



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



In the matter of:)
)
) ISCR Case No. 07-01400
SSN:)
)
Applicant for Security Clearance)

Appearances

For Government: Emelio Jaksetic, Esquire, Department Counsel
For Applicant: William F. Savarino, Esq.

July 16, 2008

Decision

MASON, Paul J., Administrative Judge:

Applicant submitted his Security Clearance Application (SCA), on September 29 2005. On June 20, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under drug use (Guideline H), personal conduct (Guideline E), and criminal conduct (Guideline J). The action was taken pursuant to 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and made effective within the Department of Defense for SORs issued on or after September 1, 2006.

Applicant submitted his answer to the SOR on July 6, 2007. DOHA issued a notice of hearing on April 4, 2008, and the hearing was held on May 15, 2008. At the hearing, five exhibits (GE 1 through 3) were admitted in evidence without objection to support the government’s case. Applicant’s ten exhibits (AE A through and AE J) were received in evidence without objection. Five witnesses testified in Applicant’s behalf. Applicant testified. DOHA obtained a copy of the hearing transcript on May 27, 2008.

Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

The SOR contains one allegation under the drug involvement guideline, three allegations under the personal conduct guideline, and one allegation under the criminal conduct guideline. Applicant denied all allegations.

Applicant is 29 years old and married. He achieved his Bachelor of Science degree in May 1999, and Masters of Science degree (computer science) in May 2005. He has been working as Senior Member of the Professional Staff for his current employer since October 2006. In that position, he is a software engineer developing code. He seeks a security clearance.

Drug Involvement

Applicant admitted using marijuana one time in the United States (U.S.) in approximately February 2004, before an eight-day trip to Europe in March 2004,¹ where he used marijuana two times in a coffee house of a European city in March 2004, four times in a coffee house in the same European city in May 2005, once in another European city in May 2005, and at least one time in the U.S. in July 2005. (GE 4) Applicant is certain he has used no drugs since July 2005.

Personal Conduct

After using marijuana on one occasion in July 2005, Applicant signed a security clearance application (SCA) (SOR 2.a.) on September 29, 2005, certifying on page 34 of 35 that, "My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both. (See Section 1001 of Title 18. United States Code) In response to question 24.a. (since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics(opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.) hallucinogenics (LSD, PCP, etc.) or prescription drugs?), Applicant answered "No" thereby denying any illegal use since the age of 16 or in the last 7 years. His claim is that he realizes now the "No" entry was untruthful. However, in September 2005 (when he certified the security form), he knew marijuana use was legal in the overseas location, and he contended he did not remember his July 2005 marijuana use at the U.S. location. I find he deliberately falsified his answer to question 24.a. of the security form by not revealing his U.S. marijuana use.

¹ On May 12, 2008, Applicant recalled using marijuana in another country during his March 2004 European trip.

While disclosing his overseas drug use in 2004² in his July 5, 2006 (SOR 2.b.) interview with a government investigator, he did not disclose his overseas drug use in 2005 because he was ashamed/disappointed to admit it, and he did not want to jeopardize his security clearance. (Tr. 94-96) For a second time, he did not disclose his marijuana use in the U.S. in 2004 or 2005 because he contends did not remember it. I find he intentionally provided false information about his drug use in July 2006.

On August 30, 2006, Applicant was interviewed and polygraphed by a government investigator in connection with a second defense contractor position he was applying for. During the interview, he acknowledged his overseas drug use in 2004 and 2005. After further discussion, he also admitted his marijuana use in the U.S. in 2004 and 2005.

On October 12, 2006, Applicant was interviewed/polygraphed a second time. He provided one additional drug use in May 2005 in a European country, and brief experimentation of marijuana as a youngster. Following a second government interview/polygraph on October 6, 2006, for the second defense contractor position, Applicant indicates he passed the polygraph. (Tr. 107) In November 2006, he submitted an updated SCA (AE F) reflecting his U.S. drug use to the second defense contractor. Applicant believes the position is still pending, but the specifications/characteristics of the offer have changed in some fashion.

