



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



In the matter of:

ISCR Case No. 18-00169

Applicant for Security Clearance

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: Ryan C. Nerney, Esq., The Edmunds Law Firm

October 5, 2018

Decision

Lokey Anderson, Darlene D., Administrative Judge:

On June 6, 2010, and June 22, 2015, Applicant submitted security clearance applications (e-QIP's). (Government Exhibits 1 and 2.) On March 12, 2018, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline H, Drug Involvement and Substance Misuse, and Guideline E, Personal Conduct. The action was taken under Executive Order (EO) 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 (AG) effective within the DoD after June 8, 2017.

Applicant answered the SOR on April 11, 2018, and requested a hearing before an administrative judge. The case was assigned to me on July 24, 2018. The Defense Office of Hearings and Appeals issued a notice of hearing on July 30, 2018, and the hearing was convened as scheduled on September 14, 2018. The Government offered six exhibits, referred to as Government Exhibits 1 through 6, which were admitted without objection. The Applicant offered nineteen exhibits, referred to as Applicant's

Exhibits A through S, which were admitted without objection. He also called two witnesses and testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on September 24, 2018.

Findings of Fact

Applicant is 39 years old, is divorced a second time, and has three children. He is currently finishing up a Bachelor's degree. He is employed by a defense contractor as an Integrative Platform Manager. He is seeking to obtain a security clearance in connection with his employment. Applicant began working for his current employer in May 2018.

Guideline H - Drug Involvement and Substance Misuse

The Government alleges that the Applicant has used controlled substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose, which can raise questions about an individual's reliability and trustworthiness.

Applicant served on active duty in the United States Navy from 1998 to 2008. He received an honorable discharge from the Navy in January 2008, and retired as an E-5. (Applicant's Exhibit C.) During his military career he received a number of awards and commendation including the National Service Medal, Global War on Terrorism Service Medal, Good Conduct Medals (2), the Armed Forces Expeditionary Medal and others. He entered the Navy on a delayed entry program, and during a urinalysis, he tested positive for cocaine. He explained that when he was called to the MEF to start processing to join the military, in addition to giving blood, getting shots and immunizations, he was given a urinalysis. At that time, Applicant tested positive for cocaine. Ultimately, he was given a waiver for this misconduct, and allowed to join the Navy. Applicant obtained a security clearance in 2007 while the military.

After retiring from the Navy, Applicant went to work for a number of defense contractors assigned overseas, as a civilian. Applicant testified that he spent almost a total of five years deployed overseas during which time he worked for five different defense contractors. While overseas, from February 2010 to May 2010, on a weekly basis, Applicant used hashish, while holding a security clearance. He testified that he purchased the hashish from a local bazaar in the area. Applicant explained that he used the hashish to help him deal with stress. At the time, Applicant was having problems with his ex-wife, child custody issues, transitioning out of the military and immediately going overseas for a civilian job, as well as the hostile environment he encountered on the job. (Tr. p. 76.) He was also dealing with an ill sister.

Applicant further testified that while working overseas for the defense contractors, he was assigned to work on a Federal Installation. He was aware of "General Order Number One" which prohibits alcohol use, sex, and any illegal drug use on base which applies to everyone on a Federal installation. (Tr. p. 77.)

In September 2010, the U.S. military accused the Applicant of wrongful possession of hashish with the intent to distribute, wrongful distribution of opiates, wrongful distribution of dangerous drugs, wrongful possession of hashish and wrongful use of hashish. Applicant stated that one of the defense contractors did not like the fact that Applicant, or anyone else for that matter, would use hashish and called for an investigation. Applicant stated that he left the area to come back to the United States about two days after the investigation started. He was given a one year bar order from the Commander and told to go home and take care of his family. (Tr. p. 80.)

Applicant states that he last used hashish in Afghanistan in May 2010. He states that he purchased it for \$5, and never sold it or intended to sell hashish to anyone while overseas. He purchased it for himself to use only. He states that he has no future intent to use illegal drugs of any sort. He signed a letter of intent indicating that if he uses any illegal drug he consents to the automatic revocation of his security clearance. (Applicant's Exhibit D.) He does not associate with anyone who uses illegal drugs. He believes he has matured since the incident, and learned a tough lesson from his misconduct. (Tr. pp. 85-86.)

