



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



In the matter of:)
)
) ISCR Case No. 14-02271
)
Applicant for Security Clearance)

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: Alan Edmunds, Esq.

10/02/2015

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant mitigated the Government’s security concerns under Guideline J, criminal conduct, and Guideline H, drug involvement, but failed to mitigate Guideline E, personal conduct security concerns. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On January 16, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines J, criminal conduct, H, drug involvement, and E, personal conduct. On May 29, 2015, an amended SOR was issued to Applicant. The action was taken 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* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

Applicant answered the SOR on March 6, 2015, and the amended SOR on June 23, 2015, and requested a hearing before an administrative judge. The case was assigned to me on August 12, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on August 18, 2015. I convened the hearing as scheduled on September 15, 2015. The Government offered exhibits (GE) 1 through 4, which were admitted into evidence without objection. The Government submitted Hearing Exhibits (HE) I and II, a copy of the discovery letter and exhibit list respectively. Applicant testified. As part of his answer to the SOR, Applicant provided exhibits (AE) A through L. At the hearing he offered AE M and N. All of the exhibits were admitted into evidence without objection. The record was held open to allow Applicant to submit additional documents, which he did. AE O was admitted into evidence without objection.¹ The record closed on September 22, 2015. DOHA received the hearing transcript (Tr.) on September 23, 2015.

Findings of Fact

Applicant denied all of the allegations in the SOR and amended SOR. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 26 years old. He is not married and has no children. He has a bachelor's degree and is attending classes to earn a master's degree. At his hearing, Applicant adopted his response to the SOR as part of his testimony. He has worked for his present employer, a federal contractor, since approximately June 2013.²

In 2007, when Applicant was 17 years old he was arrested and charged with felony possession of marijuana. He pled guilty to misdemeanor possession and received twelve months' probation.³ He began attending college in August 2007.

In March 2012, Applicant was in college and living in an apartment with two roommates. A cousin of one of the roommates was also staying at the apartment. Each roommate had their own bedroom. The cousin slept in a closet. They all shared the kitchen and living room. An incident occurred where a group of people arrived at the apartment and shot one of Applicant's roommates. It was apparently an attempted robbery. Applicant and his girlfriend were present. They left the apartment and went to the hospital to check on the condition of the roommate. The police investigated the incident and conducted a search of the apartment. Bags of marijuana, two electronic scales, two grinders, two blunts, and baggies were confiscated. A bag of marijuana was found in a dresser drawer in Applicant's room. Applicant denied the marijuana belonged

¹ Hearing Exhibit III is Department Counsel's email memorandum noting there was no objection.

² Tr. 20-23, 95; AE F, G.

³ Tr. 108. I have not considered this information for disqualifying purposes, but may consider it when analyzing Applicant's credibility and when considering the whole-person.

to him or knowing it was in his dresser. He testified that he does not know how the marijuana got into his dresser.⁴

Applicant testified that he does not use marijuana. He stated the last time he used marijuana was about a year before the incident in March 2012. In his response to the SOR from March 2015, which he adopted as his testimony, he stated: "I do not smoke marijuana, I did over three years ago, however, I did not smoke when this incident occurred, and I still don't smoke marijuana today."⁵ He admitted while in college, he associated with people that did use marijuana. He testified that he never observed his roommates smoking marijuana in their apartment. He never saw any of the paraphernalia seized in the search in the apartment. He did not observe the sale or purchase of marijuana in their apartment. He admitted he did observe marijuana in the apartment other than in his bedroom. He stated he was unaware if marijuana was being sold from the apartment where he lived. He no longer associates with any of his former roommates. He was unaware if his roommates were selling marijuana. I did not find Applicant's testimony credible that the marijuana found in his room, in his dresser drawer did not belong to him.⁶

Applicant initially testified that he dropped out or withdrew from school after the March 2012 incident. He later admitted he was suspended from school for the remainder of the semester. He returned to school and graduated in May 2013.⁷