On December 4, 2006 (SOR 3.c.), Applicant was again interviewed by an investigator for his current position. While disclosing his overseas use of marijuana in 2004 and 2005, he did not disclose his U.S. marijuana use. He stated:

I - - I was afraid of what the - - the - - of the inconsistency with my previous statements. And my second interview with DOD, I - - I put everything on the table and now there were these other - - you know - - instances. And I was just afraid of how it would look. I wasn't sure of how it would go over. So I - - I know it wasn't the right thing to do. And I decided not to disclose it. (Tr. 112)

Even though he remembered his August 2006 disclosures of his U.S. marijuana use, he did not disclose his U.S. use in his December 2006 interview. I find he deliberately falsified his December 4, 2006 interview.

² The year "2003" referenced in GE 3 is incorrect. (Tr. 118-120)

In his responses to interrogatories dated June 1, 2007, Applicant affirmed the December 4, 2006 interview. He also added in the June 1 response the two instances of drug use in the U.S. in 2004 and 2005. He knew his responses would be inconsistent with the other information he had provided to the government about his drug use. In emphasizing the truth mattered to him, he stated:

Yes it did. I knew that I - - I wasn't forthcoming with the - - with the agents. And I just - - I wanted to clear it up. I didn't - - feel good about it. I - - you know - - it's just - - it's not - - it's not me. I don't - - I'm - - I don't lie. I'm not a liar. I just wanted to - - I made a mistake and I - - I wanted to clear it up. (Tr. 115)

Character Evidence

Witness 1, the task order manager, has known Applicant for eight months, and was his supervisor for five months. Witness 1 believes Applicant has produced good work. According to Witness 1, the discrepancies in Applicant's drug use occurred because he had trouble remembering when he used marijuana, and with more interviews, Applicant recalled more instances of marijuana use. (Tr. 29)

Witness 2, also an employee of Applicant's employer since July 2000, has known Applicant for 12 ½ years, and is a personal friend. Applicant talked to Witness 2 about the SOR, and Witness 2 interpreted the omissions of information as resulting from not remembering certain things. According to Witness 2, the missing information resulted more from forgetfulness as opposed to an intent to conceal. (Tr. 40)

Witness 3, Applicant's wife met Applicant in 2004 and married him in May 2008. He talked with her about the SOR and using marijuana in 2004 and 2005. He told her he did not remember some drug use, but there were times he felt ashamed and did not want to reveal some drug use. She believes he has shown remorse and accepted responsibility for omitting the drug information. His wife knows that Applicant currently shares her position against drug use.

Witness 4, worked with Applicant until August 2007, and knows his wife. She believes he is very honest and reliable. She was surprised to learn he used marijuana in the past because of his organic diet. Witness 4 believes Applicant was nervous during the early interviews and did not recollect when he used marijuana; as he remembered more drug use, he disclosed it.

Witness 5, the project manager for Applicant's employer, stated that Applicant has not been with the company long enough for a written performance evaluation. However, through the manager's interaction with Applicant on a weekly basis, the manager has seen a very reliable employee produce a good work product. Applicant's explanations of forgetfulness, nervousness, and deception, during the interviews were explained to the manager's satisfaction. Based on his 23 years of military experience, where he has witnessed individuals in similar situations where they omit information, the

manager does not believe these omissions should preclude Applicant from receiving a security clearance.

Eight coworkers/friends provided character statements about Applicant. Witness 6, a self-employed computer consultant, has known Applicant for 13 years, and considers him trustworthy and dependable. Witness 7 is a senior director of a company. She met Applicant four years ago when they worked for the same company on different projects. Through professional and social interaction, witness 7 found Applicant to be competent, and with much integrity. Witness 8 is a project manager for Applicant's employer. Through daily contact as members at the same health club, witness 8 considers Applicant a team player.

