



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



In the matter of:)
)
) ISCR Case No. 14-03945
)
Applicant for Security Clearance)

Appearances

For Government: Ross Hyams, Esquire, Department Counsel
For Applicant: Jacob T. Ranish, Esquire

03/04/2016

Decision

RIVERA, Juan J., Administrative Judge:

Applicant mitigated the security concerns about drug involvement and criminal conduct. He failed to mitigate the personal conduct security concerns raised by his omissions from his 2013 security clearance application (SCA) of his illegal drug-related history and criminal misconduct. Clearance denied.

Statement of the Case

Applicant submitted an SCA on April 25, 2013. After reviewing it and the information gathered during a background investigation, the Department of Defense (DOD) was unable to make an affirmative decision to grant or deny Applicant's eligibility for a clearance. On December 16, 2014, the DOD Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement), Guideline J (criminal conduct), and Guideline E (personal conduct).¹ Applicant answered the SOR on January 12, 2015, and requested a hearing before an administrative judge. The case was assigned to me on July 1, 2015.

¹ DOD acted 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* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines*

The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on August 3, 2015, scheduling a hearing for September 15, 2015. The hearing was postponed due to the unavailability of court reporters. A second hearing notice was issued on September 18, 2015, scheduling a hearing for October 16, 2015. The hearing was held as scheduled.

At the hearing, the Government offered five exhibits (GE 1 through 5). Applicant objected to GE 4 because it was an unauthenticated report of an interview (obtained in June 2013) that was provided to Applicant the day before the hearing. I sustained the objection. GE 4 was marked and included in the record, but it was not admitted into evidence. Applicant testified, presented the testimony of two witnesses, and submitted eight exhibits (AE 1 through 8). All exhibits (except GE 4) were admitted into evidence. DOHA received the hearing transcript (Tr.) on October 27, 2015.

Findings of Fact

In his response to the SOR, and at his hearing, Applicant admitted all the factual allegations in the SOR, with explanations. Although he admitted to omitting material information from his 2013 SCA, he claimed that his omissions were not intentional. I considered SOR ¶¶ 3.a and 3.b denied. Applicant's admissions to the SOR and at his hearing are incorporated herein as findings of fact. After a complete and thorough review of the evidence, and having observed Applicant's demeanor while testifying, I make the following additional findings of fact:

Applicant is a 34-year-old information technology (IT) specialist employed by a federal contractor. He graduated from high school in 2002. He married his wife in April 2015, and he has no children.

Applicant's job history shows that he started working in IT related positions with different employers in September 2001. He has worked for his current employer, a federal contractor, since June 2011. This is not his first security clearance application. He submitted at least three other SCAs; however, he believes that those investigations were not completed.

Applicant submitted an SCA on June 7, 2011. In response to Section 21 (Use of Illegal Drugs) asking whether in the last year, he had illegally used any controlled substances, Applicant answered "no." (Tr. 68-69) Applicant was interviewed by a government investigator on July 11, 2011. During the interview, Applicant disclosed that in 2009-2010, he was charged with reckless driving (115 MPH in a 55 MPH zone). He was convicted and fined \$500, sentenced to six days jail (three suspended), and his license was suspended for six months.

for Determining Eligibility for Access to Classified Information (AG), implemented by the DOD on September 1, 2006.

Applicant submitted his most recent SCA in April 2013. Section 22 (Police Record), required Applicant to disclose whether in the last seven years he had been: issued a summons, citation, or ticket to appear in court in a criminal proceeding; arrested; charged, convicted, or sentenced of a crime; placed on probation or parole; and whether he was on trial or awaiting trial on criminal charges.

In his response, Applicant disclosed that he was charged with illegal possession of marijuana in October 2012. He claimed that the final disposition of the charge was pending, and that he believed that the charge would be dismissed after completion of court-ordered requirements. Applicant failed to disclose that he was arrested, charged, and convicted of public intoxication in June 2012. He also failed to disclose the he was charged with possession of marijuana in February 2012, and that he pled guilty to possession of drug paraphernalia.

Section 23 (Illegal Use of Drugs or Drug Activity), required Applicant to disclose whether in the last seven years he had: illegally used drugs or controlled substances (including marijuana); purchase, possessed, or handled any illegal drugs; and whether he had ever been ordered to attend or seek counseling or treatment as a result of his illegal use of drugs or controlled substances. Applicant answered "no," and failed to disclose that he illegally used marijuana from high school to at least January 2013, and that he purchased approximately \$1,000 worth of marijuana per year.

In January 2014, Applicant answered a set of interrogatories from DOD adjudicators. In his answers, he disclosed that:

On February 28, 2012, he was charged with possession of marijuana. The charge was later amended to possession of paraphernalia, and Applicant pled guilty to the lesser charge. (GE 1) Apparently, he was stopped by a police officer for a traffic violation and after a search of his car the officer found marijuana. (AE 1) Applicant failed to disclose this charge in his 2013 SCA.

