



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



In the matter of:)	
)	
)	ISCR Case No. 12-02525
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: Bradley Moss, Esq.

10/23/2013

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the record, I conclude that Applicant failed to mitigate security concerns under Guideline H, Drug Involvement, and Guideline E, Personal Conduct. 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 November 21, 2011. On June 11, 2013, the Department of Defense (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 DOD for SORs issued after September 1, 2006.

Applicant provided a notarized answer to the SOR, dated July 18, 2013, and he elected to have a hearing before an administrative judge at the Defense Office of Hearings and Appeals (DOHA). The case was assigned to me on August 23, 2013. I convened a hearing on September 13, 2013, to consider whether it is clearly consistent

with the national interest to grant or continue a security clearance for Applicant. The Government called no witnesses and introduced five exhibits, which were marked Ex. 1 through Ex. 5 and entered in the record without objection. Applicant testified and called two additional witnesses. He introduced six exhibits, which were identified and marked as Applicant's Ex. A through Ex. F and entered in the record without objection. At the conclusion of the hearing, at Applicant's request, I held the record open until close of business September 27, 2013, so that Applicant could provide additional information. Applicant timely provided one additional document, which I marked as Ex. G and entered in the record without objection. DOHA received the hearing transcript (Tr.) on September 23, 2013.

Findings of Fact

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

Applicant is 27 years old, never married, and has no children. He is employed as a systems engineer by a government contractor. He earned a bachelor's degree in electrical engineering in 2008. In 2010, he began part-time studies toward a master's degree in electrical engineering. He has held a security clearance since 2008. (Ex. 1; Tr. 61-62.)

Applicant enrolled at a university in 2004. Soon after arriving, he was introduced to marijuana by his roommate, and he took three puffs of marijuana from a pipe. In November 2007, while still a university student, Applicant applied for a position with a government contractor. The position he applied for required a security clearance, and Applicant completed and submitted an e-QIP on November 29, 2007.¹ On his e-QIP, in response to a question about his drug involvement, he reported marijuana use three times and stated: "I tried it out on a few occasions (peer pressure) when I came to college."² (Ex. 1; Tr. 64-67.)

Applicant claimed that he did not use marijuana again until a 2008 graduation party at his fraternity house. At that time, he was drinking beer and sitting with a group of friends. Someone passed around a pipe containing marijuana, and Applicant joined the group in smoking the marijuana. At his hearing, he could not recall the number of hits he took of marijuana at the graduation party. Applicant denied knowing that he

¹ The record reflects that Applicant was awarded a security clearance in March 2008. (Ex. 3.)

² Applicant claimed during cross examination that he used the term "occasions" to mean "hits," and his marijuana use in college was limited to the three "hits" or puffs he took on one occasion soon after arriving at the university. (Tr. 92-93.)

possessed a security clearance at the time he smoked marijuana at the party. (Tr. 68-70, 94-95, 118-119.)

After graduating from college, Applicant moved to a metropolitan area where he was employed by the government contractor in the position he had applied for in November 2007. In July 2008, when he reported for work, Applicant was informed that he had been awarded a security clearance. Applicant had two roommates, one of whom was an active user of marijuana. In February 2010, Applicant used marijuana with his roommate. He knew he possessed a security clearance; he knew that marijuana was an illegal substance; and he knew he had an obligation to report his illegal drug use to his security officer. Applicant attributed his 2010 use of marijuana to the stresses of working full-time and attending graduate school part-time. (Ex. 1; Ex. 3; Tr. 73, 77-81, 98.)

In August 2010, Applicant was interviewed by an authorized investigator from the Office of Personnel Management (OPM). Applicant told the OPM investigator that he had used marijuana on only two occasions: in 2004, once, as a college freshman, and again in 2008, once at a graduation party in his fraternity house. He did not reveal his marijuana use in February 2010. At his hearing, Applicant stated that his use of marijuana in February 2010, “completely slipped [his] mind.” The SOR alleges at ¶ 2.b. that Applicant’s failure to report his February 2010 marijuana use in his August 2010 interview was deliberate. (Ex. 2; Tr. 84.)

Applicant was also interviewed by an authorized OPM investigator on December 28, 2011. During the interview, Applicant told the investigator that he used marijuana four or five times while he was in college. He told the investigator that he believed he used the drug twice in 2004, once in 2005, and twice in 2008. At his hearing, Applicant denied using marijuana in 2005 and speculated that the OPM investigator led him on, which caused him to erroneously assert marijuana use in 2005. (Ex. 2; Tr. 70-71.)

During his December 2011 OPM interview, Applicant stated that he had reported his February 2010 marijuana use to his security officer. However, the record reflects that, in June 2010, Applicant self-reported marijuana use in May 2008, while holding a security clearance. There is no record of Applicant self-reporting marijuana use in February 2010. At his hearing, Applicant stated that he wrote an email to his security officer requesting a meeting to report his marijuana use in February 2010.³ The meeting never took place. Applicant could not explain why the record did not contain documentation of his self-report of marijuana use in February 2010. (Ex. 4; Tr. 84-86, 97, 107-108, 120-121.)

Applicant presented two witnesses, who testified on his behalf. One witness, a roommate with whom Applicant lived from June 2010 until March 2011, characterized Applicant’s 2010 use of marijuana as a “mistake.” He also said he believed Applicant to

³ Applicant was not certain that he expressed in his email his intent to self-report illegal drug use. (Tr. 108.)

be honest and forthcoming. He stated he was not aware of any associations that Applicant had with individuals who used illegal drugs. (Tr. 28-41.)