Witness 9 is employed at another company as a senior consultant. He met Applicant on a project (2004). Witness 9 has socialized with him occasionally, and recalled that Applicant attended his wedding in 2007. Witness 9 believes Applicant is a good communicator who follows directions. Witness 10, a senior software engineer, met Applicant in December 2007. He is Applicant's coworker and also his supervisor. Witness 10's observations indicate that Applicant is a real team player who has 10 years of experience in full cycle-development of software systems.

Witness 11 is an associate athletic director of community relations for a college where Applicant's wife attended. He met Applicant in January 2008. Witness 11 has had conversations with Applicant, and attended his wedding. Applicant has helped witness 11 with his home repair. Based on this interaction, witness 11 believes Applicant is honest and a team player. Witness 12 is a senior member at Applicant's employer, and is Applicant's coworker. He believes Applicant is honest, and conscientious, requiring little supervision.

Witness 13 is an intellectual property associate for a law firm, and has known Applicant for 13 years when they were in school together. Witness 13 considers Applicant a close friend. Recently, Applicant helped renovate witness 13's basement. She believes Applicant is dependable and consistently faithful to his friends.

None of the witnesses who testified have ever seen Applicant use any drugs. All witnesses vouch for Applicant's honesty.

Policies

When evaluating an applicant's suitability for a security clearance, the Administrative Judge must consider the revised 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 flexible rules of law. Recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the

adjudicative process. The Administrative Judge's ultimate adjudicative goal is a fair, impartial and common sense decision. According to the AG, the entire process is a careful, thorough evaluation 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 ¶ 2b. 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 avoided drawing 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, 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 is not restricted to normal duty hours. Rather, the relationship is an-around-the-clock responsibility between an applicant and the federal government. 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.

Drug Involvement (DI)

Drug Involvement casts doubt on a person's willingness to comply with security rules and regulations.

Personal Conduct (PC)

Providing dishonest or incomplete information during a security investigation demonstrates poor judgment.

Criminal Conduct (CC)

Violating the law demonstrates poor judgment and generating legitimate questions about a person's willingness to comply with security rules and regulations.

Analysis

Drug Involvement (DI)

24. *The Concern.* “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 or regulations.”

Applicant’s drug involvement falls within the scope of DI disqualifying condition (DC) 25.a. (any drug abuse) While Applicant’s intentional falsifications about his drug use weaken his overall credibility, there is no evidence of marijuana use after July 2005. The passage of almost three years and the infrequency of use affords a sufficient basis to apply DI mitigating condition (MC) 26.a. (*the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment*) in his favor. Guideline H is found in Applicant’s favor.

Personal Conduct (PC)

15. *The Concern.* “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.”

Deliberate as opposed to unintentional omissions of material information are cognizable under the PC guideline. Examples of unintentional omissions are those that occur through haste, oversight or misunderstanding the question.

Applicant’s deliberate falsification of his SCA in September 2005, falls within the ambit of PC DC 16.a. (*deliberate omission or falsification of relevant facts from any personnel security questionnaire to determine security clearance eligibility or trustworthiness*) Applicant’s deliberate falsifications of his interviews in July and December 2006 fall within PC DC 16.b. (*deliberately providing false or misleading information concerning relevant facts to an investigator or other official government representative*).

There are four mitigating conditions (MC) that are potentially applicable to the circumstances in this case. Those conditions are: PC MC 17.a. (*the individual made prompt, good-faith efforts to correct the omission, concealment or falsification, before being confronted with the facts*); PC MC 17.c. (*the offense was 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, PC MC 17.d. (*the individual has*

acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate stressors, circumstances, or factors that caused untrustworthy, unreliable or other inappropriate behavior, and such behavior is unlikely to recur). PC MC 17.a. is not applicable as Applicant did not make efforts to provide the full scope of his drug history until he was confronted with the polygraph. PC MC 17.b. is inapplicable because Applicant's deliberate falsifications were not isolated, Rather, they constituted a pattern of dishonesty that cannot be credibly reconciled as minor. The second element of the condition cannot be applied as the most recent falsification occurred less than 18 months before the hearing.

