



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



In the matter of:)
)
) ISCR Case No. 10-05700
)
Applicant for Security Clearance)

Appearances

For Government: Ray T. Blank, Jr., Esq., Department Counsel
For Applicant: *Pro se*

October 28, 2011

Decision

DUFFY, James F., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated the security concerns arising under Guidelines H (Drug Involvement) and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on March 22, 2010. On April 11, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H and E. DOHA acted under Executive Order (EO) 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 adjudicative guidelines (AG) implemented on September 1, 2006.

On May 20, 2011, Applicant answered the SOR and requested a hearing. Department Counsel submitted the ready-to-proceed notification on July 8, 2011. The case was originally assigned to another judge and was reassigned to me on August 9, 2011. DOHA issued a notice of hearing on August 24, 2011, and the hearing was convened as scheduled on September 16, 2011. The Government offered exhibits (GE) 1 through 5 that were admitted into evidence without objection. Department Counsel's index of exhibits is marked as Hearing Exhibit (HE) 1. Applicant testified, called no witnesses, and offered no exhibits. The record was held open until October 7, 2011, for Applicant to submit additional information. Applicant submitted exhibits (AE) A through H, which were admitted into evidence without objection. Department Counsel's email noting he had no objection to those exhibits was marked HE 2. DOHA received the hearing transcript (Tr.) on September 26, 2011.

Findings of Facts

Applicant is a 34-year-old employee of a defense contractor. He began working for his current employer in November 2005. He received a bachelor's degree in 2008. He has never been married and has no children. This is the first time that he has sought a security clearance.¹

The SOR alleged that Applicant used marijuana with varying frequency from 2003 to at least February 2010 and that he was charged with felony marijuana trafficking in 2006, which was later dismissed. It also alleged that he deliberately falsified his responses to two questions (Section 22: Police Record and Section 23: Illegal Use of Drugs or Drug Activity) on his e-QIP. In his Answer, Applicant admitted all of the SOR allegations. His admissions are incorporated herein as findings of fact.²

In responding to interrogatories on October 7, 2010, Applicant indicated that he used marijuana monthly from 2003 to 2006 and that he last used marijuana in October 2006. During an earlier interview with an Office of Personnel Management (OPM) investigator in April 2010, however, he stated that his most recent use of marijuana was sometime between December 2009 and February 2010. At the hearing, Applicant testified that he last used marijuana in February 2010. When asked at the hearing about the inconsistencies involving those dates, he stated that he was confused about the dates in responding to the interrogatories and wrote down the wrong dates.³

During the OPM interview, Applicant indicated that he used marijuana on vacations, which he took about every three months. He used this substance while on vacations in Jamaica and Canada. He also used marijuana in his friends' homes and purchased marijuana. In the interview, he also stated that he had no intention of stopping his use of marijuana. At that time, he stated that he did not intend to use

¹ Tr. 6-7, 28-29,; GE 1.

² SOR; Applicant's Answer to the SOR.

³ Tr. 36-40, GE 2, 3.

marijuana for the rest of his life but thought his desire to use this substance would naturally fade. At the hearing, he testified that he never intends to use marijuana in the future. He also testified that he no longer associated with friends with whom he used marijuana, but refused to disclose the identity of those friends during the OPM interview and at the hearing. He has had three or four drug tests at work and all had negative results. He has never received drug treatment or counseling and has never been diagnosed as being a drug abuser or drug dependent.⁴

On October 9, 2006, Applicant appeared naked and was yelling profanities in the parking lot outside his apartment. Employees and tenants of the apartment complex observed him engaging in that conduct. The police were called, arrested him, and took him to a hospital. Applicant testified that he does not know exactly why he was naked outside his apartment. He believed that incident occurred because he had been fasting, drinking alcohol, and smoking marijuana. The best reason he could give for that behavior was that he was “just drunk and not really in my right mind.” As a result of this incident, he was charged with public lewdness and disorderly conduct. On October 10, 2006, he pled guilty to both charges and was sentenced to five days in jail. He believed that he was given a drug while in the hospital and did not have a clear mind when he appeared before the judge. He does not have a good recollection of what happened when he appeared before the judge.⁵

During that October 2006 incident, the police found marijuana in boxes on the balcony of Applicant’s apartment. Applicant did not have a roommate at that time. During the OPM interview, he stated that a staff member of the apartment complex reported seeing something suspicious on his balcony. On October 10, 2006, a criminal complaint was issued stating that he did “knowingly sell, manufacture, deliver, or bring into this state, or knowingly have in actual or constructive possession . . . 60 pounds of cannabis, a controlled substance” He claimed the marijuana was not his property. He testified that the marijuana belonged to a friend who asked Applicant to store the boxes for him. He stated that the friend never told him what was in the boxes and that the boxes were sealed. However, he also stated the police report indicated one of the boxes was found open. He refused to disclose the identity of the friend to the police or later to the OPM investigator. At the hearing, he also refused to disclose the identity of the friend, but indicated the friend had an apartment in the local area and he had previously smoked marijuana with that friend. In his testimony, he indicated that he placed the boxes on the balcony. On September 30, 2008, the marijuana-related charge was dismissed with leave to reindict because an essential state’s witness was in Iraq. At the time of this hearing, he had not been reindicted.⁶

In Section 22 of his e-QIP, Applicant was asked five questions concerning his police record. He responded “Yes” to four of those questions indicating he had

⁴ Tr. 36-42, 47-49; GE 2, 3.

