



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



In the matter of:)
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Applicant for Security Clearance)

ISCR Case No. 09-08090

Appearances

For Government: James Duffy, Esquire, Department Counsel

For Applicant: Joseph Testan, Esquire

October 20, 2010

Decision

O'BRIEN, Rita C., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant has failed to mitigate the security concerns raised under the guidelines for drug involvement and personal conduct. Accordingly, his request for a security clearance is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) signed on July 2, 2009. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA)

were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request for a security clearance.

On April 6, 2010, DOHA issued to Applicant a Statement of Reasons (SOR), which specified the basis for its decision: security concerns addressed in the Directive under Guidelines C (Foreign Preference), E (Personal Conduct), and H (Drug Involvement) of the Adjudicative Guidelines (AG).²

Applicant submitted an undated Answer, received by DOHA on April 30, 2010, in which he admitted the allegations under Guideline H, Drug Involvement. Department Counsel subsequently amended the SOR on May 17, 2010, by adding Guideline E, Personal Conduct. Applicant answered the amendment on May 24, 2010, denying the new allegation.

Applicant requested a hearing before an administrative judge. Department Counsel was prepared to proceed on May 17, 2010, and the case was assigned to me on May 27, 2010. DOHA issued a Notice of Hearing on June 2, 2010. I convened the hearing as scheduled on June 17, 2010. I admitted four exhibits offered by the Government (GE 1 through 4). Applicant and four witnesses testified. He offered six exhibits, which I admitted as Applicant Exhibits (AE) A through F. DOHA received the transcript on June 25, 2010.

Procedural Ruling

Prior to the hearing, by memoranda dated May 17 2010, the Government amended the SOR by adding paragraph 2, Guideline E, Personal Conduct, containing one subparagraph, as follows:

a. You falsified material facts on a Standard Form 86 – Questionnaire for Sensitive Positions, that you signed on March 24, 2005, on which you were required to answer the following question: *24. Your Use of Illegal Drugs and Drug Activity. The following questions pertain to the illegal use of drugs or drug activity. You are required to answer the questions fully and truthful, and your failure to do so could be grounds for an adverse employment decision or action against you, but neither your truthful responses nor information derived from your responses will be used as evidence against you in any subsequent criminal proceeding. A. Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally*

¹ Required by Executive Order 10865, as amended, and DoD Directive 5220.6 (Directive), as amended.

² Adjudication of this case is controlled by the Adjudicative Guidelines, implemented by the Department of Defense on September 1, 2006.

used any controlled substances, 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?" to which you responded "No," whereas in truth, you deliberately failed to disclose your use of marijuana in 2004.

At the hearing, Applicant objected to the Government's amendment. Under Enclosure 3 of Directive 5220.6, ¶ E3.1.13, each party must serve one another with documents to be submitted at the hearing. Department Counsel served Applicant with notice of the SOR amendment by letter dated May 17, 2010, more than one month before the hearing. Applicant answered the new allegation on May 24, 2010. He had sufficient notice and opportunity to respond and admitted at the hearing that he was not prejudiced by the amendment. Applicant also objected that Department Counsel does not have the authority to amend the SOR. Under ¶ E3.1.17 of the Directive, the Administrative Judge, Department Counsel, or Applicant can move to amend the SOR at the hearing "to render it in conformity with the evidence admitted, or for other good cause." The non-amending party can be granted additional time to respond to such an amendment, if requested. The Appeal Board has described the Directive's language as to SOR amendments as "permissive." (See ISCR Case No. 08-02404 at 5 (App. Bd. June 5, 2009). I overruled Applicant's objection.

Findings of Fact

Applicant's admissions in response to the SOR are incorporated as findings of fact. After a thorough review of the pleadings and the record evidence, I make the following additional findings.

Applicant, 24 years old, was single at the time of the hearing, and does not have children. He earned a bachelor's degree in 2009 in wireless engineering and mathematics. He participated in co-op programs while in college, during which he worked for federal agencies. They occurred from May to August 2005, and from January to May 2006. He required a security clearance for these positions, and completed a security clearance application in March 2005. (Tr. 62) He was granted a security clearance in June 2006. He participated in co-op program at a federal agency from August to November 2006. He began his present full-time position as a software engineer with a defense contractor in July 2009, although he held a part-time position with the same company from January 2009, while completing his degrees. (GE 1, 3, 4; Tr. 61-64)

Applicant attended college from 2004 to 2009. He used marijuana while he was in college. When he completed his security clearance application in March 2005, he did not indicate he had used marijuana. When he completed a second security clearance application in July 2009, he disclosed that he had used marijuana recreationally in

October 2004; November 2004; twice in December 2004; twice in September 2005; and in July 2008. In his interrogatory response of March 2010, he reported his first use of marijuana as October 2004, and his last use as July 2008. (GE 1, 2)

In August 2009, Applicant met with an investigator for a security interview. He stated he used marijuana between October 2004 and July 2008. He usually used it at parties, and with college acquaintances in dorms, homes, or apartments. He used marijuana either in cigarette form, when he would inhale once, or with a pipe, when he would inhale twice. He never bought or sold marijuana. He stated he has had no contact with these acquaintances since college. (GE 3; Tr. 67-68)

