



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



In the matter of:

Applicant for Security Clearance

)
)
)
)
)

ISCR Case No. 15-04192

Appearances

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

08/09/2016

Decision

DAM, Shari, Administrative Judge:

In 2014 Applicant was discharged from military service for illegally using marijuana. He failed to disclose that information in his security clearance application. He did not mitigate the security concerns raised under the guideline for personal conduct. Eligibility for access to classified information is denied.

Statement of the Case

On July 9, 2014, Applicant submitted a security clearance application (SF 86) for re-investigation. On January 19, 2016, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline E, Personal Conduct. 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 Clearance Review Program* (January 2, 1992), as amended (Directive); and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* effective within the DOD on September 1, 2006.

On February 15, 2016, Applicant responded to the SOR (Response), and requested a hearing. On April 4, 2016, the Defense Office of Hearings and Appeals (DOHA) assigned Applicant's case to me. On April 18, 2016, DOHA issued a hearing notice, setting the hearing for May 11, 2016. The hearing was held as scheduled. At the hearing, Department Counsel offered Exhibits (GE) 1 through 5 into evidence without objection. Applicant did not offer any exhibits. On May 23, 2016, DOHA received the transcript of the hearing (Tr.).

Findings of Fact

In his Response, Applicant admitted the allegations contained in the SOR. His admissions are accepted as factual findings.

Applicant is a 32 years old and single. He has an eight-year-old son from a previous relationship. He has full custody of his child. He received a bachelor's degree in 2015 and is a Ph.D. candidate. He has been a full-time student since 2015. He has worked part-time for a security company since 2006. That company is sponsoring his clearance. He also works part-time as a tutor at the college he attends. (Tr. 12-14, 17-19; GE 1.)

In October 2003 Applicant enlisted in the Army National Guard (Guard). He served two combat tours in the Middle East, one during 2005 and 2006, and one during 2011 and 2012. (Tr. 15.) While serving he received a campaign medal, Army Commendation Medals, and Combat Action Badges. (Tr. 15-20.)

In November 2013 Applicant got together with some friends. During the course of the evening he used marijuana with them. He said that was the first time he tried it. In December 2013 he took a random drug urinalysis for the Guard. In early 2014 his drill sergeant informed him that he tested positive for marijuana. In May 2014 he was discharged from the Guard with a general discharge for testing positive for marijuana. (GE 2.) He was a staff sergeant (E-6) at the time of his discharge. (Tr. 16.) He held a security clearance from the time he enlisted in 2003 until he was discharged in 2014. He was aware that the Guard had a policy that does not tolerate illegal drug use. (Tr. 21.)

Applicant has not used marijuana since the above incident in November 2013. (Tr. 35.) He no longer associates with those friends. (Tr. 39.)

When Applicant completed the 2014 SF 86, he did not disclose that he illegally used marijuana in November 2013. During an investigative interview in September 2014, he discussed his illegal use, and was not forthcoming about his non-disclosure of the information. (GE 2.) While testifying, he admitted that he intentionally did not disclose the incident because he did not want to lose his National Guard employment and job. (Tr. 42.)

Applicant's employer and supervisor learned of his marijuana use in January 2014 (Tr. 29.) Applicant did not tell his supervisor about this hearing or that he failed to disclose the information in his SF 86. (Tr. 36. 45.)

Applicant acknowledged that he made serious mistakes by using marijuana, and by subsequently failing to disclose it or to fully inform his supervisor about his conduct. He said he was embarrassed about his conduct and took full responsibility for his actions. He intends to tell his supervisor about his non-disclosure. (Tr. 45.) He fully appreciates the importance of honesty and exhibited visible remorse over his wrongful conduct.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list potentially disqualifying 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 AG ¶ 2(a), describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense 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.

According to Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to 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.

AG ¶ 16 describes three conditions that could raise a security concern and may be disqualifying:

(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;

(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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group; and

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment.

In May 2014 Applicant was discharged from the Guard after he tested positive for illegal use of marijuana, which conduct he knew was in violation of the Guard's drug policy. The evidence establishes a security concern under AG ¶ 16(f). He intentionally failed to disclose said conduct in his 2014 SF 86, which raises a security concern under AG ¶ 16(a). His illegal use of marijuana and subsequent concealment of information about it created a vulnerability to duress, because it is the type of conduct which, if known, may affect his personal or professional standing. His subsequent attempts to conceal this activity from the Government and his employer confirm that he perceived this vulnerability. The evidence supports the application of AG ¶ 16(e)(1).

AG ¶ 17 includes five conditions that could mitigate security concerns arising under this guideline:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (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;
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and
- (g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant did not make a prompt or good-faith effort to correct the misrepresentation he made in his 2014 SF 86, prior to or during an investigative interview. AG ¶ 17(a) does not provide mitigation. Failing to intentionally disclose information in a security clearance application is not a minor offense. AG ¶ 17(c) does not provide mitigation for the SOR allegations. Applicant ultimately acknowledged his misconduct, demonstrating a willingness to take responsibility for his behavior, and providing some mitigation under AG ¶ 17(d). Because he has not told his supervisor that he failed to truthfully disclose his illegal marijuana use in his SF 86, AG ¶ 17(e) does not provide mitigation. He said he has not used marijuana since November 2013 and no longer associates with the people with whom he used it. AG ¶ 17(g) provides some mitigation.

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.

Applicant is a 32-year-old man who successfully served this country for 10 years, including two combat tours. He is intelligent, educated, and a single father. In November 2013 he made a serious mistake when he chose to use marijuana with friends. That mistake resulted in his discharge from the Guard. Subsequently, he decided not to disclose the information in his SF 86. After listening to him testify and observing his demeanor, I find him credibly remorseful and readily accountable for his misconduct. He is maturing and learning the importance of forthrightness, regardless of his fear of consequences or embarrassment over his behaviors. However, at this time he has not provided sufficient evidence of rehabilitation to reinstate his security clearance. Overall, the record evidence leaves me with concerns as to Applicant's present eligibility and suitability for a security clearance. He did not meet his burden to mitigate the security concerns arising from his personal conduct.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Personal Conduct AGAINST APPLICANT

Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	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.

Shari Dam
Administrative Judge