



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



In the matter of:)
)
) ISCR Case No. 08-00881
)
)
Applicant for Security Clearance)

Appearances

For Government: Emilio Jaksetic, Esquire, Department Counsel
For Applicant: Charles J. Ware, Esquire

February 26, 2009

Decision

RIVERA, Juan J., Administrative Judge:

Applicant failed to mitigate his falsification of his security clearance application. His continued association with illegal drug users casts doubt about his judgment and willingness to comply with rules and regulations. Clearance is denied.

Statement of the Case

On September 25, 2006, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On July 31, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified and revised.¹ The SOR alleges security

¹ On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guideline to all adjudications and other determinations made

concerns under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant answered the SOR on October 1, 2008, and requested a hearing before an Administrative Judge. The case was assigned to me on November 6, 2008. The Notice of Hearing was issued on November 13, 2008, convening a hearing on December 18, 2008. The hearing was convened as scheduled. The Government presented five exhibits, marked GEs 1-5, which were admitted without objection. Applicant testified on his own behalf, and presented one witness and no documents. DOHA received the transcript (Tr.) on December 24, 2008.

Findings of Fact

Applicant admitted all of the SOR ¶ 1 allegations (Guideline E). He failed to answer the Guideline J allegation and I entered a denial. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant is a 26-year-old systems administrator for a corporation providing network security to federal agencies. He has never been married and has no children. He completed his bachelor's degree in information systems management in the summer of 2003 (Tr. 67). Thereafter, he has taken several network certification/administrator courses to stay current in his field (Tr. 92).

After college, Applicant was unemployed for approximately seven months. In early 2004, he was hired as a physical security guard for a government contractor. While in this job, he received access to classified information at the secret level in about August 2005. He was hired by his current employer, a defense contractor, in 2006. He has been working for his current employer, a defense contractor, thereafter. He requires access to classified information to access his clients' information technology systems. He has held continuous access to classified information from 2005 to the day of his hearing.

In August-September 2006, days after Applicant was hired by his current employer, he smoked marijuana while travelling in a car with his cousin to attend a friends' "gathering" in celebration of a pending football game (Tr. 63-64, 72-73). At the gathering, he smoked marijuana again by taking some hits from a marijuana cigarette

under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006.

that was passed around. Applicant knew some of the 10-11 attendants at the gathering, but not all of them.

Applicant testified he illegally used marijuana “a couple of times” while attending high school from 1994 to 1998 (Tr. 82). He denied any use of marijuana between 1998 and 2006. He also denied any additional use of marijuana, or any use of illegal drugs, after his August 2006 use of marijuana. Applicant denied ever buying and/or selling any illegal drugs.

As part of his hiring process, two days after his 2006 use of marijuana, Applicant was required to submit a new security clearance application and to undergo a drug detecting urinalysis test. In his response to § 24 of his September 2006 e-QIP (asking whether since the age of 16 or in the last seven years he illegally used any controlled substance, i.e., marijuana), Applicant answered “No,” and failed to disclose his use of marijuana. He knew that he was required to disclose his use of marijuana but elected not to do so (Tr. 79). Applicant falsified his e-QIP because he was scared he would lose his new job, and/or that he would be denied access to classified information at the top secret level (Tr. 72-72, 79).

Applicant’s urinalysis test results came back positive for marijuana. When confronted by his company’s president (also the facility security officer), Applicant initially denied he illegally used marijuana and attributed the positive urinalysis test to passive inhalation. The next day, after consulting with his pastor and his father, Applicant disclosed to his employer that he had in fact illegally used marijuana (GEs 4 and 5). He told his employer he had used marijuana once while riding in a car with friends on their way to a football game. During a November 2006, interview with a government investigator Applicant stated he used marijuana once in September 2006 while at a party in a friend’s home. Applicant omitted information to both his employer and the investigator to minimize his drug involvement.

Applicant explained he is not a frequent marijuana user. He used marijuana in August-September 2006 because of peer pressure at the social event. He was aware it is illegal to use marijuana. He considers his use of marijuana childish and immature. He testified he is not a security risk, and that he would never betray the United States. He considers himself to be trustworthy and a good, reliable worker. During his hearing, Applicant promised never to use marijuana again. He testified that the likelihood of he smoking marijuana again is “very slim” (Tr. 75-75). He is aware of the serious security clearance concerns it raises, and the possibility of losing his job. Since August 2006, Applicant has been in the presence of people using marijuana three or four times; the last time during the summer of 2008 (Tr. 85). He was offered marijuana, but claimed he did not use it (Tr. 86). Applicant explained he did not pay attention to the people using marijuana, and that it did not bother him that they were using marijuana (Tr. 86).

The president, CEO and FSO of Applicant’s company (X) testified at his hearing (Tr. 19-56). X hired Applicant, and has been his mentor since Applicant’s 2006 drug use. Applicant holds one of the most trusted positions in the company. He has

established an excellent reputation as a knowledgeable, dependable and honest employee. X believes Applicant has made a personal and professional commitment to stay away from drugs. He also believes this was a one-time incident. Applicant participated in a six weeks drug rehabilitation/counseling program, and tested negative for drugs in three random urinalyses tests since 2006.