Rehabilitation from dishonest behavior begins with accepting full responsibility for one's conduct. Given Applicant's struggles during the hearing to take full responsibility for falsifying a government form and two interviews, residual concerns remain about his judgment and reliability that are not completely assuaged by his remedial behavior in submitting an undated security form in November 2006. Hence, the favorable mitigation Applicant receives under the first element of PC MC 17.d. in acknowledging the behavior must be weighed against Applicant's persistence in trying to rationalize his dishonest conduct. His favorable character evidence from the witnesses provides a commendable picture of Applicant's job performance and his conduct away from the job. However, his favorable attributes do not overcome his deliberate efforts to conceal his U.S. drug use.

Criminal Conduct (CC)

30. *The Concern.* "Criminal activity raises 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."

Applicant's deliberate falsifications under the PC guideline also constitute a violation of Title 18 United States Code (U.S.C.) Section 1001, a felony. Applicant's U.S. drug history was material³ to the government investigation into his security clearance suitability. CC DC 31.c. (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*) applies.

I have considered all the mitigating conditions under the CC guideline. CC MC 32.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*) does not apply. Applicant's initial falsification of his SCA in September 2005 was more than 2 ½ years ago. However, his criminal conduct continued in July 2006 with his incomplete responses about his drug use to an investigator. After he claims he disclosed all drug use in August and October 2006, he deliberately provided false information in December 2006.

³ Even though I have resolved the drug involvement guideline in Applicant's favor, materiality is not limited only to information that would affect a final agency decision, but also information (falsifications) relevant to the security clearance investigation. See, ISCR 01-06870 (September 13, 2002) at pp. 5-6.

Applicant receives limited mitigation under CC MC 32.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*) His demonstration of remorse, his good employment record, and positive character attributes in non-work situations, have been carefully evaluated. But, given the recency of his falsifications and their frequency, Applicant has not met his ultimate burden of persuasion under the CC guideline.

Whole Person Concept (WPC)

The AG indicates the ultimate determination of whether to grant a security clearance must be an overall common sense judgment based upon careful consideration of the whole person concept. Nine general policy factors define the WPC. They are: (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) extent to which the participation is voluntary; (6) the presence or absence of rehabilitation; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and, (9) the likelihood of continuation or recurrence.

Applicant's intentional falsifications of his U.S. drug use in September 2005 (SCA), July 2006 (interview), and December 2006 (interview) were serious. Each time Applicant falsified the SCA and the interviews, I believe he knew what he was doing. The falsifications are aggravated by their repetitive nature. Applicant committed the dishonest behavior between ages 26 and 27. Two months before Applicant certified his SCA in September 2005, he used marijuana, even though the amount may have been small. In July 2006, Applicant disclosed an incomplete account of his overseas drug use, but not his drug use in the U.S. Even after he purportedly provided the full history of his drug use in August and October 2006, he decided in December 2006 to withhold his U.S. drug use that he had disclosed in August 2006. Applicant's character evidence weighs heavily in his favor, but does not overcome the adverse evidence under the PC and CC guidelines.

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 (Drug Involvement, Guideline H): FOR APPLICANT

Subparagraph 1.a.

For Applicant

Paragraph 2 (Personal Conduct, Guideline E): AGAINST APPLICANT

Subparagraph 2.a.	Against Applicant
Subparagraph 2.b.	Against Applicant
Subparagraph 2.c.	Against Applicant

Paragraph 3 (Criminal conduct, Guideline J): AGAINST APPLICANT

Subparagraph 3.a.	Against Applicant
-------------------	-------------------

Conclusion

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

Paul J. Mason
Administrative Judge