



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



In the matter of:

ISCR Case No. 15-02712

Applicant for Security Clearance

Appearances

For Government: Mary M. Foreman, Esq., Department Counsel

For Applicant: Eric A. Eisen, Esq.

04/20/2017

Decision

CREAN, THOMAS M., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, I find that 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) in April 2010 to obtain a security clearance required for his duties with a defense contractor. Applicant received interim eligibility for access to classified information. Applicant applied to upgrade his eligibility for access to classified information in November 2011. On September 23, 2015, The Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns for drug involvement (Guideline H) and personal conduct for falsifying material facts on the two e-QIPs. (Guideline E). These actions were 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 initially answered the SOR on October 19, 2015. He admitted the allegation of marijuana use, but denied the allegation of falsifying material facts on the e-QIPs. On September 23, 2016, DOD amended SOR allegation 1.a, to add the words "after being granted a DoD industrial security clearance on August 19, 2010." On October 16, 2016, Applicant admitted SOR allegation 1.a as amended. Department Counsel was prepared to proceed on August 3, 2016, and the case was assigned to me on October 19, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on February 13, 2017, scheduling a hearing for March 13, 2017. I convened the hearing as scheduled. The Government offered three exhibits, which I marked and admitted into the record without objection as Government Exhibits (GX) 1 through 3. Applicant testified, and offered six exhibits which I marked and admitted into the record without objection as Applicant Exhibits (AX) A through F. DOHA received the transcript of the hearing (Tr.) on March 21, 2017.

Findings of Fact

Applicant's admissions are included in my findings of fact. After a thorough review of the pleadings, transcript, and exhibits, I make the following additional findings of fact. Applicant is 40 years old, and graduated from college in 1999 with a bachelor's degree in computer information systems. In high school and college, Applicant was active as a singer in school and church musical programs. After graduation from college, he moved close to his family and remained active in professional musical programs. He worked in various information technology positions including working overseas for the defense contractor who is his present employer. He submitted a security clearance application (SCA) in 2010, and received eligibility for access to classified information. However, he did not access any classified information while in these positions. He is not married, but lives with his fiancé. He never served on active duty in the military. (Tr. 16-28; Gov. Ex. 1, e-QIP, dated November 29, 2011; GX 2, e-QIP, dated April 9, 2010)

The SOR alleges, and Applicant admits, that he used marijuana in June 2011 after being granted eligibility for access to classified information (SOR 1.a). The SOR also alleges that Applicant provided false information on his November 29, 2011 e-QIP in response to question 23 asking about illegal drug activity by providing the date of 01/2007 for his most recent use rather than June 2011 (SOR 2.a). Applicant denied this allegation. He also denied providing false information on his April 9, 2010 e-QIP by responding "no" to question 23 asking in the last seven years had he used an illegal drug. He used marijuana on occasion from October 2000 to January 2007 (SOR 2.b).

Applicant did not drink alcohol or use illegal drugs in high school or college. He first used marijuana with friends in 2000 when he was 23 years old. He used marijuana about once a year with friends for the next few years. He stopped using marijuana in 2007. When completing his SCA in 2010, Applicant did not think about his prior use of

marijuana. He stated that he did not intentionally omit reference to his prior marijuana use on his 2010 SCA. (Tr. 28-33, 35-36)

In 2011, Applicant took a difficult professional licensing examination while stationed overseas for his contractor employer. When he passed the examination, he took a trip to England as a reward. On his way back to his duty station, he stopped in Amsterdam for a few days. He used marijuana, which was legal in the Netherlands, one time. He did not think at the time about his eligibility for access to classified information. (Tr. 33-34, 36-37)

Applicant completed his second SCA in November 2011. He checked his first SCA and was surprised by his "no" response to the use of illegal drugs question. He corrected his previous answer by noting his use of marijuana five or six times from 2000 to 2007 on the November 2011 SCA. However, he did not note his use of marijuana in Amsterdam in 2011 because he believed his use at the time was in a place where marijuana use was legal and the question referred to illegal use. He later discussed using marijuana in Amsterdam with a security investigator during his personal subject interview. (Tr. 38-39)

Applicant acknowledged that he used marijuana after college about once a year from 2000 to 2007. In 2011, he used marijuana in Amsterdam. At the time, he was working for a defense contractor, held a security clearance, and believed use of marijuana in Amsterdam to be legal but understood it was not legal in the United States. He did not know why he did not note the 2000 to 2007 marijuana use on his April 2010 SCA. He now knows he should have reported his previous use. In completing his second SCA, he realized his previous answers concerning use of marijuana were improper, so he wanted to correct his error. He disclosed his prior use. He did not disclose his use five months earlier in Amsterdam. He believed his use in Amsterdam to be legal. (Tr. 39-47; AX E, Section 23, e-QIP, November 29, 2011)

Applicant provided a Statement of Intent not to use illegal drugs in the future. He also agreed to automatic revocation of his security clearance for any violation of use of illegal drugs. (AX F, Statement, dated March 11, 2017)

