



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



In the matter of:

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) ISCR Case No. 07-06650
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Applicant for Security Clearance

Appearances

For Government: Eric Borgstrom, Esquire, Department Counsel
Applicant: *Pro Se*

September 30, 2008

Decision

CREAN, Thomas M., Administrative Judge:

Applicant submitted his electronic Questionnaire for Investigation Processing (e-QIP) on January 9, 2006. On June 12, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns for drug involvement and personal conduct under Guidelines H and E. 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006. Applicant acknowledged receipt of the SOR on November 19, 2007.

Applicant answered the SOR in writing on June 17, 2008. Applicant admitted he used marijuana with varying frequency from 1974 until July 2007. He does not know with certainty if he used marijuana in the three years before his response. He denied falsifying information on his e-QIP. Department Counsel was prepared to proceed with the case on July 31, 2008. The case was assigned to me on August 4, 2008. DOHA issued a notice of hearing on August 20, 2008, for a hearing on September 4, 2008. I

convened the hearing as scheduled. Applicant waived the requirement for 15 days advance notice of the hearing. The government offered three Government Exhibits marked Gov. Ex. 1-3, which were received without objection. An additional Government exhibit, Gov. Ex. 4, was received with Applicant's submissions after the hearing. Two witnesses also testified for the government. Applicant submitted no documents but the record was held open for him to submit documentary information. Applicant timely submitted two Applicant exhibits marked App. Ex. A-B, which were received without objection. DOHA received the transcript (Tr.) of the hearing on September 18, 2008. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

Findings of Fact

Applicant admitted in his response to the SOR that he used marijuana with varying frequency from 1974 until possibly July 2007. He further stated that he cannot state with certainty that he used marijuana in the last three years. He did tell security investigators that he possibly did use marijuana in July 2007 because the investigator wanted a date certain for his last use. He denied deliberately providing false information concerning his drug and alcohol use on his security clearance application. I thoroughly and carefully reviewed the case file, the pleadings, transcript, and exhibits. I make the following findings of fact.

Applicant is 50 years old and has worked for a defense contractor for over four years as a design draftsman. He has some college education and certificates from certain professional courses. He is not married (Tr. 61-63; Gov. Ex. 1, e-QIP, dated January 6, 2006).

Applicant did not list drug or alcohol issues in response to questions on his application for a security clearance. He stated on the e-QIP in response to questions that he had consulted with mental health professionals in the last seven years (Gov. Ex. 1, e-QIP, dated January 9, 2006). Security investigators followed up on the mental health information provided by Applicant and obtained medical the records of Applicant's treatment at a mental health facility. These records indicated prior potential alcohol and drug usage as well as a driving while intoxicated offense in 1983 (Gov. Ex. 3, Medical information, dated November 3, 200). Security investigators followed-up on this information and interviewed Applicant twice.

The first investigator, a 20 year member of the New York City Police Department who retired as a detective, testified he has been conducting background investigations for three years. When he conducts interviews, he makes notes of the interview and later transfers the information to a Report of Investigation which is then sent to his company. He was directed to conduct an interview of Applicant to inquire about his alcohol use as indicated in his medical records.

The interview was conducted on January 11, 2007, at Applicant's place of employment. Applicant denied being treated at a mental health facility for alcohol or drug abuse. He stated he was treated at the facility for depression. During the course

of the interview, Applicant told the investigator that he started drinking alcohol at the age of eighteen, and is a social drinker. He volunteered to the investigator, in response to questions, that he had been arrested and convicted for driving while intoxicated in 1983. The case was subsequently dismissed without adjudication as part of an arrangement with the prosecutor and the Court. He did not indicate any use of illegal drugs (Tr. 14-30; Gov. Ex. 2, Interrogatories, dated January 11, 2007 at -4).

Applicant's second interviewer, a retired New York City detective sergeant with four years experience conducting security investigations, testified that he interviewed Applicant at his place of work on January 18, 2008. He was directed to interview Applicant concerning his use of marijuana.

Applicant stated he did not report his use of marijuana on his security clearance application because he completed the document quickly and did not realize he should answer yes concerning his marijuana use. The interviewer following his pattern of interviewing asked about marijuana use in a chronological order, starting with the earliest use ending with the latest use. He requested the extent and frequency of use and any changes in use patterns or intensity. Applicant informed the interviewer that he started using marijuana in high school in 1974. He smoked marijuana about two or three times a week at concerts or the beach because it made him relax. He continued this use pattern until 1986 when his use became less frequent. He smoked a marijuana cigarette at concerts or at the beach with a friend he did not identify usually only once or twice a year. After 1986, his use of marijuana decreased to smoking one marijuana cigarette with the same friend about once every two years at music concerts or the beach. In response to questions from the investigator, he stated he last used marijuana in July 2007 (Tr. 32-53; Gov. Ex. 2, Testimonies, dated January 24, 2008, at 5-6).

