



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



In the matter of:)
)
) ISCR Case No. 11-02353
)
)
Applicant for Security Clearance)

Appearances

For Government: Richard A. Stevens, Esquire, Department Counsel
For Applicant: Janie Loadholt, Personal Representative

January 25, 2012

Decision

CREAN, THOMAS M., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted an Application for a Public Trust Position (SF 85P) on June 1, 2007. He received a security clearance in July 2007 when he worked for a defense contractor. His employment with that defense contractor was terminated when he tested positive for marijuana on a urinalysis test in January 2010. On January 20, 2011, he submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance as part of his employment with a different defense contractor. After an investigation conducted by the Office of Personnel Management (OPM), the Defense Office of Hearings and Appeals (DOHA) issued interrogatories to Applicant to clarify or augment potentially disqualifying information in his background. As part of his response to the interrogatories, Applicant confirmed the accuracy of a summary of an interview by a security investigator. After reviewing the results of the background investigation and Applicant's responses to the interrogatories, DOHA could not make the preliminary affirmative findings required to issue a security clearance. On July 13, 2011, DOHA

issued Applicant a Statement of Reasons (SOR) detailing security concerns for drug involvement (Guideline H). 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 in the Department of Defense on September 1, 2006. Applicant acknowledged receipt of the SOR on July 25, 2011

Applicant answered the SOR on August 10, 2011, admitting the three allegations under Guideline H. The SOR alleges security concerns under Guideline H because Applicant used marijuana from 1996 until 1999, and from 2003 until 2007 (SOR 1.a), because he tested positive on an employee drug test in January 2010 (SOR 1.b), and because he held a security clearance when he failed the drug test in January 2010 (SOR 1.c).

Department Counsel was prepared to proceed on September 6, 2011, and the case was assigned to me on September 28, 2011. DOHA issued a Notice of Hearing on October 20, 2011, scheduling a hearing for November 8, 2011. I convened the hearing as scheduled. The Government offered six exhibits, which I marked and admitted into the record without objection as Government Exhibits (Gov. Ex.) 1 through 6. Applicant and one witness testified. Applicant did not offer any documents, but I kept the record open for Applicant to submit documents. Applicant timely submitted two documents which I marked and admitted into the record as Applicant Exhibits (App. Ex.) A and B. Department Counsel had no objection to admission of the documents. (Gov. Ex. 7, E-mail, dated November 28, 2011) DOHA received the transcript of the hearing (Tr.) on November 21, 2011.

Procedural Issues

Department Counsel moved to amend the SOR to conform to the testimony received at the hearing. The amendment was to add an allegation under personal conduct (Guideline E) that Applicant provided false material facts in a Questionnaire for a Public Trust Position submitted on June 1, 2007. Applicant answered “no”, to Question 21 concerning his use of illegal drugs in the last year. During his testimony, Applicant admitted to using marijuana about once a month while in college from September 2003 until May 2007. The motion was granted and the SOR is amended to add allegation SOR 2.a. (Tr. 51-54)

Findings of Fact

Applicant admitted the factual allegations under both Guideline H and Guideline E. Applicant’s admissions are included in my findings of fact. After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact.

Applicant is a 30-year-old college graduate. He received a bachelor’s degree in management in 2007. He is now employed by a defense contractor as a systems analyst. He is studying for a master’s degree in management. He served on active duty

in the Air Force from 1999 until 2003. He was married from August 2002 until January 2004, and from May 2009 until December 2010. He had one child from his first marriage. Applicant stated he is a good employee and has received raises that are greater than the normal raises provided to other employees by his company. (Tr. 20-24)

After graduating from college in 2007, Applicant started work with a defense contractor. He submitted the Questionnaire for a Public Trust Position (SF 85P). to receive access to classified information. (Gov. Ex. 2, SF 85P, dated June 1, 2007). He answered "no" to Question 21 asking if he used any illegal drug in the last year. He admitted using marijuana while in college as late as May 2007. He admitted he intentionally provided false information on the SF 85P. Applicant stated he knew a lot of people with Government clearances that admitted using marijuana but never admitted it on the clearance application form because they would not be considered for a Government position. His reason for not admitting marijuana was to be considered for a Government position. He admitted he intentionally lied in answering the drug use question on the form. (Tr. 39-41; Gov. Ex. 1, e-QIP, dated January 1, 2011) He was granted access to classified information in July 2007.