Applicant also provided letters of recommendation. A former work associate stated that she has known Applicant for over 15 years. She has a high trust in him because he is dependable, faithful, unfailing, and a person she can go to with problems and issues. After Applicant deployed overseas, she confided in him about her own problems. Applicant assisted her to resolve her problems. (AX A, Letter, dated January 12, 2017)

A friend of Applicant for over 20 years wrote that Applicant is careful, cautious, safety conscious, and has excellent judgment. He has no doubt that Applicant can be trusted to do his duty and exercise discretion. (AX B, Letter, dated February 20, 2017)

A long-term friend of Applicant, who is an assistant district attorney, wrote that Applicant is intelligent, outgoing, engaging, honest, and trustworthy. Applicant is a competent, trustworthy, and diligent worker. He follows all rules and always tries to do his best job. The friend has no hesitation to give Applicant highest recommendation. (AX C, Letter, dated January 16, 2017).

A church pastor has known Applicant as a member of his church for over seven years. He has worked closely with Applicant in providing youth ministries. He spent time with Applicant socially and never saw him drink alcohol to excess or use illegal drugs. (AX D, Letter, undated)

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

Drug Involvement

The 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 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 drug 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 admitted using marijuana five or six times from 2000 to 2007. He admitted using marijuana in June 2011 after receiving a security clearance. These facts raise the following Drug Involvement Disqualifying Conditions under AG ¶ 25:

- (a) any drug use; and
- (g) any illegal drug use after being granted a security clearance.

26: I considered the following Drug Involvement Mitigating Conditions under AG ¶

- (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 apply only in part. Applicant admits to using marijuana five or six times from 2000 to 2007, and again once in 2011. There is no reported use of marijuana since June 2011. While Applicant used marijuana over ten years ago, he voluntarily used marijuana one time only six years ago. His voluntary use in 2011 negates a finding that his use is so infrequent or happens under unusual circumstances that it is unlikely to happen again. His use in 2011 shows that it may happen again. His voluntary use of marijuana in 2011 undercuts his stated intent not to use marijuana in the future. His last use of marijuana was only six years ago under circumstances that can likely recur. Under these circumstances, there has not been an appropriate period of abstinence. Applicant has not established circumstances that could indicate a change in lifestyle and circumstance. Applicant failed to mitigate 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.

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 done knowingly and willfully with intent to deceive.

The SOR alleges that Applicant did not provide full, complete, and accurate information concerning his drug use in responses to drug use questions on two SCAs. On his April 2010 SCA, he did not list his use of marijuana from 2000 to 2007. He did not know why he failed to report this use of marijuana on the SCA. He listed the 2000 to 2007 marijuana use on his November 2011 SCA. However, he failed to note his use of marijuana only five months earlier while being eligible for access to classified information. His reason for not listing this marijuana use was that marijuana use was not illegal in the city where he used the drug.

There is evidence indicating Applicant may not have provided full, complete, and accurate information to the security investigators. Applicant's failure to list his marijuana use on both SCAs raises a security concern under Personal Conduct Disqualifying Condition 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 eligibility or trustworthiness, or award fiduciary responsibilities).

Applicant denied that he intentionally did not provide full, complete, and accurate information to security investigators. Applicant did not know why he did not provide accurate information on his first SCA. He did not provide the marijuana use information in Amsterdam on the second application because his use was in a place where marijuana use was legal. Applicant knew of his use from 2000 to 2007 and had no reasonable explanation why he did not list this use of marijuana. Applicant's explanation why he did not note his use of marijuana five months earlier on his second SCA is not reasonable under the circumstances. Applicant's failures to list his marijuana use were deliberate and not the result of a misunderstanding of why the government was concerned about use of illegal substances. I find Applicant deliberately failed to provide correct and accurate information on drug use on his SCAs, and conclude that Applicant did not mitigate the personal conduct security concern.

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 that the letters of recommendation from Applicant's friends and co-workers and Applicant's letter of intent not to use illegal drugs in the future. The allegations under Guidelines E and H, as established by the government's evidence, reflect a lack of judgment by Applicant. The

evidence shows a recent use of marijuana while having eligibility for access to classified information and two separate failures to disclose marijuana use. Applicant's explanation for failing to disclose marijuana use and marijuana use while holding a security clearance is that he just did not think about his use marijuana under the circumstances. Applicant's actions show a lack of good judgment. He showed a lack of judgment when he did not list his prior use of marijuana on his first SCA and could not provide an explanation or reason for his failure. He showed a lack of judgment when he used marijuana in Amsterdam without thinking about the fact he had eligibility for access to classified information. He knew that while marijuana use was legal in Amsterdam, it was not legal under federal law or while holding a security clearance. He again showed a lack of judgment when he executed his second e-QIP and did not note his marijuana use in Amsterdam only five month earlier. Applicant's statement of intent not to use marijuana in the future has little impact because of his recent voluntary use.

Applicant admitted using marijuana five or six times from 2000 to 2007, and voluntarily one time in 2011. Applicant has not established that he did not deliberately provide false information concerning his drug use on two SCAs. These facts leave me with questions and doubts about Applicant's judgment and his 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
Subparagraphs 2.a - b:	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