



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



In the matter of:)
)
) ISCR Case No. 14-02706
)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: *Pro se*

March 18, 2015

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant failed to mitigate the Drug Involvement, Criminal Conduct, and Personal Conduct security concerns. Drug Involvement and Criminal Conduct security concerns arose out of Applicant’s marijuana use between May 2000 and May 2005, to include its use while holding a security clearance after February 2003. Additionally, he was arrested in February 2000 and May 2005 for drug offenses. Personal Conduct security concerns arose out of Applicant’s false answers to questions about his drug abuse history on a 2013 Electronic Questionnaires for Investigative Processing (e-QIP). Eligibility for access to classified information is denied.

Statement of the Case

On March 12, 2013, Applicant completed an e-QIP. On September 23, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, Drug Involvement; Guideline J, Criminal Conduct; and Guideline E, Personal Conduct. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial*

Personnel Security Clearance Review Program (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective after September 1, 2006.

Applicant answered the SOR on October 16, 2014, and requested a hearing before an administrative judge. The case was assigned to me on January 21, 2015. Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on January 21, 2015, and the hearing was convened as scheduled on February 25, 2015. The Government offered Hearing Exhibit (HE) I, and Exhibits (GE) 1 and 2, which were admitted without objection. The Applicant offered Exhibit (AE) A, which was admitted without objection. Applicant testified on his own behalf and called one witness. DOHA received the hearing transcript (Tr.) on March 3, 2015.

Procedural Ruling

At the hearing on February 25, 2015, I amended the SOR in order to conform to the evidence, pursuant to Directive ¶ E3.1.17. (Tr. 37.) The amendment changed the date of Applicant's arrest alleged in SOR ¶ 1.d from August 2007 to May 2005. The allegation, as amended, reads:

d. In approximately May 2005, you were charged with Possession of Marijuana for Sale. You were convicted and sentenced to five days in jail.

Findings of Fact

Applicant is a 36-year-old government contractor. He has worked for his employer for the past 14 years. He has held a security clearance in connection with his employment since 2003. He is a high school graduate. He has never been married and has no children. (GE 1; Tr. 21-23.)

The Government alleged that Applicant is ineligible for a clearance under the guidelines for Drug Involvement and Criminal Conduct because he used, purchased, and sold marijuana, before and while holding a security clearance. Additional concerns resulted from Applicant's two drug-related arrests in 2000 and 2005. Personal Conduct security concerns arose out of Applicant's answers to questions about his drug activity on his e-QIP. All of these facts raise questions about his reliability, trustworthiness, and ability to protect classified information. Applicant admitted all of the allegations. (Answer.)

Applicant's first used marijuana in high school. He used marijuana approximately twice a week in social settings with friends. He purchased marijuana for his personal consumption. (Tr. 23-32.)

In 2000, Applicant was driving when a police officer pulled over his vehicle. He was arrested and charged with driving under the influence of a controlled substance; possession of a controlled substance; and possession of marijuana while driving. He pled guilty to driver in possession of marijuana and was sentenced to two years of probation, a fine of \$500, and community service. Despite his arrest and probationary

status, he continued to use marijuana. He was aware that marijuana use was illegal. (GE 2; Tr. 23-33.)

In May 2005, Applicant was arrested and charged with possession of marijuana for sale. Applicant was in a car with his friends when they were stopped by police. He had approximately an ounce of marijuana in his possession at the time of the arrest. His friend, who was also in the vehicle, had a smaller amount of the same variety of marijuana in his possession. Applicant was accused of selling it to his friend, although Applicant testified that he did not sell it. Applicant was convicted of this charge, and served five days in jail as the result of this arrest. He did not report this arrest to his employer because he was scared he would lose his job. Applicant testified that he has not used marijuana since this arrest in 2005. In his answer to the SOR, he admitted that he used marijuana through August 2007, but that was based on his mistaken recollection of the date on which this arrest occurred. (GE 2; Tr. 31-39.)

On March 12, 2013, Applicant completed an e-QIP in connection with his position with a government contractor. The e-QIP asked three pertinent questions in "Section 23 –Illegal Use of Drugs or Drug Activity," including: "**In the last seven (7) years**, have you illegally used any drugs or controlled substances?"; "**In the last seven (7) years**, have you been involved in the illegal purchase, manufacture, cultivation, trafficking, production, transfer, shipping, receiving, handling or sale of any drug or controlled substance?"; and "Have you **EVER** illegally used or otherwise been involved with a drug or controlled substance while possessing a security clearance other than previously listed?". Applicant answered each of these questions, "No." Applicant testified that he disclosed an August 2007 arrest under "Section 22, Police Record," on his e-QIP, which he thought was the date of his second arrest for possession of marijuana for sale. He testified that he was rushing to complete the e-QIP and failed to disclose his marijuana use in Section 23. (Tr. 39-40.)

