant claims that he changed his lifestyle after completing his inpatient substance abuse program from June 2008 to August 2008. Upon completion of the program he has been employed full-time in various positions. From February 2009 to October 2013, he worked full-time at a big box store. He attended technical training to become a welder from January 2012 to November 2012. In November 2013, he was hired in his current position. His parents work at the same facility. He has a strong work ethic and receives positive reviews every six months. He did not provide a copy of the reviews. Applicant says he is a trustworthy and reliable person. He purchased a home in January 2014 and believes his life is on track. (Item 3)

In his response to the FORM, Applicant states that he would like to clarify that his drug use occurred at a time in his life when he was young and became involved with the wrong people. He realized the path he was on was not what he wanted in life so he enrolled voluntarily in a drug rehabilitation program. Upon completion of the eight week program, he came home to his supportive friends and family and changed his life. He mentions that he did not know the term "opiates" did not include all forms of drugs including heroin. He had nothing to hide, because he knew the clearance investigation included looking into his past drug treatment. With regard to the omission of his

marijuana use, Applicant listed his marijuana possession arrests and assumed that would cover his marijuana use. He did not intend to mislead with any of his answers and made clarifications when he was interviewed. Applicant states he is a reliable and trustworthy person and hopes that his past is considered his past and the decision will be in his favor. (Item 12)

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 useful 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, these guidelines are applied 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 applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion as to obtaining a favorable security 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 that 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 Executive Order 10865 provides that 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).

Guideline H, Drug Involvement

The security concern relating to the guideline for Drug Involvement is set out in AG ¶ 24:

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.

Drugs are defined as mood and behavior altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended, (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances;

Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

The guideline notes several disqualifying conditions that could raise security concerns. I find the following drug involvement disqualifying conditions apply to Applicant’s case.

AG ¶ 25(a) (any drug abuse); and

AG ¶ 25(c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia).

Applicant admits to using marijuana on a daily basis from 2005 to July 2012. He used marijuana on a recreational basis, smoking one marijuana cigarette a day. From 2005 to 2008, Applicant use Oxycontin without a prescription on average of three times a week. From 2007 to 2008, Applicant used heroin on a weekly basis. All of these substances are identified as controlled substances in the Controlled Substances Act of 1970. Applicant’s use of these substances was illegal. Applicant possessed these drugs while using them. AG ¶ 25(a) and AG ¶ 25(c) apply.

The Government’s substantial evidence and Applicant’s own admissions raise security concerns under Guideline H, Drug Involvement. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶ E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. September 22, 2005))

Guideline H also includes examples of conditions that could mitigate security concerns arising from drug involvement. The following mitigating conditions potentially apply to Applicant's case:

AG ¶ 26(a) (the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment);

AG ¶ 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; and (4) a signed statement of intent with automatic revocation of clearance for any violation); and

AG ¶ 26(c) (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).

Applicant's last use of an illegal drug apparently occurred in July 2012. However, I cannot apply AG ¶ 26(a) because of Applicant's significant history of polysubstance abuse. While Applicant should be commended for ending his heroin use after attending inpatient treatment in the summer 2008, by his own admission, he did not remain drug free after completing treatment. He continued to use marijuana on various occasions, often on a daily basis until July 2012.

Applicant's conflicting stories about his two citations for marijuana possession in 2012 and 2013 raise further questions about his credibility. He told the investigator conducting his background investigation during an interview on January 7, 2014, that he was ticketed for possession of marijuana while leaving a party in the woods in July 2012. He told the police officer that he had some marijuana in his pocket. Applicant also volunteered that he was ticketed for possession of marijuana on December 24, 2013, when he was pulled over while driving. A friend was in the car with him. During a subsequent search, the police found a small amount of marijuana in his car. Applicant claims the marijuana was the same marijuana involved in the July 2012 incident. This incident occurred about two months after he submitted his security clearance application on October 16, 2013.

In subsequent interrogatories, Applicant reviewed the summary of his interview and attested to it as being accurate. In front of a notary, he swore that he read the summary of the interview conducted on January 7, 2014, he found the interview to be accurate, and he swore that the entries were true and correct to the best of his knowledge and belief.

