



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



In the matter of:)
)
) ISCR Case No. 09-00930
)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *pro se*

March 30, 2010

Decision

CREAN, Thomas M., Administrative Judge:

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) for his employment with a defense contractor on June 4, 2008 (Gov X 4). On October 28, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline H (Drug Involvement), and Guideline E (Personal Conduct) (Gov X 1). 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 received the SOR on November 11, 2009 (Gov X 3 at 3).

Applicant answered the SOR in writing on November 12, 2009. His responses to the personal conduct security concern were inconsistent. Applicant denied the three factual allegations, but admitted the security concern. If Applicant does not admit the factual allegations, there is no security concern to admit. I find based on his answers to the factual allegations that Applicant denied the security concern under Guideline E.

Applicant admitted the factual allegation under Guideline H pertaining to a positive urinalysis test, but denied the factual allegations concerning use of marijuana from 1996 until May 2007. He admitted the drug involvement security concern. He stated that he passed another urinalysis test a week after the one he failed. Applicant elected to have the matter decided on the written record in lieu of a hearing (Gov X 3).

Department Counsel submitted the government's written case on December 31, 2009. Applicant received a complete file of relevant material (FORM) on January 22, 2010, and was provided the opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. He did not provide additional information. The case was assigned to me on March 22, 2010. Based upon a review of the case file, eligibility for access to classified information is denied.

Findings of Fact

Applicant admitted only one of the factual allegations under Guidelines H, and denied all factual allegations under Guideline E. I carefully reviewed the case file and the pleadings, and make the following findings of fact.

Applicant is a 53-year-old college graduate who has worked for a defense contractor as an engineer and technician for over two years. He is divorced with two children. He served nine years on active duty in the Navy. Applicant completed his security clearance application on June 4, 2008. Applicant responded "No" to questions concerning his use of illegal drugs. He stated in response to a question asking if he was ever fired from a job, that he was fired from a job for failing a urinalysis (Gov. X 4).

Applicant was interviewed by security investigators concerning his use of drugs on October 6, 2008. He admitted using marijuana from 1996 when he left the Navy until his last admitted use of marijuana in 2002 or 2003. He was asked about his termination from a job because he failed a drug urinalysis for marijuana in May 2007. He does not know why the test was positive because he had not used marijuana since 2003 or 2003. He did claim that his friends used marijuana and that is a possible reason for the positive test.

Applicant told security investigators in the same interview that he does not intend to use marijuana in the future. He did not provide information to investigators that he had treatment or counseling for drug use. He told investigators that he has not used other drugs. However, he is still friends with those that do use drugs, but he does not participate in their drug use. Applicant stated that his "no" answer to illegal drug use on the security clearance application was based on the fact he had not used marijuana since 2002 to 2003, and marijuana use was no longer relevant to him. He did admit to smoking marijuana socially once or twice a year because of peer pressure after leaving the Navy in 1996 (Gov X 5).

Applicant stated in response to a DOHA interrogatory that he had not soberly or consciously used marijuana since the spring of 2002. He avoids places where

marijuana is used because he does not feel it is in his best interest to frequent these places (Gov X 6).

In response to another DOHA interrogatory, Applicant stated he failed a urinalysis in April 2007 given for employment with a temporary employment service, but passed a urinalysis for a different employer in June 2007. However, the test results show that the test for the temporary employment agency was administered on May 23, 2007, and the positive marijuana use result was reported on June 21, 2007 (Gov X 7).

I find that Applicant failed a urinalysis drug test for marijuana in May 2007. Applicant's statement that he tested negative for marijuana use about one month later is only evidence that he did not use marijuana after the May 2007 positive test. It is not evidence that he did not use marijuana prior to the May 2007 positive drug test. Based on this positive drug test for marijuana, I find Applicant used the illegal drug marijuana in 2007. There is ample evidence that Applicant used illegal drugs in varying frequency from 1996 until 2007, based on Applicant's admission to drug use after leaving the Navy in 1996 until 2003, and the 2007 positive test for illegal drugs,

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised Administrative Guidelines. 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 burden of persuasion 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.

Analysis

Guideline H, Drug Involvement

The use of an illegal drug can raise questions about an individual's reliability and trustworthiness, because it may impair judgment and 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 in the Controlled Substances Act of 1970. Marijuana is listed in the Act. 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).

