



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



In the matter of:)	
)	
)	ISCR Case No. 12-04304
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Caroline E. Heintzelman, Esq., Department Counsel
For Applicant: *Pro se*

04/23/2014

Decision

CREAN, THOMAS M., Administrative Judge:

Based on a review of the case file and pleadings, I conclude that Applicant failed to provide adequate information to mitigate security concerns under Guideline E for personal conduct and Guideline H for drug involvement. Eligibility for access to classified information is denied.

Statement of the Case

On January 16, 2012, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for his employment with a defense contractor. (Item 5) After an investigation conducted by the Office of Personnel Management (OPM), the Department of Defense (DOD) issued Applicant interrogatories to clarify information in his background. After reviewing the results of the background investigation and Applicant's response to the interrogatories (Item 7), DOD could not make the affirmative findings required to issue a security clearance. On December 19, 2013, DOD issued Applicant a Statement of Reasons (SOR) detailing security concerns for drug involvement (Guideline H) and personal conduct (Guideline E). (Item 1) The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the

adjudicative guidelines (AG) effective in the Department of Defense on September 1, 2006. Applicant received the SOR on January 3, 2014. (Item 3)

Applicant answered the SOR on January 23, 2014. (Item 4) He admitted both allegations under Guideline H. He admitted SOR allegations 2.a and 2.c but denied allegation 2.b under Guideline E. Applicant requested a decision on the written record. (Item 4) Department Counsel submitted the Government's written case on February 19, 2014. Applicant received a complete file of relevant material (FORM) on February 26, 2014, and was provided the opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant did not submit additional information. The case was assigned to me on April 9, 2014.

Findings of Fact

After a thorough review of the case file and the pleadings, I make the following essential findings of fact.

Applicant is a 38 year old college graduate employed since April 2011 as an administrator by a defense contractor. He is married with one child. (Item 5, e-QIP)

The SOR alleges security concerns under Guideline H because Applicant used and purchased marijuana from January 1996 to about May 2011. (SOR 1.a and 1.b) He admitted, with explanation, that he continues to associate with individuals that use marijuana. (SOR 2.a) He denies that he falsified information concerning illegal drug use on a Questionnaire for Public Trust Position, dated April 20, 2006 (Item 6), because at the time he had not used marijuana for over a year. (SOR 2.b) He admits that he technically provided false information in response to another question concerning the illegal purchase, manufacture, trafficking, production, transfer, shipping, receiving, or sale of illegal drugs because he misread the question. (SOR 2.c)

Applicant listed on his e-QIP that he smoked marijuana occasionally on weekends or various social occasions from January 1999 until May 2011. He would go at times without smoking marijuana, but at other times, he would smoke marijuana more frequently. By the time his son was one year old in May 2010, he decided there was no reason to continue to smoke marijuana. He also noted on the e-QIP that he plans to continue to associate with people that are habitual marijuana users. These people have prescriptions for the medical use of marijuana. However, their use of marijuana was never an incentive for him to smoke the drug. His desire now is to live a healthy lifestyle and be deemed trustworthy to receive access to classified information. He admitted that from January 1996 until February 2011, he occasionally purchased marijuana to smoke. (Item 5, Section 23)

Applicant told security investigators that he used marijuana from January 1996 until May 2011, with friends at parties or concerts, and alone in his residence. He either purchased the drug himself or it was supplied by friends. He knew the drug was illegal, but did not believe he would get caught using it. He did not think he would become dependent on the drug. When smoking marijuana, he felt happy, friendly, and more

talkative. His last use of marijuana was in May 2011. He realized the negative effect his use would have on his infant son. He does not feel his marijuana use had any impact on his reliability, trustworthiness, or ability to hold a confidence. He was never charged or arrested for drug use, never sold or supplied marijuana to others, never received counseling or treatment for drug use, or tested positive for drug use. However, he intends to stay friends with people who use drugs. He notes that his friends are aware of his situation and generally do not use the drug in his presence. (Item 7 at 20-21) In response to the interrogatories, he admitted to using and purchasing marijuana during the timeframe. He also stated he did not intend to use the drug in the future. (Item 7 at 3 and 4)

Applicant answered “no” to the question on a Questionnaire for Public Trust Position signed on April 20, 2006, asking if in the last year he illegally used any controlled substance. Applicant noted that he answered “no” because he would go several years without using marijuana. When he answered the question in 2006, it was during the time he had not used marijuana within a year. On the same Questionnaire, Applicant answered “no” to the question asking if in the last seven years he had been involved in the purchase, manufacturing, trafficking, production, transfer, shipping, receiving, or sale of an illegal substance. In response to the SOR, Applicant admitted that his response was technically incorrect. He denied intentional falsification noting that he must have misread the question as pertaining to involvement in the activities for his profit. (Item 4)

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the administrative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s over-arching adjudicative goal is a fair, impartial and common sense 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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 burden of persuasion 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.

Analysis

Guideline H, Drug Involvement

The use of an illegal drug can raise questions about an individual’s reliability and trustworthiness, because it may impair judgment and raises questions about a person’s ability or willingness to comply with laws, rules, and regulations. Drugs are mood and behavior altering substances, and include those listed in the Controlled Substances Act of 1970. Marijuana is listed in the Act. Drug abuse is the illegal use of a drug or the use of a legal drug in a manner that deviates from approved medical direction (AG ¶ 24). Applicant admits to purchasing and using marijuana from January 1996 until May 2011. Applicant's marijuana use raises Drug Involvement Disqualifying Conditions AG ¶ 25(a) (any drug use); and AG ¶ 25(c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia).

The Government produced sufficient evidence to establish the disqualifying conditions in AG ¶¶ 25(a) and 25(c). The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns under drug involvement. An applicant has the burden to prove a mitigating condition, and the burden to disprove it never shifts to the Government.

