



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



In the matter of:)
)
) ISCR Case No. 10-07259
)
Applicant for Security Clearance)

Appearances

For Government: Pamela Benson, Esquire, Department Counsel

For Applicant: *Pro se*

09/17/2012

Decision

O'BRIEN, Rita C., Administrative Judge:

Applicant failed to mitigate the security concerns raised under the guidelines for Drug Involvement and Personal Conduct. His request for a security clearance is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP), signed on February 23, 2010, to request a security clearance required as part of his employment with a defense contractor (Item 5). On May 2, 2012, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) (Item 1), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) implemented by the DoD on September 1, 2006. The SOR listed security concerns addressed in the Directive under Guideline H (Drug Involvement) and Guideline E (Personal Conduct). In his Answer to the SOR, dated May 20, 2012, Applicant admitted

all ten SOR allegations under Guideline H, and the three of the five allegations under Guideline E. He also requested a decision without a hearing.

Department Counsel submitted a file of relevant materials (FORM)¹ dated July 6, 2012, which was forwarded to Applicant. It included nine documents, identified as Items 1 through 9. Applicant received the FORM on July 18, 2012, and was given 30 days to respond; his response was due by August 17, 2012. DOHA did not receive a response. The case was assigned to me on September 7, 2012.

Findings of Fact

Applicant's admissions to the allegations listed in the SOR are incorporated as findings of fact. After reviewing the pleadings and the FORM, I make the following additional findings of fact.

Applicant is 38 years old. He married in 2003, and has two daughters, two and five years of age; a third child was due in summer 2012. He earned a bachelor's degree in 1997 in electrical engineering, and a master's degree in electrical and computer engineering in 2006. Applicant obtained his first security clearance in 1997. It appears from Applicant's Answer (though not listed in his security clearance application), that he worked for a federal contractor in the late 1990s, after receiving his first security clearance. From August 2005 to October 2007, he worked as an engineer for the same defense contractor. In that position, he was granted an interim security clearance in April 2005 and a secret security clearance in February 2007. In June 2008, he began his current employment with a defense contractor as an engineer. (Items 4, 5, 7, 9)

Applicant used marijuana daily from January 1994 to December 2009, when he was 20 to 35 years old. During his security interview of April 2010, he admitted that he smoked about one-quarter of a marijuana cigarette per day, purchasing it from dealers or acquaintances. Applicant used marijuana because he liked the way it made him feel. He grew two marijuana plants in 2008, but destroyed them before they reached maturity. He denied selling marijuana. He used marijuana with friends and a coworker. When he moved to another state in November 2007, he no longer maintained regular contact with the friends with whom he used marijuana. Applicant's wife and several friends are aware of his marijuana use. (Items 5, 7, 8)

Between 1997 and 2003, Applicant used several other illegal substances. He used psilocybin (psychoactive mushrooms) six times between 1998 and December 2003. He also grew psychoactive mushrooms, but denies selling them. He purchased both marijuana and LSD. He used LSD three times between 1997 and 2001, and opium once in December 1999. He also used the prescription drug Valium, without a prescription, twice in 2001. His use of these substances occurred at the end of his college career and while he was employed, before starting his master's program. He

¹ See Directive, Enclosure 3, Section E3.1.7.

was between 23 and 29 years of age. He has never participated in a drug treatment or rehabilitation program. (Items 5, 7, 8)

During his 2010 security interview, Applicant stated his marijuana use was a "huge mistake." He no longer uses marijuana, has "moved on" in life, has no desire or intention to use illegal drugs, and is willing to submit to drug testing to show he no longer uses illegal drugs. He changed his conduct because of the need to provide for his family and be a model for his children. (Items 7, 8)

In September 2006, Applicant completed a security clearance application. When asked if he had illegally used any controlled substances within the previous seven years -- including marijuana, LSD, or prescription drugs -- he answered "No." He also answered "No" when asked if he had EVER (emphasis in original) illegally used controlled substances while holding a security clearance. (Item 6)

