



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



In the matter of:)	
)	
)	ISCR Case No. 14-02975
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Caroline E. Heintzelman, Esquire, Department Counsel
For Applicant: Rodney R. Moody, Esquire

03/08/2016

Decision

WHITE, David M., Administrative Judge:

Applicant used marijuana for almost 40 years, during ten of which he held a security clearance. He falsified information concerning his drug abuse on security clearance applications in 2003 and 2014. Resulting security concerns were not mitigated. Based upon a review of the pleadings, testimony, and exhibits, eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SF 86) on March 18, 2014. (GE 1.) On September 5, 2014, the Department of Defense Consolidated Adjudications Facility (DoD CAF) 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 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 for Determining Eligibility for Access to Classified Information*, effective within the Department of Defense after September 1, 2006.

Applicant answered the SOR in writing (Answer) on October 3, 2014, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on July 6, 2015, and the case was assigned to me on July 13, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on July 21, 2015, and I convened the hearing as scheduled on August 13, 2015. The Government offered Exhibits (GE) 1 through 3, which were admitted without objection. Applicant offered Exhibits (AE) A and B, which were admitted without objection, and testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on August 19, 2015.

Findings of Fact

Applicant is a 55-year-old employee of a defense contractor, where he has worked since 2004. He is a college graduate, who has no military service. He has held a security clearance since 2003, when he was employed by a subcontractor of his current employer. He is separated from his second wife, and has two teenage children. (GE 1; GE 2; Tr. 62-63.)

In his Answer, Applicant admitted the allegations in SOR ¶¶ 1.a and 1.b, and denied the remaining allegations, with explanations. He made additional statements concerning his drug involvement, and his inaccurate answers to questions about that subject on his two SF 86 security clearance applications, in a sworn response to DOHA Interrogatories dated July 31, 2014. Applicant's admissions and statements are incorporated into the following findings.

Applicant reported that he used marijuana on a daily basis from about 1975 (at age 14 or 15) until 1985 when he graduated from college. From 1985 to 2003 his marijuana use decreased from daily to weekly to monthly, and he estimated his average use over that period to be twice per month. From 2003 until February 2014, while holding a security clearance and working for a company that he knows has a policy tolerating no drug use at all, he admittedly used marijuana once or twice per year. On May 8, 2014, Applicant told an investigator from the Office of Personnel Management (OPM) that he "uses marijuana rarely and has never let it control him; therefore, he intends to continue to use it in the future." He said then, and confirmed in July 2014, that he would cease marijuana use if required for continued employment. He still socializes monthly with the friend he usually smokes it with. (GE 3; Tr. 34-36, 42-44, 54-55, 59.)

Applicant completed and certified the truth of his first SF 86 on July 31, 2003. (GE 2.) In response to the question asking about any drug activity during the preceding seven years, he stated that he had used marijuana rarely from January 1985 through 1999, describing it as, "Occasional social usage at concerts etc. Never habitual use." (GE 2 at 16.) He thereby intentionally concealed what he later described as his weekly to monthly use, averaging twice per month, from January 2000 through July 2003. His attempt to explain this deception during his hearing testimony, when for the first time he said that he stopped using marijuana as a 2000 New Year's resolution but started again in 2003 after obtaining his clearance, was inconsistent with his previous statements and less than credible. (Tr. 38-40, 54-57.)

Applicant also falsified his responses to two drug involvement questions on his March 2014 SF 86, which initiated this pending eligibility determination. When asked if he had illegally used any drugs or controlled substances during the preceding seven years, he responded, “No.” In the optional comment section he wrote, “Currently marijuana use is legal in [his residence] state.” When asked if he had ever illegally used or otherwise been involved with a drug or controlled substance while holding a security clearance other than previously listed, he responded, “No.” The state in which Applicant resides decriminalized recreational marijuana use in late 2012. Applicant acknowledged during his testimony that he understood marijuana to still be a controlled substance that is illegal to use under Federal law, which also controls security clearance eligibility. He further failed to explain his denial on the SF 86 of his admitted use of marijuana about twice a year between 2003 and 2014 while holding a security clearance, other than to say that he didn’t really think smoking that amount of marijuana was “use.” Applicant’s attempts to justify these falsifications during his testimony were not credible. (GE 1; GE 2; GE 3; Tr. 41-44, 49-52, 55-62.)

Applicant submitted a signed statement of intent never to use illegal drugs again, with consent to automatic revocation of his security clearance for any violation. He clarified during the hearing that his earlier assertions, that he did not consider marijuana use to be illegal in his state and that he did not think smoking marijuana once or twice a year constituted “use,” did not apply to this statement, which he signed on the morning of his hearing. (AE A; Tr. 20-21, 45, 67-69.)

