



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



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| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 14-06996 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: Gregory F. Greiner, Esq.

07/15/2016

Decision

RIVERA, Juan J., Administrative Judge:

Applicant illegally used marijuana between 1999 and 2012. He falsified his 2005, 2011, and 2014 security clearance applications (SCA) and made four false statements to investigators to cover his history of marijuana-related criminal conduct. His marijuana use and deliberate false statements continue to raise questions about his current reliability, trustworthiness, judgment, and ability to comply with the law and protect classified information. He failed to mitigate the Guidelines H and E security concerns. Clearance is denied.

Statement of the Case

Applicant submitted his most recent SCA on February 18, 2014. After reviewing it and the information gathered during a background investigation, the Department of Defense (DOD) was unable to make an affirmative decision to grant Applicant eligibility for a clearance. On July 30, 2015, the DOD issued him a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement) and Guideline E (personal conduct).¹ Applicant answered the SOR on September 26, 2014 (through

¹ The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security*

counsel), and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

The case was assigned to me on December 2, 2015. The DOHA issued a notice of hearing on January 29, 2016, scheduling a hearing for February 17, 2016. At the hearing, the Government offered nine exhibits (GE 1 through 9). Applicant testified and submitted seven exhibits (AE A through G). All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on February 25, 2016.

Procedural Issues

At the hearing, the Government moved to amend the SOR to correct typographical mistakes. Applicant did not object, and I granted the motion. (Tr. 8 - 9) SOR ¶¶ 1.a and 2.g were amended to read "November 2012," instead of "November 2011."

Findings of Fact

In his answer to the SOR, Applicant admitted he used marijuana three times between 2000 and 2012 (partial denial of SOR ¶ 1.a). He admitted the factual allegations in SOR ¶¶ 2.b and 2.c, with explanations. He denied the allegations in SOR ¶¶ 2.a, and 2.d through 2.g. His admissions to the SOR and at his hearing are incorporated herein as findings of fact. After a thorough review of the record evidence, including his testimony and demeanor while testifying, I make the following additional findings of fact:

Applicant is a 34-year-old employee of a federal contractor. He received his bachelor's degree in electrical and computer engineering in 2004. He married in 2012, and he has two sons, ages two and three months.

Applicant illegally used marijuana once in 1999-2000, while a freshman in college. He testified: "Yes. While a freshman, on occasion, my freshman year in college, I used marijuana for - - at a party, my freshman year in college." (Tr. 24) He started working for a large federal contractor in 2005, and submitted his first SCA in July 5, 2005, requesting a clearance required for his employment. Section 24 of the 2005 SCA asked Applicant to disclose whether in the last seven years he had used any illegal drugs, including marijuana. Applicant answered "no" and failed to disclose his use of marijuana while in college. Shortly thereafter, Applicant was granted a secret clearance. He possessed a secret clearance until 2011, when his clearance was revoked by another government agency (Agency).

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.

Applicant admitted that he failed to disclose he illegally used marijuana in 1999-2000 in his 2005 SCA. He claimed that he did not have the intent to falsify his 2005 SCA or to mislead the government. He was 23 years old when he submitted his 2005 SCA.

Applicant was unemployed during a period in 2011, and he illegally used marijuana in June 2011. (Tr. 25) At the time he illegally smoked marijuana in 2011, Applicant possessed a security clearance. (Tr. 42) One month later, Applicant submitted his July 2011 SCA requesting a top secret clearance from the Agency. Section 23 of the 2011 SCA asked Applicant to disclose whether in the last seven years he had used any illegal drugs, including marijuana. Applicant answered "no" and failed to disclose his June 2011 use of marijuana.

Applicant was interviewed by a government investigator in August 2011. During the interview, Applicant disclosed his college use of marijuana. He deliberately failed to disclose his use of marijuana in June 2011.