Applicant provided a copy of his offer of employment from his current employer. (Applicant's Exhibit K.) He submitted a Substance Use Assessment Report dated April 6, 2018, and the results of a drug test on April 5, 2018, both of which indicated that there were no substance use concerns observed at that time. (Applicant's Exhibits F and J.) Applicant states that his security officer is aware of his situation, and a security clearance is a condition of employment.

Guideline E – Personal Conduct

Applicant completed an Electronic Questionnaire for Investigations Processing (e-OIP) dated June 6, 2010. (Government Exhibit 2.) Section 23 concerning illegal drug use, Applicant was asked if "in the past seven years, has he illegally used any drugs or controlled substance, for example, cocaine, crack cocaine, THC (marijuana, hashish, ect.) narcotics (opium, morphine, codeine, heroin, ect.), stimulants (amphetamines, speed, crystal methamphetamine, ecstasy, ketamine, etc.), depressants (barbituates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), steroids, inhalants (toluene, amyl nitrate, etc.) or prescription drugs?" The Applicant answered, "NO". This was a false response. Applicant deliberately failed to disclose his use of hashish weekly from February 2010 to May 2010.

Applicant completed an Electronic Questionnaire for Investigations Processing (e-OIP) dated June 6, 2010. (Government Exhibit 2.) In Section 23 concerning his illegal drug use, Applicant was asked if "he has ever illegally used a controlled substance while possessing a security clearance; while employed as a law enforcement officer, prosecutor, or courtroom official; or while in a position directly and immediately affecting the public safety?" The Applicant answered, "NO". This was a false response. Applicant deliberately failed to disclose his use of hashish weekly from February 2010 to May 2010.

Applicant completed an Electronic Questionnaire for Investigations Processing (e-OIP) dated June 6, 2010. (Government Exhibit 2.) In response to Section 23 concerning his illegal drug use, Applicant was asked if "in the past seven years, have you been involved in the illegal possession, purchase, manufacture, trafficking, production, transfer, shipping, receiving, handling, or sale of any controlled substance including prescription drugs?" The Applicant answered, "NO". This was a false response. Applicant deliberately failed to disclose his purchase of hashish weekly in February 2010.

In July 2010 and again in August 2012, Applicant was interviewed by DoD investigators and on both occasions he deliberately failed to disclose that he used hashish weekly from February 2010 to May 2010; that he used hashish after being granted a security clearance in April 2007, and that he purchased hashish in February 2010.

Applicant completed an Electronic Questionnaire for Investigations Processing (e-OIP) dated June 22, 2010. (Government Exhibit 1.) In Section 23 concerning his illegal drug use, Applicant was asked if "in the past seven years, have you illegally used any drugs or controlled substances?" The Applicant answered, "NO". This was a false response. Applicant deliberately failed to disclose his use of hashish weekly from February 2010 to May 2010.

Applicant completed an Electronic Questionnaire for Investigations Processing (e-OIP) dated June 22, 2015. (Government Exhibit 1.) In Section 23 concerning his illegal drug use, Applicant was asked if "in the past seven years, have you been involved in the illegal purchase, manufacture, cultivation, trafficking, production, transfer, shipping, receiving, handling, or sale of any drug or controlled substance?" The Applicant answered "NO". This was a false response. Applicant deliberately failed to disclose his use of hashish weekly in February 2010.

Applicant completed an Electronic Questionnaire for Investigations Processing (e-OIP) dated June 22, 2010. (Government Exhibit 1.) In Section 23 concerning his illegal drug use, Applicant was asked, if he has ever illegally used or otherwise been involved with a drug or controlled substance while possessing a security clearance other than previously listed?" The Applicant answered, "NO". This was a false response. Applicant deliberately failed to disclose that he used hashish after being granted a security clearance in April 2007.

