



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



In the matter of:)
)
) ISCR Case No. 10-07075
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: *Pro se*

January 20, 2012

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline H, Drug Involvement, and Guideline E, Personal Conduct. Applicant's eligibility for a security clearance is denied.

Statement of the Case

On August 9, 2011, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, Drug Involvement and Guideline E, Personal Conduct. 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 adjudicative guidelines effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR on September 9, 2011, and elected to have his case decided on the written record. On November 1, 2011, Department Counsel submitted the Government's file of relevant material (FORM). The FORM was mailed to Applicant and it was received on November 10, 2011. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not provide additional information. The case was assigned to me on January 9, 2011.

Findings of Fact

In Applicant's answer to the SOR, he admitted all of the factual allegations.¹ After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 25 years old. He is not married and has no children. He has worked for a federal contractor since February 2009.

Applicant submitted an Electronic Questionnaires for Investigations Processing- (e-QIP) on March 11, 2009. He was granted a Secret security clearance in April 2010.²

Applicant began using marijuana at the age of approximately 14 or 15 in 2000 or 2001. He purchased marijuana from 2001 to 2004 one to two times a month and used marijuana weekly. In 2004, he joined a job corps program that required he be drug free. He remained drug free until September 2007, when he began using it again. From September 2007 to February 2010, Applicant estimated he purchased marijuana approximately 10 times and used it approximately 20 times.³

In February 2010, Applicant was charged with possession of marijuana and possession of drug paraphernalia. Police searched the garbage at his residence and found rolling papers, trace amounts of marijuana, and mail identifying the garbage as Applicant's. A search warrant was obtained and marijuana was found in Applicant's bedroom. He was subsequently charged and offered a pre-trial diversion program. He was required to complete drug substance counseling and pay court costs. Applicant continued to use marijuana after he was criminally charged in February 2010. He tested positive twice for marijuana during his court-ordered counseling program. Applicant estimated that he used marijuana approximately five times from February 2010 to May 2010. Applicant used marijuana after applying for a security clearance in March 2009 and after being issued a Secret security clearance in April 2010. He continued to use marijuana until at least May 2010.⁴

¹ SOR paragraph 2 has two subparagraphs "d". The latter should be 2.e. Applicant admitted both of them, and I am renumbering the second paragraph as 2.e.

² Items 4, 5.

³ Item 6.

⁴ *Id.*

In July 2010, Applicant was interviewed by an authorized government investigator for the Department of Defense. He was not truthful about his marijuana use. He told the investigator that he only used marijuana on two to three occasions after high school (2004). In fact, he used marijuana at least 25 times from September 2007 through May 2010. He also told the investigator that his last marijuana use was in February 2010, when he was charged with the drug offenses, whereas in truth, he used marijuana until at least May 2010. He failed to disclose to the investigator that he tested positive twice after he entered the pre-trial diversion program. He told the investigator he no longer associated with the friends with whom he used illegal drugs and he did not intend to use illegal drugs in the future.⁵ After his February 2010 drug charges, his security clearance was temporarily suspended.

Applicant failed to disclose on his March 2009 security clearance application any illegal drug use. On his April 2010 security clearance application, Applicant disclosed that he only used marijuana on two occasions in January 2010. Applicant intentionally and deliberately falsified both security clearance applications. On July 16, 2010, Applicant provided false statements to the government investigator by failing to disclose the complete history of his drug use and his two positive tests for illegal drugs.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are 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, these guidelines are applied 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.

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.

⁵ Item 9.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable security decision.”

