



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



In the matter of:)
)
) ISCR Case No. 15-01345
)
Applicant for Security Clearance)

Appearances

For Government: Nicole A. Smith, Department Counsel
For Applicant: *Pro se*

08/31/2016

Decision

CREAN, THOMAS M., Administrative Judge:

Based on a review of the case file and the pleadings, Applicant failed to mitigate drug involvement and personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on December 20, 2013, to obtain a security clearance required for a position with a defense contractor. (Item 3) After an interview conducted by a security investigator from the Office of Personnel Management (OPM) on January 29, 2014 (PSI), the Department of Defense (DOD) could not make the affirmative findings required to issue a security clearance. (Item 4) On October 30, 2015, DOD issued Applicant a Statement of Reasons (SOR) detailing security concerns for drug involvement (Guideline H) and personal conduct (Guideline E). 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 answered the SOR on December 4, 2015. He admitted the one allegation of drug use under Guideline H, but denied the one allegation of falsification of the e-QIP under Guideline E. Department Counsel sent Applicant interrogatory questions concerning his drug use. Applicant responded on October 9, 2015. (Item 4)¹ He elected to have the matter decided on the written record. (Item 2) Department Counsel submitted the Government's written case on January 21, 2016. Applicant received a complete file of relevant material (FORM) on February 10, 2016, and was provided the opportunity to file objections and to submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant did not file a response to the FORM. I was assigned the case on August 8, 2016.

Findings of Fact

I thoroughly reviewed the case file. I make the following findings of fact.

Applicant is 49 years old and a May 1985 high school graduate. He received his certificate as a journeyman pipefitter in May 2002. He worked as a unionized pipefitter at various jobs and locations from June 1997 until March 2011. In March 2011, he started working in mechanical maintenance for a DOD contractor. He married his first wife in July 1986 and divorced in February 1989. He married his present wife in July 1989. He has two adult children. (Item 3, e-QIP, dated December 20, 2013; Item 4, PSI, dated January 29, 2014)

The SOR alleges, and Applicant admits, that he used marijuana from approximately 1979 until April 2013. (SOR 1.a) The SOR alleges but Applicant denies that he deliberately failed to report his marijuana use in response to drug use questions on the e-QIP he submitted on December 20, 2013. (SOR 2.a)

Applicant answered "yes" to question 22 on the December 20, 2013 e-QIP concerning his police record. His response was based on an incident in June 1988 when he was confronted by a police officer in a parking lot for use and possession of marijuana. He received a ticket and paid a fine for illegal possession of marijuana. He was 19 years old at the time. He stated at the time that he had no intention to stop using marijuana. When questioned by the security investigator on January 29, 2014, he stated that he had not used marijuana or any illegal drug in the previous seven years. He reported that he first used marijuana at age 12, and used daily into his early twenties. In his teens, he grew marijuana for his personal use. When he was 22 or 23 years old, he curtailed his use of marijuana to approximately once a month. He stopped using marijuana at age 28 because of his increased religious feelings.

Applicant was asked again by the investigator if he had used marijuana in the last seven years. He stated this time that he had used marijuana by smoking a

¹ In the interrogatory, Applicant was requested to verify the accuracy of the PSI. He made some corrections to the information initially reported and added some additional details to some answers. He did not object to the use of the PSI.

marijuana cigarette he found in his car in 2007 or 2008. At the end of the interview, Applicant told the investigator that he forgot to mention that in April 2013 he went off camping by himself for personal and spiritual reasons and smoked marijuana. He stated this time that he has not used marijuana since April 2013. He does not consider himself addicted to marijuana, and he has never attended nor received counseling for illegal drug use. He does not associate with drug users. He now has no intention of using marijuana in the future. (Item 4, PSI, dated January 29, 2014 at 9-10)

In addition to his admissions of marijuana use to the OPM investigator, Applicant replied to an interrogatory on drug use. He reported first using marijuana in 1979 and last using marijuana in April 2013. His use of marijuana prior to 2000 was varied, and after 2000 rarely. He also reported using LSD from 1981 until 1986 six to eight times; cocaine in 1985 one or two times; and misusing prescription drugs from 1983 until 1985 five or six times. (Item 4, Response to Interrogatory, dated October 9, 2015)

Applicant did not list any arrests for illegal possession of marijuana on the December 2013 e-QIP except for the 1988 arrest for use and possession of marijuana. He failed to list his 2007 and 2013 use of marijuana in response to question 23 asking if he used illegal drugs in the last seven years. In his response to the SOR, Applicant stated he did not understand how he failed to accurately report his marijuana use. He admitted the use to the security investigator in the PSI. He stated that he takes pride in being honest. (Item 2, Response to SOR, dated December 3, 2015)

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. Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction. Drugs are defined as mood and behavior altering substances, including drugs, material, and other chemical compounds identified and listed in the Controlled Substances Act of 1970. Marijuana or cannabis is included in the Schedule 1 list. (AG ¶ 24)

Applicant admits using marijuana at various times from 1979 until April 2013. His early use was significant and his later use was sporadic. He admitted growing marijuana when he was in his teens. Applicant's possession, use, and cultivating of marijuana raises the following Drug Involvement Disqualifying Conditions under AG ¶ 25 (a) (any drug use); and (c) (illegal drug possession, including cultivation, processing manufacture, purchase, sale, or distribution; or possession of drug paraphernalia).

