



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



In the matter of:)	
)	
-----)	ISCR Case No. 11-12790
)	
Applicant for Security Clearance)	

Appearances

For Government: Julie R. Mendez, Esquire, Department Counsel
For Applicant: Christopher Graham, Esquire

04/19/2013

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

On December 7, 2012, the U.S. Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) enumerating security concerns under Guideline E (Personal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (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 on September 1, 2006.

In a response dated December 27, 2012, Applicant admitted all three allegations raised, with explanations, and requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. The case was assigned to me on January 30, 2013. The parties agreed to a hearing date of February 14, 2013, a notice to that effect was issued on February 1, 2013. Applicant waived his right to 15 days notice and the hearing was convened as scheduled.

Applicant gave testimony and offered eight documents, which were accepted into the record without objection as exhibits (Exs.) A-H. Department Counsel offered five documents, which were admitted without objection as Exs. 1-5. The transcript (Tr.) of the proceeding was received on February 25, 2013, and the record was closed. Based on a thorough review of the testimony, submissions, and exhibits, I find Applicant did

not meet his burden of mitigating security concerns related to personal conduct. Clearance is denied.

Findings of Fact

Applicant is a 30-year-old senior information systems consultant. He has worked for the same employer for over a year. Applicant earned a bachelor's degree in business administration with a concentration in accounting. He is single and has no children.

Growing up and through his time as a collegiate freshman, Applicant was "a very good student, son, [and] brother."¹ However, from November 2002 through college graduation in 2005 and until about May 19, 2009, when he executed an Electronic Questionnaire for Investigations Processing (e-QIP), he used marijuana, socially with friends, on a "few occasions."² For example, between his sophomore and senior years in college, he used marijuana about "two to four" times.³ He continued this use after college while working in his first two professional positions in different cities.

When Applicant executed his e-QIP in May 2009, he had used marijuana maybe two, but "no more than four" times, since college graduation.⁴ At the time, he had recently been laid off from one job in April 2009, was being recruited for a new position that required he complete a security clearance application, and was temporarily without a permanent position in the interim. Applicant was immature at the time; he was bitter about both having been laid off due to downsizing and having to pursue a job he considered to be a demotion. The e-QIP he completed in May 2009 had multiple errors, which he ascribes to youthful inexperience, lack of enthusiasm for the new job prospect, and haste.⁵ He notes he made multiple errors on the e-QIP. When he saw the question about drugs, he reflected, then concluded, that he was not a "drug user" because he had used marijuana so few times.⁶ Therefore, he answered "No" to Question 23 - Illegal Drug Use or Drugs or Drug Activity:

The following questions pertain to the Illegal use of drugs or drug activity. You are required to answer the questions fully and truthfully, and your failure to do so could be grounds for an adverse employment decision or action against you, but neither your truthful responses nor information derived from your

¹ Tr. 18.

² Tr. 18-19.

³ Tr. 26.

⁴ Tr. 26-28.

⁵ Tr. 20, 34-35; see Ex. 4 (Interrogatories). Applicant was laid off by one employer in April 2009, then hired by another entity in May 2009. Applicant considered the new position to be a demotion.

⁶ Tr. 30.

responses will be used as evidence against you in a subsequent criminal proceeding, a. 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, et), hallucinogenics (LSD, PCP, etc.), steroids, inhalants (toluene, amyl nitrate, etc.), or prescription drugs (including painkillers)? Use of a controlled substance includes injecting, snorting, inhaling, swallowing, experimenting with, or otherwise consuming any controlled substance.⁷

Applicant's "No" answer was based partly on his inexperience with the process and partly with his own lack of patience while rushing through the form.⁸ Indeed, lack of effort on the e-QIP reflected his overall poor judgment from that time period.⁹ Aside from growing anxiety about the direction of his career, Applicant was in an unsettling personal relationship with a woman he now views as having been a bad influence. It was with this woman, who regularly used illegal drugs, that Applicant used marijuana and cocaine in 2009.

