



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



In the matter of:

| | | |
|----------------------------------|---|------------------------|
| |) | |
| |) | ISCR Case No. 11-12424 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

06/28/2013

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the written record in this case, I conclude that Applicant failed to rebut or mitigate the Government’s security concerns under Guideline H, Drug Involvement, and Guideline E, Personal Conduct. His eligibility for a security clearance is denied.

Statement of Case

On June 3, 2011, Applicant completed and signed an electronic questionnaire for investigations processing (e-QIP). On December 3, 2012, the DOD issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, Drug Involvement, and Guideline E, Personal Conduct. DOD acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD for SORs issued after September 1, 2006.

Applicant provided two answers to the SOR. His first notarized answer was dated December 22, 2012, and his second notarized answer was dated January 31, 2013. On February 7, 2013, Applicant provided a notarized statement in which he declined a hearing, and requested a decision on the written record.

The Government compiled its File of Relevant Material (FORM) on March 14, 2013. The FORM contained documents identified as Items 1 through 5. On April 26, 2013, DOHA forwarded a copy of the FORM to Applicant, with instructions to submit any additional information or objections within 30 days of receipt. Applicant received the file on May 8, 2013. His response was due on June 7, 2013. Applicant did not submit any additional information or file any objections within the prescribed time period. On June 26, 2013, the case was assigned to me for a decision.

Findings of Fact

The SOR contains four allegations of disqualifying conduct under Guideline H, Drug Involvement (SOR ¶¶ 1.a. through 1.d.) and three allegations of disqualifying conduct under Guideline E, Personal Conduct (¶¶ 2.a. through 2.c.). In his Answers to the SOR, Applicant admitted all allegations under both guidelines. However, he further stated that he misunderstood the questions raised in Sections 23a and 23c on the e-QIP he completed and certified on June 3, 2011, and he did not willfully withhold information or falsify information in his responses. Applicant's admissions are entered as findings of fact. (Item 1; Item 2; Item 3.)

The facts in this case are established by the record provided by the Government and by information provided by Applicant. The record evidence includes Applicant's June 3, 2011 e-QIP; official agency records; and Applicant's responses to DOHA interrogatories.¹ (See Items 1 through 5.)

After a thorough review of the record in the case, including the documentary evidence, relevant policies, and applicable adjudicative guidelines, I make the following additional findings of fact:

Applicant is 41 years old. Since May 2011, he has been employed by a government contractor. He seeks a DOD security clearance. Applicant was first married in 2000. He and his wife divorced in 2002. Applicant married again in 2006. He has one adult stepchild. (Ex. 4.)

Applicant has a history of substance abuse. In a July 2011 interview with an OPM investigator, Applicant stated that he first used marijuana in 1991 during his first

¹ Applicant was interviewed by an authorized investigator from the U.S. Office of Personnel Management (OPM) on July 13, 2011. In response to DOHA interrogatories, Applicant reviewed the investigator's report and, on October 12, 2012, he signed a statement affirming that the investigator's report accurately reflected his interview. He did not provide any additional information. (Item 5.)

semester in college. He used marijuana once a day and spent about \$25 a week on marijuana. (Item 5.)

In December 1992, Applicant was expelled from college. After leaving college, Applicant's marijuana use increased to two or three times a day, and he spent about \$60 a week on his drug habit. He smoked marijuana with friends or by himself. Applicant's use of marijuana continued until at least 2007. (Item 5.)

From the mid-1990s until 2007, Applicant purchased marijuana and sold it to his friends. By selling marijuana that he purchased to his friends, Applicant was able to offset some of his drug use expenses. (Item 5.)

Applicant's marijuana use caused relationship problems in his first marriage and was a contributing factor to his divorce. Applicant's drug use also caused financial problems during this time. He continued to smoke marijuana even when he could not afford to pay his rent or buy food. (Item 5.)