In June 2012, Applicant was arrested and charged with public intoxication. He explained that a neighbor filed a noise complaint and alleged that he was smoking marijuana in his apartment. Applicant denied both allegations and averred he was burning incense. The police officers who responded to the complaint asked Applicant to come out of his apartment. When he stepped outside, he was arrested and charged with public intoxication. He contested the charge and was found guilty. (AE 1) Applicant failed to disclose this charge in his 2013 SCA.

On October 10, 2012, Applicant was charged with possession of marijuana with intent to distribute. He claimed that he was pulled over by a police officer for no valid reason. A search of his car revealed marijuana in the glove compartment. (AE 1) The original charge was amended to possession of marijuana and he pled guilty to the charge.

As a result of the above conviction, Applicant was ordered to attend an alcohol and substance abuse program around May-June of 2013. Although Applicant claimed that his last use of marijuana was in October 2012, when he reported to the substance abuse program, he failed the first drug screening and tested positive for marijuana. (Tr.46) He testified that he took a second drug screen the following day and he tested negative for drugs. He also was required to perform 24 hours of community service, to pay a \$500 fine, and his driver's license was suspended. Applicant believed that after his completion of the court requirements, the charge would be expunged and removed from his records. (GE 2, AE 5, Tr. 45)

In August 2015, Applicant participated in a biopsychosocial substance abuse assessment prepared with a view toward his security clearance hearing. According to the assessment report, Applicant started his illegal use of marijuana while in high school. He believes that his use of marijuana resulted from his unstructured upbringing caused by his parents' divorce, being homeless, and his mother having little income or support from his father. Applicant denied any other illegal drug use. He and his friends purchased marijuana together for their personal consumption. He estimated they purchased about \$1,000 worth of marijuana a year. He denied ever selling marijuana for profit. Applicant expressed remorse and regret for his illegal drug use. The substance abuse professional concluded that Applicant has a strong prognosis for continued sobriety because he has abstained from using drugs for three years. (AE 1)

Applicant claimed his last use of marijuana was in October 2012. Around that same time, he started to date his now wife and she motivated him to stop using marijuana. She is against the use of illegal drugs, and she is not big on the use of alcohol either. There is no evidence to show that Applicant has been involved in any criminal behavior, use of illegal drugs, or incidents involving law enforcement since October 2012, except for his positive test for marijuana in May-June 2013. Applicant promised to never use illegal drugs in the future. To show his commitment, he submitted a written statement of intent to abstain from any illegal drug-related behavior with automatic revocation of clearance for any violation. (AE 4)

Applicant believes that stopping his marijuana use in October 2012 allowed him to establish a better relationship with his wife. He is now involved in sports and runs and exercises to release stress. Since stopping his use of marijuana, Applicant has had no asthma problems and he believes he is now more focused in advancing his career and having more initiative at work.

Applicant also believes he has matured and started to grow up as a person. He wants to be a better person, establish a career, have a family, and to strive to meet his potential. He has been moving up on his career during the last three years. Initially, he was a desktop support person. Now he is more technically oriented, works on projects, and manages people. He has received high scores on his annual performance reviews. Applicant likes his current job and believes that he is a valuable asset to his employer. (AE 6)

Applicant's supervisors consider him to be a good employee and person. He displays a positive attitude, has a strong work ethic, and is dependable. Applicant's supervisors have been impressed with Applicant's professionalism, integrity, and technical proficiency. He is considered to be the "go-to" guy for the supervisors, and the "guru" among his peers. His supervisors trust Applicant and they favorably recommended Applicant's eligibility for a clearance.

Policies

Eligibility for access to classified information may be granted "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person's suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Guideline H, Drug Involvement

AG ¶ 24 articulates the security concern concerning drug involvement:

[u]se of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

Applicant illegally purchased and used marijuana from around 2000 until at least January 2013. He purchased approximately \$1,000 worth of marijuana per year. He was charged with possession of marijuana, and convicted of the lesser offense of possession of drug paraphernalia in February 2012. He was charged with possession-sale-distribution of marijuana, and convicted of possession of marijuana in October 2012. Applicant claimed he stopped using marijuana in October 2012 and that his last use of marijuana was around January 2013. Notwithstanding, when he reported for his substance abuse counseling in May-June 2013, he tested positive for marijuana.

AG ¶ 25 describes drug-involvement disqualifying conditions that raise a security concern and may be disqualifying in this particular case: "(a) any drug abuse" and "(b) testing positive for illegal drug use." AG ¶¶ 25(a) and (b) apply.

