



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



In the matter of:)
)
) ISCR Case No. 07-13797
)
)
Applicant for Security Clearance)

Appearances

For Government: Emilio Jaksetic, Esquire, Department Counsel
For Applicant: Scott M. Badami, Esquire

February 21, 2008

Decision

HOGAN, Erin C., Administrative Judge:

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP), on April 24, 2007. He submitted an additional e-QIP on July 10, 2007, after he changed employment. On October 24, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline H, Drug Involvement, and Guideline E, Personal Conduct for Applicant. 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.

On November 13, 2007, Applicant answered the SOR and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on December 12, 2007. The case was assigned to another administrative judge on December 20, 2008. On January 2, 2008, a Notice of Hearing was issued scheduling the hearing for January 31, 2008. On January 28, 2008, the case was transferred to me. The hearing was held on January 31, 2008. The Government offered Government

Exhibits (Gov) 1 and 2, which were admitted without objection. Applicant's counsel called three witnesses, including the Applicant, and submitted Applicant Exhibits A through F, which were admitted without objection. DOHA received the transcript of hearing on February 11, 2008. The record closed on that date. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

In his Answer to the SOR, dated November 13, 2007, Applicant admitted to all the SOR allegations.

Applicant is a 35-year-old aerospace engineer employed with a Department of Defense contractor seeking a security clearance. He has been employed with the defense contractor since June 2007. From 1999-2007, he worked for a previous defense contractor. He was awarded a Bachelor of Science in Aerospace Engineering in 1994. He currently is studying for his Masters in Engineering Management. From 1995 to 1997, he served in the Peace Corps. He is married and has no children. (Tr at 22-24, 81; Gov 2; AE A.)

In March 2003, Applicant was visiting a friend during Mardi Gras. He went out during the day, and when he returned, he discovered that his friend invited a few people over. A casual buffet was set up in the kitchen. Among the items were fresh baked cookies. Applicant ate some of the cookies. After he ate the cookies, he was told that there was marijuana in the cookies. Some time later, as he walked by the cookies, he grabbed another cookie. He ate part of the cookie but stopped himself thinking "if you want a cookie so badly, find one that doesn't have drugs in it." He later felt some effects from the marijuana. (Tr at 91-92; Answer to SOR.) Applicant no longer associates with anyone who was at the party. (Tr at 92.)

In February 2007, Applicant and his wife (then fiancée) spent a ski weekend with several friends at a friend's cabin. One of their friends stated that she was going to try marijuana for the first time. His wife decided that she would try marijuana for the first time as well. Applicant decided to do it too. The marijuana was baked in corn bread which was served with dinner. Both Applicant and his wife had a terrible experience. They both became sick and agreed that they would never do it again. (Tr at 26-27, 92-94, Answer to SOR.)

On April 24, 2007, Applicant submitted an e-QIP application to his previous employer. The request was for a National Agency Check (NAC), not a request for a security clearance. (Tr at 66-67, 102; Response to SOR.) He answered "No," in response to question 21a on the application which asks: "In the last year, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?" (Gov 1.) He admits that he understood the question and was aware that he should have listed his February 2007 marijuana use. He rationalized

that the question was not looking for someone who tried it one time, and was not going to use it again but for regular users of illegal drugs. (Tr at 117-120.) When signing the document, he certified 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 a knowing and willful false statement on this form can be punished by fine or imprisonment or both." (Gov 1, Signature Forms.)

In June 2007, Applicant accepted a job with his current employer. Shortly after he started his new job, he was asked to fill out a new e-QIP application in order to apply for a SECRET security clearance. Question 24a on the application asks: "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, heroine, etc.), amphetamines, depressants (barbituates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?" In response to this question, Applicant answered "Yes" and listed his March 2003 and February 2007 marijuana use. (Gov 2.)

Before submitting the second e-QIP application, he had a discussion with his wife. They had recently got engaged. He told her that he intended to list his drug use on this current form. He told her that he omitted his drug use on the last form, and by listing it on the current form there could be trouble. (Tr at 122-123.) Applicant thought the second questionnaire would supersede the prior questionnaire.

Applicant and his wife have not used marijuana since the February 2007 incident. Neither intends to use marijuana again. They have told their friends that they cannot be present when marijuana is used. They have not been present while people were using marijuana since February 2007. He is willing to submit to random drug tests. (Tr at 25, 28, 101-102, 132.) In his response to the SOR, Applicant submitted a signed statement, dated November 8, 2007, indicating that he intends to refrain from drug abuse now and in the future. Should he fail to refrain from any and all drug abuse, he expects the automatic and immediate revocation of any and all security clearances he may possess. (Tr at 96-100; Response to SOR.)

Applicant states that he will never use marijuana again because: "I have too much at risk. My relationship, you know, with my wife, my career. I'm hoping to have a family soon. All of this would be put at risk by such a stupid move as to try marijuana again." (Tr at 101-102.)

