



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



In the matter of:)
)
-----) ISCR Case No. 08-03707
SSN: -----)
)
Applicant for Security Clearance)

Appearances

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

November 25, 2008

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines E (Personal Conduct) and J (Criminal Conduct). Applicant's eligibility for access to Sensitive Compartmented Information (SCI) was revoked for drug abuse in May 2005, under DCID 6/4, as amended by Intelligence Community Policy Memorandum 2006-700-3, dated July 12, 2006; and that action became final when his appeal was denied in August 2007. This case concerns Applicant's collateral security clearance, which was not revoked. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on November 8, 2005 (Government Exhibit (GX) 3). On May 28, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines E and J. 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 (AG) promulgated by the President on December 29, 2005.

Applicant acknowledged receipt of the SOR on June 3, 2008; answered it on June 18, 2008; and requested determination on the record without a hearing. DOHA received his response on June 23, 2008. Department Counsel submitted the government's written case on August 31, 2008. On September 4, 2008, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the government's evidence. Applicant received the FORM on September 15, 2008, and he did not respond. The case was assigned to me on November 19, 2008.

Findings of Fact

In his answer to the SOR, Applicant admitted all the allegations. His admissions are incorporated in my findings of fact.

Applicant is a 51-year-old principal contract administrator for a defense contractor. He has worked for his current employer since June 1980 and held a clearance since June 1983. He was married in September 1955 and has a 28-year-old daughter.

Applicant was interviewed by a security investigator in August 1999 in connection with his application for SCI eligibility. He admitted he started using marijuana in high school around 1974 and used it on a monthly basis with friends on weekends until about 1980. From 1980 until December 1996, he used it occasionally at parties or vacations with family members. He told the investigator he stopped using marijuana in December 1996 because he had matured and he learned his employer had instituted mandatory drug testing (GX 7 at 1).

At some time in 2000, while his application for SCI was being processed, Applicant used marijuana once (GX 5 at 5). He was granted SCI eligibility in March 2000, but cautioned in writing that any further drug abuse would result in revocation of his SCI eligibility (GX 6 at 17). He used marijuana once again in 2003 with his brother and cousins at a family picnic (GX 6 at 11).

When Applicant submitted his e-QIP in November 2005, he answered "no" to question 24a, asking if he had illegally used any controlled substance, including marijuana, during the last seven years. He did not disclose his use of marijuana in 2000 and 2003. He also answered "no" to question 24b, asking if he had ever used a controlled substance while possessing a security clearance. He did not disclose his use of marijuana after receiving a secret clearance in June 1983 and a top secret clearance and access to SCI in June 2000.

In April 2007, Applicant's access to SCI was suspended after he tested positive for marijuana in March 2007. Applicant explained to a security investigator that he and his brothers smoked marijuana while grieving after their father's funeral on the day before the urinalysis. He disclosed his marijuana use to his wife (GX 5 3-4).

After Applicant's positive urinalysis, he was ordered to obtain drug counseling as a condition of continued employment. He completed the one-hour session that was

required. At the recommendation of the counselor, he attended four one-hour grief counseling sessions in March and April 2007. The counselor did not provide a prognosis (GX 5 at 5). Applicant access to SCI was revoked in May 2007 (GX 6 at 2). His appeal of that decision was denied in August 2007 (GX 6 at 1).

In his answer to the SOR, Applicant stated his conduct was “an aberration rather than the norm.” He offered to undergo increased random drug testing, polygraph examination or other measures at any interval, at his own expense if necessary, in order to receive another chance to retain a clearance.

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “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 and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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.

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531.

“Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline E, Personal Conduct

The SOR alleges Applicant’s top secret/SCI access was suspended by another government agency in April 2007 based on a positive drug test for marijuana (SOR ¶ 1.a); he used marijuana from 1974 through 1996, and in the late 1990s, 2000, 2003, and March 13, 2007 (SOR ¶ 1.b); he used marijuana after being issued a clearance in June 1983 (SOR ¶ 1.c); he used marijuana after signing receipt of a letter on March 13, 2000 informing him that illegal drug involvement would result of revocation of access to SCI (SOR ¶ 1.d); he continued to use marijuana after receiving a top secret/SCI clearance in June 2000 (SOR ¶ 1.e); and he falsified his security clearance application by not disclosing his drug involvement (SOR ¶¶ 1.f and 1.g).

The documentary evidence reflects that Applicant’s SCI eligibility was suspended in April 2007 and revoked in May 2007, but there is no evidence that his top secret collateral clearance was revoked at that time. Thus, the allegation in SOR ¶ 1.a that Applicant’s top secret clearance was suspended in April 2007 is not supported by substantial evidence.

The security concern under this 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.

The following disqualifying conditions under this guideline are relevant to Applicant’s drug involvement:

[C]redible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse

determination, but which, when combined with all available information 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, . . . [including] a pattern of dishonesty or rule violations (AG ¶ 16(d)); and

[P]ersonal 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 (AG ¶ 16(e)).