Applicant admitted he used marijuana with a cousin and a friend while in high school from 1996 until 1999. He told a security investigator he used marijuana in high school about ten times a year. At the hearing, he started that he was unsure of the frequency of use in high school, but guessed that it was about once a month. Applicant entered active duty in the Air Force in 1999 after graduation from high school. He did not use illegal drugs, including marijuana, while on active duty. The Air Force had a zero tolerance for drug use, and there were random urinalysis tests. He was tested about six times while on active duty. Applicant left active duty in 2003 to attend college. He admitted using marijuana again with the same cousin and friend about once a month while in college from 2003 until 2007. He never purchased marijuana. It was always supplied by his cousin or his friend. His last use of marijuana was in May 2007. (Tr. 24-32; Gov. Ex. 4, Response to Interrogatory, dated April 25, 2011)

Applicant was employed by the defense contractor and had access to classified information in January 2010 when he tested positive for marijuana. He testified that he attended a party with about eight others at a friend's house to watch the college championship football game. He was at the party for about eight hours from about 8 pm until 4 am the next day. He was aware that four or five people at the party were smoking marijuana, but he stayed at the party. He did not smoke marijuana. He knew he would be drug tested soon since his job was being converted to a Government position requiring a drug test. The only reason he could provide for his positive test for marijuana was that he passively inhaled marijuana smoke at the party. He did know about passive inhalation before the party since he heard people talk about it and remembered it being mentioned on television. In January 2010, Applicant's position with the defense contractor was being converted to a Government position. As a potential government employee, he was required to take a drug urinalysis test. He admitted he tested positive for marijuana on the test in January 2010. (Tr. 32-39, 41-43)

The Government presented information to show that marijuana use can be detected from urine samples. However, there have been no reported instances where passive inhalation of marijuana smoke, even under extreme conditions, caused urine samples of non-marijuana users to test positive for marijuana using the screening and confirmation cutoff levels mandated by the Substance Abuse and Mental Health Services Administration, the Government agency that establishes the standards. Applicant did not present information to show the nanogram level for his positive test. (Gov. Ex. 5, Article: Urine Testing for Detection of Marijuana, dated September 16, 1983; Gov. Ex. 6, Article: Passive Inhalation of Marijuana Smoke and Urine Drug Test Results. dated November 4, 2011).

Applicant no longer closely associates with the friend who used marijuana with him. He sees him about every six months but he no longer smokes marijuana with him. His cousin was incarcerated in February 2010 for other offenses and he has only spoken to him once since then. Applicant's employer has a drug-free work-place. A condition of Applicant's employment with the defense contractor requires that he not use illegal drugs. If he uses illegal drugs, he can be immediately terminated. (Tr. 21-23, 29-42-43; Gov. Ex. 4, Response to Interrogatory, dated April 25, 2011, at 1; App. Ex. A, Employee's Handbook, dated April 4, 2010) In October 2010, Applicant was charged by his wife with domestic violence. He entered a diversion program that required periodic drug testing. Applicant tested negative for all drug use on monthly tests conducted from December 2010 until June 2011. (Tr. 43-45; Gov. Ex. 1,e-QIP, dated January 20, 2011, at 36-37; and App. Ex. B, Drug test results, dated November 10, 2011)

Applicant's mother testified that her son is a good person. He has a good work ethic. He excelled at the jobs he held as a youth. He excelled in school and was a member of the National Honor Society and a straight A student. She knows he is not perfect but he is a good person. (Tr. 44-47)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised Administrative Guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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 burden of persuasion to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk 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.

