



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



In the matter of:)
)
) ISCR Case No. 12-12335
)
Applicant for Security Clearance)

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

09/17/2013

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated personal conduct and drug involvement security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On April 9, 2013, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E (personal conduct) and H (drug involvement). 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) implemented by the DOD on September 1, 2006.

Applicant answered the SOR in writing on April 22, 2013, and April 29, 2013, and elected to have the case decided on the written record in lieu of a hearing. The Government's written case was submitted on July 23, 2013. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the

security concerns. Applicant received the FORM on August 5, 2013. As of September 13, 2013, he had not responded. The case was assigned to me on September 16, 2013. With no objection from Applicant, the Government exhibits included in the FORM are admitted.

Findings of Fact

Applicant is a 57-year-old employee of a defense contractor. He has worked for the same employer since 1978. He attended college for a period, but he did not earn a degree. He married in 1979 and divorced in 1984. He has been married to his current wife for more than 20 years. He has three adult children.¹

Applicant was arrested and charged with driving under the influence (DUI) or a similar alcohol-related driving offense five times between about 1978 and 1989. At least four of the arrests resulted in a conviction. He was arrested in 2005 and charged with DUI and possession of marijuana. He pleaded *nolo contendere* to DUI in 2006. The possession of marijuana charge was dismissed. He was sentenced to a fine, court costs, community service, loss of driver's license for four months, and attendance at an alcohol safety school.²

Applicant smoked marijuana regularly from 1973 through 1978. He stopped using marijuana for a period when he was hired by his current employer in 1978. His current wife was a marijuana smoker when they met. He resumed smoking marijuana with her in about 1985 and smoked on an almost-daily basis until about 1989, when his wife became pregnant and they both stopped smoking marijuana. Applicant held a security clearance from about 2002 to 2007. He resumed smoking marijuana in about 2005. He smoked marijuana several times a week from 2005 through April 2011.³

Applicant was arrested in November 2004 and charged with possession of marijuana, first offense. He stated that he was angry at his wife for smoking marijuana. He took her marijuana and left their home. He was intoxicated and walked over a bridge that did not permit pedestrian traffic. He was stopped by the police, and the bag of marijuana was found during a search. He was charged with possession of marijuana. The disposition of the charge is unclear.⁴

Applicant submitted a Questionnaire for National Security Positions (SF 86) in February 2006. Section 23d asked: "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?" He listed his 2005 DUI arrest, but he did not include that he was also arrested for possession of marijuana. He did not list his five alcohol-related arrests between 1978 and 1989, and he did not list his 2004 possession

¹ Items 4-6, 11.

² Items 2, 4, 7-11.

³ Items 2-4, 9, 11.

⁴ Items 2-4, 7, 11.

of marijuana charge.⁵ Applicant answered “No” to Section 24a of the SF 86, which asked:

Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?⁶

Applicant admitted that he deliberately failed to disclose his marijuana use on the SF 86. He denied that he intentionally failed to list his 2004 possession of marijuana charge and his five alcohol-related arrests between 1978 and 1989. He stated that he did not list the DUI charges because he misread the question to be limited to the previous seven years. He stated that he did not list the 2004 possession of marijuana charge because the charge was dismissed.⁷

Applicant was interviewed for his background investigation in about 2007. He terminated the interview because he did not like the questions the investigator was asking about his son. Applicant felt the investigator was unpleasant, condescending, and harsh. The investigator also asked him why he provided incorrect information on his SF 86.⁸

Applicant reapplied for a security clearance and submitted another SF 86 in January 2013. He listed all six DUIs and that, when he was arrested in 2005 for DUI, he was also charged with possession of marijuana. He listed marijuana use from 1973 through April 2011. He wrote that he “[s]moked when [he] was young. On and off since then. Not crazy about it.” He also wrote: “I have never been much of a marijuana user. I don’t feel as if I’m missing anything by not using it.”⁹

Applicant was interviewed for his background investigation in February 2013. He discussed his criminal charges and marijuana use. He stated that he had not smoked marijuana since April 2011, and he did not intend to use it in the future. He had alcohol treatment related to his DUIs, but he never received drug treatment. He stated that his wife was still a marijuana smoker.¹⁰

⁵ Item 5.

⁶ Item 5.

⁷ Item 2.

⁸ Items 9, 11.

⁹ Items 4, 9.

¹⁰ Item 11.

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 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 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."

Under Directive ¶ E3.1.14, the Government must present evidence to establish 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." The applicant has the ultimate burden of persuasion to obtain a favorable security 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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

The security concern for drug involvement is set out in AG ¶ 24:

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.

The guideline notes conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

- (a) any drug abuse;¹¹
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (g) any illegal drug use after being granted a security clearance.

Applicant possessed and smoked marijuana while he held a security clearance. All of the above disqualifying conditions are applicable.

AG ¶ 26 provides conditions that could mitigate security concerns. 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.

Applicant smoked marijuana regularly from 1973 through 1978. He stopped using marijuana for a period when he was hired by his current employer in 1978. He resumed

¹¹ Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

smoking marijuana with his current wife in about 1985 and smoked on an almost-daily basis until about 1989, when his wife became pregnant and they both stopped smoking marijuana. He resumed smoking marijuana in about 2005, and he smoked marijuana several times a week from 2005 through April 2011. He stopped using illegal drugs in April 2011, but his wife continued to smoke marijuana.

There is no bright-line rule for when conduct is recent. Applicant has not used illegal drugs in more than two years. However, he went long periods without using illegal drugs, and then smoked marijuana on numerous occasions with full knowledge that illegal drug use is inconsistent with holding a security clearance. I am unable to conclude that illegal drug use is completely in his past. His drug use continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶¶ 26(a) and 26(b) have some applicability. Notwithstanding, I conclude that security concerns remain despite the presence of some mitigation.

Guideline E, Personal Conduct

The security concern for personal conduct 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 . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant intentionally provided false information about his marijuana use on his 2006 SF 86. AG ¶ 16(b) is applicable to SOR ¶ 2.b. He did not list his 2004 possession of marijuana charge and his five alcohol-related arrests between 1978 and 1989 on his 2006 SF 86, but there is insufficient evidence to determine that the omissions amounted to intentional falsifications. SOR ¶ 2.a is concluded for Applicant.

Applicant's illegal drug use while holding a security clearance created a vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable to SOR ¶ 2.c.

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 continued to smoke marijuana after he submitted his 2006 SF 86. He did not correct his falsification when he was interviewed for his background investigation in about 2007. Instead, he terminated the interview. AG ¶ 17(a) is not applicable.

Applicant receives credit in mitigation for revealing his drug and alcohol problems in his January 2013 SF 86 and during his February 2013 interview. He has not used illegal drugs since April 2011. However, I am unable to conclude that illegal drug use is completely in his past. His drug use and intentional falsification of his SF 86 continue to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶¶ 17(c) and 17(d) are not applicable. AG ¶ 17(e) is applicable. With unresolved doubts about Applicant's current reliability, trustworthiness, and judgment, I conclude that personal conduct security concerns remain despite the presence of 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 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 the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines E and H in this whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant has a long history of smoking marijuana, including while holding a security clearance. He lied about his drug use on his 2006 SF 86. There is no evidence of any illegal drug use after April 2011, and Applicant revealed his drug use in 2013. Notwithstanding, there are significant concerns about Applicant's reliability, trustworthiness, judgment, and willingness to comply with rules and regulations.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant has not mitigated 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:	Against Applicant
Subparagraphs 1.a-1.d:	Against Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	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.

Edward W. Loughran
Administrative Judge