When asked why he falsified his 2011 SCA and why he made a false statement in August 2011 to a government investigator, Applicant responded that he was unemployed and in between jobs. He was concerned that if he disclosed his illegal use of marijuana he would not get the job offer. He knew that making a false statement was the wrong thing to do, but he was concerned about not getting the job offer. (Tr. 26) Applicant was interviewed by a government investigator in August and September 2011. During both interviews, Applicant failed to disclose his prior illegal marijuana use to the investigator and continued to make false statements. He made the false statements because he was concerned that if he told the truth, he would not get the job. (Tr. 26-28)

Applicant claimed he did not use any illegal drugs between 2000 and 2011. In July 2011, Applicant submitted an SCA to the Agency requesting an upgrade of his clearance to a top secret. He failed to disclose his June 2011 use of marijuana in his July 2011 SCA. After undergoing a polygraph assisted interview, Applicant disclosed his June 2011 use of marijuana and his clearance eligibility was revoked. Applicant appealed the revocation of his clearance to the Agency in March 2012.

While the appeal was pending, Applicant married (November 2012), and he and his wife went to Jamaica for their honeymoon. While in Jamaica, he purchased some souvenirs and claimed that, unbeknown to him, the vendor put a bag of marijuana in with his souvenirs. Applicant and his wife smoked one marijuana cigarette in November 2012. He claimed he threw away the remaining marijuana.

Applicant submitted his most recent SCA in February 2014. Section 23 of the 2014 SCA asked Applicant to disclose whether in the last seven years he had used any illegal drugs, including marijuana. Applicant answered "yes" and disclosed his use of marijuana in June 2011. Applicant stated in his 2014 SCA that the Agency denied him a top secret clearance as a result of the concerns raised by his June 2011 illegal use of marijuana. In March 2012, he appealed the clearance revocation and submitted a

statement of intent to never use illegal drugs again. He stated in his 2014 SCA: "I have not used any illegal drug or controlled substance since June 2011." Applicant falsified his February 2014 SCA and failed to disclose his November 2012 use of marijuana with his wife during their honeymoon in Jamaica. (GE 1) Applicant admitted his statements in his February 2014 SCA were not true, but claimed he did not intend to falsify his 2014 SCA. (Tr. 29-30, 49)

In May 2014, Applicant was interviewed by a government investigator. During the interview, he deliberately made three false statements. He told the investigator that he never had used any marijuana prior to June 2011, when in fact he had used marijuana in at least 1999-2000 while a freshman in college. He also told the investigator that he admitted his use of marijuana in June 2011 prior to his polygraph-assisted interview, when in fact he failed to disclose his June 2011 use of marijuana until after he was administered a polygraph. Additionally, he told the investigator that he had never used marijuana after June 2011, when in fact, he used marijuana in at least November 2012 with his wife during their honeymoon.

Applicant claimed that he has never been a consistent marijuana user. He considered his marijuana use as three isolated incidents. At his hearing, Applicant admitted that he deliberately falsified his SCAs and made false statements to investigators because he wanted to be hired or to keep his job. He feared that if he disclosed his prior illegal drug use, he would not be hired or allowed to retain his job.

Applicant admitted his mistakes. He understands that his falsifications of the SCAs and his false statements were wrong and showed poor judgment. He believes he has changed his behavior and his past marijuana-using behavior is no longer indicative of his character. Applicant believes that he has worked hard to finish college, start a career, and provide for his family.

Applicant was evaluated by a board certified psychiatrist in September 2015. Based on Applicant's statement about his illegal use of marijuana (taking two puffs in 1999; two puffs in 2011, and sharing a marijuana cigarette with his wife in 2012), the psychiatrist concluded that Applicant's marijuana use has been minimal and infrequent. He concluded that Applicant appears to be at minimal risk for any future substance abuse. (AE C) Applicant promised that he would never use illegal drugs again. He claimed he no longer associates with his marijuana-using friends.

Applicant does not believe he is a threat to national security. He believes he just made mistakes and bad decisions. Applicant also believes that he has matured and his main concern now is providing support for his family - to do the right things as a father, husband, and as a valued employee.

Applicant submitted two reference statements lauding his reliability, trustworthiness, professional qualifications, expertise, and work ethic. His references believe Applicant deserves a second chance – that he has learned from his past mistakes and is ready to move forward. They do not believe Applicant is a threat to

national security or would be involved in any illegal drug activity in the future. Additionally, Applicant submitted documents showing he is considered to be a valuable, productive employee. (AE G)

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 on at least three occasions between 1999 and 2012.