Applicant told the investigator that he stopped using marijuana in 2007. In September 2010, however, Applicant went on vacation with a friend and used marijuana again. Applicant claims he has not used marijuana since September 2010, although he continues to associate with the friend with whom he used marijuana, and the friend uses marijuana when he and Applicant are together. (Item 5.)

Applicant has not sought treatment or counseling for his drug use. He has not been diagnosed or evaluated as a drug abuser or drug dependent by a qualified medical professional or a licensed clinical social worker. He claims he has never had a positive drug test. (Item 5.)

In June 2011, Applicant completed an e-QIP. Section 23a on the e-QIP asks the following:

In the last 7 years, have you illegally used any controlled substance, for example, cocaine, crack cocaine, THC (marijuana, hashish, etc.), narcotics (opium, morphine, codeine, heroin, etc.), stimulants (amphetamines, speed, crystal methamphetamine, Ecstasy, ketamine, etc.), depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), steroids, inhalants (toluene, amyl nitrate, etc.) or prescription drugs (including painkillers)?

Applicant answered "Yes" to Section 23a. He listed his one use of marijuana in September 2010. He failed to disclose the full extent of his drug use between June 2004 and at least 2007. The SOR alleges at ¶ 2.b. that Applicant's failure to disclose this information was deliberate. (Item 1; Item 4; Item 5.)

Section 23c on the e-QIP Applicant completed in June 2011 asks the following: "In the last 7 years, have you been involved in the illegal possession, purchase,

manufacture, trafficking, production, transfer, shipping, receiving, handling or sale of any controlled substance?” Applicant answered “No” to Section 23c and failed to disclose that, between June 2004 and at least 2007, he purchased marijuana on several occasions and also purchased and sold marijuana to others during this time. The SOR alleges at ¶ 2.c. that Applicant’s failure to disclose this information was deliberate. (Item 1; Item 4; Item 5.)

As an attachment to his Answers to the SOR, Applicant provided a copy of his most recent performance review. The review assesses 18 work and skill categories. Applicant met the requirements for 12 categories. He exceeded the requirements in the following categories: works independently; assigned job completed to schedule; technical proficiency; capable of accepting personal responsibility; interaction/works well with supervisors; interaction/works well with co-workers. (Item 2; Item 3.)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant an applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

When evaluating an applicant’s suitability for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, the administrative judge applies these guidelines 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.

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 in 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 classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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

Guideline H, Drug Involvement

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual’s reliability and trustworthiness because it may impair judgment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations. AG ¶ 24(a) defines drugs as “mood and behavior altering substances.” The definition of drugs includes “(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.” AG ¶ 24(b) defines drug abuse as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.”

The record in this case establishes that Applicant used marijuana, at various times, from 1991 to 2010. From 1992 to 2007, he used marijuana frequently, sometimes daily, and he purchased and sold marijuana to others to help pay for his drug habit.

Applicant’s behavior casts doubt on his reliability, trustworthiness, and good judgment. It also raises security concerns about his ability or willingness to comply with laws, rules, and regulations. I conclude that Applicant’s illegal drug use and his purchase and sale of illegal drugs to others raise security concerns under AG ¶¶ 25(a) and 25(c). AG ¶ 25(a) reads: “any drug abuse [as defined at AG ¶ 24(b)].” AG 25(c) reads: “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession or drug paraphernalia.”

Applicant's drug use began in 1991 and continued until at least 2007, a period of 16 years. His most recent use of marijuana occurred in September 2010. His drug use was sustained, habitual, and a lifestyle choice.

Three Guideline H mitigating conditions might apply to the facts of Applicant's case. If Applicant's drug use "happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on [his] current reliability, trustworthiness, or good judgment," then AG ¶ 26(a) might be applicable in mitigation. If Applicant demonstrated an "intent not to abuse any drugs in the future by (1) disassociation from drug-using associates and contacts, (2) changing or avoiding the environment where drugs were used, (3) abstaining from drug use for an appropriate period, or (4) signing a statement of intent with the automatic revocation of his security clearance for any violation," then AG ¶ 26(b) might be applicable. If Applicant provided evidence of "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," then AG 26(d) might be applicable.