Applicant's second level supervisor, Mr. W., testified that he has known Applicant since 1999. They first were co-workers. Mr. W. was recently promoted. He indicates that Applicant is an important part of the division's leadership and technical team. He notes that Applicant is a first rate engineer who is honest and trustworthy. He is aware of the all of the allegations in the SOR. He first learned from his superiors because Applicant had previously informed them. In early January 2008, Applicant personally approached him and told him of the allegations. He does not condone Applicant's conduct, and believes he should have known better. He discussed this with Applicant.

However, he acknowledges that Applicant voluntarily told the truth when he filled out his second e-QIP application. Applicant assured him that this conduct will not be repeated and he believes him. Applicant has offered to take a drug test at any time that is requested of him. He strongly endorses his application for a security clearance. (Tr at 45-75; AE E.)

Applicant's most recent performance report indicates that Applicant "has proven to be exceptionally competent in his assigned duties. He demonstrates a high level of expertise and is relied upon by the customer to keep the procedure development process on schedule to meet the Projects milestones. He excels in promoting team efforts and works well across operational boundaries . . . He is a valued asset to the [company's] engineering team." (AE B.) Applicant's past performance evaluations with previous employers have been favorable. To summarize, he either met or exceeded standards in past performance evaluations. He has also received several awards throughout his career. (AE F.)

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.

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

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

The guideline notes several disqualifying conditions that could raise security concerns. I find Drug Involvement Disqualifying Condition (DI DC) ¶ 25(a) (any drug abuse) applies to Applicant’s case. He illegally used marijuana on two occasions. The first occasion was in March 2003. The second occasion was in February 2007.

The guideline also includes examples of conditions that could mitigate security concerns arising from drug involvement. Two apply to Applicant’s case. Drug Involvement Mitigating Condition (DI MC) ¶ 26(a) (the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment) applies. The record evidence indicates that Applicant used marijuana on two separate and isolated occasions. Although the last use occurred in February 2007, a year has passed. Although, Applicant did not use the best judgment when he decided to use marijuana, there is no evidence he is a habitual user. Applicant and his wife are adamant that they will never use marijuana again. Applicant has learned a difficult lesson pertaining to his marijuana use and future use is not likely to recur.

The second mitigating condition that applies is FC MC ¶ 26(b) (a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using

associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; and (4) a signed statement of intent with automatic revocation of clearance for any violation.) Applicant does not intend to use marijuana ever again. He and his wife have told their friends that they can longer be present when marijuana is used. They have not observed illegal drug use since the February 2007 incident. He has not used marijuana since the February 2007 incident. His two time use of marijuana was experimental. He is not a habitual user. He submitted a statement with his response to the SOR, indicating his intentions to refrain from future illegal drug use. He acknowledges that if he is caught using illegal drugs in the future that it will result in his automatic revocation of his security clearance. Applicant has taken sufficient steps demonstrating that he does not intend to abuse any drugs in the future. Applicant has met his burden to mitigate the security concerns raised under Guideline H, Drug Involvement.

Personal Conduct

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

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

There are specific disqualifying conditions which may be raised. Applicant's deliberate omission of his February 2007 marijuana use in response to question 21a on his April 24, 2007, e-QIP application raises Personal Conduct Disqualifying Condition (PC DC) ¶ 16(a) (deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities). Applicant admits he deliberately omitted his February 2007 marijuana use in response to question 21a. Although he rationalized to himself why he did not have to list the marijuana use on the application, it was a deliberate omission. He understood the question. Although this was his first time filling out an e-QIP application, Applicant is a college-educated aerospace engineer.

PC DC ¶ 16(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) applies with respect to subparagraph 1. Applicant's concealment of his marijuana use made him vulnerable to exploitation, manipulation or duress.

The personal conduct concern may be mitigated. Personal Conduct Mitigating Condition (PC MC) ¶ 17(a) (the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts) applies. Applicant fully disclosed his marijuana use on his second e-QIP application, which was submitted a little over two months after his first e-QIP application. Applicant's marijuana use was not discovered through a third party. He was not confronted about his marijuana use during a security clearance background investigation. He disclosed his marijuana use on his second application because he knew it was the right thing to do. When he accepted his new position, he was required to submit a new e-QIP application for a security clearance. It is unlikely the Government would have discovered Applicant's marijuana use had he not disclosed it.

PC MC ¶ 17(e) (the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress) applies. Applicant fully disclosed his past marijuana use on his July 10, 2007, security clearance application. He also fully disclosed his past marijuana use to his wife and work supervisors. He is no longer vulnerable to exploitation, manipulation, or duress due to his past marijuana use.

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. Although Applicant was a mature adult during the time each of the SOR allegations occurred, he accepted full responsibility for his actions and made no excuses for his behavior. Although his last use of marijuana occurred a little over a year ago, his use was experimental. It is unlikely that he will use marijuana again. He understands that future illegal drug use will result in the automatic revocation of his security clearance. He understands the severity of his earlier omission on his security clearance application. He is well respected in his

field and he fully disclosed his SOR issues to his chain of command, even though he was not required to do so.

While the Applicant's past conduct justified the concerns raised under Drug Involvement and Personal Conduct, he has met his burden of mitigating the security concerns arising under these 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, Guideline H:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

ERIN C. HOGAN
Administrative Judge