⁵ Tr. 29-34; GE 3, 5.

⁶ Tr. 29-36, 41-42, 49-54; GE 1, 3, 4.

reportable interactions with law enforcement authorities. Specifically, in Section 22b, he was asked if he had been arrested by any law enforcement officer in the last seven years. He answered "Yes" to Section 22b and listed that he was charged with marijuana trafficking in October 2006 and that the charge was dismissed. The same information concerning the marijuana trafficking charge was listed for each of his "Yes" answers to the other questions in Section 22. In responding to Section 22b, however, he did not disclose that he was arrested for public lewdness and disorderly conduct. All of those charges, *i.e.*, public lewdness, disorderly conduct, and marijuana trafficking, arose out of one arrest in October 2006. At the hearing, he testified that his failure to disclose the public lewdness and disorderly conduct charges was an oversight. In filling out Section 22b, he indicated he was focused on the marijuana trafficking charge, which was the most serious offense. He also indicated that he explained the entire situation surrounding these offenses during the OPM interview.⁷

In his e-QIP, Applicant was asked in Section 23a if he had illegally used marijuana in the last seven years. He answered "No" to that question. However, he did answer "Yes" to Section 23c that asked if he had been involved in the illegal possession purchase, manufacture, trafficking, production, shipping, receiving, handling, or sale of any controlled substance in the last seven years, and disclosed the following:

Dates of use/activity

From (Month/Year): 10/2006 To (Month/Year): 10/2006

Type of controlled substance(s)

marijuana

Explain (nature of use/activity, frequency of activity and number of times used)

I was charged with trafficking marijuana, the case was dismissed.

Additional comments

I am answering yes to this question as instructed by Personnel (sic) Security

Additional Comments

Answering yes to c as instructed by Personnel Security Administrator⁸

At the hearing, he testified:

As far as count (b) [SOR ¶ 2.b] where I falsified material facts on the questionnaire, again that may have been -- I am going to say that that was an oversight on my part. That form, 50 pages, was filled out a number of times. It was sent to the company's security department for their review. They made some suggestions. I made some changes. It went back and forth a couple of times, so I many have just, -- I think that was a check box.

⁷ Tr. 24-25, 42-47; GE 1.

⁸ GE 1.

It may have been checked at one time, and it many have been unchecked at another time. I still believe that was just an oversight on my part. I was not meant to hide anything or to deliberately just falsify information. Again, in the interview, I explained the complete situation verbally, and for me, it's just hard with correspondence and things like that. Things kind of get lost. . . . I guess the whole point of everything is to say that filling out the form or mis-filling (sic) out the form was not done in an attempt to hide anything.⁹

He stated he did not review the entire form before submitting it. At the hearing, he was asked if he disclosed his use of marijuana to the personnel security administrator when he was filling out the e-QIP. He stated he did not disclose that information to the personnel security administrator.¹⁰

Applicant submitted letters of reference from individuals who recommended him for a security clearance. Two of those individuals have known him for over 20 years. They describe him as talented and hardworking. One individual indicated that he has excellent family values and is trustworthy. Applicant has received a letter of appreciation from his employer for his five years of service to that company. His performance evaluations reflect that he has received ratings of "exceeds expectations" or "consistently meets expectations" in most categories. In 2010, his overall rating was "frequently exceeds expectations." His supervisor described him as an excellent, dignified, and trustworthy employee.¹¹

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions that are to be used 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, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense 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.

⁹ Tr. 25-26.

¹⁰ Tr. 42-46; GE 1.

¹¹ AE A-H.

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 the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain a favorable 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to drug involvement:

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.

(a) Drugs are defined as mood and behavior altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and

(2) inhalants and other similar substances;

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

The guideline lists several conditions that could raise disqualifying security concerns under AG ¶ 25. Two are potentially applicable in this case:

(a) any drug abuse; and

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant used marijuana from 2003 to February 2010. From 2003 to 2006, he used it monthly. He has purchased marijuana. In October 2006, the police found 60 pounds of marijuana in boxes on the balcony of his apartment. He was charged with trafficking of marijuana, but that charge was eventually dropped because an essential witness was in Iraq. He claimed that he was storing the boxes for a friend and was not aware that they contained marijuana. Despite his claim of lack of knowledge, sufficient circumstantial evidence exists to establish that he knowingly possessed that marijuana. For example, he admitted that he placed the boxes on his balcony. He indicated the police found one of the boxes open. He was using marijuana before he was arrested. A staff member of his apartment complex had enough of a suspicion about the boxes to report that concern to the police. Applicant provided no meaningful explanation of why a friend would ask him to store the boxes when the friend had an apartment in the local area. He refused to disclose the identity of his friend. Based on the record evidence, I find that Applicant knowingly possessed the marijuana that was found on his balcony. Both AG ¶¶ 25(a) and 25(c) are applicable in this case.

