



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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 [NAME REDACTED]) ISCR Case No. 10-08310
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 Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esquire, Department Counsel
For Applicant: *Pro se*

February 10, 2012

Decision

MALONE, Matthew E., Administrative Judge:

Applicant mitigated the security concerns raised by his use of illegal drugs, a deliberate falsification of his security clearance application, and other adverse personal conduct. His request for a security clearance is granted.

Statement of the Case

After reviewing the results of Applicant's 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 continue Applicant's access to classified information. On June 10, 2011, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns

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

addressed in the adjudicative guideline (AG)² for drug involvement (Guideline H) and personal conduct (Guideline E).

Applicant timely answered the SOR and requested a decision without a hearing. However, on September 30, 2011, Applicant requested a hearing.³ The case was assigned to me on October 24, 2011. Pursuant to a Notice of Hearing issued on November 3, 2011, I convened a hearing in this matter on December 1, 2011. The parties appeared as scheduled. The Government presented nine exhibits, which were admitted without objection as Government's Exhibits (Gx.) 1 - 9.⁴ Applicant testified and presented two witnesses. DOHA received a transcript (Tr.) of the hearing on December 9, 2011. I left the record open to receive additional relevant information from the Applicant. The record closed on December 16, 2011, when I received Applicant's timely post-hearing submission. It is included in the record, without objection, as Applicant's Exhibit (Ax.) A.

Findings of Fact

The Government alleged under Guideline H that Applicant used marijuana from May 2006 until February 2010 (SOR 1.a); that he has purchased marijuana (SOR 1.b); that he used marijuana after being granted a security clearance in 2007 (SOR 1.c); that he was arrested in 2008 for possession of marijuana, drug paraphernalia, and obtaining alcohol with a false driver's license (SOR 1.d); and that in February 2010, he tested positive for marijuana in a workplace drug screening, and completed a drug rehabilitation program as a condition of keeping his job (SOR 1.e).

The Government also alleged under Guideline E that Applicant deliberately made a false statement to the Government when he answered "no" to question 24.a (*Your Use of Illegal Drugs and Drug Activity. Since the age of 16 or in the last 7 years, whichever, is shorter, have you illegally used a controlled substance, for example, marijuana...*) of an Electronic Questionnaire for Investigations Processing (eQIP) he submitted on November 8, 2006 (SOR 2.a); and that in March 2007, he was charged with speeding and possession of a fake identification card (SOR 2.b). The Government also cross-alleged the illegal drug involvement addressed in SOR 1.a and 1.d (SOR 2.c).

Applicant admitted all of the allegations. His admissions are incorporated in my findings of fact. Having reviewed the response to the SOR, the transcript, and exhibits, I make the following additional findings of fact.

² The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006). Pending official revision of the Directive, they take precedence over the guidelines listed in Enclosure 2 to the Directive.

³ His request is included in the record as Hearing Exhibit (Hx.) I.

⁴ Department Counsel provided an index of its documents. It is contained in "Government's Proposed Exhibits" and included in the record as Hx. II.

Applicant is 24 years old and employed by a defense contractor in a position that requires a security clearance. His work site is a private shipyard engaged in the construction, maintenance and overhaul of nuclear-powered U.S. Navy aircraft carriers and submarines. Applicant has worked for his current employer since March 2006, when he was 18 years old. His secret-level security clearance was granted after a background investigation completed in February 2007. Applicant grew up in a different state than the one in which he now lives and works. A high school graduate with a 3.5 grade point average, Applicant was recruited by his employer to work and study in the company's apprentice program, and to play on the company's industrial league football team. His participation in the apprentice program also allowed him to pursue an associate's degree in mechanical engineering technology as part of his daily work schedule. He recently completed those studies, and he has been accepted to a nearby four-year university to complete his bachelor's degree in that field. (Gx. 1; Gx. 9; Tr. 6, 9, 32 - 33, 41)

Applicant started using marijuana in May 2006. He estimates he had used the drug about two or three times before he submitted his eQIP in November 2006. Applicant knew after he submitted the eQIP that his answer to question 24.a was false and he should correct it. But he was afraid that doing so would cost him his job. (Gx. 7; Tr. 34)

The frequency of Applicant's marijuana use varied from little or no use during football season (August to December) to regular use on weekends the rest of the year. Applicant averred that when he moved to the area where he works, he rented an apartment near the shipyard in an area where, he later learned, drug use was commonplace. He did not know anyone in the area and began using marijuana with some of his neighbors. He later started buying small amounts for personal use, and spent an average of \$30 weekly for his marijuana. Applicant moved to a different apartment in January 2007, but most of his new neighbors were college students, and marijuana use was commonplace there as well. (Gx. 7)

On March 9, 2007, Applicant was stopped for speeding. During the traffic stop, in addition to his regular driver's license, he was found to have a false identification card he had obtained to buy alcohol (he was 19 years old at the time). Applicant was issued a summons and later appeared in court as required. Although he pleaded guilty, both charges were dismissed because the police officer did not appear in court. (Gx. 2; Gx. 3; Gx. 7)

