



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



In the matter of:)	
)	
)	ISCR Case No. 15-00611
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Rhett Petcher, Esq., Department Counsel
For Applicant: *Pro se*

06/27/2016

Decision

LYNCH, Noreen A, Administrative Judge:

On October 10, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) listing security concerns arising 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; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), implemented in September 2006.

Applicant timely answered the SOR and requested an administrative determination. Department Counsel submitted a File of Relevant Material (FORM), dated January 20, 2016. Applicant received the FORM on February 25, 2016, and submitted a response to the FORM. I received the case assignment on May 20, 2016. Based on a review of the case file, submissions, and exhibits, I find Applicant failed to meet his burden regarding the security concerns raised. Security clearance is denied.

Findings of Fact

In his answer to the SOR, Applicant admitted the factual allegations under Guideline H (Drug Involvement) with the exception of one, and denied the allegations under Guideline E (Personal Conduct). (Item 1)

Applicant is a 55-year-old employee of a defense contractor. He earned an undergraduate degree in 1985, and completed some graduate courses. Applicant is not married and has no children. He has worked for his current employer since 2000. (Item 1) Applicant has held a security clearance since 2007. He completed his latest security clearance application on November 16, 2015. (Item 3)

Drug Involvement

The SOR alleges in 1.a that Applicant used marijuana on several occasions from at least 2002 to April 2012; in 1.b that Applicant purchased marijuana; in 1.c that he currently possesses a glass pipe for marijuana use; and in 1.d that he purchased marijuana and continued to use marijuana while holding a security clearance that was issued in November 2007. Applicant smoked an estimated four grams of marijuana a year during the alleged period and he purchased the drug on at least one occasion. He admits that he used the illegal drug while holding a DOD security clearance. (Item 6) He states that his last use was in April 2012. He denied that he has a glass pipe. (Item 1)

In response to the FORM, Applicant was emphatic that he used marijuana, but he was never impaired. He is distraught that his past actions regarding marijuana have jeopardized his relationship with DOD. He stated that he has faithfully served for 15 years. He understands that it is a privilege to have a clearance, but he has never done anything to jeopardize the safety of programs. (Response to FORM)

He continued to state that while he used marijuana over the last decades, the events were infrequent and with minimal consumption. He stated that he has never been impaired on the job. He has not smoked marijuana in four years. (Response to FORM) He understands that it is an illegal substance, but again he stressed that he was not a habitual user. He cites to social situations and peer influence. In an OPM interview in 2006, he stated that he would not use marijuana again for unspecified health issues. (Item 4) He also stated that he was lulled into complacency over the years of marijuana possession because of the decriminalization of marijuana over the years by state legislature. He continued to use marijuana after 2006. (Item 5) Applicant sold his beach home because that was where the marijuana was primarily used. He bought the marijuana in 2011 to impress a woman. He stated that he is willing to submit an affidavit promising not to use marijuana under penalty of clearance revocation. He will submit to random drug testing. (Response to FORM)

Personal Conduct

The SOR alleges that information as stated under Drug involvement subparagraph 1.d; and that applicant failed to timely file his Federal income tax return

for the tax year 2008; failed to file his state income tax return for tax year 2008; failed to file his Federal income tax return for tax year 2011 and that he failed to timely file his state income tax return for the tax year 2011.

Applicant admitted the allegation in 2.a regarding drug use. He denied the rest of the allegations about failing to file federal and state taxes for the years in question. (Item 1)

In his Response to FORM, Applicant stated that the tax issues have “long been resolved.” (Item 6) He provided some documentation that he filed and made payments for both Federal and state taxes for years 2008 and 2011. He blamed extensive travel for work in not filing the 2008. He cited to brokerage delays in receiving and compiling pertinent records. He stressed that he volunteered this information during his 2012 investigative interview, but there were no questions involving his taxes. He was never contacted by the IRS or state comptroller regarding the issues. He contacted them in 2012 to rectify the situation. He paid the taxes owed and he paid a penalty for the federal taxes. He claimed this was the result of “stupidity” and procrastination rather than deception.

Applicant stated that tax year 2011 was a refund year. (Item 6) He did not owe Federal or state taxes. The delays were caused by similar circumstances as in 2008. He should have filed for an extension but did not. He wrote that the Federal and state tax returns were filed eight months late. He has no outstanding balance. He has changed his method of filing and getting his information from his broker to prevent this from happening again. He has access to his records electronically and can access his information while on the road. He also computes and files electronically.