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H, Drug Involvement

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. 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; Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

I have considered the disqualifying conditions under drug involvement AG ¶ 25 and conclude the following have been raised:

- (a) any drug abuse;
- (b) testing positive for illegal drug use;

(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 began using marijuana when he was 14 or 15 years old. He purchased marijuana from 2001 to 2004, one to two times a month and used it weekly. He stopped using marijuana until September 2007, when he resumed his use through May 2010. He estimated he purchased marijuana about 10 times and used it approximately 20 times. He used it after applying for a security clearance and after he was granted a Secret security clearance. He was charged in February 2010 with possession of marijuana and possession of drug paraphernalia. He was in a pre-trial diversion program and tested positive twice for marijuana. He estimated he used marijuana approximately five times from February 2010, when he was charged, until May 2010. I find all of the above disqualifying conditions apply.

I have considered all of the mitigating conditions under AG ¶ 26. The following three are potentially applicable:

(a) the behavior happened so long ago, was so infrequent or happened under circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(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 are used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation; and

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant was a regular marijuana user. He used marijuana after he was arrested for possession of marijuana and drug paraphernalia and while in a pre-trial diversion program. Applicant's use was sufficiently recent and frequent that I cannot conclude it is unlikely to recur. The fact he continued to use it after he applied for and was granted a Secret security clearance casts doubt on his reliability, trustworthiness and good judgment. Applicant has not had an appropriate period of abstinence from drug use. Insufficient evidence was provided to conclude he has completed a prescribed drug treatment program and aftercare program, and he has not received a favorable prognosis by a duly qualified medical professional. No information was provided as to the specifics of the pre-trial diversion program. I find AG ¶¶ 26(a) and 26(d) do not apply. There is insufficient evidence to conclude Applicant has demonstrated his

intention not to abuse drugs in the future. He stated he no longer associates with friends with whom he used drugs. I find there is insufficient evidence to apply AG ¶ 26(b).

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.

I considered the disqualifying conditions under AG ¶ 16 that could raise a security concern and conclude the following have been raised:

(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;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant deliberately failed to disclose on his March 2009 security clearance application any of his illegal drug use or that he purchased marijuana in the past. He failed to disclose the full extent of his drug use on his April 2010 security clearance application. He falsified material facts during his personal subject interview with a government investigator when he failed to disclose his complete history of his illegal drug use and that he had tested positive twice for marijuana. I find Applicant deliberately and intentionally falsified his security clearance applications and provided false information to a government investigator. The above disqualifying condition applies.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following 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;
- (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; and
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant was aware of the frequency of his past drug use and his responsibility to disclose it when he completed both security clearance applications and when he was interviewed by a government investigator. He was aware when he was interviewed that he had tested positive for drug use after starting his drug program and failed to disclose it to the investigator. He did not promptly correct his falsification. Rather, he continued to lie about his drug use and provided false information. His falsifications are not minor. His actions cast doubt on his reliability, trustworthiness and good judgment. Finally, on his answer to the SOR, he seemed to acknowledge the extent of his past drug use. Although this is a positive step, there is insufficient evidence to find any of the above mitigating conditions apply.

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.

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 the 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. Applicant has used marijuana since he was a teenager. He stopped for several years and then resumed using it again in 2007. He lied on his security clearance application by failing to disclose any of his past illegal drugs uses, possession, or purchases. He was granted a Secret security clearance based on his falsifications. He continued to use marijuana after he was granted a security clearance. He was charged with possession of marijuana and illegal drug paraphernalia. He continued to use marijuana after the charge and tested positive twice during his pre-trial diversion program. An insufficient period of time has elapsed to conclude illegal drugs are no longer a part of his life. His willingness to provide false information on his security clearance applications and to a government investigator, and his falsifications about his past uses are security concerns. Overall, the record evidence leaves me with serious questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline H, Drug Involvement, and Guideline E, Personal 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 H:	AGAINST APPLICANT
Subparagraphs 1.a-1.d:	Against Applicant
Subparagraph 1.e:	For Applicant
Subparagraphs 1.f-1.h:	Against Applicant
Subparagraph 1.i:	For Applicant
 Paragraph 2, Guideline E:	 AGAINST APPLICANT
Subparagraphs 2.a-2.e:	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.

Carol G. Ricciardello
Administrative Judge