In the interview, Applicant also admitted that he used marijuana in July 2008, when he held a security clearance. This use was the only time he used it after obtaining a clearance. He told the investigator that he had received all the instructions regarding holding a security clearance. At the time of his security interview, no one knew that Applicant had used marijuana while holding a security clearance. He also told the investigator that he had no intent to use marijuana in the future. When DOHA sent him a copy of the interview report in March 2010, he reviewed it, corrected some entries made by the investigator, then noted that "Everything else is accurate." He did not correct any of the information concerning his marijuana use. He also typed in his first use of marijuana as "October 2004." He signed a notarized certification that the interview was accurate, as corrected, and that his responses to the interrogatory were true. (GE 3)

At the hearing, Applicant testified that he first used marijuana in the fall of 2005, not 2004. He used it about six times in 2005, before he received his security clearance in June 2006. He also admitted the July 2008 use, which occurred after receiving his security clearance. Applicant testified that he made a mistake on his 2009 security clearance application. When he completed it, he estimated that he had done his first application in September 2004; he knew he did not use marijuana before that date, so he entered that he started smoking marijuana in October 2004. After receiving the SOR amendment alleging a falsification, he reviewed the dates and realized that, since he actually completed his first application in March 2005, and he did not use marijuana until after he completed his application, his first marijuana use occurred in October 2005, not October 2004. He stated that there is no doubt in his mind that he began using marijuana *after* completing the 2005 application, not before. He knew that disclosing he used marijuana after obtaining his security clearance might jeopardize the clearance, but wanted to be honest about his drug use. (Tr. 67, 70-75)

On cross-examination, Applicant admitted that he was unsure about the actual dates of his use, and that the dates he gave were not precise, but only to the best of his knowledge. He listed the specific number of times each month only to indicate the infrequency of his marijuana use, rather than the exact dates or number of times. He testified that the maximum number of times he used marijuana was seven; that he first used it in September 2005; that he most likely used marijuana in October and

November 2005; and that it was possible he used it more than once in those months. He also testified that he did not use it with a pipe or with any other paraphernalia. He knew when he used it that it was illegal. (Tr. 77-84)

Applicant has never been treated for his drug use. Other than his fiancée, he no longer associates with the friends with whom he used marijuana in the past. His fiancée testified that she no longer uses illegal drugs. Applicant has no intent to use marijuana in the future, as it is inconsistent with his career goals. He attached to his Answer to the SOR a signed, notarized statement of intent not to use marijuana or other illegal drugs in the future, with revocation of his security clearance if he reneges. (Answer; Tr. 68-69)

The employment evaluation Applicant submitted for September 2009 to May 2010 shows that he either exceeded standards or performed exceptionally in all categories. Several long-standing friends and college roommates submitted character references, which describe Applicant as having strong character, as well as being reliable, trustworthy, and a hard worker. Several were familiar with Applicant's marijuana use, and opined that it is a thing of the past, and that Applicant is not easily influenced by others. (AE A-F)

Applicant's current Technical Lead testified. He has functioned as Applicant's daily supervisor since the fall of 2009. He testified that Applicant is reliable and exercises good judgment. Applicant told the witness about his marijuana use, and that he has no intent to use it again, as it is counter-productive to his career goals. He does not believe Applicant would knowingly falsify his security clearance application. (Tr. 22-30)

Applicant's fiancée testified. She and Applicant met in 2005. They started dating in 2007, and have had daily contact since then. He told her he used marijuana about six times in fall of 2005. In July 2008, she and Applicant were at a party. An acquaintance had marijuana, and she and Applicant shared the joint with several other friends. They do not associate now with the people with whom they used it at the party. In October 2008, Applicant's fiancée used marijuana again for the last time. Applicant has told her he will not use it again. She does not believe he deliberately falsified his 2005 security clearance application. (Tr. 31-44)

A coworker, who has known Applicant for one year and has had daily interaction with him, testified he finds Applicant to have mature judgment, and to be trustworthy and reliable. In early 2010, Applicant told him that after completing the security clearance application in March 2005, he used marijuana in the later months of 2005 "...on once or twice a month basis" for a total of about six times. (Tr. 45-52) Another friend, who has known Applicant for eight years, testified that Applicant told him he used marijuana a few times very early in his college career. The witness stated that, since he himself started college in 2005, Applicant would have started in 2004. Applicant also told the witness that he had used marijuana in 2008. (Tr. 53-60)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the Adjudicative Guidelines (AG).³ Decisions must also reflect consideration of the “whole-person” factors listed in ¶ 2(a) of the Guidelines.

The presence or absence of a disqualifying or mitigating condition does not determine a conclusion for or against an applicant. However, specific applicable guidelines are followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guideline H (Drug Involvement) and Guideline E (Personal Conduct).

A security clearance decision is intended only to resolve the question of whether it is clearly consistent with the national interest⁴ for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to Applicant to refute, extenuate or mitigate the Government’s case. Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion.⁵ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or his own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government.⁶

Guideline H, Drug Involvement

³ Directive. 6.3.