In his response to the June 2015 SOR, Applicant claimed that marijuana found by police during the July 2012 incident was not his. He stated: " the one gram of marijuana found in my vehicle was not mine. I do realize that I am guilty by association

and the Officer gave the infraction to the driver as it was in my vehicle.” Regarding the December 2013 incident, Applicant states, “I admit and truthfully this one really upset me that I had left the marijuana in the car from a previous time and the Officer issued me the infraction. I am now choosing my company of friends more carefully.”

Applicant’s conflicting responses to his two possession of marijuana citations raise concerns about his credibility. He initially admitted to the investigator conducting his background investigation that the marijuana was his during the July 2012 incident (in fact, it was in his pocket). Regarding the December 2013 incident, while not expressly saying it was his marijuana, he does not expressly state that it was someone else’s marijuana in his car. In his Answer to the SOR, he claims the marijuana belonged to someone else in both incidents.

Also troubling is Applicant’s contention that the July 2012 and December 2013 incidents involved the same marijuana. The state statute requires the law enforcement officer to confiscate the marijuana at the time the citation is issued. (HE I) A reasonable person would conclude the officer confiscated the marijuana during the July 2012 incident. As such, it is likely, Applicant possessed additional marijuana in December 2013. This occurred after he was hired by his current employer and after he submitted his security clearance application.

For these reasons, I cannot apply AG ¶ 26(a). Considering Applicant’s lengthy history of substance abuse as well as his conflicting statements about his July 2012 and December 2013 citations for possession of marijuana, doubts remain about his reliability, trustworthiness, and good judgment.

AG ¶ 26(b) does not apply because Applicant continued to associate with friends who use illegal drugs after he was hired in his current position, and after he applied for a security clearance. He was cited for possession of marijuana two and half months after submitting his security clearance application. He did not submit a signed statement of intent to stop using illegal drugs with automatic revocation of clearance for any violation.

AG ¶ 26(d) does not apply, Although Applicant provided some of his treatment records, they were incomplete. There was no information on Applicant’s prognosis when he completed his second drug rehabilitation program in August 2008. No information was provided about whether the rehabilitation facility suggested aftercare requirements for Applicant. Of even greater concern, is Applicant’s continued habitual use of marijuana after completing his drug rehabilitation program in 2008. Applicant admits to using marijuana on a daily basis until July 2012, four years after the completion of his drug rehabilitation program. While Applicant provided medical records from his primary care physician indicating that he passed a drug test in a hair sample provided on February 25, 2013, the sample was not tested for THC, a metabolite of marijuana.

Applicant has made great progress in turning his life around. However, absent a recent favorable prognosis by a duly qualified medical professional, I cannot conclude Applicant’s history of substance abuse is in the past. Applicant did not meet his burden to mitigate the security concerns raised under Guideline H, Drug Involvement.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct 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.

The following disqualifying condition applies to Applicant's case:

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).

Applicant is alleged to have deliberately omitted his illegal heroin use and marijuana use in response to Section 23 of his e-QIP application dated October 16, 2013. Applicant listed his "Opiod" use in response to the question. Heroin is considered an "Opiod." For this reason, I find Applicant did not intentionally omit his heroin use on his security clearance application. I cannot say the same for his omission of his marijuana use on a daily basis between 2005 to July 2012. His listing of two arrests for marijuana possession in response to another question on the security clearance application did not put the government on notice about his extensive marijuana use.

In Applicant's case, the following mitigating condition applies: AG ¶ 17(a) (the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts). Applicant volunteered his marijuana use during his background investigation interview. While he intentionally omitted his marijuana use on the e-QIP application, he cured the omission by providing full disclosure during his background investigation interview.

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 the facts and circumstances surrounding this case. Although Applicant claims to have stopped the illegal use of Oxycontin in 2008, the illegal use of heroin in 2008, and the illegal use of marijuana in July 2012, he has a long history of drug abuse. Absent a recent favorable prognosis by a duly qualified medical professional, I cannot conclude the concerns related to his history of illegal drug abuse are mitigated. Applicant's conflicting statements regarding his marijuana possession citations in July 2012 and December 2013 raise further issues about his credibility. For these reasons, Applicant has not met his burden to overcome the security concerns raised by his illegal drug use.

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
Subparagraphs 1.a – 1.h:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 1.a:	For 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.

ERIN C. HOGAN
Administrative Judge