Analysis

Guideline H, Drug Involvement

The use of an illegal drug can raise questions about an individual’s reliability and trustworthiness, because it may impair judgment and raises questions about a person’s ability or willingness to comply with laws, rules, and regulations. Drugs are mood and behavior-altering substances, and include those listed in the Controlled Substances Act of 1970. Marijuana is an illegal drug and listed in the Controlled Substance Act of 1970. Applicant admits the illegal use of marijuana from 1996 until 1999, and from 2003 until 2007. He tested positive for marijuana use on a urine drug test in January 2010. To use marijuana, Applicant had to possess the drug. Applicant's marijuana use and possession raises Drug Involvement Disqualifying Conditions AG ¶ 25(a) (any drug use); AG ¶ 25(b) (testing positive for illegal drug use); 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).

The Government produced sufficient evidence to establish the disqualifying conditions in AG ¶¶ 25(a), 25(b), 25(c), and 25(g). The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns under drug involvement. An applicant has the burden to refute an established allegation or prove a mitigating condition, and the burden to prove or disprove it never shifts to the Government. Applicant raised conditions that may mitigate the security concern.

Applicant stated he did not intentionally use marijuana before he tested positive for marijuana use in January 2010. He claimed he was at a party for eight hours where marijuana was smoked by others and he passively inhaled the marijuana smoke. He knew or believed a person could test positive for marijuana use just by passive inhalation of the smoke from others. However, the Government presented evidence to show that passive inhalation of marijuana is very unlikely based on the Department of Defense confirmation and cutoff levels used to test positive for marijuana use. Applicant did not present information to show his tested nanogram level could indicate a potential for passive inhalation. He did not meet his burden to establish unknowing use of marijuana. The positive test result for marijuana in January 2010 establishes he used marijuana while holding a security clearance.

I considered Drug Involvement Mitigating Conditions AG ¶ 26(a) (the behavior happened so long ago, was so infrequent, or happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment); and AG ¶ 26(b) (a demonstrated intent not to abuse 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). While there is no "bright line" rule for determining when conduct is recent or sufficient time has passed since the incidents, a determination whether past conduct affects an individual's present reliability and trustworthiness must be based on a careful evaluation of the totality of the evidence. If the evidence shows a significant period of time has passed without evidence of drug involvement, there must be an evaluation whether that period of time demonstrates changed circumstances or conduct sufficient to indicate a finding of reform or rehabilitation.

The mitigating condition at AG ¶ 26(a) does not apply. Applicant admitted using marijuana in high school from 1996 until 1999. He did not use marijuana or other illegal drugs while on active duty in the Air Force from 1999 until 2003. He admitted using marijuana while in college from 2003 until 2007. He worked for a defense contractor and was tested for drug use. He tested positive for marijuana use in January 2010. Later, drug tests conducted from December 2010 until June 2011 while Applicant was in a pre-trial diversion program were negative for drug use. Applicant used marijuana from 1996 until at least January 2010. He abstained from using marijuana when he knew his use would be an issue, such as his time in the Air Force and while in the pre-trial diversion program. He used marijuana when he believed his use of the illegal drug would be safe since he would not be tested for illegal drug use. His last use of marijuana was about two years ago. While two years is a long time, it must be balanced against his use of marijuana over a period starting in 1996. It must also be balanced against his use of marijuana at times he was not being tested for drug use. For a good part of the two years since January 2010 that he did not use marijuana, he was tested for drug use under the pre-trial diversion program. This latest period of drug use abstinence does not indicate Applicant has been reformed or rehabilitated. His drug use can recur when he feels it convenient and he is not being tested for drug use. Accordingly, his past drug use still reflects on his current reliability, trustworthiness, and good judgment.

