



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



In the matter of:)	
)	
)	ISCR Case No. 11-01451
)	
Applicant for Security Clearance)	

Appearances

For Government: Caroline H. Jeffreys, Esquire, Department Counsel
For Applicant: *Pro se*

02/22/2012

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant abused marijuana from 2000 through August 2010. He purchased the illegal drug for his personal consumption, and he also sold the drug to friends. Applicant falsified his August 2010 security clearance application and a February 2010 interview by denying any use of marijuana after May 2010. Applicant no longer intends to use any illegal drug in the future, but it is too soon to conclude that his drug abuse is safely in the past. Personal conduct concerns are also not fully mitigated. Clearance denied.

Statement of the Case

On September 1, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline H, Drug Involvement, and Guideline E, Personal Conduct, which provided the basis for its preliminary decision to deny him a security clearance. DOHA took action 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 allegations on September 22, 2011, and he requested a decision without a hearing. On October 13, 2011, the Government submitted a File of Relevant Material (FORM) consisting of seven exhibits (Items 1-7). DOHA forwarded a copy of the FORM to Applicant and instructed him to respond within 30 days of receipt. Applicant received the FORM on October 21, 2011. He elected to file no rebuttal, and on January 19, 2012, the case was assigned to me to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Findings of Fact

The SOR alleged under Guideline H that Applicant used marijuana/THC (tetrahydrocannabinol), up to daily, from about 2000 through August 2010 (SOR 1.a); at times while working or driving (SOR 1.d); that he purchased marijuana/THC for his personal consumption (SOR 1.b); that he sold marijuana to friends without the intent to profit from the sales (SOR 1.c); and that he was terminated from a job around 2006 after he took from the trash a bag of marijuana that had been found in the store (SOR 1.e). Under Guideline E, Applicant allegedly falsified his August 2010 Electronic Questionnaire for Investigations Processing (e-QIP) (SOR 2.a) and an October 2010 interview (SOR 2.b) by not disclosing that he had used marijuana in August 2010 after he had claimed a last use of the illegal drug in May 2010. Applicant admitted the allegations, and his admissions are incorporated as findings of fact. After considering the Government's FORM, which includes Applicant's Answer to the SOR allegations (Item 4), I make the following additional findings of fact.

Applicant is a 31-year-old tool design engineer, who has been employed by a defense contractor since August 2010. He earned his bachelor's degree in June 2010 and seeks his first security clearance. (Item 5.)

Applicant began smoking marijuana around 2000, shortly after he lost his driver's license following a car accident at age 20. He was depressed and had little parental guidance. Applicant discovered that he enjoyed the drug's mellowing effects and used it almost every day until May 2010. (Items 5, 6.) Applicant experimented with LSD and Ecstasy twice each around 2000, but he did not like them. (Item 6.)

Applicant worked as a foreman for a tree service company from July 2002 to August 2005. He used marijuana/THC at work while he trimmed trees and, at times, when he was operating a vehicle. (Item 6.) In addition to abusing marijuana regularly, Applicant used cocaine about ten times during a six-to-eight-month period sometime between 2003 and 2005. Applicant bought small amounts of cocaine for his own use. He stopped using the drug because he did not like it. (Items 5, 6.)

In January 2006, Applicant began his undergraduate studies while working part-time as a cashier for a wholesale club. (Item 5.) In December 2006, he was involuntarily

terminated from his part-time job for retrieving a bag of marijuana from the store's trash three weeks earlier. Another employee had found the marijuana in the store and turned it over to a supervisor, who tossed it in the trash. (Item 7.)

From January 2007 to September 2008, Applicant held a co-op engineering position with a defense contractor. After three months without work, he took a co-op job at a company that assembles steering systems for the automotive industry. He spent two academic quarters with the company between January 2009 and September 2009, and was unemployed during his final two semesters of college. (Item 5.)

Over the years, Applicant usually used marijuana with friends. (Item 6.) He bought the illegal drug for his personal consumption with varying frequency, sometimes four times per month. (Item 5.) Also, he sold the drug to friends on occasion as a favor to them and not for his intended profit. (Item 6.)

In March 2010, Applicant moved in with his fiancée. She apparently does not use any illegal drugs, and did not approve of his illegal drug use. In May 2010, he decided to stop smoking marijuana because he would soon be graduating from college and needed steady employment so that he could repay his student loans. (Items 5, 6.)