Applicant provided his copy of the 2008 tax payment check made to the IRS, dated March 29, 2013. (Item 7) He did not provide the actual filing form. The notice sent to him by the IRS was dated March 18, 2013. (AX A) He also presented a check payable to the IRS for his tax 2008 dated October 24, 2012. Applicant provided a refund advice notice from the state for tax year 2011. Another check to the state for state tax 2008 was dated October 2012. (Response to FORM)

Policies

When evaluating an applicant’s suitability for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” An 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.” 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.

The United States Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .”¹ The burden of proof is something less than a preponderance of evidence.² The ultimate burden of persuasion is on the applicant.³

A person seeking access to classified information enters into a fiduciary relationship with the Government based on 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 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 Executive Order 10865 provides that 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.”⁴ “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁵ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.⁶ The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant’s character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

¹ See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

² *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

³ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁴ See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

⁵ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁶ *Id.*

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:

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

(b) testing positive for illegal drug use;

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

(d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;

(e) evaluation of drug abuse or drug dependence by a licensed clinical social worker who, is a staff member of a recognized drug treatment program;

(f) failure to successfully complete a drug treatment program prescribed by a duly qualified medical professional;

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

(h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

Applicant admitted his use of illegal drugs (marijuana) from 2002 until 2012 and the 2011 purchase of marijuana. He used marijuana after being granted a security clearance. AG ¶ 25(a), (c) and (g) apply.

AG ¶ 26 provides conditions that could mitigate security concerns:

(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; and

(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 last claimed use of marijuana was in 2012. He states that he has not used any illegal drugs since that time. He states that his use was never habitual; nor was he ever impaired. He noted in 2006 that he would not use marijuana for health reasons, but he continued. He would agree to sign a statement of intent. He noted that he only used marijuana in social situations and has sold his beach house where the use occurred. Given his history, I have doubts as to his intentions to stop using marijuana. He also used marijuana while holding a security clearance. No mitigating conditions apply under the drug involvement concern.

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. Under AG ¶ 16(a), a disqualifying conditions exists when there is “deliberate omission, concealment, or falsification of relevant facts from any personnel questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security eligibility or trustworthiness, or award fiduciary responsibilities.” Under AG ¶ 16(c) a disqualifying condition exists by “credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.”

Applicant, while admitting the SOR drug involvement allegations, minimized the fact that it should jeopardize his clearance. He repeatedly stated that his use was not habitual and he was never impaired. His use spanned a number of years while holding a security clearance. His behavior and personal conduct are disqualifying as they raise questions about his judgment, reliability, truthfulness, and willingness to comply with the law.

Applicant admitted that he did not timely file his Federal and state taxes for 2008 and 2011. He had a vague excuse about extensive work travel and incomplete records. He did not follow rules and regulations. The documentation was not sufficient to establish when he actually filed the income tax filings. A 2013 notice showed an amount of federal tax due for tax year 2008. He did present a check in the amount of \$327.75 that was due by April 13, 2013. As to the state tax, Applicant presented a check in the amount of \$174.

After considering the mitigating conditions outlined in AG ¶ 17, I conclude that none of them apply. Applicant did not make prompt or good-faith efforts to file his 2008 and 2011 tax filings. He did not ask for an extension. He provided no information that indicates he was ill-advised. The incidents are too recent and serious to be mitigated by the passage of time. I have serious doubts about his good judgment and reliability, especially given the fact that he held a security clearance. He has not provided information in this record to show that he has met his burden of proof to mitigate the personal conduct concern.

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 an applicant’s conduct and all the 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. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the whole-person factors. Applicant is 55 years old. He has worked for the same company since 2000. He held a security clearance during these years. He is an educated man. He is not married and has no children.

Applicant failed to submit sufficient information or evidence to mitigate the security concerns raised in his case. He used marijuana until at least 2012. He has been entrusted with a security clearance during his career. Applicant has not shown good judgment and honesty. He has disregarded rules and regulations over the years, including while holding a security clearance. He has not provided documentation to show drugs are no longer a problem for him. He has not provided sufficient information concerning late filing of his taxes for 2008 and 2011. I have doubts given the record. Accordingly, Applicant has not mitigated the security concerns under both guidelines. Clearance is denied.

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-1d:	Against Applicant
Paragraph 2., Guideline E:	AGAINST APPLICANT
Subparagraph 2.a-2e:	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 a security clearance. Clearance is denied.

NOREEN A. LYNCH.
Administrative Judge