



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



In the matter of:)	
)	
)	ISCR Case No. 14-04031
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: *Pro se*

June 18, 2015

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant failed to mitigate the Drug Involvement and Personal Conduct security concerns. Applicant used marijuana in 2001 while holding a security clearance; used ecstasy in July 2009 and July 2010; and consumed alcohol infused with the active chemical in marijuana in 2011. He intentionally omitted his 2001 drug use on his 2005 security clearance application. Eligibility for access to classified information is denied.

Statement of the Case

On May 9, 2013, Applicant submitted an e-QIP for a periodic review. On October 16, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, Drug Involvement, and Guideline E, Personal Conduct. The action was taken under Executive Order (EO) 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 after September 1, 2006.

Applicant responded to the SOR (Answer) on October 28, 2014, and requested a hearing before an administrative judge. The case was assigned to me on February 18, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 6, 2015, and the hearing was convened as scheduled on April 22, 2015. The Government offered Hearing Exhibit (HE) I and Exhibits (GE) 1 and 2, which were admitted without objection. Applicant offered Exhibits (AE) A and B, which were admitted without objection. Applicant testified on his own behalf. DOHA received the hearing transcript (Tr.) on April 30, 2015.

Findings of Fact

Applicant is a 39-year-old employee of a government contractor. He is a service academy graduate and served on active duty from 1999 to 2008 in the Marine Corps, when he was honorably discharged. He held a top secret security clearance while in the Marine Corps. He is married and has three minor children. He has worked for his present employer since September 2012. (GE 1; GE 2; AE A; AE B; Tr. 25-26.)

The SOR alleged that Applicant used marijuana in 2001 while holding a security clearance; used ecstasy in July 2009 and July 2010; and consumed a food product containing marijuana in December 2011. The SOR also alleged that Applicant deliberately omitted his 2001 marijuana use on his 2005 security clearance application. In his Answer and during his testimony, Applicant admitted all of the allegations contained in the SOR pertaining to his marijuana use and his intentional falsification on his security clearance application. His Answer contains an explicit signed statement of intent not to use illegal substances again. (Answer; Tr. 21-22.)

Applicant first used marijuana in June 2001. He used it at a hotel party with his brother and other partygoers. He testified that although he was aware of DOD policies against the use of illegal substances, he tried it out of curiosity. He no longer associates with anyone from this party that still uses illegal substances. He did not report his marijuana use to anyone in his chain of command. He held a security clearance at the time. (Tr. 26-30.)

Applicant used ecstasy two times, at separate bachelor parties, in July 2009 and July 2010. He was married and had one child at the time he used ecstasy. He was no longer in the military at the time of his ecstasy use and was unaware if his employer had a drug use policy. However, he was aware that its use was against the law. He no longer associates with the friends with whom he used ecstasy. (Tr. 30-31.)

Applicant's last illegal drug use was in December 2011. He was watching a football playoff game at a party, and consumed tetrahydrocannabinol (THC) the active chemical ingredient in marijuana, which had been infused into alcohol. He no longer associates with the friends that were at this party. (Tr. 36-37.)

On August 15, 2005, Applicant completed a security clearance application. Question 27 asked Applicant: "Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana . . .?"

Question 28 asked Applicant, “Have you EVER illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official; while possessing a security clearance; or while in a position directly and immediately affecting public safety?” Applicant answered Questions 27 and 28, “No.” He intentionally falsified his e-QIP because he was afraid it would affect his military career and security clearance if he told the truth about his 2001 marijuana use. It was not until his May 9, 2013 security clearance application that he disclosed his marijuana use in 2001. He disclosed it at that time because he wanted to take responsibility for his actions. (Tr. 22-24, 42-47.)

During his active duty service, Applicant was awarded the Navy-Marine Corps Commendation Medal (gold star in lieu of second award); two Air Medals; and was on the Commodore’s List in recognition of his meritorious performance. He has a number of certificates earned through completion of training courses. (AE B.) He presented no letters of recommendation.

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 (DCs) and mitigating conditions (MCs), 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, these guidelines are applied 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) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 the 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, “[t]he 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.” Section 7 of Executive Order 10865 provides: “[a]ny determination under this order adverse to an

applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

A person applying 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.

Analysis

Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to Drug Involvement:

Use 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.

I have considered all of the evidence in this case and the disqualifying conditions under Drug Involvement AG ¶ 25, and the following are potentially applicable:

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

The Government presented sufficient information to support all of the factual allegations under Guideline H (SOR ¶¶ 1.a through 1.c). Applicant used marijuana in 2001 while holding a security clearance. He also used ecstasy in 2009 and 2010. He consumed a THC-infused alcoholic beverage in 2011. The facts established through the Government’s evidence, and through Applicant’s admissions, raise security concerns under both of the above disqualifying conditions.

I have considered all of the evidence in this case and the mitigating conditions under Drug Involvement AG ¶ 26, and the following are potentially 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) 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.

More than three years have passed since Applicant's last use of an illegal substance. However, more than eight years passed between his first use of marijuana and his first use of ecstasy. He was a mature adult who was married with a child when he decided to use ecstasy. I cannot find that future use is unlikely to occur. In this instance, an appropriate period of abstinence has not been demonstrated. The evidence does not support the application of AG ¶ 26(a).

AG ¶ 26(b) provides limited mitigation. Applicant stated that he does not intend to use illegal substances in the future. His Answer contains an explicit signed statement of intent not to use illegal substances again. He claimed that he no longer associates with drug users. These are factors that weigh in Applicant's favor. It appears Applicant used illegal substances in the past when the social situation made it available. Despite his assurances to not use drugs in the future, based on his past conduct and his age when he made those decisions, I am not confident he will comply. As noted above, Applicant has not yet demonstrated an appropriate period of abstinence. Applicant has not provided sufficient evidence to meet his burden of proof to overcome the concerns raised by his poor judgment in using illegal substances.

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 conditions are 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

(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.

Applicant was dishonest about his marijuana use. He deliberately omitted his 2001 marijuana use, while holding a security clearance, on his 2005 security clearance application. He concealed this drug abuse because he knew his actions were illegal, a violation of security policies, and in violation of military regulations. Additionally, his marijuana use created a vulnerability to exploitation, manipulation, or duress, and is an activity that could affect his personal, professional, or community standing. Using marijuana and later falsifying his security clearance application demonstrated that he lacked the good judgment to comply with rules and regulations that are counter to his desires. The above disqualifying conditions apply.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

- (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; and
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant corrected the falsifications concerning his 2001 marijuana use while possessing a security clearance on his 2013 e-QIP. His disclosure in 2013 was before being confronted with the facts, but his disclosure was not prompt or timely. Applicant hid his 2001 marijuana use throughout his entire military career. Applicant clearly knew he was being dishonest when he falsified his security clearance application. The evidence does not support the full application of AG ¶ 17(a).

Applicant's eventual disclosure of his marijuana use does not mitigate the concerns relating to his poor judgment and resulting vulnerability to coercion. He made poor decisions to violate laws, security procedures, and military regulations when he used illegal substances. He failed to produce sufficient evidence that similar lapses in judgment are unlikely to recur, without the passage of more time or other evidence that

demonstrates trustworthiness and good judgment. He has not obtained counseling or taken other steps to indicate that risky or illegal conduct is unlikely to recur. The evidence does not support AG ¶¶ 17(c) and 17(d) are applicable.

Applicant has earned a number of awards and certificates. However, not enough time has passed to know whether Applicant could again be tempted and persuaded to violate laws or other rules for his own personal benefit, as he did when he knowingly used marijuana after being granted a security clearance. AG ¶ 17(e) is not supported by the record.

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(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 pertinent facts and circumstances surrounding this case. Applicant has not used marijuana since December 2011. He has divulged information about his drug use, although not always in an expedient manner. He testified that he will not use illegal substances in the future. However, Applicant was a mature adult with a high level of responsibility when he knowingly violated laws, security procedures, and military regulations. Not enough time has passed since Applicant's drug use in 2011 to permit a finding that drug abuse is unlikely to recur. Further, while he eventually disclosed his marijuana use to the Government, he falsified his 2005 security clearance application.

Overall, the record evidence leaves me with 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 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 Enclosure 3 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
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.

Jennifer I. Goldstein
Administrative Judge