



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



In the matter of:)	
)	
)	ISCR Case No. 11-13632
)	
Applicant for Security Clearance)	

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: Michael W. Cassidy, Esq.

08/17/2013

Decision

ANTHONY, Joan Caton, Administrative Judge:

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

Statement of the Case

Applicant completed and certified an electronic questionnaire for investigations processing (E-QIP) on July 19, 2011. On April 4, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, Personal Conduct, and Guideline H, Drug Involvement. 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 DOD for SORs issued after September 1, 2006.

Applicant provided a notarized answer to the SOR, which DOD received on May 3, 2013. In his answer, he provided additional information, and he elected to have a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. The case was assigned to me on July 11, 2013. I convened a hearing on August 13,

2013, to consider whether it is clearly consistent with the national interest to grant a security clearance for Applicant. The Government called no witnesses and introduced three exhibits, which were marked Ex. 1 through Ex. 3 and entered in the record without objection. Applicant testified and called no other witnesses. He introduced four exhibits, which were identified and marked as Applicant's Ex. A through Ex. D and entered in the record without objection. DOHA received the hearing transcript (Tr.) on August 16, 2013.

Findings of Fact

The SOR contains two allegations of disqualifying conduct under Guideline E, Personal Conduct (SOR ¶¶ 1.a. and 1.b.) and two allegations of disqualifying conduct under Guideline H, Drug Involvement (SOR ¶¶ 2.a. and 2.b.). In his Answer to the SOR, Applicant admitted one allegation under Guideline E, and he admitted one part of the second Guideline E allegation and denied the other part. He admitted one Guideline H allegation and denied the other. Applicant's admissions are entered as findings of fact. (SOR; Answer to SOR.)

Applicant is 31 years old. He has never married, and he has no children. For the past two years, he has lived in a spouse-like relationship with a girlfriend. He is employed as a programming manager by a government contractor. He expects to be awarded a bachelor's degree in computer science in December 2013. He seeks a security clearance for the first time. (Ex. 1; Tr. 21-22, 40.)

Applicant attended high school from 1997 to 2001. During that time he used marijuana on multiple occasions. He testified that marijuana made him feel anxious. He recalled using marijuana once between 2001 and 2008 or 2009. He reported that his marijuana use increased in 2008 or 2009 when he spent time with his brother who was a user of marijuana. (Ex. 1; Tr. 27-30, 60-61.)

In July 2011, Applicant completed an e-QIP as a part of his request for a security clearance. In requesting information on illegal drug use or drug activity, the e-QIP states, in pertinent part: "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. Neither your truthful responses nor information derived from your responses will be used as evidence against you in any subsequent criminal proceeding." (Ex. 3.)

When Applicant completed his e-QIP in July 2011, he reported, in response to questions about his illegal use of drugs or drug activity, that he used marijuana from "01/1997 (Estimated) to Present." He further explained his marijuana use as "rare and sporadic use at social gatherings, probably less than 15 times in 10 years." (Ex. 1 at 31.)

In September 2011, Applicant was interviewed about his drug use by an investigator from the U.S. Office of Personnel Management (OPM). He told the

investigator that he smoked marijuana approximately 15 times between January 1997 and August 2011.¹ He told the investigator that he smoked marijuana to help with feelings of anxiety. However, after smoking the marijuana, Applicant said he felt anxious. (Ex. 3.)

Applicant told the OPM investigator that he had never been ordered or advised to seek drug counseling, and he had never tested positive on a drug test. He also told the investigator he intended in the future to continue smoking marijuana, since he did not believe his use to be harmful. (Ex. 3.)

In early 2012, Applicant and his girlfriend² traveled to another state to visit his brother, who was working there. While visiting his brother, Applicant used marijuana again. He was not sure if his girlfriend was present when he used marijuana. (Tr. 28-30, 59-60.)

In December 2012, DOD sent Applicant a request for additional information about his drug use. He was advised to provide the information within 20 days and to sign and notarize his response. The DOD request for additional information also contained the following advisory:

You may refuse to answer these Interrogatories on constitutional or other grounds. However, if you decide to exercise that right or fail to provide the requested information, we will be unable to resolve this issue of making a determination concerning your clearance eligibility. Also, any security clearance you may now have will be suspended, further processing of your case will be discontinued, and any pending clearance requested will be denied. (Ex. 3.)

