



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



In the matter of:

ISCR Case No. 15-01791

Applicant for Security Clearance

Appearances

For Government: Nicole A. Smith, Department Counsel

For Applicant: *Pro se*

08/10/2016

Decision

CREAN, THOMAS M., Administrative Judge:

Based on a review of 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 May 7, 2014, to obtain a security clearance required for a position with a defense contractor. (Item 3) After an investigation conducted by the Office of Personnel Management (OPM) on July 15, 2014 (PSI), the Department of Defense (DOD) could not make the affirmative findings required to issue a security clearance. (Item 4) On December 13, 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 18, 2015. He admitted the one allegation of drug use under Guideline H, but denied the one allegation of drug use while holding a security clearance under Guideline E. Department Counsel sent Applicant interrogatory questions concerning his drug use. Applicant responded on September 11, 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 February 2, 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 filed a timely response on March 9, 2016. I was assigned the case on June 9, 2016.

Findings of Fact

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

Applicant is 36 years old. He received a bachelor's degree in May 2002 and a master's degree in May 2009. He married in May 2008 and has two children at home. He was employed as a management business consultant by a Government contractor from September 2009 until May 2014. He had been granted eligibility for access to classified information as required by his work on some classified matters. At the time, he submitted his e-QIP, Applicant had been selected by a different defense contractor as a business architect consultant. The defense contractor is his sponsor for a renewed security clearance. It appears that Applicant has been employed in this position since submitting his e-QIP in May 2014. (Item 3, e-QIP, dated May 7, 2014; Item 4, Personal Subject Interview, dated July 15, 2014)

The SOR alleges, and Applicant admits, that he used marijuana on two occasions in May 2013 (SOR 1.a). Applicant noted the May 2013 marijuana use in response to drug use questions on the May 2014 e-QIP. He also admitted the May 2013 marijuana use in response to drug use interrogatory questions. (Item 4) Applicant denied that he held a security clearance when he used marijuana in May 2013. (SOR 2.a)

Applicant informed the OPM security investigator in the PSI that he used marijuana about 25 times between 1995 and 2005.² He also admitted that he again used marijuana twice in May 2013. He knew at the time that use of marijuana was illegal and against Government policy. He used marijuana at this time because he felt like he wanted to use marijuana. He informed the investigator that he does not intend to use marijuana again. When he used marijuana, he got light headed with no other side effects. In addition to his admissions to the OPM investigator, Applicant's replied to an interrogatory on drug use that he used cocaine three times from July 2002 until January 2003, and mushrooms five times from January 1996 until January 2003.

¹ In the interrogatory, Applicant was requested to verify the accuracy of the PSI. He made some minor corrections. He did not object to the use of the PSI.

² In his response to the FORM, Applicant amended the date of use of marijuana from 2005 to 2003.

In his reply to the SOR, Applicant stated that his two-time use of marijuana in May 2013 was within a short period of two weeks. He used the marijuana with his brother on one occasion and with a friend on the other occasion. He did not seek out the marijuana, but it was offered to him. He used the marijuana in a safe environment and not while driving a car or in public. He called his use of marijuana in May 2013 a lapse in judgment. This experimental use reinforced in him that drugs have no place in his or his family's life. He says he is capable of discontinuing his use of marijuana and never thinks of it again. He claims to now have surrounded himself in a Christian environment so he no longer associates with people who use illegal drugs. He knows others that use marijuana but he can discontinue his use no matter how frequently he is exposed to the drug. However, since he knows many people that used marijuana or illegal drugs, he does not feel the need to disassociate himself from those people solely because they use drugs. (Response to SOR, dated December 18, 2015; Item 6, Response to FORM, dated March 9, 2016)