In mid-August 2010, Applicant was hired by his current employer. (Item 5.) The day he was hired, he provided a urine sample and then went out and smoked marijuana. (Item 6.) On August 23, 2010, Applicant executed an e-QIP on which he responded affirmatively to questions 23.a concerning whether he had illegally used any controlled substances in the last seven years, and 23.c about whether he had been involved in the illegal possession, purchase, manufacture, trafficking, production, transfer, shipping, receiving, handling, or sale of any controlled substance in the last seven years. Applicant disclosed that he had used marijuana/THC for personal use from August 2003 to May 2010, as follows:

Handling and purchasing has been as often as 0-4 times a month. Using has been as often as many times a day to once every few months or so. In the past year, I have done such a thing a few times. The last time I used marijuana was May 11, 2010, a month before graduation.

Also, five to seven years ago, after the death of his father, he "handled and bought very small amounts of cocaine for personal use." He used the cocaine about five times within a couple of months. He denied any intent to use marijuana or cocaine in the future. Applicant also added that he was not proud of his drug abuse, he did not lie, and he was aware of the consequences of lying on the e-QIP. (Item 5.)

On October 4, 2010, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM) about his drug use and affirmative response to the drug trafficking question on his e-QIP. Applicant indicated that his marijuana use began around 2000. He listed a first use of marijuana in August 2003 because he had been asked about drug use only within the last seven years. He admitted that he used marijuana

almost daily, sometimes up to four times a day. However, he denied that he had used any illegal drugs since May 2010, that he had ever used marijuana at work, or that he had ever driven under the influence of THC. Applicant also denied that he had ever sold illegal drugs to his friends or anyone else. He claimed that he thought trafficking meant driving a vehicle in traffic with drugs in his car. Applicant admitted that he had used cocaine about ten times around 2003, and he volunteered that he had experimented with LSD and Ecstasy twice around 2000. Applicant explained that he had disclosed his drug use on his e-QIP because he respected his coworkers who held security clearances as well as the DOD, and he did not want any issues to arise concerning his honesty. Applicant indicated that his fiancée does not tolerate illegal drug involvement, so he sees his old friends only about once a month in passing. He expressed a willingness to sign a statement allowing for the automatic revocation of his security clearance should he abuse any illegal drug in the future. (Item 6.)

In response to DOHA interrogatories, Applicant indicated on April 27, 2011, that he had in fact sold some marijuana to friends, although not for his intended profit. He also disclosed that he had lied about one detail on his e-QIP in that after stopping his marijuana abuse in May 2010, he used THC on one occasion in mid-August 2010, after he signed paperwork for his job and submitted a urine sample. Applicant attributed that use to immaturity and ignorance. Over the ten years that he used THC “almost every day,” he used it at work when he painted and trimmed trees on occasion and even sometimes when driving. Applicant indicated that he concealed his abuse of marijuana in August 2010 because he knew that co-employees would see his responses, but he wanted to redeem himself by showing his honesty now:

As much as these words prove I have been dishonest in the past, they show my honesty now. They also show I want to be honest. I may be thirty years old, but I still have a lot of growing to do. I want to be respected as an individual and to do so, I must respect myself first. I know the difference between right and wrong. I feel I make the right decisions now. With confidence, I am committed to being a competent engineer. I am reliable, trustworthy, and with my life if necessary, would protect classified information. (Item 6.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 required to be considered 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 overall 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. 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 applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion to obtain 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 the 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

Drug Involvement

The security concern 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.

Under AG ¶ 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),¹ and

(2) inhalants and other similar substances.

Under AG ¶ 24(b), drug abuse is defined as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.” Potentially disqualifying condition AG ¶ 25(a), “any drug abuse,” applies because Applicant abused THC, primarily if not exclusively marijuana, almost daily from 2000 until May 11, 2010, and he used it again on the day that he was hired by his current employer in mid-August 2010. Furthermore, although not alleged in the SOR, the evidence substantiates that he abused cocaine on ten occasions over a six-to-eight-month period sometime between 2003 and 2005. He also tried LSD and Ecstasy on two occasions around 2000.² AG ¶ 25(c), “illegal drug possession, including cultivation, processing, manufacture, purchase, sale or distribution; or possession of drug paraphernalia,” is also established. Applicant purchased marijuana and cocaine for his personal consumption. He sold marijuana to friends, albeit not for intended profit.

Mitigating condition 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,” cannot reasonably apply to a ten-year history of almost daily marijuana abuse, even though his involvement with LSD, Ecstasy, and cocaine would fall within AG ¶ 26(a). Concerning AG ¶ 26(b), “a demonstrated intent not to abuse any drugs in the future,” can be shown by “(1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; or (4) a signed statement of intent with automatic revocation of clearance for any violation.” Applicant informed an OPM investigator in October 2010 that he was no longer socializing with the friends involved in his marijuana abuse; he was living with his fiancée, who does not tolerate illegal drug use; and he was willing to execute a signed statement with automatic revocation of security clearance for any future drug abuse. Excepting the single

¹Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act, are contained in 21 U.S.C. § 812(c).