The first factual allegation under drug involvement involves marijuana use with varying frequency from about 1996 until May 2007 (SOR 2a). Applicant admitted using marijuana from 1996 until 2002 or 2003. He tested positive for marijuana in a May 2007 urinalysis. The second factual allegation concerns the May 2007 positive test for marijuana. Applicant denies use of marijuana after 2002 to 2003. He cannot explain the positive test except that he was in places where his friends used marijuana. While there is no direct evidence of marijuana use between 2002 or 2003 and May 2007, the fact that Applicant tested positive for marijuana in May 2007 indicates he has used marijuana since 2003. The government established the factual allegation. Applicant has not presented sufficient information to rebut the factual allegation.

I have considered the Drug Involvement Mitigating Conditions (DI MC) and find none apply. Applicant admitted using marijuana for an extended period of time from 1996 until 2003. I find that he used marijuana after 2003, at least until May 2007, when he tested positive for marijuana use. His use of marijuana is recent and frequent since it occurred as late as 2007. DI MC AG ¶ 26(a) (the behavior happened so long ago, was so infrequent, or happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment) does not apply.

Applicant stated he does not intend to use marijuana in the future. He also stated that he is still friends with those that do use marijuana, but does not participate with them in the marijuana use. This statement about being with marijuana using friends but not using marijuana is not valid evidence to show intent not to use marijuana in the future. He has not received any counseling for illegal drug use nor does he participate in any drug avoidance programs. Applicant has a long history of marijuana use, but his

intent not to use marijuana is only recent and in response to questions from security investigators. The 2007 failed drug test for marijuana is a further indication he continues to use illegal drugs. Applicant has not presented sufficient information of changed circumstances to indicate and validate his intent not to use illegal drugs in the future. DI MC AG ¶ 26(b) (a demonstrated intent not to abuse 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) does not apply because he failed to provide evidence to support the mitigating condition. Guideline H is decided against Applicant

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 answered "no" to a question on his June 2008 security clearance application concerning his use of marijuana from 1996 until May 2007. He told security investigators in October 2008, and responded to DOHA interrogatories in April 2009, that he had not used marijuana since 2002. The positive test for marijuana use in May 2007, has not been explained and is sufficient evidence for a finding that Applicant used marijuana until at least May 2007. Applicant's statement that he tested negative for marijuana use about one month later is not evidence that he did not use marijuana prior to the positive drug test in May 2007, but only evidence he did not use marijuana from May 2007 until the test in June 2007. His failure to respond accurately to using marijuana after 2003 as evidenced by the May 2007 failed urinalysis raises concerns under Personal Conduct Disqualifying Condition (PC DC) AG ¶ 16(a) (the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history, or similar form used to conduct investigations, to determine security eligibility or trustworthiness).

Applicant deliberately failed to provide accurate information concerning his illegal drug use. 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 tested positive for marijuana in May 2007. He

indicated the date of the test as April 2007. However, the test results clearly show the test was administered on May 23, 2007, for pre-employment with the temporary employment agency. There is no confusion on the results of the test. I find that Applicant deliberately failed to disclose his illegal drug use evidenced by the positive test results for marijuana. I find against Applicant as to Personal Conduct.

“Whole-Person” Analysis

Under the whole-person concept, the administrative judge evaluates the applicant’s conduct and all of the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

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

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

Applicant has not established that he is trustworthy, reliable, and exercises good judgment. To the contrary, he used marijuana recently and frequently. He did not provide full and complete information about his drug use on his security clearance application, in response to interrogatories, and questions of security investigators. Even though he stated he does not intend to use illegal drugs in the future, he did not present sufficient information to support his intent. Applicant used marijuana and has not provided sufficient evidence to convince me he should be trusted with access to classified information. The record evidence leaves me with questions about Applicant’s eligibility and suitability for a security clearance. For all these reasons, Applicant has not mitigated drug involvement and personal conduct security concerns.

Formal Findings

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

Paragraph 1, Guideline E:	AGAINST APPLICANT
Subparagraphs 1.a - 1.c:	Against Applicant

Paragraph 2, Guideline H: AGAINST APPLICANT

Subparagraph 2.a - 2.b: Against Applicant

Conclusion

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

THOMAS M. CREAN
Administrative Judge