Applicant denied in his response to the SOR that when he used marijuana in May 2013 he had an active DOD Industrial Security Clearance. The Joint Personnel Adjudication System (JPAS) reveals that Applicant had an active security clearance in May 2013. Applicant was informed verbally and in an e-mail exchange between Applicant and his company's security officer in May 2014 that his clearance was terminated in February 2013 because he no longer needed a clearance for his job. (Item 2, Answer to SOR, dated December 18, 2015) In his response to the FORM, Applicant again emphasized that to the best of his knowledge, he did not have a security clearance in May 2013, when he used marijuana. He pointed out that he left a job in early 2011 that required him to have a security clearance. He believed his security clearance went inactive at that time. In May 2013, when he used marijuana, he did not think about having a security clearance. His use of the drug was with his brother and a friend in a safe place with no risk or harm to anyone. His intent was not malicious or deliberate to disobey authority. (Item 5, JPAS Entry, dated February 1, 2016; Item 6, Response to FORM, dated March 9, 2016)

Applicant also noted that he started consuming alcohol in approximately 1994 when he was 15 or 16 years old. He would consume ten beers a week until he was 25-years-old (2004), and since then he consumes two or three alcoholic beverages per week. He reported that he has been intoxicated about 100 times since 1995 after reaching the age of 15 or 16. He also reported that he was arrested and convicted of driving while intoxicated in 2009. In addition to having to pay a fine, Applicant was required to receive alcohol counseling. He completed the counseling in 2010. (Item 4, Response to Interrogatory, dated September 11, 2015, PSI, dated July 15, 2014)

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 twice in May 2013. He also admits using marijuana approximately 25 times from 1995 until 2003. He denied using marijuana after being granted a security clearance. Applicant's use of marijuana raises the following Drug Involvement Disqualifying Condition under AG ¶ 25 (a) (any drug use) While it may be unclear whether Applicant was still holding a security clearance when he used marijuana in May 2013, the information is sufficient to raise disqualifying condition AG¶ 25 (g) (any illegal drug use after being granted a security clearance).

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;

(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); and

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirement, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

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 in his teens and early 20s. It appears that he stopped using marijuana for about ten years from 2003 until 2013. But, he purposely used marijuana in 2013, only about three years ago. There was a long period of time that he did not use marijuana but he recently voluntarily and purposely went back to using marijuana. His statement of intent to not use marijuana in the future is not strong and firm. His use of marijuana in the past was with his brother and friends. His use of marijuana in May 2013 was with his brother and a friend so it is can likely recur. Applicant has not been in a drug abuse treatment program or received counseling for drug abuse. He did receive alcohol counseling after his arrest for driving while intoxicated.

Applicant has a long history of substance abuse. He consumed alcohol at an early age, was intoxicated over 100 times, and arrested for driving while under the influence of alcohol. In addition to using marijuana in his teens and early 20s, he used other illegal substances. Applicant may have been substance abuse free for ten years, but he did abuse marijuana in May 2013. He knew it was illegal and against Government policy but he used the illegal drug anyway. 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. 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. 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. (AG ¶ 15)

Applicant used marijuana in May 2013 while holding a security clearance. Even though Applicant did not believe that he had an active valid security clearance in May 2013, the JPAS entry establishes that he did have a valid security clearance at the time. The circumstances of this use raises Personal Conduct Disqualifying Condition AG ¶ 16 (c) (credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, or other characteristics indicating that the person may not properly safeguard protected information).

I considered Personnel Conduct Mitigating Conditions under 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). As noted above, the circumstances of Applicant's May 2013 marijuana use can likely happen again. He can be offered marijuana by his brother or a friend. In May 2013, he had eligibility for access to classified information. He did not know at the time that his eligibility for access to classified information had possibly been terminated. He did not learn of the termination until a year later in May 2014. He knew he was eligible for access to classified information in the immediate past, and he did not think about his security circumstance status when offered marijuana. He just took and used the marijuana without thinking of the circumstances and ramifications. Applicant has not mitigated personal conduct security concerns for his use of marijuana while holding a security clearance.

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 1995 until 2003. He again used marijuana twice in 2013. He had eligibility for access to classified information at the time. 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