²In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

(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. (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). Applicant’s involvement with more dangerous drugs is relevant to show the extent of his drug abuse. The lack of recurrence since at least 2005, if not before, shows some ability to abide by a resolve to abstain.

use of marijuana in mid-August 2010, his involvement with illegal drugs stopped just before he graduated from college. Applicant has taken some affirmative steps to demonstrate his intent to remain drug-free. Nonetheless, given the regularity of his marijuana abuse, its duration, and the fact that he abused the drug on the day that he was hired by a defense contractor, a lengthier abstinence is required to sufficiently guarantee that his drug abuse is safely in the past. AG ¶ 25(b) is not yet firmly established.

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 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.

Applicant deliberately concealed his then very recent use of marijuana from his August 2010 e-QIP. He falsely claimed that he last used marijuana on May 11, 2010. Furthermore, the evidence suggests that he may also have minimized the extent of his marijuana use in the year preceding his e-QIP. He indicated on his security clearance application that he used THC "as often as many times a day to once every few months or so," but also that he had used marijuana "a few times" in the last year. Applicant told an OPM investigator in October 2010 that he used THC "almost daily, sometimes up to four times a day." In April 2011, he told DOHA that he used THC "almost every day for 10 years." Applicant's misrepresentation about his last use of marijuana, if not the extent of his THC abuse from 2009 to 2010, establishes 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.

Furthermore, while Applicant candidly admitted to the OPM investigator that he had used marijuana/THC almost daily, he again falsely claimed that he had not used any illegal drugs since May 2010. He also denied that he had ever used the drug while working, that he ever drove a vehicle while under the influence of marijuana/THC, or that he ever sold illegal drugs, including to his friends. AG ¶ 16(b), "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative," also applies.

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,” is pertinent. Applicant omitted his use of marijuana in August 2010 from his e-QIP because he was concerned about other employees having access to his application.

Applicant used marijuana in mid-August 2010 “the day [he] was hired, signed paperwork, and gave a urine sample.” That illegal drug involvement was current in relation to his August 23, 2010 e-QIP omission. During his interview in October 2010, Applicant had the opportunity to make a “good-faith effort to correct the omission, concealment, or falsification before being confronted with the facts,” which could qualify for mitigation under AG ¶ 17(a). Instead, when he could not plausibly be concerned about other employees having access and claimed that he respected the DOD, he chose to again deny any illegal drug use after May 2010. Applicant’s admissions to DOHA in April 2011, of almost daily marijuana use for ten years, of marijuana use in mid-August 2010, and of sales of marijuana to friends, are viewed favorably. However, these belated rectifications do not qualify for mitigation under AG ¶ 17(a).

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,” is not pertinent to falsification of a security clearance application signed under advisement that a knowing and willful false statement can be punished by fine or imprisonment or both under 18 U.S.C. § 1001. Deliberate false statements made on a security clearance application are serious, and when the falsity is repeated in a face-to-face interview, it is very difficult to apply AG ¶ 17(c).

With due consideration to Applicant being the sole source of information about his illegal drug use, and his desire to right the wrong that he committed by his dishonesty, his repeated falsification is only partially mitigated under 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,” or AG ¶ 17(e), “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.” Concerning AG ¶ 17(d), Applicant told the OPM investigator that he disclosed his drug involvement on his security clearance application to avoid any consequences for not being honest (“He did not want this to come back and bite him in the ass for not being honest.”) He said this knowing as he did so that he was not being fully honest. Without some corroborating evidence, such as a track record of reliable representations, it is difficult to overcome the doubts about his personal judgment raised by his repeated falsifications. To the extent that AG ¶ 17(e) applies because of his disclosures to the Government, it is unclear whether his employer is aware that he used marijuana on the day that he submitted a urinalysis for his employment, or that the significant persons in his life, such as his fiancée, are fully aware of his history of illegal drug use.

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 his conduct and all relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(a).³ In making the overall commonsense determination required under AG ¶ 2(c), I have to consider Applicant's poor judgment in abusing controlled substances. Applicant's youth cannot fully extenuate his heavy abuse of marijuana, which continued after he enrolled in college and while he was working as a co-op engineer for a defense contractor. He has yet to explain what led him to abuse marijuana in August 2010. He had just taken a urinalysis test for his new job, so he knew that drug use would not have been condoned by his employer. Applicant then concealed that abuse of marijuana from the Government when he completed his security clearance application and when he was questioned by an OPM investigator. It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Based on the facts before me and the adjudicative guidelines that I am bound to consider, for the aforesaid reasons, I am unable to conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance at this time.

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
Subparagraph 1.a-1.e:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant

³The factors under AG ¶ 2(a) are as follows:

(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.

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.

Elizabeth M. Matchinski
Administrative Judge