On May 24, 2008, Applicant was issued a citation charging him with possession of less than ½ ounce of marijuana, possession of drug paraphernalia, and obtaining alcohol as a minor through false pretenses (he was still a minor and had obtained another fake identification card). All three misdemeanor charges were dismissed after Applicant paid a fine and completed community service. (Gx. 4; Gx. 7; Tr. 37 - 38)

In February 2010, a worker at the shipyard was caught using marijuana on the job. A subsequent investigation resulted in Applicant being implicated as one of numerous other employees who also used illegal drugs, but not necessarily in the

workplace. Applicant was ordered to submit to a urine test, the results of which were positive for marijuana. Applicant was told that if he completed a six-week intensive outpatient drug treatment and counseling program, he would be able to keep his job. Additionally, Applicant lost his advanced standing in the apprentice program and the allowances for his college studies, was kicked off the football team, and lost about \$4 from his hourly wage. Nonetheless, he acknowledged that he was “lucky” to still have a job. (Gx. 7)

Applicant successfully completed the outpatient treatment in April 2010. The licensed clinical social worker (LCSW) who issued his discharge summary did not provide a clinical diagnosis about his drug use, but listed Applicant’s prognosis as “guarded” and recommended continued participation in a 12-step program. Applicant has been randomly tested at least three times since completing the program. All of the drug tests were negative. He is no longer subject to testing in connection with the prior drug use and treatment. (Gx. 5; Gx. 6; Gx. 7; Tr. 31 - 32, 44 - 46)

Applicant has an excellent reputation at work. This is likely one of the reasons he was retained after he tested positive for marijuana. His coworkers and friends hold him in high regard for his honesty, hard work, professionalism and reliability. He has no record of mishandling sensitive information, and his coworkers describe him as a stickler for adhering to proper procedures, both in their engineering procedures and in the handling and storage of sensitive information. (Tr. 48 - 65)

Applicant now lives in an area where drug use is uncommon. He is in a committed relationship with a woman who is a lawyer and does not tolerate drug use. Applicant occupies his free time with his girlfriend and other friends who share his interest in motorcycles, working on cars, and various outdoor sports. Applicant has regained the pay and apprentice program status he lost after his positive drug test. He has excelled in the apprentice program, and his performance has shortened by two months the time it will take to complete the program. As of the hearing, he had completed his associate’s degree studies on his own time, and he expected to begin his bachelor’s degree studies in the spring 2012 semester. (Ax. A; Tr. 29 - 35, 36, 40)

Policies

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁵ for an applicant to either receive or continue to have access to classified information. Each decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁶ and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the “whole-person” concept, those factors are:

⁵ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁶ Directive. 6.3.

(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.

The presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of 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 the 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.⁷

A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, 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 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.⁸

Analysis

Drug Involvement

The Government presented sufficient information to show that Applicant illegally used marijuana with varying frequency between May 2006 and February 2010, when he tested positive for the drug in a workplace urinalysis. While there is no indication that he used drugs in the workplace, after February 2007 he did so while holding a security clearance. Applicant also bought and possessed small amounts of marijuana for his personal use, and he was charged with possession of less than ½ oz. of marijuana and possession of drug paraphernalia in 2008. Applicant admitted these facts, which raise a security concern addressed in AG ¶ 24 as follows:

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

⁷ See *Egan*, 484 U.S. at 528, 531.

⁸ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

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.

More specifically, the Government established applicability of the disqualifying conditions listed at AG ¶ 25(a) (*any drug abuse...*); AG ¶ 25(c) (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*); and AG ¶ 25(g) (*any illegal drug use after being granted a security clearance*).

By contrast, Applicant's changed residence, his committed relationship, and the positive information about his workplace performance and academic pursuits, support application of the mitigating condition at 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.

Applicant's abstinence since February 2008, his completion of an outpatient drug treatment and counseling program, and the general improvement of his professional and personal circumstances, all support application of the mitigating condition at AG ¶ 26(b):

a demonstrated intent not to abuse any drugs in the future, such as: (1) dissociation 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.

When compared to his period of drug use between ages 19 and 23, Applicant's non-use of marijuana for the 22 months from February 2010 through at least the hearing date, together with his changed circumstances, constitutes a sufficient period of abstinence.

Finally, Applicant completed a drug treatment and counseling program. The LCSW did not provide a diagnosis of abuse or addiction; however the LCSW also provided a "guarded" prognosis with a recommendation of continued 12-step program participation. Applicant did not establish that he continued with a 12-step program, but the record supports a conclusion that he has remained drug-free since February 2010.

Accordingly, although Applicant's completion of the program warrants some applicability of the mitigating condition at AG ¶ 26(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*), that benefit is limited by the prognosis.

Based on all of the foregoing, I conclude Applicant presented sufficient information to show that he is not likely to use illegal drugs again. He has mitigated the security concerns about his drug involvement.