A second witness on Applicant's behalf was his manager and the individual who evaluated his work. He praised Applicant's work ethic and ability. He testified that he had appraised Applicant's work in 2011 and 2012 as "excellent." (Tr. 47-58.)

Applicant provided his work performance evaluations for 2011 and 2012. In 2012, he received "excellent" ratings in job knowledge, work management and effective communication. In 2011, Applicant was evaluated as "exceptional" in interactions with customers, job knowledge, work management, teamwork, and communication. (Ex. E; Ex. F.)

Applicant also provided letters of character reference from five individuals who know him professionally and personally. All of the letters of character reference praised Applicant's intelligence, sincerity, work ethic, and honesty. One senior colleague attributed Applicant's use of marijuana to his youth. Another senior colleague praised Applicant's ability to work well under pressure. All found him to be trustworthy and reliable. (Ex. A; Ex. B; Ex. C; Ex. D; Ex. G.)

Applicant testified that he has limited contact with his former college friend, the individual with whom he used illegal drugs in September 2004. At his hearing he stated that he last spoke with this individual in July 2013. He also testified that he sees the individual with whom he used illegal drugs in February 2010 when he attends large group gatherings about twice a year. He asserted that he has not used marijuana since February 2010. (Tr. 67; 81, 83.)

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). 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 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, with varying frequency, from about September 2004 until February 2010. In February 2010, he knowingly used marijuana while entrusted with a security clearance. 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) and 25(g). AG ¶ 25(a) reads: “any drug abuse [as defined at AG ¶ 24(b)].” AG ¶ 25(g) reads: “any illegal drug use after being granted a security clearance.”

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 2010. He stated that he has limited contacts with those individuals with whom he used illegal drugs in the past. One individual with whom he used illegal drugs was a college friend, and the other individual was a former roommate.

Applicant’s illegal drug use occurred periodically over six years, suggesting a lifestyle choice that went beyond curiosity and experimentation. While his marijuana involvement was infrequent, his use in 2010 occurred when he was a mature adult and entrusted with a security clearance. In 2008, he used marijuana after completing an application for a security clearance. These actions 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 infrequent associations with those with whom he used illegal drugs in the past.

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.

Between 2004 and 2010, Applicant used marijuana. In February 2010, he used marijuana while holding a security clearance. When he was interviewed in a background investigation by an OPM investigator in August 2010, Applicant concealed the extent of his drug use by stating that he had used marijuana on only two occasions, with his last use occurring in May 2008. He did not reveal his use of marijuana in February 2010, approximately six months before the interview, while holding a security clearance. At his hearing, he stated that his February 2010 use "slipped his mind."

During a December 2011 personal subject interview with an OPM investigator, Applicant asserted that he had self-reported his use of marijuana in February 2010 to his employer's security office. At his hearing, he acknowledged that he sent an email request for a meeting to his security officer, but the meeting never took place. There was no record to document that he had self-reported his February 2010 marijuana use while holding a security clearance. Applicant's personal conduct raises security concerns under AG ¶¶ 16(b) and 16(e)(1).

AG ¶ 16(b) reads: "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative."

AG ¶ 16(e)(1) reads: "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. . . ."

I observed Applicant carefully at his hearing. I have assessed his credibility, and I have reviewed his written statements and his testimony carefully. I conclude that his falsifications in his August 2010 interview with an authorized investigator regarding his use of marijuana and his failure to report his use of marijuana in February 2010 while holding a security clearance were deliberate. I also conclude that he deliberately misled an authorized investigator when he asserted in his December 2011 security interview that he had reported his February 2010 use of marijuana while holding a security clearance to his employer's security officer, when, in fact, he had reported only his 2008 use of marijuana.

Several Guideline E mitigating conditions might apply to the facts of this case. Applicant's disqualifying personal conduct might be mitigated under AG ¶ 17(a) if "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts." 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 completely,” then AG ¶ 17(b) might apply. 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 cause doubt on the individual’s reliability, trustworthiness, or good judgment,” then AG ¶ 17(c) might apply.

Additionally, AG ¶ 17(d) might apply in mitigation 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.” AG ¶ 17(e) might apply if “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.”

Applicant is a mature adult who has accepted a position of responsibility with a government contractor. He knew, or should have known, of the importance of telling the truth to the Government when seeking a security clearance. He also knew that his drug use in February 2010 while holding a security clearance would raise security concerns. Applicant’s lack of truthfulness and failure to self-report his illegal drug use misled the Government and caused it to trust him with classified and privileged information.

Applicant failed to provide documentation showing he made good-faith efforts to correct the false statements he made in his background interviews before he was 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 appear to constitute a pattern of deception and cast doubt on Applicant’s reliability, trustworthiness, and good judgment. Accordingly, I conclude that none of the mitigating conditions apply to the facts of Applicant’s case.

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. His unwillingness to provide relevant and material information about his drug use and his drug use while holding a security clearance reflects a lack of candor that impacts his credibility and raises serious security concerns about his reliability, trustworthiness, and judgment.

Applicant's illegal drug use occurred intermittently over a period of six years. Insufficient time has passed to conclude that Applicant will not return to such drug use if an occasion presents itself. Applicant failed to meet his burden of persuasion in mitigating the Government's allegations under the drug involvement and personal conduct adjudicative guidelines. Overall, the 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.b.:	Against Applicant
Paragraph 2, 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 the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Joan Caton Anthony
Administrative Judge