In X's opinion, Applicant has matured and is meeting all expectations as a professional. Applicant has had no behavioral issues during the last two years. Applicant's performance has been so good that X would like to assign him to deal with specific customers and contracts. He recommended Applicant receive a security clearance without reservations.

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 controlling 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.

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by "substantial evidence,"² demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information.

² See Directive ¶ E3.1.14. "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence “to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).³

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* Executive Order 12968 (Aug. 2, 1995), Section 3.

Analysis

Guideline E, Personal Conduct

Under Guideline E, the security concern is that 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. AG ¶ 15.

In 2006, Applicant illegally used marijuana while possessing a security clearance. Two days later, he deliberately falsified his security clearance application when he failed to disclose his marijuana use. His falsification was knowledgeable and with the intent to mislead the government. When confronted, he initially lied to his employer about his illegal drug use; however, he recanted his false statement the next day.

Applicant deliberately failed to disclose his illegal use of marijuana because he was scared he would lose his new job, and/or that he would be denied access to classified information if he disclosed the truth.

Because of his maturity, education and experience holding a security clearance, Applicant knew or should have known the importance of accurately completing his

³ “The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant’s past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15.” ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

security clearance application and telling the truth. Nevertheless, he failed to provide information that was material to making an informed security decision. AG ¶¶ 16(a) “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire” and (b) “deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority , or other official government representative,” apply.

AG ¶ 17 lists seven conditions that could mitigate the personal conduct security concerns:

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

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

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

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

After considering all the mitigating conditions, I find none applies to this case. Applicant made no effort to correct his falsification until he was confronted with his positive urinalysis test by his employer. Even then, he initially lied to his employer about his use of marijuana. AG ¶¶ 17(a) and (b) do not apply.

I consider Applicant's falsification of his security clearance application a serious offense. I find his behavior aggravated because Applicant used marijuana while possessing a security clearance and employed as a security guard. Moreover, he falsified his security clearance application knowing he was required to tell the truth. Applicant's falsification did not happen under such unique circumstances that it is unlikely to recur. His actions cast doubt on the Applicant's reliability, trustworthiness, and good judgment. AG ¶ 17(c) does not apply.

Notwithstanding Applicant's disclosure of his drug use to his employer and his employer's selfless mentoring of Applicant, he continues to associate with persons involved in the illegal use of drugs. Applicant has failed to change his behavior and did not take positive action to reduce any possible vulnerability to exploitation. His continued association with persons involved in criminal activity casts doubt about Applicant's judgment and willingness to comply with rules and regulations. AG ¶¶ 17(d), (e), and (g) do not apply.

Guideline J, Criminal Conduct

Under Guideline J, the security concern is that 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 falsified his security clearance application when he failed to disclose he used marijuana while possessing a security clearance. His falsification of the security clearance application is material and a violation of 18 U.S.C. § 1001. Making a false statement under 18 U.S.C. § 1001 is a serious crime, a felony (the maximum potential sentence includes confinement for five years and a \$10,000 fine).⁴

Applicant's behavior raises security concerns under AG ¶ 31(a) "a single serious crime or multiple lesser offenses," and AG ¶ 31(c) "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted."

AG ¶ 32 lists four conditions that could mitigate the criminal conduct security concerns raised under AG ¶ 31:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur

⁴ It is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation, or knowingly make or use a false writing in any matter within the jurisdiction of the executive branch of the Government of the United States. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. See *Egan*, 484 U.S. at 527.

and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense; 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.

After considering all the mitigating conditions, I find that none apply. Applicant's illegal use of marijuana and falsification are recent. Furthermore, for the same reasons articulated in the discussion of AG ¶ 17 (pp. 6-7, *supra*), incorporated herein, I find his evidence is not sufficient to show successful rehabilitation or mitigation.

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) 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.

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. AG ¶ 2(c).

Applicant's record of employment for two government contractor weighs in his favor. I particularly note Applicant's employer's strong favorable testimony. Applicant expressed remorse, stated that he has learned his lesson, and has matured since 2006. These factors show some responsibility, rehabilitation, and mitigation. Other factors tend to mitigate concerns such as his counseling, character, reputation, and job performance.

The evidence against mitigating Applicant's conduct is substantial. Factors that weigh against mitigation include: the nature and seriousness of the offense, his age and education, his employment as a security guard, and his possession of a security clearance at the time he used marijuana and falsified his security clearance application. Applicant was well aware of the illegality of using marijuana and the adverse legal consequences for his actions. Notwithstanding his possession of a security clearance and his job as a security officer, he used marijuana and then lied about it on his security clearance application and subsequently to a government investigator. Applicant knew or should have known the importance of the trust placed on him by the Government. Notwithstanding, he failed to be candid and honest on his security clearance application and subsequently to his employer and to a government investigator.

Moreover, Applicant continues to associate with persons involved in the illegal use of drugs. Applicant has failed to change his behavior and did not take positive action to reduce any possible vulnerability to exploitation. His continued association with persons involved in criminal activity casts doubt about Applicant's judgment and willingness to comply with rules and regulations.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he failed to mitigate the security concerns pertaining to 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 E:	AGAINST APPLICANT
Subparagraphs 1.a - 1.c:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a	Against Applicant

Conclusion

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

JUAN J. RIVERA
Administrative Judge