



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



In the matter of:)
)
) ISCR Case No. 11-12488
)
)
Applicant for Security Clearance)

Appearances

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

07/18/2013

Decision

MASON, Paul J., Administrative Judge:

After testing positive for marijuana in March 2005, Applicant was terminated from his job. In 2007 or 2008, Applicant tested positive for the same drug a second time. Even after he was allowed to keep his job, he tested positive in May 2010 and was terminated again. He falsified his May 2011 security clearance application by denying the actual reason for two job terminations was that he tested positive for marijuana. While admitting in his June 2011 subject interview that he was terminated from two jobs for testing positive for marijuana, he denied he knowingly ingested the drug. The drug involvement and personal conduct security concerns have not been mitigated. Eligibility for access to classified information is denied.

Statement of the Case

Applicant's Electronic Questionnaire for Investigations Processing (e-QIP, Item 4) was certified on April 25, 2011. He signed the e-QIP on May 3, 2011.¹ On June 17, 2011, he provided an interview to an investigator from the Office of Personnel Management (OPM). A summary of the interview and responses to interrogatories was signed and notarized by Applicant on February 13, 2013. (Item 5). He agreed with the contents of the summary and indicated it could be used in evidence to determine his security suitability. He provided responses to interrogatories on November 12, 2012. (Item 6)

On March 13, 2013, the Department of Defense (DOD) issued the Statement of Reasons (SOR) (Item 1) detailing security concerns under drug involvement (Guideline H) and personal conduct (Guideline E). 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) implemented on September 1, 2006.

Applicant submitted his notarized answer to the SOR on April 1, 2013 and request a decision based on a written record. (Item 3) A copy of the Government's File of Relevant Material (FORM, the Government's evidence in support of the allegations of the SOR) was sent to Applicant on May 30, 2013. In an attachment to the FORM, Applicant was advised he could object to the information in the FORM or submit additional information in explanation, extenuation, or mitigation. He received the FORM on June 11, 2013. Applicant's response is dated June 12, 2013. The case was assigned to me on June 21, 2013.

Findings of Fact

The first paragraph of the SOR contains three allegations under the drug involvement guideline. Applicant admitted that in 2005 he tested positive for THC (marijuana) on a drug test administered by his employer. (SOR 1.a) He admitted testing positive for THC in 2007 or 2008. (SOR 1.b) Applicant admitted testing positive for THC in May 2010. (SOR 1.c)

The second paragraph of the SOR contains three allegations under the personal conduct guideline. The first two allegations are based on Applicant's incorrect responses to Section 13C of his May 3, 2011 e-QIP regarding his employment terminations in 2005 and June 2010. Concerning SOR 2.a, though Applicant admitted he was fired from the truck driving job in March 2005, he continued to claim in his answer to this allegation that he left the job by mutual agreement because of

¹ SOR 2.a, 2.b, and 2.c indicate the e-QIP is dated May 5, 2011. The correct date is May 3, 2011. Pursuant to E3.1.17 of Department of Defense Directive 5220.6, the date in the three allegations is changed to May 3, 2011, to conform the SOR to the evidence presented.

disagreements with a fellow employee, rather than after testing positive for THC as alleged under SOR 1.a.

Regarding the SOR 2.b allegation, Applicant admitted that he was fired in June 2010 for testing positive for THC rather than being laid off because of a work slowdown as he indicated in the e-QIP.

The third allegation of the SOR relates to Applicant's response to Section 23d. of his May 2011 e-QIP. (SOR 2.c) He admitted his "no" answer to the question of whether he had received drug counseling in the last seven years was false. However, he added that he did not have a problem with addiction.

Applicant is 56 years old and has been married since May 2009. He has one stepdaughter. He received his high school diploma in June 1975. Applicant has been employed as a truck driver for a defense contractor since April 2011. Before his current job, Applicant was unemployed for about 10 months. From 2006 to June 2010, he was a truck driver for a shipbuilder. He was also a truck driver for several other companies.