Applicant testified that he voluntarily entered the mental health treatment facility for depression and not for alcohol or drug abuse. The intake evaluations lists depression issues as a reason for admission and lists drug abuse and alcohol abuse among conditions to be evaluated and considered as a cause of mental health issues (see, Gov. Ex. 3, Medical records, October 30, 2003, at 50-52, 56). Applicant was asked by the security investigator when he last smoked marijuana. He told the investigator that he last used in July 2007. However, he is not sure of this use because he remembers using marijuana only every two or three years. He did state that he remembers last use of marijuana on his birthday about four years before the interview. The security investigator did ask him to try to remember the last use more clearly and he responded with the July 2007 date. Applicant in his post hearing submission stated unequivocally that he last used marijuana in 2004 on his birthday (App. Ex. B, Statement, dated September 23, 2008).

He usually used marijuana with the same friend who he still associates with five or six times a year. He used cocaine about 20 times, LSD about three times, and PCP once in high school with the last use of these illegal drugs in 1983. He purchased marijuana in the 1970, but not since then. He stopped using marijuana because he lost interest in the drug (Tr. 55-69).

Applicant completed his e-QIP in January 2006 in one afternoon. He sought information from family, friends, and other sources to include an on-line computer search to find specific information, like addresses and telephone numbers, to complete the application (Tr. 70-71). He answered "NO" to question 24 asking in the last seven years had he used illegal drugs. He responded "no" because he did not recall any specific use at the time he completed the application. He was also under pressure to complete the form. Only recently did he recall using marijuana on his birthday in 2004. It may have crossed his mind that if he listed marijuana use on the application it could negatively affect his ability to be granted access to classified information (Tr. 71-74; See. App. Ex. A, Applicant's Statement, dated September 23, 2008).

Applicant responded "NO" to question 23 asking if he had ever been charged with or convicted of an offense relating to alcohol or drugs. He did not list the driving while intoxicated offense because it had been dismissed without adjudication. It was his belief that it was no longer a part of his record, and he did not have to list it on the form. He also overlooked the meaning of the question in his haste to complete the application. He was unsure of whether he had to include the incident on his application as well as the data on the arrests. He did not want to provide incorrect information (Tr. 74-77; App. Ex. A, Applicant's Statement, dated September 23, 2008).

I find that Applicant last used marijuana in July 2007. Applicant's testimony concerning his last use of marijuana at the hearing was contradictory and elusive. He stated he was not sure of the time of his last use and eludes to the last use being in 2004 on his birthday. In his post hearing submission he was sure that he last used marijuana on his birthday in 2004. However, he told the security investigator in January 2008 that he last use marijuana in July 2007. The security investigator is an experienced questioner who used a chronological and changed circumstances approach to determine Applicant extent and last use of marijuana. The last use in July 2007 was only six months before the January 2008 interview and would have been remembered by Applicant.

Applicant's employer provided information that Applicant is a good employee. Applicant's supervisor, engineering manager, and human resource manager stated that he has been employed by the company for over four years. His overall performance is good. He consistently completes assignments and willingly works overtime when required. He makes valuable suggestions and constructive criticism to improve the company's product. They recommend that he be granted access to classified information (App. Ex. B, Letter, dated September 23, 2008)

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 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 over-arching adjudicative goal is a fair, impartial and common sense 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 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 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 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 H, Drug Involvement

The 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 mood and behavior altering substances, and include those listed on the Controlled Substances Act of 1970. Drug

abuse is the illegal use of a drug or the use of a legal drug in a manner that deviates from approved medical direction. (AG ¶ 24)

Applicant admits that he started using marijuana in 1974. He provided various statements as to when he stopped using marijuana. He admitted to security investigators and in response to the SOR that his last use of marijuana was in July 2007. Another time, he stated he could not recall using marijuana after 2004. I find that Applicant last used marijuana in July 2007. This is sufficient information to raise Drug Involvement Disqualifying Conditions (DI DC) ¶ 25(a) (any drug use), and DI DC ¶ 25(c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution). Applicant also informed security investigators that he used cocaine, LSD, and PCP. Since the government has not alleged the use of cocaine, LSD, and PCP in the 1970 to be of security concern, this use of illegal drugs will not be considered to have raised any disqualifying conditions but will be discussed as it affects the whole person concept. The government has alleged that Applicant used marijuana after he submitted a security clearance application. The application was submitted in January 2006. Applicant used marijuana in July 2007. However, under the circumstances this is not a disqualifying condition since Applicant has not been granted a security clearance. His use of marijuana after submitting an application for a security clearance will be considered as a factor under the whole person concept but not as a disqualifying condition.

The government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 25(a) and (c). The burden shifts to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the illegal drug use. (Directive ¶ E3.1.15) An applicant has the burden to refute an established allegation or prove a mitigating condition, and the burden of disproving it never shifts to the government (See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005)).