AG ¶ 25 describes three conditions related to drug involvement that could 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 . . . ; and
- (g) any illegal drug use after being granted a security clearance.

AG ¶ 26 provides two 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; and
- (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.

Applicant claimed that he only used marijuana on three occasions, and that his last marijuana use occurred in November 2012. It has been close to four years since Applicant's most recent use of marijuana. There is no evidence of any further drug

abuse. Applicant has been a productive member of society and has not been involved in any issues of concern since November 2012.

Applicant promised to never use any illegal drugs again. His assurance is grounded on his desire to care and provide for his family. I have given this statement less weight and reviewed Applicant's evidence cautiously, in light of his history of illegal marijuana possession and use. Applicant knew his marijuana-related criminal behavior would raise the Government's concerns because he falsified his 2005, 2011, and 2014 SCAs, and made false statements to investigators to cover his criminal behavior. Notwithstanding, Applicant continued his marijuana-related criminal conduct after he submitted his 2005 SCA, after he was granted a security clearance in 2005, and after his clearance was revoked by the Agency in 2011.

Applicant's drug involvement and numerous falsifications continue to cast doubt on his reliability, trustworthiness, and judgment. Considering the evidence as a whole, I find that his testimony about his changed lifestyle, marijuana abstinence, and promises to never use illegal drugs in the future, are not credible.

Guideline E, Personal Conduct

AG ¶ 15 articulates the security concern for personal conduct:

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 deliberately falsified his 2005, 2011, and 2014 SCAs and made three false statements to Government investigators to cover his history of marijuana-related criminal conduct between 1999 and 2012. His deliberate falsifications trigger 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 lists five conditions that could potentially 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; and
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant's evidence is insufficient to mitigate the Guideline E security concerns. Applicant has a history of repeated falsifications to cover his drug-related criminal misconduct. Applicant deliberately falsified his 2005 SCA to cover his criminal conduct. Notwithstanding, he continued his marijuana-related criminal conduct after he submitted his 2005 SCA, after he was granted a security clearance in 2005, and after his clearance was revoked in 2011 for falsifying his 2011 SCA. In 2012, Applicant again used marijuana and he later falsified his 2014 SCA and made false statements to Government investigators.

Applicant disclosed his marijuana-related criminal behavior in 1999-2000, 2011, and his 2005 and 2011 SCA falsifications after undergoing a polygraph-assisted interview in 2011. Notwithstanding, he again falsified his 2014 SCA and made false statements to investigators in 2014. Considering the evidence as a whole, Applicant has not reduced his vulnerability to exploitation, manipulation, and duress. Applicant has continued to display a lack of judgment and a propensity to lie.

Applicant failed to mitigate the Guideline E security concerns. He never made any attempts to correct his falsifications until confronted. For the above reasons, and those discussed under Guideline H, incorporated herein, I find that none of the personal conduct mitigation conditions apply.

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). I have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a 34-year-old employee of a federal contractor. His references lauded his reliability, trustworthiness, professional qualifications, expertise, and his work ethic.

Applicant illegally used marijuana between 1999 and 2012. He falsified his 2005, 2011, and 2014 SCAs and made three false statements to investigators to cover his history of marijuana-related criminal conduct. His propensity to make false statements make it difficult to believe his testimony in extenuation, mitigation, and rehabilitation.

Applicant continued his marijuana-related criminal conduct after he was granted a security clearance in 2005, and after his clearance was revoked in 2011. Applicant violated the trust placed in him by the Government. He never corrected his falsifications or disclosed his criminal behavior until he was confronted. His actions underline his possible inability or unwillingness to comply with the law, rules, and regulations.

On balance, Applicant's evidence is insufficient to mitigate the security concerns raised by his use and possession of marijuana while possessing a security clearance, and his numerous deliberate false statements.

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:

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| Paragraph 1, Guideline H: | AGAINST APPLICANT |
| Subparagraph 1.a: | Against Applicant |
| Paragraph 2, Guideline E: | AGAINST APPLICANT |
| Subparagraphs 2.a through 2.g: | 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