



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



In the matter of:)
)
) ISCR Case No. 14-03591
)
Applicant for Security Clearance)

Appearances

For Government: Dave F. Hayes, Esquire, Department Counsel
For Applicant: Eric Eisen, Esquire

11/20/2015

Decision

RIVERA, Juan J., Administrative Judge:

Applicant was honest and forthcoming in his 2014 security clearance application (SCA) and disclosed his past illegal drug use and his omissions in his 2005 SCA. He acknowledged his mistakes and demonstrated his intent to comply with the law, rules, and regulations. Moreover, it shows Applicant’s current maturity, judgment, and his desire to be truthful, reliable, and honest. He mitigated the drug involvement and personal conduct security concerns. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted his most recent SCA on April 6, 2014. The Department of Defense (DOD) issued him a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement) and Guideline E (personal conduct) on February

23, 2015.¹ Applicant answered the SOR on March 16, 2015, and requested a hearing before an administrative judge. The case was assigned to me on June 9, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on June 17, 2015, scheduling a hearing for August 20, 2015.

At the hearing, the Government offered two exhibits (GE 1 and 2). Applicant testified and submitted seven documents. (AE A through G) AE D through G were admitted for the limited purpose of taking administrative notice of an alleged social trend toward the decriminalization of marijuana use. All exhibits were admitted without objection and made part of the record. DOHA received the hearing transcript (Tr.) on August 28, 2015.

Findings of Fact

In his response to the SOR, Applicant admitted all the factual allegations in the SOR, except for SOR ¶¶ 1.c and 2.d, which he denied. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence, and having considered Applicant's demeanor while testifying, I make the following additional findings of fact:

Applicant is a 33-year-old employee of a federal contractor. He graduated from high school in 2001, received his bachelor's degree in 2005, and completed his master's degree in business administration in 2010. He has never been married, and he does not have any children. He is engaged to be married sometime in 2016.

Applicant illegally used marijuana during high school in the late 1990s, and he used hallucinogenic mushrooms twice during his first year of college in 2002. He denied using any other illegal drugs, including marijuana, while attending college.

During his last two summers in college, Applicant participated in internship programs with a federal contractor, and was offered a position immediately after his graduation. The federal contractor had a policy against its employees using drugs, and Applicant was required to participate in a drug-testing program before both of his internships and before he was hired.

Applicant submitted his first SCA in September 2005. He failed to disclose in his 2005 SCA that he illegally used marijuana in the late 1990s and hallucinogenic mushrooms in 2002. Applicant explained that he did not consider himself a drug user, and because it was three years since his most recent use of illegal drugs, he did not consider it or did not think about his past use of illegal drugs when he completed his 2005 SCA. (Tr. 36) Shortly thereafter, he was granted eligibility for a secret clearance.

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

Applicant testified that he never had access to classified areas, classified information, or worked with people who had access to classified information.

Applicant illegally used marijuana twice in 2010; once at a concert and the second time while visiting a friend's home. He claimed that he only took a puff on both occasions. He also illegally used medications without a prescription. Applicant has diagnosed recurrent back problems and pain. He explained that in 2007 - 2008, his mother gave him twice what he believes was a prescription medication (Vicodin or hydrocodone), and in two other occasions, a friend gave him hydrocodone for back pain. In 2011, Applicant illegally used what he believed was cocaine. He testified that he felt uncomfortable and disappointed at himself after he used the cocaine and he regretted it immediately. He promised not to use illegal drugs again.

Applicant was hired by his current employer, a federal contractor, in 2012. He likes his current job and believes that he has been successful at it. In his current job, Applicant works with classified information and interacts with co-workers who also are involved with classified information. He participated in periodic training about his duties and responsibilities to be eligible to possess a security clearance. As a result of his work with classified information, Applicant now understands the importance of maintaining his eligibility to possess a security clearance, protecting classified information, and demonstrating good judgment, reliability, and trustworthiness.

Applicant submitted his most recent SCA in April 2014. He disclosed in his 2014 SCA all of his illegal drug-related behavior from the late 1990s to 2011. Applicant explained that, as a result of working with classified information and the training he received, he understood that he omitted important information from his 2005 SCA. He repeatedly averred he did not intend to falsify his 2005 SCA or to mislead the Government. He was immature and did not pay attention to detail. Applicant disclosed his 2005 SCA omissions in his 2014 SCA because he wanted to have a clean start and to be transparent in his relationship with the Government. Applicant wants to establish and maintain a reputation for being truthful, honest, and responsible.

Applicant attributed his past use of illegal drugs to his immaturity, curiosity, and his desire to fit in with his peers. He has removed himself from the social setting where illegal drugs are used. He still has infrequent contact, in the form of emails and text messages, with some of his illegal drug-using friends. However, he has not had personal contact with them in a long time. Applicant credibly testified that he no longer wants to place his life, his job, and his fiancée at risk because of his past drug use.