I have considered the drug involvement mitigating conditions (DI MC) and determine that none apply. Applicant's last use of marijuana was in July 2007, only a year ago. Applicant admitted using marijuana from 1974 until 2007, a period of over 34 years, a long period of time. His period of not using marijuana is only a year compared to over 34 years of use. Applicant presented no evidence that his use of marijuana will not recur. Accordingly, Applicant has not presented sufficient information to raise DI MC AG ¶ 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).

Likewise, he has not demonstrated an intention not to abuse drugs in the future. Applicant stated he lost interest in marijuana and does not intend to use it in the future. The mere statement that he does not intend to use in the future is not sufficient to raise DI MC 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; (4) a signed statement of intent with automatic revocation of clearance for any violation). Applicant still associates with the individual who he used marijuana with in the past. He

has not used marijuana for only a little over a year. He has not established that he changed his environment that facilitated his drug use in the past.

Applicant has not raised DI MC AG ¶ 26(c) (abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended); and DI MC AG ¶ 26(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 received treatment at a recognized medical facility for depression and not drug abuse. He was not counseled about drug abuse. He used marijuana after receiving the treatment. I find against Applicant on Guideline H, Drug Involvement.

Guideline E, Personal Conduct

A security concern is raised because conduct involving questionable judgment, untrustworthiness, unreliability, 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 ¶ 15) Personal conduct is always a security concern because it asks the central question does the person's past conduct justify confidence the person can be entrusted to properly safeguard classified information.

The security clearance system depends on the individual providing correct and accurate information. If a person conceals or provides false information, the security clearance process cannot function properly to ensure that granting access to classified information is in the best interest of the United States Government. Applicant's failure to list a 1983 driving while intoxicated conviction and list use of marijuana in response to questions on his security clearance application raises a security concern under Personal Conduct Disqualifying Condition (PC DC) 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 responsibility).

Appellant denied intentional falsification. While there is a security concern for an omission, concealment, or falsification of a material fact in any written document or oral statement to the government when applying for a security clearance, every omission, concealment, or inaccurate statement is not a falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully. Applicant states that he did not believe he had to list the driving while intoxicated offense since it had been dismissed without adjudication. He stated he did not list his use of marijuana because he could not recall any specific use of marijuana and he was in a hurry to complete the form. Even though the form states an applicant should list any arrests or convictions for abuse of alcohol, it is reasonable that an individual with no legal training who did not carefully reading the form would not respond in the affirmative for an

alcohol-related incident if the case was dismissed without adjudication. I find for Applicant as to personal conduct concerning failure to list his alcohol-related arrest in 1983 on the security clearance application.

Applicant has not presented sufficient information to establish his failure to respond correctly to the question concerning use of illegal drugs was not deliberate with an intention to deceive. Applicant knew of his use of marijuana within the seven years prior to completion of the application. He indicated that it may have been on his mind when answering the question that if he listed his use of drugs he would not be granted access to classified information. I find that Applicant deliberately provided a false response on his security clearance application to the question concern his use of illegal drugs but not in response to the question concerning an arrest or conviction for alcohol-related offenses.

I considered all of the Personal Conduct Mitigating Conditions under AG ¶ 17 and determine none apply. Applicant never made a good faith effort to correct erroneous or inaccurate information. He was questioned twice by security investigators about his alcohol-related arrest and his use of drugs. While Applicant eventually admitted the alcohol-related offense and his use of drugs to the investigators, it was only after prodding by them and in response to detailed questioning.

Guideline J, 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. (AG ¶ 30) Applicant violated federal law by knowingly and willfully providing false information on his security clearance application. This conduct raises Criminal Conduct Disqualifying Conditions (CC DC) AG ¶ 31 (a) (a single serious crime or multiple lesser offenses), and CD DC AG ¶ 31 (c) (allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted). As noted above, Applicant provided false information repeatedly on his security clearance application concerning his use of marijuana. I have considered all of the mitigating conditions under Criminal Conduct Mitigating Conditions AG ¶ 32 and determine that none 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 the 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) 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 common sense 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 considered that Applicant used marijuana from 1974 until July 2007. I also considered that in the 1970s, he used cocaine, LSD, and PCP. I considered that he deliberately failed to list his use of marijuana until questioned by security investigators. I considered that he continued to use marijuana after submitting a security clearance application knowing that use of marijuana was of security concern. I also considered the opinion of his employer that he is a good employee who is an asset to their company. Overall, the record evidence leaves me with questions and doubts that Applicant will not use illegal drugs in the future. His use of marijuana and his failure to list his use on the security clearance application leaves me with doubts and questions about his honesty, integrity, truthfulness, trustworthiness, and his eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his illegal drug use, personal conduct, and criminal conduct.

Formal Findings

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

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	For Applicant
Paragraph 3, 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.

THOMAS M. CREAN
Administrative Judge