



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



In the matter of:)
)
) ISCR Case No. 10-02475
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: *Pro se*

April 29, 2011

Decision

RIVERA, Juan J., Administrative Judge:

Applicant illegally used marijuana intermittently from the 1980s until November 2008. He used marijuana after he was granted access to classified information at the secret level around 1992, and access to sensitive compartmented information (SCI) around 2004. Moreover, he falsified his 2008 security clearance application (SCA) and made a false statement to a government background investigator to cover his past use of marijuana. His behavior continues to cast doubt on his reliability, judgment, and ability and willingness to comply with the law and follow rules. Clearance is denied.

Statement of the Case

Applicant submitted an SCA on November 4, 2008. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is

¹ Required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; and Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as revised.

clearly consistent with the national interest to grant Applicant's request for a security clearance.

On September 27, 2010, DOHA issued Applicant a statement of reasons (SOR), which specified the basis for its decision – security concerns under Guidelines H (Drug Involvement) and E (Personal Conduct) of the adjudicative guidelines (AG).²

Applicant responded to the SOR allegations on November 9, 2010, and elected to have his case decided without a hearing. A complete copy of the file of relevant material (FORM), dated December 29, 2010, was provided to him. Applicant responded to the FORM on February 2, 2011. He objected to some aspects of the FORM and submitted information in mitigation and extenuation. The case was assigned to me on April 4, 2011, to determine whether a clearance should be granted or denied.

Findings of Fact

Applicant admitted all the SOR factual allegations under guidelines H and E. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, including Applicant's SCA, his answers to the SOR and interrogatories, his statements to government investigators, and his answer to the FORM, I make the following additional findings of fact.

Applicant is a 58-year-old systems support engineer working for a government contractor. He served on active duty as an enlisted service member in the U.S. Air Force from January 1976 until January 1978. His service was characterized as honorable. His education includes a 1985 bachelor's degree in engineering, an additional engineering certification in 2003, and a 2008 master's in business administration. Applicant is currently divorced. He has been married twice, and has three children, ages 21, 18, and 16.

Applicant has been employed as an engineer by numerous corporations since 1983 to present. He has worked for his current employer, a government contractor, since March 2004. He received access to classified information at the secret level in September 1992, from another government agency. Applicant was granted access to SCI in July 2004, and he signed a statement from his company warning him that the unlawful use of any drugs, including marijuana, was a basis for ineligibility for a security clearance and SCI.

In November 2008, Applicant submitted an SCA. Section 24 of the SCA asked whether in the last seven years he had used any illegal drugs (including marijuana), and whether he had ever used a controlled substance while possessing a security clearance. Applicant deliberately falsified his SCA when he answered "NO" to both questions.

² Adjudication of this case is controlled by the AGs, implemented by the DoD on September 1, 2006.

During his background investigation, a review of Applicant's mental counseling records revealed that in December 2008, Applicant sought counseling, among other things, to curtail his marijuana use. He told his counselor that he was using marijuana from time to time and that he wanted to stop his marijuana use. In January 2009, Applicant was questioned by a background investigator about his marijuana use. Applicant told the investigator that he used marijuana on a recreational basis during the weekends, and that he last used marijuana in 1988. Applicant made a false statement when he failed to reveal the full extent of his marijuana use.

In March 2009, Applicant was questioned by another government investigator about his use of marijuana. During the March 2009 interview, Applicant admitted using marijuana from an unspecified date until 1988, but that he started to use marijuana again in January 2005. Applicant admitted that he used marijuana 12 times in 2005, 16 times in 2006, 8 times in 2007, and 12 times from August to November 2008. Applicant admitted he knew marijuana use was illegal. He explained he used marijuana to self-medicate for his depression. Applicant's SCI access was revoked by the other government agency in May 2009, and his clearance was suspended.

Applicant's correspondence to the other government agency, to DOHA adjudicators, and in his response to the FORM, shows that he is deeply sorry, remorseful, and embarrassed about his past questionable behavior. He apologized for falsifying his SCA and for making the false statements. He understands that the use of illegal drugs is a "grave" offense. Moreover, he understands that his falsifications broke the trust and confidence placed in him by the Government.

Applicant stated that he disclosed his marijuana use and his false statement to his supervisor and his facility security officer. In a June 2009 letter, he averred that he was participating in both an employee assistance program and in counseling with a psychologist. He believes that he is making excellent progress in his treatment. It is not clear whether the treatment and counseling are related to his depression and other personal problems or to his substance abuse.

In his November 2010 letter to a DOHA adjudicator, Applicant claimed that since the suspension of his clearance he has learned a hard and invaluable lesson. He believes that his behavior and performance during the 18 months since his clearance was suspended have demonstrated that he is trustworthy. Applicant averred that he is now in control of himself. Through counseling and therapy, he has learned to manage his personal problems and stress levels in a healthy way. He is now involved in physical fitness, proper nutrition, and participates in church activities. Applicant volunteered to submit to any drug testing to show that he is abstinent. He also promised to sign a statement of intent with automatic revocation of clearance for any violation. He did not submit such document. He also did not include a recent diagnosis and prognosis by a duly qualified medical professional concerning his substance abuse problem.