In his answer to the SOR, Applicant admits the above mentioned allegations set forth under this guideline. He realizes that he had four different opportunities on his security clearance applications to disclose his use of hashish to the Government. He also had about four different interviews with a DoD investigators where he should have disclosed his hashish use, and did not. This is a total of eight opportunities to disclose his hashish use and did not do so. He explained that he continued to lie because he knew he had lied in 2010, and just wanted to bury the situation. He felt he had to stick to his story. He was afraid of losing his job and his security clearance. (Tr. pp. 89-90.) Applicant was granted a Top Secret security clearance based upon this erroneous

information. In 2015, Applicant was up for a periodic review of his security clearance. Again, he did not disclose his use of hashish and decided to lie again on the application. (Tr. p. 92.) It was not until June 2016, when Applicant met with a DoD investigator that he disclosed his hashish use. After six years of telling the lies, he states that he knew it was not the right thing to continue to do.

Applicant gives great credence to a program he entered that has helped him deal with his decision making and honesty. In November 2015, Applicant participated in a program to become a Life Coach and his morals and values and ethical standpoint changed. He wanted to be honest about everything. He has now obtained his Life Coach Certificate and Master Life Coach Certificate and is active in the program. (Applicant's Exhibit E.)

Letters of recommendation submitted on Applicant's behalf from his professional colleagues, friends, and ex-wife, attest to his strong work ethic, maturity, his ability to properly handle classified material, and his overall trustworthiness and reliability. (Applicant's Exhibits I and N.)

Applicant's performance evaluation from 2014 to 2015 shows that he "consistently exceeds expectations," has "exceptional performance," or is a "stand out". (Applicant's Exhibit H.)

Two witnesses who have known the Applicant for many years and consider him a good friend, attest to his hard working nature, trustworthiness, and good judgment. Applicant is described as a loyal person, intelligent, self-starter who loves his job, and feels terrible about his mistakes in the past. Applicant is highly recommended for a security clearance. (Tr. pp. 26-57.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used 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, administrative judges apply the guidelines in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), 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 national security eligibility 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.

Directive ¶ E3.1.14, requires the Government to present evidence that establishes 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.”

A person who applies for access to classified information seeks to enter 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.

Section 7 of EO 10865 provides that adverse decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H: Drug Involvement and Substance Misuse

The security concern relating to the guideline for Drug Involvement and Substance Misuse is set forth at AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any "controlled substance" as defined in 21 U.S.C. 802. *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above.

The guideline at AG ¶ 25 contains three conditions that could raise a security concern and may be disqualifying:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia, and
- (f) any illegal drug use while granted access to classified information or holding sensitive position.

The guideline at AG ¶ 26 contains conditions that could mitigate security concerns. None of the conditions are applicable:

- (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) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:
 - (1) disassociation from drug-using associates and contacts;
 - (2) changing or avoiding the environment where drugs were used; and
 - (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

None of the mitigating factors demonstrate full mitigation. Although the use of hashish occurred about eight years ago, Applicant used hashish while holding a security clearance, while deployed and working overseas for the Government, and while working on a Federal Installation.

Guideline E - Personal Conduct

The security concern for the personal conduct guideline is set out in AG ¶ 15:

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 conditions that could raise a security concern and may be disqualifying. The following disqualifying condition is potentially applicable:

(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; and

(b) deliberately providing false information or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

Applicant deliberately failed to disclose his hashish use on multiple security clearance applications and during numerous interviews with DoD investigators during his security background checks over the course of about six years. The fact that he continued to conceal this information from the Government from 2010 to 2016, and was subsequently granted a Top Secret clearance based on fraudulent information raises serious questions about his credibility and indicates behavior that shows questionable judgment, unreliability, and untrustworthiness.

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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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 facts and circumstances surrounding this case. I have incorporated my comments under Guideline H and Guideline E in my whole-person analysis. Applicant has failed to provide sufficient evidence to demonstrate that he meets the qualifications for a security clearance.

Overall, the record evidence leaves me with many questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the Drug Involvement and Substance Misuse and Personal Conduct security concerns.

Formal Findings

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

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant
Subparagraph 2.d:	Against Applicant
Subparagraph 2.e:	Against Applicant
Subparagraph 2.f:	Against Applicant
Subparagraph 2.g:	Against Applicant
Subparagraph 2.h:	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 national security eligibility for a security clearance. Eligibility for access to classified information is denied.

Darlene Lokey Anderson
Administrative Judge