When Applicant completed his February 2010 security clearance application, he was asked if he had illegally used any controlled substances within the previous seven years; engaged in illegal production of any controlled substances within the previous seven years; or EVER (emphasis in original) used controlled substances while holding a security clearance. In response to each of these questions, Applicant answered "Yes." He listed marijuana use from January 1994 to January 2008. He did not disclose growing marijuana or psychoactive mushrooms. He also failed to disclose that he used psychoactive mushrooms during the previous seven years. In his Answer, he stated that he did not disclose his illegal drug use between 1999 and 2003 because he thought his security clearance was not active during that time. (Items 4, 5)

During his 2010 security interview, Applicant admitted to the investigator that he did not disclose his illegal drug use during his 2006 investigation. He also discussed his marijuana use, but failed to disclose that he grew psychoactive mushrooms, or that he used any other illegal substances. The security investigator's report does not show that Applicant revealed his marijuana cultivation. However, Applicant states that he did disclose it, and the investigator failed to report his disclosure. Applicant was provided with the opportunity to review the report, but did not correct it to state that the investigator had not listed this disclosure. Applicant notes in his Answer that "any information regarding my drug use has been voluntarily submitted by me, and not discovered through investigation." (Items 1, 4, 5, 8)

In his 2010 investigation, Applicant gave two different dates for his most recent marijuana use, which he described in his Answer as "'fudging' the date of my last marijuana usage on my EQIP [security clearance application]..." In his 2010 security clearance application, he listed it as January 2008, but in his security interview and interrogatory response, he stated his last use was December 2009, about two years later. He provided two reasons for the date discrepancy. In his interrogatory response, he explained that his intent on the application was to state his last *purchase* was in

January 2008, but in his interview he was disclosing that his last use of marijuana was December 2009. (Items 4, 5, 7, 8)

In his Answer to the SOR, Applicant provided a different explanation for these discrepant dates:

I lied about the dates of my marijuana usage on my current EQIP [2010 security clearance application], because I was concerned that my FSO (and immediate supervisor) would see the applications and discover that I was a recent user. I did have a frank conversation with my FSO at the time about my prior drug use, but implied that the period of my usage was farther in the past. (Item 4)

In his Answer, Applicant states, "I do admit to enjoying smoking marijuana and to hiding my use of it from employers in the past. . . . I realize what a huge mistake it was to lie about my drug use. At the time, I was scared of losing my job, losing respect, losing my life. Now, a greater sense of perspective helps keep me honest in all facets of my life." The FORM does not include information about the extent or timing of Applicant's disclosure of his illegal drug use to his current employer. (Items 4, 5, 8)

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 AG.² Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the Guidelines, commonly referred to as the "whole-person" concept. 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 when 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 evidence requires consideration of the security concerns and adjudicative factors addressed under Guideline H and Guideline E.

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest³ 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.

² Directive, 6.3.

³ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion.⁴ 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 her or her 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.⁵

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.

Of the eight disqualifying conditions listed at AG ¶ 25, the following apply:

(a) any drug abuse;⁶

(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 illegally used marijuana between 1994 and 2009, and several other illegal drugs between 1997 and 2003. He purchased marijuana and LSD, and

⁴ See *Egan*, 484 U.S. at 528, 531.

⁵ See *Egan*; AG ¶ 2(b).

⁶ ¶ 24(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.

cultivated psychoactive mushrooms and marijuana. He received his first security clearance in 1997. Applicant admits that he “used illegal drugs on multiple occasions while possessing a security clearance.” AG ¶ 25 (a), (c), and (g) apply.

The following mitigating conditions are relevant under AG ¶ 26:

(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’s last use of illegal drugs in December 2009 is not recent. However, his daily use was both frequent and long-standing, because it continued for 15 years. During this period, he displayed maturity in some ways -- he married, became a father, and held professional positions. Yet he displayed poor judgment and untrustworthiness by continuing to use a drug he knew to be illegal. Moreover, Applicant's use of illegal drugs while holding a security clearance casts serious doubts on his trustworthiness, reliability, and good judgment. AG ¶ 26(a) does not apply.

Some mitigation is available to Applicant under AG ¶ 26(b) because he has abstained from marijuana use for more than two years. He moved to another state in 2007, claiming that he moved away from friends with whom he used illegal drugs. However, mitigation under ¶26(b)(1) is limited because he continued to use marijuana for two years after moving away from his drug-using associates. Applicant states he has no intention to use illegal drugs in the future, although the file does not include a signed statement to that effect. Only partial mitigation is available under AG ¶ 26(b).