Applicant's past illegal drug use continues to cast doubt on his current reliability, trustworthiness, and good judgment. He failed to establish that he had abstained from drug use for an appropriate period or that he had disassociated from those with whom he had used drugs in the past. He failed to demonstrate that he had changed his conduct to avoid environments where drugs are used. He did not provide a signed statement of his intent not to abuse drugs in the future, with automatic revocation of his security clearance for any violation.

Applicant's illegal drug use occurred periodically over a period of many years. Insufficient time has elapsed to demonstrate whether he will abstain from illegal drug use in the future. I conclude that AG ¶¶ 26(a), 26(b), and 26(d) do not apply in mitigation to the facts of Applicant's case. I also conclude that the conduct alleged in SOR ¶ 1.d. is not a disqualifying condition under Guideline H, and accordingly, I find for Applicant on that allegation.

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern:

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.

When Applicant completed his e-QIP in 2011, he listed a one-time use of marijuana in September 2010. In his response to Section 23a, he failed to disclose his

frequent use of marijuana between 2004 and 2007. In his response to Section 23c, he also failed to disclose his frequent purchase and resale of marijuana. Applicant's personal conduct raises security concerns under AG ¶ 16(a), which reads: "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's continued contact with at least one friend with whom he used illegal drugs also raises a security concern under AG ¶ 16(g), which reads: "association with persons involved in criminal activity."

In his answer to the SOR, Applicant denied that his failure to disclose the full extent of his 16-year marijuana use and his failure to disclose his frequent purchase and resale of marijuana to others were deliberate. Instead, he stated that his omissions were the result of misunderstandings.

DOHA's Appeal Board has cogently explained the process for analyzing falsification cases:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

Applicant was a mature adult when he completed his e-QIP in 2011. He knew, or should have known, of the importance of telling the truth to the Government when seeking a security clearance. He also had reason to know that his drug use and his illegal drug possession, purchase, and sale were substantial and would raise security concerns. Additionally, Applicant should have known that illegal drug use is criminal activity and his continued associations with known drug users cast doubt upon his reliability, judgment, and willingness to comply with rules and regulations.

When Applicant completed his security clearance application in 2011, he responded "yes" when asked if he had, in the last 7 years, used illegal drugs. He admitted using marijuana one time in 2010, even though he had also used marijuana habitually and frequently on multiple occasions between 2004 and 2007. He answered "No" when asked if, in the last 7 years, he had ever possessed, purchased, or sold illegal drugs, even though he knew he had done so between 2004 and 2007.

Applicant made no good-faith efforts to correct the falsifications in his e-QIP before being confronted with the facts. He did not claim that the falsifications occurred as a result of improper or inadequate advice of authorized personnel. His falsifications were neither minor nor infrequent. Instead, they cast doubt on Applicant's reliability, trustworthiness, and good judgment.

After thoroughly reviewing the documentary evidence in this case, I conclude that Applicant used, possessed, purchased, and sold marijuana frequently over a significant period of time. I also conclude that his falsifications on his 2011 e-QIP were deliberate. Accordingly, none of the Guideline E mitigating conditions apply.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all relevant 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 raised by the written record in this case. Applicant has worked for his present employer since May 2011, and he has compiled a good work record. However, he has used, possessed, purchased, and sold illegal drugs for many years. His lack of candor in failing to reveal this information on his e-QIP raises serious concerns about his trustworthiness and reliability.

Applicant failed to meet his burden of persuasion in mitigating the Government's security concerns under the drug involvement and personal conduct adjudicative guidelines. Overall, the record evidence in this case leaves me with questions and doubts about Applicant's eligibility and suitability 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. - 1.c.: | Against Applicant |
| Subparagraph 1.d.: | For Applicant |
| Paragraph 2, Guideline E: | AGAINST APPLICANT |
| Subparagraphs 2.a - 2.c.: | 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.

Joan Caton Anthony
Administrative Judge