I considered Drug Involvement Mitigating Conditions AG ¶ 26(a) (the behavior happened so long ago, was so infrequent, or happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment); and AG ¶ 26(b) (a demonstrated intent not to abuse 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). These mitigating conditions do not apply.

While there is no "bright line" rule for determining when conduct is recent or sufficient time has passed since the incidents, a determination whether past conduct affects an individual's present reliability and trustworthiness must be based on a careful evaluation of the totality of the evidence. If the evidence shows a significant period of time has passed without evidence of drug involvement, there must be an evaluation whether that period of time demonstrates changed circumstances or conduct sufficient to indicate a finding of reform or rehabilitation.

Applicant admits using marijuana for over 15 years from 1996 through May 2011. He also purchased marijuana for his use. His past use of marijuana still casts doubt on his current reliability, trustworthiness, and good judgment. Applicant indicates he has not used illegal drugs for about three years. There is no evidence presented that he has changed his lifestyle or the steps taken to indicate he no longer uses illegal drugs. To the contrary, he has shown his intent to be with people that do use drugs. Applicant's abstinence from marijuana use for three years and his statement that he will not use marijuana in the future must be set off against his purchase and use of marijuana willingly and voluntarily for over 15 years, and his expressed intention to continue to associate with marijuana users. The three years of no drug use is small in comparison to the over 15 years of use. Accordingly, Applicant has not met his burden to show changed circumstances or conduct that indicates he has reformed and will no longer use illegal drugs. There is no compelling evidence of intent not to use drugs in the future, or a changed circumstance indicating reform or rehabilitation. AG ¶¶ 26(a) and 26(b) do not apply.

Guideline E, Personal Conduct

A security concern is raised for personal conduct based on Applicant's responses to drug use questions on a Questionnaire for Public Trust Position. Personal conduct is a security concern because conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process (AG ¶ 15). Personal conduct is always a security concern because it asks whether the person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. The security clearance system depends on the individual providing correct and accurate information. If a person conceals or provides false information, the security clearance process cannot function properly to ensure that granting access to classified information is in the best interest of the United States Government.

Applicant completed a Questionnaire for Public Trust Position on April 20, 2006. He answered "no" to the two drug use questions on the questionnaire. Applicant's inaccurate and incomplete answers to drug use questions can raise a security concern under Personal Conduct Disqualifying Condition AG ¶ 16(a) (the deliberate omission concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history, or similar form used to conduct investigations, to

determine security eligibility or trustworthiness). Applicant's intent to continue to associate with friends, who use marijuana, even though their use is for medical reasons, raises Personal Conduct Disqualifying Condition AG 16(e) (association with persons involved in criminal activity).

Applicant denied that he intentionally failed to include his marijuana use in the last year before completing the Questionnaire for Public Trust Position in April 2006. While there is a security concern for an omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for a security clearance, not every omission, concealment, or inaccurate statement is a falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully with intent to deceive. Applicant answered "no" to the drug use question because he completed the form in the period of time he had not used marijuana. Applicant admits using marijuana for a time before and after he completed the questionnaire, but not in the year prior to completion of the Questionnaire. There is no information presented to establish that he was using drugs within a year of completing the Questionnaire, and thereby establishing that his answer was not correct. I find for Applicant on SOR allegation 2.b.

Applicant admits that he provided false and misleading information in response to the question on the Questionnaire concerning the illegal purchase, manufacture, trafficking, production, transfer, shipping, receiving, or sale of marijuana in the last seven years. Applicant's admission is sufficient information to establish that Applicant purchased illegal drugs in the seven years prior to his completing the Questionnaire and that his "no" answer was false. I further find that the falsification was intentional.

I considered Personal Conduct Mitigating Conditions AG 17(a) (the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts); AG 17(c) (the offense 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; and AG 17(d) (the individual has acknowledged the behavior and obtained counseling to change the behavior or taken positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur).

I find that these mitigating conditions do not apply to SOR allegations 2.a and 2.c. Applicant's intention to continue to associate with marijuana users may place him in a circumstance where he will again use marijuana in spite of his intentions not to do so. The drug question concerning the purchase of illegal drugs in the last seven years on the Questionnaire for Public Trust is simple and straight forward. It seeks to learn from an applicant the extent of the applicant's drug use. Applicant's responses show intent to obfuscate his prior drug use. Applicant's deliberate actions show untrustworthiness and unreliability.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the 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 surrounding this case. I considered his intention not to use drugs in the future.

Applicant was open about his over 15 years of marijuana use from 1996 through 2011. However, it is not obvious that he is working to change his lifestyle and his use of illegal drugs. He stated his intent not to use illegal drugs in the future but he still intends to associate with friends who use marijuana for medical purposes. He used marijuana for over 15 years, and it has only been three years since his last admitted use of marijuana. Applicant has not presented sufficient information to establish there are changed circumstances to his lifestyle indicating he will not use illegal drugs in the future. His intentions may be good but it is too soon to know if he will follow those intentions or again slip into drug use. Applicant has not met his burden to show that his drug use from 1996 through 2011 no longer reflects adversely on his reliability, honesty, trustworthiness, and good judgment. His 15-year use of illegal drugs shows that he may not properly safeguard classified information. For all these reasons, I conclude Applicant has not mitigated the security concerns from illegal drug use. In addition, he provided false and inaccurate answers to drug use questions on his Questionnaire for a public trust position. Overall, the record evidence leaves me with questions and doubts as to Applicant's judgment, reliability, and trustworthiness. He should not be granted access to classified information.

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
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For Applicant
Subparagraph 2.c:	Against Applicant

Conclusion

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

THOMAS M. CREAN
Administrative Judge