Applicant also submitted a forensic drug testing report for an underarm hair sample he submitted on July 31, 2015, to a drug testing laboratory. The sample tested negative for cannabinoids and carboxy-THC, indicating that he had not digested any marijuana recently. The report commented, “Body hair represents up to 1 year.” (AE B.)

Applicant did not submit mitigating evidence concerning the quality of his professional performance, the level of responsibility his duties entail, or his track record with respect to handling sensitive information and observation of security procedures.¹ I considered his testimony to be credible concerning his willingness to forego future drug abuse in order to save his job, but less than credible concerning his attempted justification of previous drug abuse while holding a security clearance and falsification of his 2003 and 2014 security clearance applications.

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

¹Applicant discussed an incident, during which he left a Government laptop computer containing “secured” information in the waiting area of a civilian airport, but that did not result in any adverse action against him. Tr. 29-30.

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.

(a) Drugs are defined as mood and behavior altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and

(2) inhalants and other similar substances;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. The two DCs raised by the evidence in this case are:

(a) any drug abuse (see above definition); and

(g) any illegal drug use after being granted a security clearance.

Applicant admittedly used marijuana with varying frequency from about 1975 to February 2014. He did so while holding a security clearance after 2003. These facts support application of the foregoing DCs, shifting the burden to Applicant to prove mitigation of resulting security concerns. In May 2014 Applicant said that he intended to continue marijuana use in the future, but clearly declared in AE A and during his testimony that he intends to discontinue drug use. Therefore, the former concerns arising under AG ¶ 25(h) from his, "expressed intent to continue illegal drug use," are no longer present.

AG ¶ 26 provides four conditions that could mitigate the security concerns arising from Applicant's drug involvement:

(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.

Applicant's marijuana abuse continued for almost 40 years, without any significant period of abstinence until 2014, when he applied to renew his security clearance. This casts doubt on Applicant's current reliability, trustworthiness, and judgment, and there is insufficient persuasive evidence that drug abuse is unlikely to recur. Mitigation under AG ¶ 26(a) was not established.

Applicant told the OPM investigator in May 2014 that he intended to continue using marijuana in the future, and only changed that position after receiving the SOR. He continues at least monthly social contact with the friend with whom he usually smoked marijuana. His period of abstinence since early 2014 is a good start, but not significant compared to almost 40 years of regular drug use without regard to criminal laws and workplace policies prohibiting such conduct. His signed statement of intent is less persuasive than it might otherwise be, had he not attempted to parse the meanings of "illegal" and "use" with respect to his earlier misconduct. Applicant failed to establish significant mitigation under AG ¶ 26(b).

Neither AG ¶¶ 20(c) nor (d) were raised by Applicant's circumstances or the evidence in this case. He was not abusing a prescription drug, and he was neither recommended for nor involved in any drug treatment program.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The DCs supported by the evidence in this case are:

(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.

Applicant deliberately falsified his 2003 SF 86 by failing to disclose his drug abuse between January 2000 and the time he certified the completeness and truth of that document. He deliberately falsified his 2014 SF 86 by denying illegal drug use during the past seven years, while holding his security clearance. He also knew that his drug use violated his company's policies and Federal law, subjecting him to adverse professional consequences for his conduct. Security concerns under AG ¶¶ 16(a) and (e) were accordingly raised by substantial evidence under these facts.

AG ¶ 17 describes conditions that could mitigate security concerns under the Personal Conduct guideline. The MCs with potential application in this case are:

(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 made no effort to correct his concealment of his drug abuse on either of his security clearance applications before being confronted with them. His explanations after being confronted were not credible. These recent and multiple falsifications are felony offenses under Title 18 U.S.C. § 1001, and are not considered to be minor offenses in connection with security clearance eligibility determinations.

Applicant did not admit his attempts to deceive, but rather proposed inconsistent and unpersuasive semantic justifications for his false answers. No supervisor offered testimony or character evidence to support a conclusion that his concealed drug abuse in violation of company policy no longer subjects him to potential exploitation or duress. Accordingly, Applicant failed to establish mitigation under any of those Mcs.

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 is a mature individual who is accountable for the untrustworthiness and bad judgment demonstrated by his long history of drug abuse, and by his attempts to conceal his drug abuse on two security clearance applications. Applicant did not demonstrate rehabilitation or permanent behavioral changes, but instead attempted to minimize and justify his misconduct. The potential for recurrence, pressure, coercion, and duress remains undiminished. He provided insufficient evidence concerning his professional performance or character to mitigate the security concerns raised by his misconduct. Overall, the evidence creates substantial doubt as to Applicant's eligibility and suitability for a security clearance.

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
Subparagraphs 1.a and 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a through 2.d:	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.

DAVID M. WHITE
Administrative Judge