Two Drug Involvement mitigating conditions under AG ¶ 26 are potentially applicable:

(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; (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant used marijuana with varying frequency for a period of about seven years. He last used it approximately 19 months ago when he was 33 years old. His long, frequent, and recent use of marijuana casts doubt on his reliability, trustworthiness, and good judgment. Moreover, his possession of 60 pounds of marijuana in 2006 raises significant security concerns.

When interviewed in March 2010, Applicant stated he had no intention of stopping his use of marijuana. At the hearing, however, he stated that he does not intend to use that substance in the future. He also testified that he no longer associates with drug-using friends; however, he refused to identify the friends with whom he has used marijuana. In light of his refusal to identify those friends, little weight is given to his claim that he no longer associates with them. From a review of the entire record evidence, I find that a sufficient period of abstinence has not passed to conclude that his illegal drug involvement will not recur. AG ¶¶ 26(a) and 26(b) do not apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to 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.

AG ¶ 16 describes a condition that could raise security concerns and may be disqualifying in this case:

(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.

For a finding of falsification to be sustainable, an applicant must have had a culpable state of mind at the time the information was submitted. A falsification must be made deliberately -- knowingly and willfully. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence that an applicant had a culpable state of mind at the time of the submission.¹²

¹² The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)). See also ISCR Case No. 05-03472 at 5 (App. Bd. Mar. 12, 2007), ISCR Case No. 03-09483 at 4 (App. Bd. Nov 17, 2004).

With regard to SOR ¶ 2.a, the e-QIP question at issue is whether Applicant was arrested by law enforcement officials in the last seven years. When he submitted his e-QIP in March 2010, he disclosed that he was arrested for the trafficking of marijuana in October 2006 and noted that charge was dismissed. He did not disclose that he was initially arrested during that incident for public lewdness and disorderly conduct, the two offenses to which he pled guilty. He was only arrested once for all three of those offenses. At the hearing, he indicated that in answering that question he was focused on reporting the most serious charge, *i.e.*, marijuana trafficking, and failed to list the others due to an oversight. His explanation is plausible. The question at issue did not ask Applicant about charges, but arrests. He reported that one arrest and, in doing so, substantially complied with the reporting requirement. I find for Applicant on the SOR ¶ 2.a. He did not deliberately falsify his response to Section 22b of the e-QIP.

On the other hand, I find that Applicant deliberately falsified his response to Section 23a of his e-QIP. At the time he submitted his e-QIP, he had a long history of using marijuana. The month before he submitted the e-QIP he used that substance, but failed to disclose such use in the security clearance application. He claimed his failure to disclose such illegal drug use was an oversight. He also indicated that he may have checked the block that he used a controlled substance and, later during the e-QIP review process, it became unchecked. I do not find his explanations credible. In the security clearance process, he has made inconsistent statements about his marijuana use. During the OPM interview in April 2010, he stated that he last used marijuana sometime between December 2009 and February 2010. In responding to interrogatories in October 2010, he stated he last used marijuana in October 2006. His failure to disclose this marijuana use on his e-QIP was not an oversight. When he was filling out that application, he discussed with the personnel security administrator that he had been charged with trafficking marijuana, a charge that had been dropped, but also indicated that he did not disclose to that individual his use of marijuana. Sufficient circumstantial evidence exists to establish that he deliberately failed to disclose his use of marijuana in his response to Section 23a of the e-QIP. AG ¶ 16(a) applies to that deliberate falsification.

Six personal conduct mitigation conditions under AG ¶ 17 are potentially applicable:

- (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; and

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

In his e-QIP, Applicant deliberately failed to disclose his use of marijuana over a number of years. When applicants intentionally falsify their e-QIPs, they seriously undermine the entire security clearance investigation process. At the hearing, Applicant claimed the omission of the information concerning his use of marijuana was an oversight. He has not accepted responsibility for this misconduct. I find that none of the mitigating conditions apply to the security concerns arising under AG ¶ 16(a).

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 relevant 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.

Under AG ¶ 2(c), 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.

I considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional

comment. For the past six years, Applicant has excelled in his job. His character references vouch for his trustworthiness and reliability. Nevertheless, his drug involvement and personal conduct raise significant security concerns. All of Applicant's questionable conduct must be viewed as a whole. In doing so, the record evidence leaves me with questions and doubts about his eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the Drug Involvement and Personal Conduct security concerns.

Formal Findings

Formal findings 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
Subparagraphs 1.a – 1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 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.

James F. Duffy
Administrative Judge