Question one on the DOD interrogatory asks: "Have you used any narcotic, depressant, stimulant, hallucinogen (to include LSD or PCP) and/or any Cannabis (to include marijuana and hashish) except prescribed by a licensed physician, since September 2011? Yes____No____" (Ex. 3.)

If Applicant's answer was "Yes," he was instructed to provide information on the type of drug used, the dates of use, and the total number of times used. He was further instructed to tell if he had ever purchased, sold, transported, or manufactured the drug used. Finally, he was asked if he intended to use the drug in the future.

¹ At his hearing, Applicant stated that he stopped using marijuana in 2009, and smoked once again in 2012. He failed to credibly explain why he stated on his e-QIP that he used marijuana from 1997 to 2011. (Tr. 43-44.)

² Applicant stated that his girlfriend experimented with drugs in college, but she does not use illegal drugs as a young adult. (Tr. 59-60.)

Applicant sent a notarized response, dated December 31, 2012, to the DOD interrogatories. In response to question one, he provided none of the information requested and wrote: "I am not comfortable answering this question." Applicant's refusal to answer the interrogatory at question one is alleged at SOR ¶ 1.a. (Ex. 3.)

Applicant acknowledged reading the information advising him that a refusal to answer the interrogatory question about his illegal drug use after September 2011 could result in the denial of his request for a security clearance. He stated that he did not think the Government would deny him a clearance for not answering the question because he felt uncomfortable. He stated that he expected to receive a telephone call from the Government asking him why he felt uncomfortable. (Tr. 52-53.)

Question two on the DOD interrogatories asked: "Have you decided to stop using illegal substances? If yes, please explain why you decided to stop using. If no, please explain [why] you have decided to continue use of illegal substances." Applicant responded to question two as follows: "I have neither decided to stop or continue using illegal substances. It is not something I think about." Applicant's marijuana use from 1997 to at least 2012 is alleged at SOR ¶ 2.a. and cross-alleged at SOR ¶ 1.b. His statement that he may continue to use marijuana in the future is alleged at SOR ¶ 2.b. and cross-alleged at SOR ¶ 1.b. (SOR; Ex. 3.)

In February 2013, DOD wrote to Applicant, reminded him that he had failed to provide requested information in response to the December 2012 interrogatories, and pointed out that the requested information was relevant, material, and necessary for a determination of his eligibility for a security clearance. DOD advised Applicant that if he refused to provide the requested information, it would be unable to reach a determination, any existing clearance he had been granted at any level would be revoked, and the processing of his case would be discontinued. (Ex. 2.)

In response to question one, Applicant identified the following illegal drug use since September 2011, when he was interviewed by an OPM investigator: "If memory serves me, I took a single drag of marijuana at a party in early 2012. Other than that no, I have not used any narcotics since September 2011." (Ex. 2.)

In response to question two, which inquired whether he had decided to stop using illegal substances, Applicant wrote:

To stop doing something I feel you must be doing it in the first place. While I acknowledge that I have smoked marijuana very sporadically in the past, in no reasonable way would I consider myself an active marijuana user. I believe that to say I have decided to stop using illegal substances implies more of a use of illegal substances than I think is accurate. That being said, I have no intention to use illegal substances in the future; if that means I have decided to stop using illegal substances [then] yes, I have decided to stop. (Ex. 2.)

At his hearing, Applicant was asked why he stated he was not comfortable answering the DOD interrogatory inquiring about his illegal drug use after his September 2011 interview with the OPM investigator. He replied that the interrogatory documents did not provide any assurances that the information he might provide about his more recent illegal drug use would not be used against him in a criminal proceeding. He acknowledged that he did not seek clarification or further information on the matter from an authorized individual. When asked why he then provided the information when he was asked again in February 2013, Applicant responded that he felt more relaxed and concluded that he would not go to jail for his "single drag. . . of marijuana at a party while on vacation." (Tr. 34-35, 52-53.)

In his February 2013 response to DOD interrogatories, Applicant stated: "I have no intent when it comes to the use of illegal substances. I have no plans to use any illegal substances but cannot predict how I will feel in the future and I'm not morally opposed to the use of drugs." At his hearing, Applicant was asked if he remained morally unopposed to marijuana use. He replied: "It depends on what moral system you're using. I don't think using drugs that don't harm anyone else is morally corrupt." Applicant continued: "I do not believe that my past use of marijuana has been immoral because it is in such small quantities and I've never purchased it or anything except as far as it is illegal and immoral because of that." Applicant acknowledged that all of his marijuana use was illegal behavior. (Ex. 3; Tr. 46-47.)

Applicant does not know if his employer has a policy that prohibits drug use by its employees. He was not given a drug test when he began to work for his employer. At his hearing, Applicant provided an affidavit, dated August 13, 2013, in which he acknowledged illegal drug use on approximately 15 occasions from January 1997 to August 2011. He also acknowledged using marijuana once in early 2012 while on vacation. (Ex. D; Tr. 47-48.)

In his affidavit, Applicant stated: "I have since come to understand this minor and infrequent use of marijuana is an obstacle to my being granted a security clearance." At his hearing, Applicant testified that an earlier unsigned draft of the affidavit contained a promise that he would never use marijuana again. He explained he was uncomfortable with that language "because I take my word seriously and I think promising never to do something ever again is a serious promise. And I'm not willing to make that promise without a lot of thought." (Ex. D; Tr. 37.)

Applicant further explained:

And I was thinking, you know, if I promise someone I'm never going to use marijuana again, and then 40 years from now, you know maybe I feel like it. I'm long past all the security clearance and all that stuff, you know, I would be a different person I'm not. You know, I'm not willing to make a lifelong promise because I'm first on my word. That being said, I can, what I have said is, please be advised that I have absolutely no intention of

using marijuana in the future. And I think that is a completely honest and truthful statement. (Tr. 37-38.)

In his signed affidavit, Applicant stated he had “absolutely no intention of using marijuana in the future. I am also no longer exposed to those whom have used marijuana with in the past. I understand that if granted a security clearance, I would forfeit that clearance if it were ever determined that I had taken an illegal drug.” (Ex. D.)

Applicant provided letters of character reference from a coworker, a friend, and a professor who supervised him in a research project. The letters praised Applicant’s work ethic and his dedication to his job. His coworker also noted that he trusted Applicant and found him to be reliable and of good character. (Ex. A; Ex. B; Ex. C.)

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 revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used 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, 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 as 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.

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 E, 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.

Under Guideline E, unfavorable clearance actions will normally result in the following situations:

- (a) Refusal, or failure without reasonable cause, to undergo or cooperate with security processing, included but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation;
- (b) Refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

Applicant completed an e-QIP in July 2011 and admitted illegal drug use from 1997 until July 2011. An OPM investigator discussed his drug use with him in September 2011. In December 2012, the DOD sent Applicant an interrogatory asking him if he had used any illegal drug since September 2011, and, if he had used an illegal drug during that time, to provide specific information about the drug use. Applicant refused to answer the question, stating that he was not comfortable in so doing. He did not state why the question made him uncomfortable, and he did not contact an authorized official to discuss his concern. When asked if he intended to cease using illegal drugs, Applicant equivocated and did not answer the question.

Applicant's refusals raise security concerns under AG ¶¶ 15(a) and 15(b). Several Guideline mitigating conditions might apply to the facts of this case. Applicant's disqualifying personal conduct might be mitigated under AG ¶ 17(b) if "the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security process" and "[u]pon being made aware of the requirement to cooperate or provide information, the individual cooperated fully and truthfully." If "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," then AG ¶ 17(c) might apply. AG 17(d) might apply if "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 occur."

Applicant did not cure his December 2012 refusal to provide full, frank, and truthful answers to the Government's lawful questions. Two months later, however, the DOD sent Applicant another request for information, reminding him that its initial request for information on his drug use was relevant, material, and necessary for a determination of his security worthiness. Applicant replied and reported that he took one "drag" of marijuana at a party in 2012. When asked why he responded in February 2013 and not in December 2012, Applicant replied that he did not think his use of marijuana warranted criminal prosecution and so he decided to respond. When asked a second time by the DOD if he had decided to stop using illegal substances, Applicant equivocated, and stated: "I believe that to say I have decided to stop using illegal substances implies more of a use of illegal substances than I think is accurate. That being said, I have no intention to use illegal substances in the future; if that means I have decided to stop using illegal substances [then] yes, I have decided to stop."

Applicant attributed his refusal to answer interrogatories in December 2012 to his discomfort and concern that he might be subject to criminal prosecution if he admitted illegal drug use after September 2011. When he completed his e-QIP, he was advised that revelations of illegal drug use would not subject him to criminal prosecution. When DOD requested that Applicant provide information in his drug use after September 2011, it did not specifically advise him that reporting his subsequent drug behavior

would not result in criminal prosecution. I conclude that AG ¶ 17(b) applies in mitigation in this case.

Applicant's refusal was not minor, however, and it occurred relatively recently. After his initial refusal, he was informed of his responsibility to cooperate and provide the requested information. He later provided the information requested of him and acknowledged his drug use in 2012. In an affidavit, he asserted he did not intend to use illegal drugs in the future. I conclude that AG ¶¶ 17(c) and 17(d) have some applicability in this case.

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."

Through Applicant's admissions, the record establishes that he used marijuana from 1997 until 2012. Applicant's drug involvement 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 raises security concerns under AG ¶ 25(a), which reads: "any drug abuse [as defined at AG ¶ 24(b)]."

Two 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.

Applicant's last use of marijuana was in 2012, approximately one year ago. He provided an affidavit stating his intent not to abuse drugs in the future, and acknowledging automatic revocation of his security clearance for any violation. He also stated he no longer associates with those individuals with whom he used illegal drugs in the past. One of those individuals, he reported, was his brother.

Applicant's illegal drug use occurred periodically over 15 years, suggesting a lifestyle choice that went beyond curiosity and experimentation. While his use of marijuana was infrequent, it occurred when he was a mature adult, and it continues to cast doubt on his reliability, good judgment, and willingness to comply with laws, rules, and regulations. I conclude that AG ¶ 26(a) does not apply in mitigation to the facts of Applicant's case. However, I conclude that AG ¶ 26(b) partially applies to Applicant's August 13, 2013 statement that he does not intend to use illegal drugs in the future, no longer associates with those with whom he used illegal drugs in the past, and understands that if he were granted a security clearance, it would be automatically revoked if he were to use illegal drugs in the future. Because Applicant's statement is recent and insufficient time has passed for him to demonstrate a commitment to abstinence, he has not yet reliably demonstrated his intent not to use illegal drugs in the future.

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 in this case. Applicant is appreciated as a coworker and friend. When he refused to provide full, frank, and truthful answers about his use of illegal drugs and his intentions about using illegal drugs in the future, Applicant was a mature adult. When he was advised that refusal to provide information about his drug use since September 2011 could result in denial of access to classified information, Applicant responded to the DOD interrogatories. Applicant's responses to the interrogatories and his testimony at his hearing suggested that he was sometimes ambivalent about using marijuana in the future. He stated that he did not believe that using small amounts of marijuana was immoral, and he did not want to commit to giving up marijuana use permanently. Insufficient time has elapsed for Applicant to

demonstrate that he intends to abstain from illegal drug use and will not return to such drug use if an occasion presents itself.

Applicant's illegal drug use occurred intermittently over a period of 15 years, between 1997 and 2012. He failed to meet his burden of persuasion in mitigating the Government's allegations under the personal conduct and drug involvement adjudicative guidelines. Overall, the evidence in this case leaves me with questions and doubts about Applicant's judgment, reliability, 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 E:	AGAINST APPLICANT
Subparagraph 1.a.:	For Applicant
Subparagraph 1.b.:	Against Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant
Subparagraph 2.b.:	For 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