I considered the following Drug Involvement Mitigating Conditions under 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

(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.

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.

These mitigating conditions do not apply. Applicant used marijuana from his teens into his late twenties. His use initially was heavy and then tapered off in his late twenties. He had stopped his recurring use of marijuana until 2007/2008 when he used one time. In April 2013, he went off by himself and used marijuana. From his late twenties until at a minimum 2007, it appears that Applicant stopped using marijuana for periods of time. His last use of marijuana was in 2013, only about three years ago. While there was a long period of time that he did not use marijuana, he voluntarily and purposely went back to using marijuana in 2013. His statement of intent to not use marijuana in the future is undercut by his use of marijuana in April 2013. This shows that his use of marijuana can likely recur. Applicant has not been in a drug abuse treatment program or received counseling for drug abuse.

Applicant has a history of drug abuse. In addition to marijuana, he used other illegal drugs such as cocaine and LSD and misused prescription drugs. Applicant may have been substance abuse free for some years, but he did use marijuana in April 2013. Applicant's substance abuse history shows that he could easily slip back to substance abuse. Applicant has not met his burden to establish that he will not abuse illegal drugs in the future. It has only been three years since his last use of marijuana, so there has not been an appropriate period of abstinence and change of lifestyle and circumstance to establish that Applicant will not use illegal drugs in the future. Applicant has not mitigated security concerns for drug involvement.

Personal Conduct

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 and sensitive information. Of special interest is any failure to provide truthful and candid answers during the process to determine eligibility for access to classified information or any other failure to cooperate with this 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 or sensitive information. Authorization for a security clearance 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 or sensitive information is in the best interest of the United States Government.

Applicant failed to list his 2007 and April 2013 use of marijuana on the December 2013 e-QIP in response to question 23 asking if he used illegal drugs in the last seven years. In his response to the SOR, Applicant stated he did not understand how he failed to accurately report his marijuana use. He admitted his 2007 use of marijuana to the security investigator in the PSI only after repeated questioning by the investigator. He mentioned his use of marijuana in April 2013 only as an after-thought at the conclusion of the interview. He was surprised he did not mention the 2007 or April 2013 use of marijuana because he takes pride in being honest. (Item 2, Response to SOR, dated December 3, 2015)

Applicant's failure to list his 2007 and April 2013 marijuana use raises a security concern under Personal Conduct Disqualifying Condition AG ¶ 16(a) (the 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 eligibility or trustworthiness, or award fiduciary responsibilities).

Applicant denied intentionally falsifying the drug use part of the e-QIP. He did not understand why he did not include the information on the e-QIP. While there is a security concern for a deliberate 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 knew about but did not report on his e-QIP his use of marijuana in 2007 and April 2013. Twice in the interview with the OPM security investigator, Applicant stated he had no additional drug use information to report. He revealed the 2007 use only after prodding by the investigator. At the end of the interview, he reported that he remembered using marijuana in April 2013. This use was about eight months before he completed the e-QIP and less than a year before the interview. He remembered to report marijuana use 25 years before completing the e-QIP, but not the usage that occurred six years and the usage that occurred eight months before completing the e-QIP. He finally reported the 2007 usage after prodding and the April 2013 usage as an afterthought. There are strong indications that he knew about the 2007 and April 2013 usages but deliberately failed to disclose them in response to a question on the e-QIP. I find against Applicant as to deliberate omission of important information on the e-QIP.

I considered the following mitigating conditions under AG ¶ 17:

(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 by 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; and

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstance that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

These mitigating conditions do not apply. Failure to provide full and complete information in response to questions on a security clearance application is not a minor offense. This failure to provide accurate information was recent and not isolated since it involved two separate incidents of marijuana use. Applicant was not confused about the requirement to provide accurate information. Applicant only provided correct information in response to prodding by the investigator and as an after-thought at the end of the interview. Applicant's actions in providing incomplete or inaccurate information could recur.

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. Applicant admitted using marijuana from 1979 to 2013. He reported using marijuana in 2007 and again in 2013. While he stated that he had no intention of using marijuana in the future, his last use in April 2013 was while he went off camping on his own to think and meditate. His use under these

circumstances shows that his use of marijuana can recur. In addition, he did not completely and accurately report his use of marijuana until prodded by the investigator and as an after-thought. Overall, these facts leave me with questions and doubts about Applicant's judgment, reliability, trustworthiness, and eligibility and suitability for access to classified information. For all these reasons, I conclude that Applicant has not mitigated drug involvement and personal conduct security concerns. Eligibility for access to classified information is denied.

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
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	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.

THOMAS M. CREAN
Administrative Judge