Applicant has changed his lifestyle to fit in with his current professional work environment and with his live-in fiancée. He has known his fiancée since 2012, and they have plans to get married in the near future. He no longer considers the use of illegal drugs part of his life. He expressed remorse and regret for his past illegal use of drugs. He promised that he will never use illegal drugs in the future. To demonstrate his commitment, he signed a statement of intent with automatic revocation of clearance for

any violation. He believes that he has invested too much in his career, his profession, and his relationship to risk losing it all because of the use of drugs.

Applicant's employer has a policy against its employees using illegal drugs. Applicant's co-workers lauded his dedication, reliability, judgment, honesty, and work ethic. He is considered to be a driven professional and an exemplary leader who makes significant contributions to his team. His co-workers endorse his eligibility for a security 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

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.

Between 2007 and 2011, Applicant illegally used marijuana (twice in December 2010), hydrocodone (four times between 2007 and 2008), and cocaine (once in 2011). At the time of his illegal drug use, Applicant possessed a secret security clearance granted to him in 2006.

AG ¶ 25 describes three drug-involvement disqualifying conditions that raise a security concern and may be disqualifying in this particular case: "(a) any drug abuse;"² "(c) illegal drug possession . . . ;" and "(g) any illegal drug use after being granted a security clearance." AG ¶¶ 25(a), 25(c), and 25(g) are applicable.

AG ¶ 26 provides two 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; 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.

Both mitigating conditions apply and mitigate the drug involvement security concerns. Applicant's illegal drug-related behavior was infrequent and occurred almost four years ago (2011). Applicant disclosed in his 2014 SCA his history of illegal drug use from the late 1990s to 2011. Moreover, he disclosed that he omitted from his 2005

²AG ¶ 24(b) defines "drug abuse" as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction."

SCA his illegal drug use from the 1990s to 2002. Applicant credibly explained that he wanted to have a clean start and to be transparent in his relationship with the Government. Applicant wants to establish and maintain a reputation for being truthful, honest, and responsible. Because of his current maturity, change of lifestyle, and professional behavior, I believe that his use of illegal drugs is unlikely to recur. His past use of illegal drugs does not cast doubt on his current reliability, trustworthiness, and judgment.

Applicant has made lifestyle changes and avoids associating with his past drug-using friends and contacts. He is living with his fiancée who does not use illegal drugs. They are in a stable relationship and have new professional friends and acquaintances that do not use illegal drugs. Moreover, Applicant signed a statement of intent with automatic revocation of clearance for any violation.

Applicant acknowledged his mistakes and attributed them to his inexperience and desire to be accepted by and fit in with his friends. He now understands the adverse criminal and security clearance consequences that he will face if he is involved with any illegal drugs in the future. He believes that he has invested too much in his education, relationship, and profession to risk it all by using illegal drugs.

Considering the evidence as a whole, I find that Applicant's past use of illegal drugs are unlikely to recur and do not cast doubt on his current reliability, trustworthiness, and judgment.

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 illegally used drugs infrequently from the late 1990s until 2011. He omitted relevant and material information from his 2005 SCA when he failed to disclose his illegal use of marijuana while in high school and his use of mushrooms as a freshman in college.

Applicant's omissions and his illegal drug use trigger the applicability of the following disqualifying conditions 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;

(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; and

(g) association with persons involved in criminal activity.

AG ¶ 17 lists five 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; and

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

Applicant disclosed his illegal use of drugs and corrected his 2005 SCA omissions when he submitted his 2014 SCA. The Government had no independent knowledge of Applicant's prior use of illegal drugs, or that he omitted information from his 2005 SCA until his disclosures in his 2014 SCA. Applicant attributed his failure to disclose the information to his lack of familiarity with the security clearance system, his lack of attention to detail, and his immaturity.

Applicant's disclosure of his past illegal drug use and of his omissions in his 2005 SCA demonstrate an acknowledgment of his mistakes. It also shows his intent to comply with the law, rules, and regulations. By disclosing the information, Applicant

reduced his vulnerability to exploitation, manipulation, and duress. Moreover, it shows Applicant's current maturity, judgment, and his desire to be truthful, reliable, and honest.

For the above reasons, and those discussed under Guideline H, incorporated herein, I find that AG ¶ 17 ¶¶ (b), (c), (d), and (e) partially apply and mitigate the personal conduct security concerns.

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 and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a 33-year-old employee of a defense contractor. His past illegal drug use is not recent. He has established a reasonable period of abstinence and a change of lifestyle. His work performance and reference statements give substance to his promise to never use drugs again. He clearly understands the possible adverse consequences he will face if he is ever involved in the use of illegal drugs. He specifically understands that he could be fired from his job, and his eligibility for a security clearance may be revoked.

Applicant was honest and forthcoming in his 2014 SCA and disclosed his past illegal drug use and his omissions in his 2005 SCA. He acknowledged his mistakes and demonstrated his intent to comply with the law, rules, and regulations in the future. Moreover, it shows Applicant's current maturity, judgment, and his desire to be truthful, reliable, and honest. After weighing all the facts and circumstances, in the context of the whole person, I conclude that Applicant has mitigated 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 Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	FOR APPLICANT
Subparagraphs 1.a - 1.c:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 1.a - 1.d:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

JUAN J. RIVERA
Administrative Judge