AG ¶ 26 provides potentially applicable drug involvement mitigating conditions:

(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;

(b) a demonstrated intent not to abuse any 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;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

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

Drug-involvement mitigating conditions AG ¶¶ 26(a), (b), and (d) apply, and mitigate the security concerns. Applicant's most recent drug-related behavior occurred in January 2013, and as such it is not recent. I considered that Applicant expressed remorse and regret for his illegal drug use. The substance abuse professional that evaluated Applicant concluded that he has a strong prognosis for continued sobriety because he has abstained from using drugs for three years. There is no evidence of any additional criminal misconduct or law-enforcement involvement.

Applicant has made positive lifestyle changes. He is now married and his wife motivated him to stop using marijuana. There is no evidence to show that Applicant has been involved in any further criminal behavior, use of illegal drugs, or incidents involving law enforcement since October 2012. Applicant promised to never use illegal drugs in the future. To show his commitment, he submitted a written statement of intent to abstain from any illegal drug-related behavior with automatic revocation of clearance for any violation.

Applicant's references' statements and his performance reviews speak well of his performance. Taken together they show Applicant is on the right path to rehabilitate himself. He is now dedicated to his wife and his work. On balance, Applicant's evidence is sufficient to establish that his drug-related behavior is unlikely to recur. Guideline H is decided for Applicant.

Guideline J, Criminal Conduct

Under Guideline J, the concern is that criminal activity "creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations." AG ¶ 30.

Between February and October 2012, Applicant was convicted of three criminal offenses – possession of drug paraphernalia in February 2012; public intoxication in June 2012, and possession of marijuana in October 2012. Applicant's criminal behavior raises security concerns under AG ¶ 31(a) "a single serious crime or multiple lesser offenses," and AG ¶ 31(c) "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted."

AG ¶ 32 lists two conditions that could mitigate the criminal conduct security concerns raised under AG ¶ 31:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur

and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

For the same reasons discussed under Guideline H, incorporated herein, I find that the above mitigating conditions apply. There is no evidence of Applicant being involved in any criminal conduct after October 2012. Applicant has made lifestyle changes that show he is more mature and has become a responsible adult. Guideline J is decided for Applicant.

Guideline E, Personal Conduct

AG ¶ 15 articulates the security concern for 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.

Applicant omitted relevant and material information from his 2013 SCA when he failed to disclose that he was charged and convicted of public intoxication, and charged with possession of marijuana (convicted of possession of drug paraphernalia) in 2012. Moreover, Applicant failed to disclose his history of illegal purchase and use of marijuana from his days in high school (2000) to at least January 2013.

Although not alleged in the SOR, I note that Applicant also failed to disclose his illegal drug-related behavior in his 2011 SCA. I considered this information solely for the purpose of assessing Applicant's credibility and his claims of mistake, inadvertent behavior, or lack of intent to mislead the Government.

Applicant's falsification of his 2013 SCA triggers the applicability the following disqualifying condition under 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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

AG ¶ 17 lists six conditions that could potentially mitigate the personal conduct security concerns:

- (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 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;
- (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
- (f) the information was unsubstantiated or from a source of questionable reliability.

Applicant submitted several explanations for his failure to disclose the required information, such as: he believed the offenses were misdemeanors or traffic offenses with fines of less than \$300 and not required to be disclosed; the SCA instructions were confusing and he did not understand them; and that he never intended to falsify or mislead the Government.

Notwithstanding, I find the questions were plain and simple to understand, and that Applicant deliberately omitted relevant information. (Section 23 – “In the last seven years have you illegally used any drug or controlled substance?” and “In the last seven years have you been involved in the illegal purchase of any drug or controlled substance?”)

Considering the evidence as a whole, including his demeanor while testifying, I find that the above mitigating conditions are not sufficiently raised by the facts and circumstances of this case and are not applicable. Personal conduct security concerns are not mitigated.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c). I have incorporated my comments under Guidelines H, J, and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant, 34, has been working for his employer since 2011. He has made positive lifestyle changes since he started dating his wife in 2012. He is now motivated to be a good husband, have a family, become a productive member of society, and be a productive employee. Applicant promised to never use illegal drugs in the future and submitted a statement of intent to abstain from any illegal drug-related behavior with automatic revocation of clearance for any violation. Applicant's references' statements and his performance reviews taken together show Applicant is on the right path to rehabilitate himself. He mitigated the security concerns pertaining to drug involvement and criminal conduct.

Notwithstanding, after weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude Applicant failed to mitigate the personal conduct security concerns. His falsification of the 2013 SCA is a serious offense in violation of federal law.

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:	FOR APPLICANT
Subparagraphs 1.a and 1.b:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraphs 2.a through 2.c:	For Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraphs 3.a and 3.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. Clearance denied.

JUAN J. RIVERA
Administrative Judge