⁴ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁵ See *Egan*, 484 U.S. at 528, 531.

⁶ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

The security concern about drug involvement is that

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. AG ¶ 24.

The evidence raises three potentially disqualifying conditions under AG ¶ 25:

- (a) any drug abuse;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (g) any illegal drug use after being granted a security clearance.

Applicant used marijuana six or seven times while in college between 2004 and 2005. He used it at parties and at friends' houses. He sometimes used in the form of a cigarette, and he sometimes used it with a pipe. In June 2006, he was granted a security clearance. Nevertheless, he used marijuana again in 2008. At that point, he not only knowingly engaged in illegal conduct, but did so while he carried the additional obligations imposed on those who hold security clearances. AG ¶¶ 25(a), (c), and (g) apply.

I have considered all of the potential mitigating conditions under AG ¶ 26, especially the following:

- (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; and
- (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's uses of marijuana in 2004 and 2005 were not recent, having occurred five to six years ago. However, his 2008 use was more recent. Applicant's drug use did not occur under unusual circumstances, as he used marijuana at parties, with friends, and his fiancée. Moreover, as recently as 2008, the fact that he held a security clearance did not prevent him from engaging in this illegal conduct. His behavior raises doubts about his judgment. Mitigation under AG ¶ 26(a) applies in part, only in regard to his early marijuana use.

As to AG ¶ 26(b)(4), Applicant testified that he has no plans to use marijuana in the future, and submitted a notarized statement to that effect. However, Applicant's failure to disclose his 2004 marijuana use on his first application undermines the reliability of this statement. Applicant no longer associates with the friends with whom he used marijuana in college. However, AG ¶ 26(b)(1) cannot be applied in complete mitigation because he has an ongoing relationship with his fiancée, with whom he used marijuana in July 2008. Although she no longer uses marijuana and has no intent to use in the future, she testified that she again used marijuana in October 2008, after the July use with Applicant. Only partial mitigation is available under AG ¶ 26(b)(1).

As of the date of the hearing, Applicant had not used marijuana in two years. There is no bright line defining an appropriate period of reform and rehabilitation. In some cases, two years could be interpreted as a sufficient period of abstinence. However, the fact that Applicant knowingly used an illegal drug after he was granted a security clearance, and the poor judgment shown by this conduct, weighs against a conclusion that sufficient time has passed. The partial mitigation under AG ¶ 26 does not overcome the gravity of the fact that Applicant chose to use marijuana while he held a security clearance.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern about personal conduct:

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.

The Guideline E allegation implicates the following disqualifying condition under 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

The government alleges that Applicant deliberately falsified his security clearance application in 2005 when he failed to disclose his 2004 marijuana use. He provided, in his 2009 application, seven dates when he used marijuana between October 2004 and September 2005, and then in July 2008. He confirmed these dates when he met with the security investigator in 2009. In March 2010, when he received a copy of the investigator's report to review for accuracy, he did not change the dates he had provided. Only when the Government alleged that he falsified his first application did he revise the dates, claiming that he started using marijuana in 2005, not 2004. I conclude, based on his repeated confirmation of the initial set of dates he provided, that he deliberately failed to disclose his 2004 uses on his 2005 application. Moreover, during his security interview, he admitted using a pipe to smoke marijuana, but at the hearing, he denied ever using a pipe. AG ¶ 16(a) applies.

Guideline E contains the following relevant mitigating conditions under AG ¶ 17:

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

(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.

Applicant's falsification is unmitigated. Falsification of information provided to the Government cannot be considered minor. Although Applicant disclosed his drug use when he completed his 2009 application, the record contains no evidence that he sought to correct the falsification promptly after completing the 2005 application. His conduct reflects negatively on his trustworthiness and good judgment. AG ¶¶ 17(a) and 17(c) do not apply.

Whole-Person Analysis

Under the whole-person concept, an administrative judge must evaluate an Applicant's security eligibility by considering the totality of the Applicant's conduct and all 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.

AG ¶ 2(c) requires that 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. Under the cited guidelines, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Weighing in Applicant's favor are several positive factors: he has earned a college degree, and performed successfully at work. His supervisor, as well as friends and co-workers, opined that he is reliable and a hard worker. He maintained a stable relationship, and expected to marry a few months after the hearing. He abstained from marijuana use for two years.

However, other facts raise security concerns. Applicant used marijuana up to seven times between 2004 and 2005. He used marijuana in the fall of 2005, even though he had completed a security clearance application that put him on notice that illegal drug use was a security concern. Then in 2008, he again engaged in criminal conduct and disregarded the obligations of security clearance holders, when he used an illegal drug after he had been granted a clearance in 2006. His conduct indicates a lack of judgment and trustworthiness, and raises doubts as to whether he understands what is required of those who hold security clearances.

Overall, the record evidence fails to satisfy the doubts raised about Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from the cited adjudicative guidelines.

Formal Findings

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a. – 1.b.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a.	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 allow Applicant access to classified information. Applicant's request for a security clearance is denied.

RITA C. O'BRIEN
Administrative Judge