Policies

The President of the United States 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.” *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant 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. 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).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs 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 adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable to reach his decision.

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 that 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. See *also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication that 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 or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[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 H, Drug Involvement

AG ¶ 24 articulates the security concern about 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.

Applicant has an extensive history of illegal marijuana use extending from around the 1980s until November 2008. He used marijuana after he was granted access to classified information at the secret level in 1992; after he was granted access to SCI in July 2004; and after he signed a statement acknowledging that the illegal marijuana use (any illegal drug) was a basis for ineligibility for SCI and a security clearance.

AG ¶ 25 describes eight conditions related to drug involvement that could raise a security concern and may be disqualifying. Three drug involvement disqualifying conditions raise a security concern and are disqualifying in this particular case: AG ¶ 25(a) “any drug abuse,”³ AG ¶ 25(c) “illegal drug possession . . . purchase, sale, or distribution,” and AG ¶ 25(g) “any illegal drug use after being granted a security clearance.”

AG ¶ 26 provides four potentially applicable drug involvement mitigating conditions:

³ AG ¶ 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.”

AG ¶ 24(a) defines “drugs” as substances that alter mood and behavior, including: (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.

(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.

I find that none of the Guideline H mitigating conditions fully apply. Applicant stopped using marijuana in November 2008. As such, his use could be considered not recent. However, the evidence does not support the conclusion that his questionable behavior is unlikely to recur. His illegal use of marijuana, although intermittent, spans a period of over 20 years. Applicant served in the military, he is well-educated, and has extensive experience working for government contractors and dealing with the security clearance process. He was 52 years old in 2004, when he received access to SCI and signed the drug use warning statement. He was 56 years old when he last used marijuana in November 2008. Applicant was well aware that using marijuana is a criminal offense and about the adverse job-related consequences of his actions. Notwithstanding, he elected to use marijuana.

Applicant did not present evidence that he has satisfactorily completed a drug treatment program and received a favorable prognosis by a duly qualified medical professional. He self-medicated with marijuana because of his depression problems. He did not present corroborating medical evidence to show that he has overcome his depression. His evidence is insufficient to show that the factors that triggered his depression and subsequent marijuana use are no longer present. He also failed to establish that he does not have a current substance abuse problem. Considering the totality of the circumstances, without credible corroborating evidence, Applicant's assertions of abstinence and well-being are not sufficient to mitigate the present security concerns.

Applicant past questionable behavior still casts serious doubts on his reliability, judgment, and his ability and willingness to comply with the law. Applicant's favorable evidence, at this time, is not sufficient to mitigate the Guideline H security concerns.

Guideline E, Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern:

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 willfully falsified his November 2008 SCA when he failed to disclose his illegal marijuana use during the seven years preceding his SCA and his marijuana use after being granted a security clearance. Moreover, he compounded his falsification by making a false statement to a government background investigator.

Applicant's falsifications are material and trigger the applicability of disqualifying conditions 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 of status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;" AG ¶ 16(b): "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;" and AG ¶ 16(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."

Because of his education, maturity, and extensive experience working for government contractors and dealing with the security clearance system, Applicant knew that he was required to disclose his marijuana use in his SCA. Applicant deliberately falsified his SCA and made a false statement to a government investigator because he was aware of the probable adverse consequences his marijuana use would have on his eligibility for a security clearance, and ultimately his job.

AG ¶ 17 lists seven conditions that could mitigate 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;

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

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

After considering the above mitigating conditions, I find that none apply to the facts of this case. Applicant falsified his 2008 SCA. His falsification is a serious, recent offense (felony level).⁴ Moreover, he also made a false statement to a government investigator. He made no effort to correct his false statements until he was confronted by a second government investigator. His behavior shows questionable judgment, untrustworthiness, unreliability, and lack of candor.

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):

⁴ See 18 U.S.C. 1001.

(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.

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. AG ¶ 2(c).

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a well-educated and valuable employee. He is also a dedicated father. In 2008, he sought counseling to help him stop using marijuana, and he stopped using marijuana in November 2008. He expressed remorse and embarrassment for his questionable behavior, and promised to remain abstinent. He is undergoing counseling to overcome his depression and substance abuse issues. This recent conduct shows responsibility, good judgment, and some mitigation.

Notwithstanding, the factors against granting his access to classified information are more compelling. Applicant illegally used marijuana for many years and while holding a security clearance. He then made false statements to cover his questionable behavior. He broke the trust placed in him. At this time, his evidence is insufficient to show that the factors that triggered his depression and subsequent marijuana use are no longer present. He also failed to establish that he does not have a current substance abuse problem. On balance, the record evidence fails to convince me of 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 Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1a - 1c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 1a - 1d:	Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Eligibility for a security clearance is denied.

JUAN J. RIVERA
Administrative Judge