



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



In the matter of:)
)
) ISCR Case No. 11-14265
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

06/28/2013

Decision

RIVERA, Juan J., Administrative Judge:

Applicant’s long-term illegal use of marijuana, lack of credibility, and his falsification cast serious doubt on his current reliability, trustworthiness, judgment, and ability to follow the law. Clearance denied.

Statement of the Case

Applicant submitted his most recent security clearance application (SCA) on June 22, 2011. On March 22, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) listing security concerns under Guideline H (drug involvement) and Guideline E (personal conduct).¹ Applicant answered the SOR on April 1, 2013, and requested a hearing before an administrative judge.

¹ 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* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

The case was assigned to me on April 24, 2013. The Defense Office of Hearings and Appeals (DOHA) issued the notice of hearing on May 3, 2013, scheduling a hearing for May 22, 2013. At the hearing, the Government offered exhibits (GE) 1 through 3. Applicant testified and submitted one exhibit (AE) 1, comprised of Tabs A through P. Tab P was received post-hearing. DOHA received the hearing transcript (Tr.) on June 3, 2013.

Findings of Fact

Applicant admitted and denied, in part, the factual allegation under SOR ¶ 1.a. He admitted that he stated he used marijuana ten times between October 2001 and March 2011. He claimed he only used marijuana four times during that period. He admitted SOR ¶ 1.b, and partially admitted the allegation in SOR 2.a. He failed to admit or deny the allegation under SOR ¶ 2.b. After a thorough review of all the evidence, including his testimony and demeanor while testifying, I make the following findings of fact:

Applicant is a 39-year-old employee of a government contractor. After graduating from high school, he enlisted in the U.S. Army where he served from June 1992 until August 1998. His service was characterized as under honorable conditions and he received a General discharge. He married his wife in May 2006. He has a 15-year-old son from a prior relationship. He attended college and completed his associate's degree in computer science in June 2005.

Applicant was hired by his current employer in July 2007, and that same month he submitted his first SCA. Section 24 (Your Use of Illegal Drugs and Drug Activity) asked him to disclose whether in the last seven years he had illegally used any controlled substances, including marijuana. Applicant answered "Yes," and stated that he used marijuana five times between October 2001 and September 2002. (GE 2) He was granted access to classified information at the secret level shortly thereafter.

Applicant submitted his pending SCA in June 2011. Section 23 (Illegal Use of Drugs or Drug Activity) asked him to disclose whether in the last seven years he had illegally used any controlled substances, including marijuana. Applicant answered "Yes," and stated that he used marijuana ten times between October 2001 and March 2011. (GE 1)

Applicant was interviewed by a government investigator in September 2011 concerning his illegal drug use. He told the investigator that he started using marijuana in October 2001 because he wanted to experiment. He said he used marijuana by himself or socially with a diverse number of friends. He used marijuana once a year while on vacation to relax. He used marijuana while vacationing in two foreign countries in September 2005 and March 2011. He estimated he used marijuana a total of ten times between 2001 and March 2011. Applicant told the investigator he did not intend to use marijuana in the future because he wanted to be a good role model for his son and other young adults. He denied he ever purchased or sold marijuana. He always

obtained it from friends. He believes that he could not be blackmailed because of his illegal use of marijuana because his wife and friends were aware of his marijuana use. (GE 3)

The investigator asked Applicant why he failed to disclose in his June 2011 SCA that he illegally used marijuana after possessing a security clearance. Applicant answered it was an oversight on his part, and that he was not aware it was against policy to use marijuana while possessing a security clearance. (GE 3)

In his April 2013 answer to the SOR and at his hearing, Applicant contradicted most of his prior admissions about his illegal use of marijuana. He claimed that between October 2001 and March 2011, he only used marijuana four times. He testified he illegally used marijuana in October 2001, because he was clinically depressed as a result of his unemployment. He used marijuana in January 2002, after his grandmother's funeral. He claimed he used marijuana during a September 2005 cruise after he saw the devastation caused by a hurricane to the Mississippi Gulf Coast region. (Applicant failed to disclose in his July 2007 SCA his September 2005 illegal marijuana use). He also confirmed that he used marijuana in March 2011 during a vacation to another country, while possessing a security clearance that was granted to him in 2007. He considers his marijuana use in March 2011 "a stupid mistake."

Applicant claimed that he never intended to falsify or omit any information about his prior use of marijuana. He averred that at the time he completed the SCA he could not remember all of his prior marijuana use because his use was sporadic. He simply provided wrong information because he did not remember specific dates or events. Applicant claimed he has not used marijuana since March 2011.

Applicant believes he has matured and that he is now a different person. He claimed he no longer associates with his marijuana-using friends. He is now involved in his community as a mentor and counselor for young adults. He teaches them how to avoid depression, and to stay away from alcohol and drugs. He considers himself to be a role model to young adults and his two subordinates at work. He also serves as a coach for different teams and performs as an umpire. Applicant testified he has learned how to handle adversity by using coping skills he learned from a therapist and his pastor. He submitted a statement of intent with automatic revocation of clearance for any use of illegal drugs.

Applicant considers himself to be a hard worker. His references stated that he is respected by friends and coworkers because of his strong ethics and dedication. He is considered to be an asset to his employer because he is technically proficient and knowledgeable. He has received exceptional job performance ratings indicating that he regularly exceeds expectations. Because of his outstanding performance and positive attitude his supervisors recommend his eligibility for a security clearance.

Policies

Eligibility for access to classified information may be granted “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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Guideline H, Drug Involvement

AG ¶ 24 articulates 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 or willingness to comply with laws, rules, and regulations.

Applicant illegally used marijuana ten times between October 2001 and March 2011. He used marijuana after possessing access to classified information at the secret level.

AG ¶ 25 describes eight conditions related to drug involvement that could raise a security concern and may be disqualifying. The following drug involvement disqualifying conditions raise a security concern and are disqualifying in this case:

- (a) any drug abuse;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (g) any illegal use after being granted a security clearance.

AG ¶ 26 provides four potentially applicable drug involvement mitigating conditions:

- (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;
- (b) a demonstrated intent not to abuse any drugs in the future, such as:
 - (1) disassociation from drug-using associates and contacts;
 - (2) changing or avoiding the environment where drugs were used;
 - (3) an appropriate period of abstinence;
 - (4) a signed statement of intent with automatic revocation of clearance for any violation;
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and
- (d) 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.

Considering the evidence as a whole, I find that none of the Guideline H mitigating conditions apply. Applicant's four contradictory statements about the extent of his illegal marijuana use establish his lack of credibility. His lack of credibility adversely impacts the validity of his testimony concerning his change of behavior, disassociation from drug-using friends, successful rehabilitation, and his ability and willingness to abstain from illegal drugs. On balance, Applicant's testimony and evidence are insufficient to mitigate the drug involvement security concerns.

Guideline E, Personal Conduct

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

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.

Applicant disclosed in his July 2007 SCA that he illegally used marijuana five times between October 2001 and September 2002. He was granted access to classified information at the secret level shortly thereafter.

Applicant disclosed in his June 2011 SCA, that he illegally used marijuana ten times between October 2001 and March 2011. He used marijuana while possessing a secret level security clearance in March 2011. Applicant told a government investigator in September 2011 that he started using marijuana in October 2001 because he wanted to experiment. He said he used marijuana by himself or socially with a diverse number of friends. He used marijuana once a year while on vacation to relax. He used marijuana while vacationing to two foreign countries in September 2005 and March 2011. He estimated he used marijuana a total of ten times between 2001 and March 2011.

Applicant deliberately falsified his July 2007 SCA when he failed to disclose he illegally used marijuana between 2002 and July 2007.

Applicant's behavior triggers the applicability of the following disqualifying conditions under 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;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing.

AG ¶ 17 provides seven conditions that could mitigate the personal conduct security concerns.

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

(b) 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 clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) 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;

(d) 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 recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

For the same reasons discussed under the Guideline H, incorporated herein, I find that none of the Guideline E mitigating conditions apply. On balance, Applicant's testimony and evidence are insufficient to mitigate the personal conduct security concerns.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c).

Applicant is a 39-year-old employee of a government contractor. He served in the U.S. Army six years. His service was characterized as under honorable conditions and he received a General discharge. He is married and has a 15-year-old son. He completed an associate's degree in computer science.

Applicant has been working for a government contractor since 2007. He considers himself to be an honest, hardworking, and productive employee. His references and outstanding performance appraisals indicate he is a valuable employee, a dedicated father, and an esteemed volunteer in his community. Notwithstanding, Applicant's long-term illegal use of marijuana, lack of credibility, and his falsification cast serious doubt on his current reliability, trustworthiness, judgment, and on his ability to follow the law.

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:	AGAINS APPLICANT
Subparagraphs 1.a, 1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a, 2.b:	Against Applicant

Conclusion

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

JUAN J. RIVERA
Administrative Judge