On June 4, 2013, Applicant completed a security clearance application. Question 23 asked: "In the last 7 years have you illegally used any drugs or controlled substances?" Applicant responded "Yes. . . After my last time using marijuana in August 2007, I got on probation for my offense at 17, and I haven't used marijuana since." In July 2013, Applicant was interviewed by a government investigator, Applicant first testified that he did not recall what he told the investigator about when he last used marijuana. When asked why he did not tell the investigator the truth, he stated: "well, as I said, I'm literally talking one or two times that I may have used it after that. The exact days, I'm not sure but I do admit that I did it. That's basically all I can tell you." Applicant later admitted he told the investigator that his last marijuana use was August 2007.⁸ He further explained:

Well, the reason I believe was because I know I didn't smoke when I first went to college. Like, I was not smoking at all, so—and that what I know.

⁴ Tr. 24-33, 37, 58, 69.

⁵ Answer to SOR.

⁶ Tr. 23, 32-35, 38, 69-72. Applicant's drug use was not alleged and will not be considered for disqualifying purposes, but will be considered when analyzing Applicant credibility and the whole-person.

⁷ Tr. 63-69.

⁸ Tr. 84-88, 90, 105-106.

And, you know, and when I say that I used it in 2010, I mean, I'm not talking about, you know, I sat back for a whole-day and smoked a bunch of marijuana. You know, I'm talking about social outings I may have hit some marijuana. That's the kind of smoking marijuana that I'm talking about, you know.⁹

Applicant was charged with felony possession of marijuana. In October 2014, he entered a pretrial intervention program, which required him to participate and complete meaningful counseling or therapy, submit to drug and alcohol testing, pay the associated expenses and other criteria as set forth in the program.¹⁰ On October 14, 2014, Applicant completed a questionnaire as part of the program, where he disclosed his substance abuse background. Regarding his marijuana use, he indicated he first used marijuana at age 17 and disclosed that his last use was three years prior. He was also asked to "[b]riefly explain in your own words why you are here." The interviewer wrote: "Got caught with marijuana."¹¹ Applicant completed the terms of the program and on April 7, 2015, the judge ordered the charge to be nolle prosequere.¹²

Applicant testified that he did use marijuana after August 2007. His last use was sometime in 2010 or 2011, but his use was only one or two times.¹³ When asked why he did not disclose his most recent use on the SCA he stated: "Because I know I did not use it. I may have hit it socially, but not...." He then stated he was not sure why he did not just say 2011. I find Applicant deliberately falsified information on his security clearance application and provided a false statement to the government investigator when he stated he last used marijuana in August 2007, when in fact his last use was approximately in 2010 or 2011.

Applicant's parents are aware of the incident. Applicant stated that he no longer associates with the people involved in the March 2012 incident. He lives in a different city and wants to grow professionally. Applicant signed a letter of intent not to use illegal drugs in the future or associate with anyone who uses illegal drug, and agreed to an automatic revocation of a security clearance should he violate it.¹⁴ He has successfully completed the rehabilitation program that was part of the pretrial intervention program.¹⁵ Applicant provided evidence of a good employment record and recognition awards.¹⁶ A

⁹ Tr. 106.

¹⁰ AE A, C, D, E.

¹¹ AE D.

¹² Tr. 33-36, 72-84, 90; AE M and O.

¹³ Tr. 88.

¹⁴ AE B.

¹⁵ AE C, D, E.

¹⁶ Tr. 48-49; AE H, I, J, K, L, N.

character letter describes Applicant as an upstanding citizen and proactive member of the community. He is respectful of rules and regulations. He is considered a professional trustworthy person.¹⁷

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are 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, 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. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

¹⁷ AE L.

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).

Analysis

Guideline J, Criminal Conduct

AG ¶ 30 sets out the security concern relating to criminal conduct:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

I have considered the disqualifying conditions under criminal conduct AG ¶ 31 and the following two are potentially applicable:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

In 2012, Applicant was arrested and charged with felony possession of marijuana. I find the above disqualifying conditions apply.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and the following two are potentially applicable:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and
- (d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Applicant entered a pretrial intervention program regarding his felony possession of marijuana. He completed the rehabilitation and counseling program successfully. The felony charge against him was nolle prossed. He is committed to never using illegal drugs again. He no longer associates with his former roommates and indicated his intention to not associate with people who use illegal drugs. He provided evidence of a good employment record and that he is working on his master's degree. The offense occurred more than three years ago. I find sufficient time has elapsed since the offense

occurred and that it is unlikely to recur. I find both of the above mitigating conditions apply.

Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern for 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 the disqualifying conditions for drug involvement under AG ¶ 25 and the following are potentially applicable:

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

Applicant illegally possessed marijuana and was charged with felony possession. He entered a pretrial intervention program. I find the above disqualifying condition applies.

I have considered the mitigating conditions under AG ¶ 26. 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 participated in a pretrial intervention program that he successfully completed. He is committed to never using illegal drugs again or associating with those that do. It has been more than three years since the date of the offense. Applicant had an earlier drug charge in 2007 that apparently did not deter him from being involved in drugs again. Based on the successful rehabilitation evidence, I believe Applicant has moved past his youthful indiscretions and understands the importance of refraining from any involvement with illegal drugs and the potential detriment it has on his future. I find future involvement with illegal drugs is unlikely to recur. He has demonstrated his intention to refrain from any illegal drug activity. AG ¶¶ 26(a) and 26(b) apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern for 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I find the following potentially applicable:

(a) deliberate omission, concealment, or falsifications 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 authorities, or other official government representative;

(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; 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.

Applicant was charged with illegal possession of marijuana and participated in a pretrial intervention program. Marijuana was found in his room in his dresser drawer. There is insufficient evidence to conclude he was involved in the illegal sale of marijuana. He admitted he observed marijuana in his apartment. When Applicant completed his security clearance application and when he made a statement to a government investigator he deliberately provided false information when he stated his last use of marijuana was in August 2007. He later admitted his last use of marijuana was sometime in 2010 or 2011. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following mitigating conditions under AG ¶ 17:

(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; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken positive steps to alleviate the stressors, circumstances, or factors that caused the untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant did not make a prompt good-faith effort to correct his falsification on his security clearance application or regarding his statement to the government investigator. He did not provide candid testimony when he was asked about his last use of marijuana. He failed to grasp that although his use may have been infrequent from 2007 to 2011, he was required to report it honestly. Rather he rationalized that his use did not happen all day, occurred at a social settings, and was a small amount. I have considered the likelihood of further criminal activity and drug involvement under the personal conduct guidelines and conclude he has sufficiently mitigated those concerns as analyzed above. AG ¶¶ 17(c) and 17(d) apply to SOR ¶ 3.a. However, I cannot conclude that providing false information on his security clearance application and to the government investigator is minor or that a sufficient amount of time has passed to mitigate the concerns. His failure to be truthful did not happen under unique circumstances and casts doubt on his reliability, trustworthiness, and good judgment. AG ¶¶ 17(c) and 17(d) do not apply to SOR ¶¶ 3.(b) and 3(c).

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. I have incorporated my comments under Guidelines J, 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 is a 26-year-old college educated man who is pursuing a master's degree. He has done well in his job in the relatively short time he has been employed. He participated in a pretrial intervention program after he was charged with felony possession of marijuana that was found in his dresser drawer in his room. He does not intend to use drugs in the future. I believe he has matured and understands the serious impact drugs and criminal activity will have on his future, and he is unlikely to be involved in either. The concern is that Applicant provided false information on his security clearance application and when he was interviewed by a government investigator. Applicant failed to meet his burden of persuasion regarding his personal conduct. This conduct raises questions about his judgment, reliability, and trustworthiness. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under the criminal conduct, and drug involvement, but failed to mitigate the 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 J:	FOR APPLICANT
Subparagraph: 1.a:	For Applicant
Paragraph 2, Guideline H:	FOR APPLICANT
Subparagraph: 2.a:	For Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph: 3.a:	For Applicant
Subparagraph: 3.b:	Against Applicant
Subparagraph: 3.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 a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge