



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 10-10127¹
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel

For Applicant: *Pro se*

June 12, 2012

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on July 6, 2010. (Government Exhibit 1.) On July 26, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, which detailed security concerns under Guidelines H (Drug Involvement) and 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 (AG) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR in writing on August 23, 2011, and requested a decision without a hearing(Answer). He subsequently decided to have a hearing before an administrative judge. Department Counsel was prepared to proceed on December 19, 2011. This case was assigned to me on January 20, 2012. DOHA issued a notice of

¹Applicant is applying for a security clearance, not a trustworthiness determination. The caption for this case has been changed from "ADP" to "ISCR." (Transcript (Tr.) 31-33.)

hearing on January 24, 2012. I convened the hearing as scheduled on February 15, 2012. The Government offered Government Exhibits 1 through 4, which were received without objection. Applicant testified on his own behalf, and submitted Applicant Exhibits A through F, which were also received without objection. DOHA received the transcript (Tr) of the hearing on February 23, 2012. The record closed on that day. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

Applicant is 37, married, has a Master of Science degree, and is currently in a PhD program. He is employed by a defense contractor and seeks to obtain a security clearance in connection with his employment.

Paragraph 1 (Guideline H - Drug Involvement)

The Government alleges under Guideline H that Applicant is ineligible for clearance because he has used illegal drugs. He admitted all three allegations in the SOR under this paragraph. (1.a through 1.c.) Those admissions are findings of fact.

Applicant used illegal drugs from about 1993 until September 2008. He was granted a security clearance in November 2005, and eligibility for access to sensitive compartmented information (SCI) in July 2008. Applicant's primary drug of choice was marijuana, which he used and purchased during this entire period. His usage ranged from once or twice a week in high school, to once or twice a month in college, to once or twice a year near the end. He also sold small amounts of marijuana. Applicant maintains that he stopped all drug use in September 2008, and has not used any illegal drugs since that time. Applicant states that he does not currently use drugs and has no desire or intent to use drugs in the future. (Tr. 38-49.)

At the hearing, Applicant stated he had used marijuana three times since being employed by his current company in 2005, and once or twice after receiving a security clearance. (Tr. 54.) In the e-QIP Applicant filled out on July 6, 2010, he stated that he used marijuana three times in 2005, three times in 2006, twice during 2007, and once in 2008, for a total of nine times. Applicant testified that figure was more accurate, stating, "I put more thought and time into giving the right answer there." (Government Exhibit 1 at Section 23; Tr at 74.)

Applicant was asked by Department Counsel, "So, the question I have for you, sir, is that you know it's illegal. You know it's wrong. Now, you know its against . . . company policy, and now you know it's against Security Clearance policy, why would you still do it?" He answered, "It was something that I had to come to terms with on my own time. It was hard, but I did. I may have done - - if I did it wrong - - I admit that. But I did it, and I haven't touched it since." (Tr. 52.) With regards to his stated last use of marijuana in 2008 Applicant stated, "I was lost in the moment." (Tr. 53.) Applicant also stated that marijuana use was a cultural thing in the city where he grew up, which was

part of the reason he was using marijuana with old friends after receiving a security clearance. He further stated that as he has grown up, and moved out of that environment, he no longer socializes with any of his drug using friends from the past. (Tr. 75-77.)

Paragraph 2 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has made false statements during the clearance screening process. In addition, it is alleged that Applicant used marijuana after being granted Special Compartmented Information (SCI) access in July 2008, and that the SCI access was denied in January 2010 because of drug involvement and personal conduct issues. These acts are alleged to show untrustworthiness, questionable judgment, unreliability, or other characteristics indicating that Applicant may not properly safeguard classified information. Applicant admitted all four allegations in the SOR regarding this paragraph. (2.a through 2.d.) Those admissions are findings of fact.

Applicant filled out a Security Clearance Application on February 3, 2005, when he was applying for a job in the defense industry. (Government Exhibit 3.) Section 27 of that application asks Applicant whether, since the age of 16 or in the last seven years, whichever is shorter, he had illegally used any controlled substance, such as marijuana. Applicant answered, "No." This was a false statement to a relevant question about his drug use, since Applicant had used marijuana from 1993.

Applicant filled out a second Security Clearance Application on May 15, 2008. (Government Exhibit 2.) Section 27 of that application also asks Applicant whether, since the age of 16 or in the last seven years, whichever is shorter, he had illegally used any controlled substance, such as marijuana. Section 28 of that application asks Applicant whether he had "EVER illegally used a controlled substance . . . while possessing a security clearance?" Applicant answered both questions, "No." These were false statements to relevant questions about his drug use, particularly since Applicant had used marijuana after he became employed in 2005, and granted a security clearance at the same time.

Applicant was interviewed by an investigator from the Office of Personnel Management in August 2009. (Government Exhibit 4.) Applicant prepared a signed affidavit, wherein he discussed his "No" response to the questions about drug use:

The reason for my "no" response to the drug question is because I did not want to be discriminated against or have any prejudices against me for my past drug activity. I was also fearful of not getting the job which I hold today. . . . In 7/2008 I met with a female investigator representing the Office of Personnel Management and we reviewed my security questionnaire. . . . I told her that I had answered each question truthfully, even though at the time I was ready and willing to discuss my drug use. Regrettably the opportunity did not present itself and I did not bring it up as I was still concerned about losing my job. (See Tr. 60-62.)

Regarding his falsification Applicant testified:

When I came to this crossroad, when I filled out that Application, I wondered - - and I didn't quite see it as much as lying as withholding the truth and not being so forefront - - but allowing to be able to keep secrets. That 's what we have to be able to do to keep our country safe, and that's what I was trying to do to keep my family safe. (Tr. 66.)

Applicant then testified at length about his attitude on truthfulness and security. As will be discussed below, Applicant is a very accomplished young man. Part of his motivation for lying was so that people would not concentrate on the negative, and not on the positive aspects of his life. He further testified that his attitude has changed and he now recognizes the importance of being truthful with the government. (Tr. 66-71.)

Applicant subsequently told another government investigator of his drug use when he was facing a polygraph examination. It was after that interview his SCI access was revoked. (Tr. 54-59.)

Applicant testified that his manager at work knows what is happening with his clearance. One or two colleagues also know his situation. However, he also stated that no one at work has seen the SOR. (Tr. 62-63, 71-73; Applicant Exhibit A.)

Mitigation

Applicant submitted documentary evidence showing that he is a highly respected person and employee. He submitted documents showing how he was a very accomplished student, receiving scholarships for undergraduate and master's studies, as well as a fellowship for his PhD studies. (Applicant Exhibits B and D.)

He submitted performance evaluations concerning the entire period of his employment, up to 2011. These evaluations show an employee who was consistently getting high marks for his ability and work performance, which was usually either commendable or outstanding. (Applicant Exhibit C.)

Applicant has received recognition many times for his work. (Applicant Exhibit F.) Of particular note is the fact that he received a "Technical Honors" peer rating. This rating means that his peers view him as a role model. The letter notifying Applicant of this award, dated December 10, 2010, is found on page 22 of Applicant Exhibit F.

Applicant's wife submitted a letter on his behalf, where she talks about the kind of person Applicant is. (Applicant Exhibit B at 1-2.) Finally, Applicant Exhibit E contains certificates from throughout Applicant's life showing that he is a person of drive, perseverance and character.

Policies

Security clearance decisions are not made in a vacuum. 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, which are to be used as appropriate 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. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that, "Any 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.

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, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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. Security clearance decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to protect or 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.

Finally, as emphasized in Section 7 of Executive Order 10865, "Any determination under this order adverse to an applicant shall be a determination 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

Paragraph 1 (Guideline H - Drug Involvement)

The security concern relating to the guideline for Drug Involvement is set out in AG ¶ 24:

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 especially considered the following:

- (a) any drug abuse;

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

- (g) any illegal drug use after being granted a security clearance.

Applicant used marijuana on a regular basis from 1993 to September 2008. He sold and purchased marijuana during the entire period and he also held a security clearance after November 2005, and SCI access after July 2008. All of the above disqualifying conditions apply.

I have considered all of the mitigating conditions under Drug Involvement AG ¶ 26 and especially considered the following:

- (a) the behavior happened so long ago, was so infrequent or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's 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 are used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant's abuse of marijuana occurred over three years ago. He states that he has turned his life around, no longer wants to use marijuana, and will not use it in the future. The problem here is that Applicant is not a good, or necessarily trustworthy, reporter about his own life. In addition, despite being pressed by Department Counsel, he was unable to adequately explain his reasons for continuing to use marijuana after being employed in the defense industry and receiving a security clearance, or his reasons for stopping. Applicant has made dramatic changes in his life, he has not yet convincingly demonstrated they are permanent. Paragraph 1 is found against Applicant.

Paragraph 2 (Guideline E - Personal Conduct)

The security concern for Personal Conduct is set out in AG ¶ 15:

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 in 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 applicable 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

(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

The record shows, and Applicant admits, that he falsified information concerning his drug use on two questionnaires within three years. These questionnaires were filled out in 2005 and 2008. Applicant also concealed his drug use from a government investigator during an interview in 2009, less than a year after his last use. Such an action demonstrates that he knew that his conduct, if known, would affect his professional and community standing.

In addition, Applicant testified that he did not like to inform people, including some supervisors, of his drug use. Applicant used marijuana after being granted SCI access, which was withdrawn because of his drug use and falsification. Finally, as set

forth above, Applicant had a 15 year history of drug abuse, which ended in 2008. Both of the Disqualifying Conditions apply.

Based on all the available evidence, the following Mitigating Conditions may apply 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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(g) association with persons involved in criminal activity 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 did not make any attempt to come forward with the truth about his marijuana use until confronted with a polygraph examination. AG ¶17(a) does not apply. While Applicant last falsified an application in 2008, he withheld information from a government investigator in 2009. Under the particular circumstances of this case, I cannot find that enough time has passed to apply AG ¶17(c).

Turning to AG ¶17(d), Applicant maintains he has changed his behavior. However, as described above, Applicant failed to convincingly show that such behavior is unlikely to recur.

Applicant states that he no longer associates with his drug-using friends from the past. He further states that as a father he no longer sees drugs as part of his life. ¶¶ 17(e) and (g) have some application.

It is Applicant's burden to show that he is trustworthy. Applicant has repeatedly given the government false information about relevant portions of his life, so it is difficult to find that Applicant is currently believable. Applicant is an obviously highly intelligent and successful man, who is still young. Yet, he had difficulty explaining his reasoning for lying, and why he should be trusted now. Of particular concern was his testimony at the hearing that he only used drugs two or three times after 2005, which was so wildly at

odds with his statements in the questionnaire (Government Exhibit 1) of his use being upwards of nine times. While that may seem like a petty difference at first glance, his testimony was often vague and filled with platitudes rather than real facts about himself. It is also telling that he falsified two questionnaires because he suspected his drug use might keep him from getting a job. Applicant also attempted to argue that because he could not make a “connection” with the 2009 investigator he found it impossible to come forward and tell her the truth. Couple that action with his subsequent failure to come forward before being confronted, it is simply too soon for me to find that he has mitigated the facts of his repeated falsifications, or that he has demonstrated rehabilitation.

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. My Guidelines H and E discussion apply here as well. Applicant engaged in drug use that ended about three years ago. He also repeatedly gave the government false information about his drug use. Yet, he is undoubtedly an intelligent and talented man, respected in his workplace and throughout his educated life for his successes, drive and abilities. In certain respects, this could be said to be a close case, yet it is not. In the final analysis, Applicant has failed to adequately explain his conduct in using marijuana, especially after being employed in the defense industry with a security clearance, as well as his falsifications concerning such use. Once again, it is Applicant’s burden to show he is eligible for a security clearance. He has not done so.

Based on the state of the record, I find that there have not been demonstrated permanent behavioral changes under AG ¶ 2(a)(6). Accordingly, at the present time, I find that there is the potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)); and that there is also a likelihood of recurrence (AG ¶ 2(a)(9)).

Overall, the record evidence leaves me with serious questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his Drug Involvement and Personal Conduct. He is not currently eligible for a security clearance.

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 through 1.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a through 2.d:	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.

WILFORD H. ROSS
Administrative Judge