The mitigating condition at AG ¶ 26(b) applies only in part. Applicant presented information to show he has changed his lifestyle. He has not used an illegal drug for about two years. He no longer spends time with the individuals he used marijuana with in the past, and he is employed in a drug free workplace. Applicant's good intentions must be set against his willing and voluntary use of marijuana. His marijuana use was always with the same friend and the same cousin. He still sees the friend but not as often. He has not seen his cousin in over two years. He works in a drug free workplace and he is subject to termination for using illegal drugs. Applicant has a good job he likes which gives him a good future. His performance is excellent. He stated his intent not to use illegal drugs in the future or be with people that use drugs. All of this information is some evidence of intent not to use drugs in the future, and could indicate a changed circumstance of reform or rehabilitation. However, Applicant had the opportunity to reform and be rehabilitated after leaving the Air Force and while employed by a defense contractor and holding a security clearance. But he continuously slipped back into drug use using marijuana in college and while employed by his previous defense contractor employer. He still sees his friend who supplied and used marijuana with him. He has not met his burden to show changed circumstance or conduct that indicates he has reformed and will no longer use illegal drugs.

Personal Conduct

A security concern is raised for personal conduct based on Applicant's responses to drug use questions on a security clearance application. Personal conduct is a security concern because conduct involving questionable judgment, untrustworthiness, unreliability, 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 (AG ¶ 15). Personal conduct is always a security concern because it asks whether the person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. The security clearance system depends on the individual providing correct and accurate information. If a person conceals or provides false information, the security clearance process cannot function properly to ensure that granting access to classified information is in the best interest of the United States government.

Applicant completed a security clearance application in June 2007. He answered "no" to the question asking if he had used any illegal drug in the last year. He admits he used marijuana as late as May 2007. Applicant's inaccurate answer to the drug use question raises a security concern under Personal Conduct Disqualifying Condition AG ¶ 16(a) (the deliberate omission concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history, or similar form used to conduct investigations, to determine security eligibility or trustworthiness).

I considered all of the mitigating conditions in AG ¶ 17, and determine none apply. Applicant admits he deliberately intended to deceive by providing false information on the Questionnaire for a Public Trust Position. While there is a security

concern for an omission, concealment, or falsification of a material fact in any written document or oral statement to the government when applying for a security clearance, not every omission, concealment, or inaccurate statement is a falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully with intent to deceive. Applicant admitted that he knowingly and willfully omitted the drug use information on his application for a public trust position. Applicant's action in providing false information in the security clearance process was recent and concerning a major issue. His actions were deliberate with intent to deceive. He acted on his own without advice from anyone to provide false or misleading information. Applicant has not mitigated the security concern about his inaccurate answer concerning drug use on the June 2007 security clearance application.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered that Applicant is an excellent worker. I considered his intention not to use drugs in the future. However, Applicant has not presented sufficient information to establish there are changed circumstances to his life style indicating he will not use illegal drugs in the future. His intentions may be excellent but his actions are not sufficient to show reform and rehabilitation. He had opportunities in the past to refrain from drug use but he continued to willingly and knowingly use illegal drugs. He used marijuana while holding a security clearance. Applicant has not met his burden to show that his drug use no longer reflects adversely on his reliability, honesty, trustworthiness, and good judgment. In addition, Applicant deliberately with the intent to deceive provided inaccurate information on an application for a public trust position. His false answer is a strong indication of his questionable judgment, lack of candor, dishonesty, and unwillingness to comply with rules and regulations. It shows that he is unreliable, untrustworthy and not candid. A person with these traits cannot be trusted to safeguard classified information. For all

these reasons, I conclude Applicant has not mitigated the security concerns for personal conduct. Overall, the record evidence leaves me with questions and doubts as to Applicant's judgment, reliability, and trustworthiness. He should not be granted access to classified information.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a - 1.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

THOMAS M. CREAN
Administrative Judge