In 2005, Applicant was employed as a truck driver for a trucking company. In approximately March 2005, Applicant was administered a drug test by his employer and tested positive for THC. He left by mutual agreement after the positive drug test. (SOR 1.a, 2.a) (Item 5 at 5)

During Applicant's truck driving employment from 2006 to June 2010, he failed a drug test for THC in 2007 or 2008. (SOR 1.b) Upon the recommendation of a company official, Applicant enrolled in group therapy at an outpatient drug clinic. The hour-long therapy sessions met once a week for about a month. (Item 5 at 5)

While employed by the same company in May 2010, Applicant was given a drug test and tested positive for THC. (SOR 1.c, 2.b) The human resources manager informed Applicant that he could enroll in treatment again or be retested at a cost of \$200. When Applicant refused to retake the drug test, he was fired. (Item 6 at 3)

In his May 2011 e-QIP, Applicant answered "no" to Section 23 requiring disclosure of counseling for drug use in the last seven years. Applicant received counseling in 2007 or 2008 after testing positive for THC on a drug test. (SOR 2.c) (Item 5 at 5)

Applicant informed the OPM investigator during his June 2011 interview that he was not knowingly using marijuana during the periods when he tested positive for THC, the same reason he supplied for not disclosing the positive drug tests on the security application. He attributed the positive drug tests to second-hand smoke from friends who smoked the drug. He indicated he has not seen the friends, who he refused to name, since 2005. He surmised that the positive drug tests may also have resulted from eating some food containing marijuana. Applicant acknowledged smoking marijuana, but claimed he stopped during the 1990s when random drug testing was imposed in the

work place. He had three negative drug tests since the positive test in May 2010. His most recent negative test result was in May 2011. He indicated he had no intention of using illegal drugs in the future.

In his response to interrogatories dated November 12, 2012, Applicant admitted he used marijuana irregularly after high school. He claimed he was never under the influence of drugs at work. The effect of drug use made Applicant quiet and relaxed. The last time he remembered using marijuana was in May 2010, when he used the drug with friends. He admitted the use represented poor judgment. Applicant admitted testing positive on May 28, 2010, after a part fell off his truck. No additional information was provided. Embarrassment prevented Applicant from disclosing his drug use on his security clearance application. (Item 6 at 2-5)

In his response to the FORM, Applicant reiterated his embarrassment about not disclosing his drug use on the e-QIP. He does not associate with the drug using friends anymore. Applicant indicated that he does not steal and he does not squeal. He does what is asked to the best of his ability. (FORM response)

Character Evidence

Applicant supplied no character evidence to provide insight into his job performance or his conduct in the community where he lives.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the guidelines in the AG. Each guideline lists potentially disqualifying conditions and mitigating conditions that are useful in evaluating an applicant's eligibility for access to classified information.

The administrative judge's ultimate goal is to reach a fair and impartial decision that is based on sound and prudent judgment. The decision should also include a careful, thorough evaluation of a number of variables known as the "whole-person concept" that brings together all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. 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 the potential, rather than actual, risk of compromise of classified information.

Under Directive ¶ E3.I.14., the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.I.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 bears the ultimate burden of persuasion in demonstrating that he warrants a favorable security clearance decision.

Analysis

Drug involvement

Paragraph 24 of the AG sets forth the security concern for drug involvement:

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 to comply with laws, rules and regulations;

The pertinent disqualifying conditions under AG ¶ 25 that may be disqualifying are:

- (a) any drug use;²
- (b) testing positive for illegal drug use;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

Applicant began using marijuana after graduating from high school in June 1975. He claimed he used the drug until the 1990s when random drug testing was implemented in the work place. His drug use would no longer raise security concerns under the drug involvement guideline had there been no additional evidence of marijuana use in 2005, 2007 or 2008, and May 2010. Applicant's admitted use of marijuana with friends and testing positive in May 2010, after his earlier denial of knowingly using marijuana since the 1990s, raises significant security concerns about his credibility and whether Applicant is clearly committed to abstaining from drug use in the future. AG ¶¶ 25 (a), (b), (c) and (h) apply.

The relevant mitigating conditions under AG ¶ 26 of the drug involvement guideline are:

- (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; and

² Drug use is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction. (Directive at 34)

(b) a demonstrated intent not to abuse any drugs in the future, such as: (1) dissociation from drug-using associates and contacts, (2) changing or avoiding the environment where drugs are used, (3) an appropriate period of abstinence, and a signed statement of intent with automatic revocation of clearance for any violation.

Though Applicant claimed in November 2012 that his last drug use occurred more than two years earlier, he furnished no information about his drug use in his May 2011 e-QIP or his June 2011 interview, two critical stages of the security investigation. His earlier concealment of this information continues to have a negative impact on his current reliability, trustworthiness, and judgment. Applicant's earlier claim of having severed his ties with his drug-using friends in 2005 is discredited by his recent admission of again using marijuana with his drug-using friends in May 2010. The circumstances of his recent drug use causes concern about whether Applicant's current environment is drug free. Because Applicant has been dishonest about his drug use, I am unable to confidently conclude that he has been abstinent for three years. Lastly, Applicant failed to submit a signed statement of intent to abstain from all drug use in the future. AG ¶¶ 26 (a) and (b) do not apply.

Personal Conduct

Paragraph 15 of the AG sets forth the security concern for personal conduct:

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.

AG ¶ 16 contains one potentially disqualifying condition that is relevant to Appellant's omission of information from his e-QIP in April 2010:

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.

Though security concerns are immediately raised by an omission of information from a security questionnaire or an interview, not every omission under the personal conduct guideline should be considered a falsification. Omissions can result from haste, oversight, or misinterpretation of the questions in the security form or in the interview. To fall within the scope of the guideline, the omission must be a deliberate concealment or falsification of relevant facts used to determine security clearance suitability.

Judging by the entirety of the evidence, Applicant deliberately concealed his drug use on his e-QIP. Under Section 13C of the form, Applicant falsely claimed he was fired from his job in 2005 over disagreements with a fellow employee. In May 2010, Applicant dishonestly claimed he was terminated because of slowdown in work. In response to Section 23d. of the e-QIP, Applicant deliberately denied he had received outpatient counseling in 2007 or 2008. AG ¶ 16(a) applies.

The relevant mitigating conditions under AG ¶ 17 are:

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

AG ¶ 17(c) the offense was 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; and

AG ¶ 17(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate stressors, circumstances, or factors that caused untrustworthy, unreliable or other inappropriate behavior, and such behavior is unlikely to recur.

AG ¶ 17(a) mitigates deliberate omissions of relevant information when the individual makes a prompt good-faith effort to correct the deliberate omission before being confronted by the facts. Instead of telling the truth on his May 2011 e-QIP about why he was terminated from a job in 2005 and May 2010, Applicant deliberately provided false information. When asked why he did not disclose his positive drug tests on his e-QIP, Applicant chose to provide false information a second time by claiming that the marijuana suspiciously found its way into his body without his knowledge. AG ¶ 17(a) does not apply.

AG ¶ 17(c) does not apply because Applicant's dishonest conduct was frequent. Applicant provided false information about the scope and frequency of his drug use. He tried to conceal his drug use so that he would not have to reveal the true reasons for his two job terminations. Applicant's deliberate falsifications continue to cast doubt on his reliability and judgment.

AG ¶ 17(d) is inapplicable. Though Applicant ultimately admitted the positive drug test in May 2010 was due to his drug use, he continues to deny he was fired from his job in 2005 for testing positive for marijuana. In view of Applicant's deliberate falsifications of his May 2011 e-QIP, his June 2011 interview, and the unpersuasive evidence presented under AG ¶ 26, Applicant has not carried his burden under the personal conduct guideline.

Whole-Person Concept

I have examined the evidence under the disqualifying and mitigating conditions under the drug involvement and personal conduct guidelines. I have also weighed the circumstances within the context of nine variables known as the whole-person concept. In evaluating the relevance of an individual's conduct, the administrative judge should consider the following factors listed in 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 the participation was 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.

As set forth under AG ¶ 2(c), the final security clearance decision must be an overall commonsense judgment based upon careful consideration of the specific guidelines, each of which is to be evaluated in the context of the whole person.

Applicant is 56 years old and has been employed as a truck driver since April 2011. He has been a truck driver for most of his professional career. He has been married since May 2009 and has one stepdaughter.

The SOR identifies three separate incidents between March 2005 and May 2010, when Applicant failed drug tests administered by his employers. In the 2005 offense, Applicant left his job by mutual agreement after testing positive for marijuana. In 2007 or 2008, Applicant tested positive for the same drug, but the employer allowed him to keep his job provided he complete counseling. He exercised good judgment by completing outpatient counseling. Having lost one job for using marijuana, and given a second chance to continue working at his second job, Applicant should have known what the consequences would be for testing positive again. Nonetheless, Applicant tested positive a third time in May 2010 and lost his job in June 2010.

Applicant compounded his poor judgment in his May 2011 e-QIP, by concealing the true reason for his job terminations in March 2005 and May 2010, and by denying he had participated in drug counseling. He continued to show poor judgment in his June 2011 interview by denying his ongoing marijuana use triggered the positive drug test results. Considering all the information under the disqualifying and mitigating conditions, and in the context of the whole-person concept, Applicant has not overcome the adverse security concerns raised under the drug involvement and personal conduct guidelines. See AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

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 (Drug Involvement):	AGAINST APPLICANT
Subparagraphs 1.a-1.c:	Against Applicant
Paragraph 2 (Personal Conduct):	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 national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Paul J. Mason
Administrative Judge