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 following disqualifying conditions are relevant 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 employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; 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.

AG ¶ 16(a) applies where an applicant engages in deliberate falsification of documents. On his 2006 security clearance application, Applicant knowingly failed to disclose his illegal drug use and his use of illegal drugs while holding a security clearance. When he completed his 2010 security clearance application, Applicant admitted his marijuana use, but provided a false date that indicated he ended his use in January 2008, two years earlier than his actual end date of December 2009. In 2010, when he was interviewed by a security investigator, Applicant disclosed only his marijuana use, and did not disclose his use of several other illegal substances or his use of a prescription drug without a prescription. Applicant also deliberately provided false information to his FSO when he led the FSO to believe he had stopped using illegal drugs earlier than he had.⁷ AG ¶ 16(a) and 16(b) apply.

⁷ Applicant's falsification to his FSO is not alleged in the SOR, and I do not rely on it to reach my conclusions. I limit my consideration of this falsification to the following limited purposes, described by the Appeal Board in ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006):

Conduct not alleged in an SOR may be considered: (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3. *Id.*; ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003). See *also*, ISCR Case No. 08-09232 at 2-3 (App. Bd. June 14, 2010).

The following mitigating conditions under AG ¶ 17 are relevant:

(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;

The record contains no evidence that Applicant informed any authorized government official that he wished to correct the answers on his security clearance applications. Although he discussed his illegal drug use during his 2010 interview, the Appeal Board has held that subsequent honesty at an interview does not negate the security implications of initial dishonesty on security clearance applications.⁸ AG ¶ 17(a) does not apply. Applicant's conduct cannot be considered minor because he concealed material and relevant information from the Government. He intentionally hid all of his illegal drug use in the 2006 investigation, and gave incomplete and misleading information in the 2010 investigation. Applicant's conduct casts serious doubts on his judgment and trustworthiness. AG ¶ 17(c) cannot be applied.

Whole-Person Analysis

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

⁸ ISCR Case No.02-23073 at 3 (App. Bd. Mar 20, 2004).

Applicant has demonstrated mitigating behaviors, including his positive employment history and his stable family life. His abstinence from marijuana use for more than two years, and his intent not to use marijuana in the future, are also positive steps. However, they are outweighed by his negative conduct: He last used an illegal drug when he was a mature adult of 35 years; he knowingly violated the law by using an illegal drug for an extensive period of 15 years; he used illegal drugs while he held a security clearance, and he falsified information he provided the Government.

In evaluating the facts, I considered the entirety of Applicant's illegal drug use extending back to 1994. Although he was granted security clearances in 1997, 2005, and 2007, previous favorable security clearance adjudications do not preclude a subsequent unfavorable decision. Each adjudication encompasses review of an applicant's complete history, especially if new information comes to light following the previous adjudication.⁹ Applicant's history includes purchasing and cultivation of marijuana, use of several other illegal substances, and use of a prescription drug without a prescription. Each decision to use marijuana was a decision to engage in an illegal act, and he made that decision daily for 15 years. He continued to use marijuana despite knowing it was illegal, and that it placed his livelihood and security clearance in jeopardy. He violated the Government's trust by providing false information about his drug use since 2006. His falsifications over the past several years undermine his credibility and his claim of rehabilitation. Applicant used illegal drugs and falsified information, as a mature adult, demonstrating that he is willing to place his own needs before the Government's and is unwilling to abide by rules and regulations.

A fair and commonsense assessment of the available information shows Applicant has not satisfied the doubts raised about his suitability for a security clearance. For these reasons, I conclude he has not mitigated the security concerns arising from the cited adjudicative guidelines.

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 as follows:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a – 1.j	Against Applicant

⁹ See ISCR Case No. 01-24504 at 3 (App. Bd. Feb. 11, 2003), "The government is not estopped from making an adverse clearance decision when there have been prior favorable adjudications. This is especially true when the most recent adjudication takes into account facts and circumstances that were not necessarily present or as significant at the time of an earlier investigation."

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 interests of national security to allow Applicant access to classified information. Applicant's request for a security clearance is denied.

RITA C. O'BRIEN
Administrative Judge