Applicant is well respected by those who know him, as verified by the friends and co-workers that wrote letters of support on his behalf. He is considered to be honest and trustworthy. He is dedicated to his work, and has an excellent work ethic. (AE A.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in AG ¶ 2(a) describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The

administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to Drug Involvement:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual’s reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations.

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

- (a) any drug abuse;

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

(g) any illegal drug use after being granted a security clearance.

The Government presented sufficient information to support all of the factual allegations under Guideline H (SOR ¶¶ 1.a-1.d). Applicant used marijuana from at least 2000 to 2005 on a weekly basis. He purchased it in quantities of up to one ounce. His use of marijuana continued after being granted a security clearance in 2003, and led to two drug-related arrests and convictions. The facts established through the Government's evidence and through Applicant's admissions raise security concerns under all of the above disqualifying conditions.

I have considered all of the evidence in this case and the mitigating conditions under Drug Involvement AG ¶ 26. 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;

(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

(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.

Applicant has worked hard to excel in his career, as described by those who know him. Since his last marijuana use almost ten years ago, Applicant has matured. He has not used any type of legal or illegal intoxicant since 2005. These mitigating factors are considerable, but are outweighed by other evidence in this case.

Applicant used marijuana twice a week from 2000 to 2005, including while possessing a security clearance. He indicated that he knew marijuana use was illegal and that he should not use marijuana while holding a security clearance, yet he placed his own desires above requirements of the national interest. He neither submitted a signed statement of intent with automatic revocation of clearance for any violation, nor offered any testimony about his future intent to abstain from marijuana use. He did not provide evidence of disassociation from his marijuana using friends. Applicant has not mitigated the security concerns relating to his Drug Involvement. None of the mitigating conditions fully apply.

Guideline J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following 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.

Applicant pled guilty to Driver in Possession of Marijuana in 2000. He was arrested again in 2005 and charged with Possession of Marijuana for Sale. He was convicted and served five days in jail. He also illegally used MJ twice a week for five years, despite not having been formally charged of this conduct. The above disqualifying conditions have been established.

Two Criminal Conduct mitigating conditions under AG ¶ 32 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 has been arrested twice, in 2000 and 2005. Both arrests were related to marijuana. Applicant presented little evidence of rehabilitation. He has not been fully forthright with the government concerning his marijuana use. I cannot find future criminal behavior is unlikely to recur. AG ¶¶ 32(a) and 32(d) were not established.

Guideline E, Personal Conduct

The security concern for the Personal Conduct guideline is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions

about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

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

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and

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

Applicant was dishonest about the full extent of his illegal drug activity when he completed and certified the truth of his e-QIP. He deliberately omitted use, purchase, and sale of marijuana through May 2005. Additionally, he did not disclose that he had used marijuana while possessing a security clearance from 2003 to May 2005 on his 2013 E-QIP. His drug involvement and criminal activity also create a vulnerability to exploitation, manipulation, or duress. The above disqualifying conditions apply.

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

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

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

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

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

Applicant failed to present information that he made a prompt, good-faith effort to correct his false denials of drug abuse on his e-QIP. AG ¶ 17(a) does not apply.

Applicant made poor decisions to violate laws and security policy by using, purchasing, and selling marijuana. Further, he chose to lie about his marijuana use on his e-QIP. Applicant exhibited a pattern of exercising poor judgment in falsifying his e-QIP and by using marijuana while holding a security clearance. He failed to produce sufficient evidence that similar lapses in judgment are unlikely to recur. Mitigation under AG ¶¶ 17(c) and 17(d) was not established.

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

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

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

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant is highly respected by those who know him. He testified he has not used marijuana since May 2005. However, his testimony lacks credibility as a result of his choice to falsify his e-QIP in 2013.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I

conclude Applicant failed to mitigate the Drug Involvement, Criminal Conduct, and Personal Conduct security concerns.

Formal Findings

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

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a-1.d:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a-3.d:	Against Applicant

Conclusion

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

Jennifer I. Goldstein
Administrative Judge