The reference in AG ¶ 16(a) to “information that is not explicitly covered under any other guideline” does not preclude consideration of Applicant’s drug abuse under Guideline E instead of Guideline H (Drug Involvement). The Appeal Board has determined that the language in Guideline E does not “fundamentally alter the history, scope, and purpose of Guideline E.” Instead, the new language “continues the longstanding tenet that specific behavior can have security significance under more than one guideline and . . . by focusing on the concepts of questionable judgment and irresponsibility, it contemplates that behavior will have independent security significance under Guideline E in a broad range of cases.” ISCR Case No. 06-20964, 2008 WL 2002589 at *5 (App. Bd. Apr. 10, 2008). I conclude that Applicant’s history of drug abuse before and after he received a security clearance and eligibility for access to SCI raise AG ¶¶ 16(d) and (3) under Guideline E.

The relevant disqualifying condition for Applicant’s falsifications of his security clearance application is “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.” AG ¶ 16(a). Applicant’s admission that he falsified his answers to questions 24a and 24b on his application raises this disqualifying condition.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 16(a), (d), and (e), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns based on falsification of a security clearance application may be mitigated if “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.” AG ¶ 17(a). Applicant submitted his application in November 2005, but he did not disclose his post-1996 marijuana use until he was interviewed by an investigator after his positive urinalysis in March 2007. This mitigating condition is not established.

Security concerns based on personal conduct may be mitigated if “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.” AG ¶ 17(c). Although individual instances of marijuana use might arguably be considered “minor,” Applicant’s long history of marijuana use, his multiple breaches of trust by using marijuana while holding a clearance, and his concealment of his marijuana use on his security clearance application, are not minor when considered together. Thus, I conclude the first prong of AG ¶ 17(c) (“so minor”) is not established.

The second prong of AG ¶ 17(c) (“so much time”) focuses on the recentness of the conduct. There are no “bright line” rules for determining when conduct is “recent.” The determination must be based on a careful evaluation of the totality of the evidence. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” *Id.* Applicant’s last marijuana use was in March 2007, about 15 months before the SOR was issued. In light of his lifelong history of marijuana use, continuing with periodic use in 2000, 2003, and 2007, I am not satisfied sufficient time has passed to warrant a finding of rehabilitation. I conclude the second prong of AG ¶ 17(c) is not established.

Although his father’s funeral might be considered a “unique circumstance,” most of Applicant’s marijuana use has been in social and family situations. The totality of his behavior casts doubt on his reliability, trustworthiness and good judgment. I conclude AG ¶ 17(c) is not established.

Security concerns can be mitigated if “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” AG ¶ 17(d). Applicant received one hour of mandatory drug counseling, and he voluntarily received about four hours of grief counseling. Given his lifetime of drug abuse, multiple breaches of trust, and falsification of his e-QIP, I am not convinced his behavior is “unlikely to recur.” I conclude AG ¶ 17(d) is not established.

Finally, security concerns may be mitigated if “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.” AG ¶ 17(e). It appears that Applicant’s spouse, family members, and supervisors are aware of his drug abuse, but their awareness is not based on Applicant’s “positive steps.” The record does not reflect whether Applicant’s coworkers, neighbors, or his daughter are aware of his conduct. I conclude AG ¶ 17(e) is not established.

Guideline J, Criminal Conduct

The SOR cross-alleges Applicant’s falsification of his security clearance application under this guideline. The concern raised by criminal conduct is set out in AG ¶ 30 as follows: “Criminal conduct creates doubt about a person's judgment, reliability,

and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.” AG ¶ 30. Conditions that could raise a security concern and may be disqualifying include “a single serious crime or multiple lesser offenses” and “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted.” AG ¶¶ 31(a) and (c).

It is a felony, punishable by a fine or imprisonment for not more than five years, or both, to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of the executive branch of the government of the United States. 18 U.S.C. § 1001. Security clearances are matters within the jurisdiction of the executive branch of the government of the United States. A deliberately false answer on a security clearance application is a serious crime within the meaning of Guideline J. Applicant’s lifelong illegal marijuana use and his deliberate concealment of his marijuana use raise the disqualifying conditions in AG ¶ 31(a) and (c).

Security concerns under this guideline may be mitigated by evidence that “so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment.” AG ¶ 32(a). They also may be mitigated if, “there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.” AG ¶ 32(d). For the reasons set out in the above discussion of AG ¶¶ 17(c) and (d) under Guideline E, I conclude AG ¶¶ 32(a) and (d) are not established.

Whole Person Concept

Under the whole person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of the applicant’s conduct and all the circumstances. An 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 common sense judgment based upon careful consideration of the guidelines and the whole person concept. I have incorporated my comments under Guidelines E and J in my whole person analysis. Some of the factors

in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a mature adult who has spent his life employed by defense contractors, but he also has used marijuana for most of his adult life. He has held a clearance for many years, but he has breached the trust implicit in a security clearance by continuing his marijuana use and concealing it from his employer. After weighing the disqualifying and mitigating conditions under Guidelines E and J, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on personal conduct and criminal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

Formal Findings

I make the following formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25:

Paragraph 1, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraphs 1.a-1.g:	Against Applicant
Paragraph 2, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge