



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



In the matter of:)
)
XXXXXXXXXX, XXXXX) ISCR Case No. 10-03039
)
Applicant for Security Clearance)

Appearances

For Government: Carolyn H. Jeffreys, Esq., Department Counsel
For Applicant: *Pro se*

June 22, 2011

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns under Guidelines H (drug involvement) and E (personal conduct). Clearance is denied.

Statement of the Case

On September 24, 2009, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP).¹ On November 5, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H (drug involvement) and E (personal conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

¹ Applicant previously submitted an e-QIP on December 6, 2006. (Item 6.)

The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Applicant answered the SOR on November 29, 2010, and elected to have his case decided on the written record in lieu of a hearing.

A complete copy of the file of relevant material (FORM), dated January 6, 2011, was provided to him by letter dated January 27, 2011. Applicant received the FORM on February 17, 2011. He was afforded a period of 30 days to file objections and submit material in refutation, extenuation, or mitigation. He did not submit any materials, comments, or objections in response to the FORM. The case was assigned to another administrative judge on April 11, 2011, and due to caseload considerations, was reassigned to me on April 27, 2011.

Findings of Fact

Applicant admitted all SOR factual allegations. His admissions are incorporated as findings of fact. After a thorough review of the record evidence, I make the following additional findings of fact.

Background Information

Applicant is a 56-year-old warehouse technician, who has been employed by a defense contractor since May 2006. He seeks a security clearance in conjunction with his employment. (Item 5.)² Applicant attended a university from August 1980 to April 1984, but did not graduate. He married in April 1974 and divorced in March 1988. Applicant has four children – three are adults and one is a minor. Applicant has not served in the military.

Drug Involvement

The drug use alleged in the SOR is not contested. During a February 22, 2010 Office of Personnel Management (OPM) interview, Applicant identified multiple instances of marijuana use beginning around 1980 to at least February 2010. During this 30-year period, he estimates that he used marijuana approximately 1,000 times. His marijuana use depended on availability. Throughout the years, he would purchase small amounts of marijuana or friends would provide him with “a rolled marijuana cigarette.” (Item 7.)

Applicant stated in his February 2010 OPM interview that marijuana has not had any negative impacts on his personal or professional life except in the late 1990’s or

² Item 5 is Applicant’s September 2009 e-QIP and is the source for facts in this paragraph unless otherwise stated.

early 2000's, when he tested positive for marijuana during an employer-sponsored urinalysis. As a result of testing positive for marijuana, Applicant was required to undergo individual counseling for drug use. He also stated that he has never felt addicted to marijuana nor compelled to stop his marijuana use or seek counseling for marijuana use. In the same interview, Applicant stated that he intends to "wean himself off marijuana in a year" for health reasons. (Item 7.)

Applicant has not participated in drug counseling or rehabilitation, and has not been diagnosed with substance abuse. He presented no evidence of a recent diagnosis or prognosis concerning his use of illegal drugs. Applicant continues to associate with friends who use marijuana. He believes the laws regarding marijuana are unjust and that he is not harming anyone as a result of his marijuana use. (Item 7.) The record does not include any evidence from third parties and those who know him well that support a claim of disassociation with drug using associates, change of environment, an appropriate period of abstinence, or a signed statement of intent with automatic revocation for any future violation.

Personal Conduct

The personal conduct falsifications alleged in the SOR are not contested. Applicant submitted false information on his December 2006 e-QIP and September 2009 e-QIPs regarding his past drug use. In his December 2006 e-QIP, when asked whether he had used illegal drugs to include marijuana in the previous year, he responded "no." In his September 2009 e-QIP, when asked whether he had ever illegally used a controlled substance while possessing a security clearance, he responded "no" even though he had been granted a security clearance in about 1984. It was in Applicant's February 2010 OPM interview, when he was confronted by an investigator, that he revealed the extent of his past drug involvement. During this interview, Applicant stated he made a mistake in updating the end date of his marijuana use. (Item 7.)

Also alleged is the application of 50 U.S.C. § 435c, more commonly known as the Bond Amendment, that precludes the granting or renewal of a security clearance to an individual "who is an unlawful user of a controlled substance or an addict." It is unclear from the evidence whether Applicant is a current "user" given his stated intent to quit using marijuana for health reasons. The FORM did not contain any information regarding Applicant's current drug use.

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.” *Egan* at U.S. 528.

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 unfavourable, 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 drug use. He used marijuana for a 30-year period from 1980 to 2010. During this timeframe, he purchased user amounts of marijuana on a regular basis, and about 20 years ago tested positive for marijuana requiring him to undergo drug counseling.

AG ¶ 25 describes eight conditions related to drug involvement that could raise a security concern and may be disqualifying. Two drug involvement disqualifying conditions raise a security concern and are disqualifying in this particular case: AG ¶ 25(a) “any drug abuse”³ and AG ¶ 25(c) “illegal drug possession.”

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

- (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;

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.

(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 consumed illegal drugs from 1980 to 2010. Apart from participating in individual drug counseling approximately 20 years ago after a positive urinalysis, he has not participated in any treatment program. He presented no evidence of a recent diagnosis or prognosis concerning his illegal drug use. Application of any mitigating conditions under Guideline H is not warranted in light of Applicant's age, his lengthy history of illegal drug use, his continued association with individuals who use drugs, and his willingness to continue using drugs. His past questionable behavior still casts doubts on Applicant's reliability, judgment, and willingness to comply with the law.

Guideline E, Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating, "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 admitted falsifying his December 2006 and September 2009 e-QIPs in his SOR Answer. During his February 2010 OPM interview, he stated that he made a mistake regarding the "end date" of his marijuana use; however, it is clear that his subsequent 30-year marijuana use admission does not afford him much relief on these falsification concerns.

Applicant's deliberate falsification triggers the applicability of the following disqualifying condition: 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 or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities."

AG ¶ 17 lists seven conditions that could potentially mitigate the 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 none apply. Applicant's deliberate falsifications of his e-QIP are recent and serious. A statement is false when it is made deliberately, knowingly, and willfully. An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported. Here, Applicant knew of his drug history and chose not to disclose it. He certified his answers to be true and correct.

Had Applicant's information been relied upon without verification, he may well have been successfully vetted for a security clearance. Regardless of the reason Applicant chose not to be forthcoming, the process does not allow for applicants to pick and choose which questions they will answer correctly. When applicants lie on their security clearance applications, as Applicant did in this case, they seriously undermine the process.⁴ He made no effort to correct his falsification. It was not until he was

⁴ The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

confronted by an OPM investigator in February 2010 that he revealed the extent of his past marijuana use. 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):

(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).

The comments in the Analysis section are incorporated in my whole-person assessment. I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant attended college and has been successfully employed his adult life. He was married and raised four children. His accomplishments and attributes reflect well on him.

However, in the absence of documentary evidence submitted in response to his FORM to show that he has demonstrated an intent not to abuse drugs in the future, such as disassociation with drug users, avoiding the environment where drugs are used, and a signed statement of intent not to use drugs in the future with automatic

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

revocation of his clearance for any violation, these concerns must be decided against him. Furthermore, additional favorable evidence is required for Applicant to overcome concerns raised regarding his deliberate falsifications. 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 2a – 2b:	Against Applicant
Subparagraph 2c:	For 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.

ROBERT J. TUIDER
Administrative Judge