Shortly after he completed the e-QIP and certified his answers, Applicant met with an investigator. He does not recall the investigator addressing the questions regarding past drug use.¹⁰ Meanwhile, although Applicant kept in communication with his facility security officer, he was unaware that he had been granted an Interim Secret Clearance in late May 2009 or that he had been granted an Interim Top Secret Department of Defense Industrial Security Clearance in June 2009.¹¹ There is no evidence that Applicant was aware that he had been granted any interim clearance.¹² Had he known that he had been granted some level of security clearance, he "might have made some different decisions" during this period, including his decision to use cocaine on one occasion and marijuana on two occasions in about October 2009 with

⁷ See, e.g., SOR, dated Dec. 7, 2012.

⁸ Tr. 55-56. Applicant was 26 years old at the time. Tr. 56. He admits that despite not having a current income flow, despite the sour economy, and despite the tight job market, he was still in the stage when a rafting trip took priority over his profession. Therefore, he resented the fact that the e-QIP and related paperwork from his prospective employer cut into the time he had otherwise planed to spend with his brother on a rafting trip. Applicant acknowledges that he no longer has such an immature outlook and would now put job stability, responsibility, and his profession at the top of his list of priorities. Tr. 57.

⁹ Tr. 34.

¹⁰ Tr. 31-32.

¹¹ Tr. 32-33.

¹² Tr. 54.

his former lady friend.¹³ However, the implications of using illegal drugs shortly after submitting a security clearance application “did not cross [his] mind at the time.”¹⁴ It was not until November 2009 that he learned that he already had been granted a Top Secret Clearance.¹⁵

In May 2010, Applicant and the lady friend were drinking alcohol to the point of intoxication. The woman fell repeatedly during their binge. At some point after they arrived at Applicant’s apartment, she stopped breathing, and Applicant called 911. He went with her to the hospital as she received treatment. Later, unbeknownst to Applicant, she filed a complaint against Applicant claiming that he had caused her to fall and caused her injury. The inaccurate accusation upset Applicant. He reevaluated their relationship and considered both her drug use and her behavior. Within a week, they ended their relationship.

Other than two subsequent e-mails used to solicit money from Applicant, Applicant has had no contact with her since that time. In the interim, Applicant worked with the local police concerning her allegation. The charge was ultimately dismissed and the charge eventually expunged from his record. He dutifully reported the incidents to his security contact person at work in about January 2011, as the incident was being resolved with the local authorities.¹⁶ The information eventually culminated in a new Defense Department investigation regarding Applicant’s security clearance.¹⁷ During that investigation, Applicant was interviewed in July 2011. It was during that interview that Applicant described his relationship with his former lady friend in depth and discussed the incident at issue; he does not recall whether his personal use of drugs was raised.¹⁸ After that interview, Applicant wished to clarify some issues and a second interview was conducted in August 2011. It was during this interview Applicant disclosed the couple’s use of cocaine in 2009. It is unclear when Applicant disclosed his past marijuana use. Notes from the August 2011 interview state “Subject’s history with marijuana was taken in a previous interview,” but the substance is not referenced in the

¹³ Tr. 32.

¹⁴ Tr. 34.

¹⁵ Tr. 33.

¹⁶ Tr. 46-47.

¹⁷ Tr. 47-50.

¹⁸ Tr. 48.

interviewer's notes from their July 2011 meeting.¹⁹ The Government's exhibits only include interview notes from July and August 2011 (Ex. 3) and July 2009 (Ex. 4).²⁰

Today, Applicant has overcome his initial misgivings that his current employer and initial job offer were a poor match. He is now thriving in his work and fully committed to his employer. In describing his present employment, Applicant demonstrates a vastly improved level of maturity. In the past year, he has received a promotion. He has received good ratings for his performance and he is lauded by both his superiors and peers.²¹ He changed his circle of friends and peers, no longer associating with those who are not good influences on his life.²² His family and friends encourage his dedication to his work, and he genuinely enjoys his professional obligations.

Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all 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.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by

¹⁹ Tr. 50-53; Ex. 3 (Interrogatories) at 12 (Testimonies, Interview of Aug. 22, 2011, at 3). The interview notes reflect that Applicant and his former lady friend used cocaine on one occasion. Later, it states that Applicant's marijuana use was previously discussed in a previous interview, but does not indicate where such information may be found. The July 2011 interview testimonies found later in Ex. 3 do not mention marijuana use.

²⁰ The only other significant reference in those exhibits to drugs are in Ex. 3 at pages 2-6, which are answers to interrogatory questions signed November 1, 2012, over a year after the August 2011 interview.

²¹ Exs. C-E (Work-related evidence).

²² Tr. 58.

Department Counsel. . . .²³ The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant.²⁴

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 safeguard 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). “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”²⁵ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.²⁶

Analysis

Guideline E – Personal Conduct

Security concerns arise from matters of personal conduct because 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.²⁷ In addition, any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process is of special interest.²⁸ Here, Applicant denied having used illegal drugs in the past when he completed his October 2009 e-QIP. If that omission was intentional and was meant to deceive, it would be sufficient to raise Personal Conduct Disqualifying Condition AG ¶ 16(a) (*deliberate*

²³ See *also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

²⁴ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

²⁵ *Id.*

²⁶ *Id.*

²⁷ AG ¶ 15.

²⁸ *Id.*

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).

When Applicant completed his e-QIP in 2009, he was a college graduate in his mid 20s. Applicant initially testified that he answered “No” to the question about past drug use because he completed the e-QIP in haste. While he may have been depressed or distressed due to either his professional or romantic situation, he surely understood the significance of the e-QIP, which is a detailed inquiry. Its length and its focus on detail should give the average applicant sufficient notice that it must be addressed in more than a perfunctory manner.

Applicant also argued that he failed to identify his past marijuana use because he did not consider himself to be a drug user, *per se*. Question 23 Illegal Drug Use or Drugs or Drug Activity does not parse words regarding marijuana use in terms of how often one abused the drug. It simply inquires about illegal drug use in the preceding seven years. Consequently, the fact that Applicant’s past use may have been relatively negligible becomes somewhat irrelevant under this guideline. The lapse in personal judgment demonstrated here is not his past use of marijuana (which would be appropriate for review if Guideline H was at issue), but his failure to disclose it on the e-QIP. Here, that failure was volitional, which gives rise to AG ¶ 16(a).

Moreover, Applicant and his former lady friend illegally used cocaine and marijuana in 2009, after Applicant completed his e-QIP. While it is unclear whether Applicant knew he had already been granted an interim security clearance, this fact invokes AG ¶ (16)(c) (*credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with the rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information*).

It is hard to accept Applicant’s failure to note his past drug use on his e-QIP or his use of illegal drugs after certifying that eQIP as mere misunderstandings or lapses. They were volitional choices demonstrating poor judgment and untrustworthiness. More time is needed for Applicant to mend his track record for reliability, obviating application of mitigating conditions such as Personal Conduct Mitigating Condition 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 circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment*). At best, given his candor since 2011, AG ¶ 17(e) (*the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress*) applies in part.

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 the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). Under AG ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based on 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, as well as the whole-person factors. Multiple facts speak in Applicant's favor. He is articulate, straightforward, and well-educated. He has clearly matured in recent years. He now values the stability of a profession and recognizes the importance of maintaining a challenging job he enjoys. He now prefers to socialize with disciplined professionals, rather than those who abuse substances. He has made considerable personal progress in the past few years.

Applicant chose to mince words when he declined to divulge his past use of illegal drugs on his e-QIP. He also chose to use illegal drugs after certifying his application for a security clearance. Good judgment dictated that he report his past use of any illegal drugs, it also dictated that he refrain from illegal drugs and illegal activity while a security clearance application was pending. To make such poor choices and to then wait until 2011 to disclose them to his employer or security personnel demonstrates poor reliability and dubious trustworthiness. This is true despite recent personal growth, maturation, and professional success, all of which indicate that Applicant is presently on the right track and needs little more than additional time to demonstrate his worthiness for a security clearance. At present, however, security concerns remain unmitigated. Clearance is denied.

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 E:	AGAINST APPLICANT
Subparagraphs 1.a-1.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 a security clearance. Clearance is denied.

ARTHUR E. MARSHALL, JR.
Administrative Judge