Personal Conduct

The Government presented sufficient information to show that Applicant deliberately omitted relevant and material information from his November 2006 eQIP. The Government also established that Applicant was cited for speeding and for possession of a fake identification card in March 2007, as alleged in SOR 2.b. However, available information showed that the charges were dismissed and that Applicant did not, as alleged, have to pay a fine or perform community service. The Government information also established the factual allegations of drug use, alleged in SOR 1.a and 1.d, and cross-alleged under this guideline at SOR 2.c.

The security concern about Applicant's judgment, reliability and trustworthiness is expressed at AG ¶ 15 as follows:

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.

More specifically, information about Applicant's adverse personal conduct supports application of the disqualifying condition at 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.

Applicant knew his answer to eQIP question 24.a was false because he had already used marijuana a few times before completing the questionnaire.

This conduct can be mitigated by establishing one or more of the following mitigating conditions under AG ¶ 17:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

AG ¶ 17(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;

AG ¶ 17(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 mitigating condition at AG ¶ 17(a) does not apply, because at the time he submitted the eQIP, Applicant knew his answer was false and that he should correct it. However, he did not correct his answer out for fear of losing a job he had just started. Further, the mitigating condition at AG ¶ 17(b) does not apply for these reasons, and because Applicant did not establish he was advised by anyone regarding his eQIP answers.

Applicant's falsification is mitigated through application of AG ¶ 17(c). Although his conduct in this regard was not minor (knowingly making a false statement to the Government is fundamentally at odds with the industrial security program and is a potential violation of federal law), it was isolated and is not likely to recur. Applicant's eQIP was submitted more than five years ago, when he was 19 years old. His straightforward testimony and acceptance of responsibility for his actions, his record of performance in the apprenticeship program, his change of personal circumstances, and the strong recommendations of his coworkers support a conclusion that the false statement made for fear of losing his job is no longer a reliable indicator of his judgment and reliability.

I also conclude that AG ¶ 17(c) applies to Applicant's 2007 citation for speeding and possession of a fake identification card, as well. Applicant admitted to this conduct even though the charges were dismissed. The event occurred four years ago, when he was about 20 years old, and there is no indication of similar conduct since then. Indeed, even though his possession of a fake identification was illegal, he is now of legal age to consume alcohol and has no incentive to engage in such conduct again. Overall, this conduct was minor, infrequent, and not likely to recur.

As to Applicant's use of illegal drugs, in light of my conclusions under Guideline H, above, available information requires consideration of the disqualifying condition at AG ¶ 16(c):

credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline,

but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.

The record also supports application of AG ¶ 16(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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Applicant falsified his eQIP in November 2006 because he was concerned that his drug use, if known, would cost him his job. He then continued that conduct, while holding a security clearance, until February 2010, when he tested positive for marijuana. Applicant cannot reasonably argue he was unaware that his drug-related personal conduct could affect his professional standing.

By contrast, the record supports application of the following mitigating conditions:

AG ¶ 17(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;

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

AG ¶ 17(f): association with persons involved in criminal activities has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant has admitted to his falsification and his use of marijuana since 2006. These facts are known to his colleagues and are not likely viable as a basis for manipulation. He has completed counseling for his drug use and accepted responsibility for all of his adverse conduct since 2006. Further, his personal and professional circumstances have changed significantly. He no longer lives near or associates with illegal drug users. He has demonstrated, through his outpatient treatment and subsequent negative urinalyses, that he will not use illegal drugs in the future. Overall, Applicant's adverse personal conduct is not likely to recur and no longer reflects poorly on his judgment and reliability. I conclude, based on all of the available information bearing on Applicant's

judgment, reliability and trustworthiness, that the security concerns about Applicant's personal conduct are mitigated.

Whole-Person Concept

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guidelines E and H. I have also reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). I further note that Applicant is 24 years old. He has been employed by the same company since he was 18 years old. He has steadily sought to improve his circumstances throughout his time with his employer. He no longer lives near or associates with drug users. He has earned his associate's degree, and recently matriculated at a nearby university to complete his bachelor of science degree. He now has a more stable lifestyle centered around his relationship and his friends who do not use illegal drugs. After losing pay and benefits, such as his advanced apprentice status and academic allowances, Applicant has regained his previous standing. His performance in his company's apprentice program has been exemplary. Finally, Applicant has acted responsibly regarding procedures to protect sensitive information, as well as insisting that he and his coworkers adhere to proper procedures on the job.

My assessment of his demeanor and the straightforward way he has responded to the Government's information leads me to conclude that Applicant understands the severity of his past conduct. Further, he has matured sufficiently that he will not engage in such conduct again. I am also confident he will be candid with the Government at all times about information required to protect classified information. A fair and commonsense assessment of all available information about Applicant's past and current circumstances shows that he has satisfactorily addressed the doubts about his ability to protect the Government's interests as his own.

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:	FOR APPLICANT
Subparagraphs 1.a - 1.e:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a - 2.c:	For Applicant

Conclusion

In light of all of the foregoing, it is clearly consistent with the national interest to continue Applicant's access to classified information. Request for security clearance is granted.

MATTHEW E. MALONE
Administrative Judge