



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



In the matter of:)
)
) ISCR Case No. 10-06362
)
Applicant for Security Clearance)

Appearances

For Government: Julie Mendez, Esquire, Department Counsel
For Applicant: *Pro se*

November 8, 2011

Decision

RIVERA, Juan J., Administrative Judge:

Applicant illegally used marijuana from around 1982 until July 2008. He used marijuana after he was granted a top secret security clearance in April 2007. Moreover, he deliberately falsified two security clearance applications (SCA), and made false statements to a government investigator. Clearance is denied.

Statement of the Case

Applicant submitted SCAs on August 7, 2006; July 8, 2008; and April 8, 2010. After reviewing the results of the latest background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to continue Applicant's security clearance.

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.

On May 16, 2011, DOHA issued Applicant a statement of reasons (SOR) alleging security concerns under Guidelines H (Drug Involvement) and E (Personal Conduct) of the adjudicative guidelines (AG).² Applicant responded to the SOR allegations on June 9, 2011, and requested a hearing before an administrative judge. The case was assigned to me on July 29, 2011. DOHA issued a notice of hearing on August 5, 2011, convening a hearing on September 13, 2011. The Government offered exhibits (GE) 1 through 10. GEs 1 through 9 were admitted without objection. GE 10 is a demonstrative exhibit that was marked for identification, but not admitted. Applicant testified and presented exhibit (AE) 1, which was admitted without objection. DOHA received the transcript of the hearing (Tr.) on September 19, 2011.

Findings of Fact

Applicant admitted all the SOR allegations. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, and having observed Applicant's demeanor and considered his testimony, I make the following findings of fact.

Applicant is a 44-year-old construction project manager working with a government contractor. He attended college from September 1985 until December 1990, when he received his bachelor's degree in construction management. He married his wife in March 2000, and he has a 29-year-old stepson and an 11-year-old son from this marriage.

After college, Applicant worked for several construction contractors. He was hired by his current employer, a government contractor, in July 2006. Applicant is considered to be a valuable employee. He successfully managed several complex construction projects, and is currently managing five construction projects with an aggregate value of approximately \$30 million. He demonstrates a strong sense of commitment, technical expertise, and managerial abilities. He is considered to be honest, trustworthy, and very reliable.

Applicant started illegally using marijuana around 1982, while he was in high school. He estimated he smoked marijuana once or twice a week. He continued using marijuana during college. He estimated he consumed marijuana approximately 50 times between 1985 and 1990, around 10 times each year. From 1990 until 2002, when his son was born, he used marijuana every month. From 2002 until July 4, 2008, he used marijuana two to five times a year. He claimed his last use of marijuana was on the 4th of July 2008. He also purchased marijuana sporadically for his personal use.

Applicant submitted his first SCA on August 7, 2006, because of his work with another government agency (Agency). He did not disclose in his 2006 SCA that he used marijuana from around 1982 until August 2006. In April 2007, the Agency granted him a

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

top secret security clearance with access to sensitive compartmented information (SCI). Because of his security clearance and SCI access, in April, May, and June 2007, he received documents and briefings that informed him of the Agency's zero tolerance for illegal drug use.

In July 2008, Applicant submitted a second SCA in which he again did not disclose that he illegally used marijuana from around 1982 until July 2008. In August 2008, after a polygraph-assisted interview, Applicant disclosed he used marijuana from 1986 until 1990, approximately 50 times. After further testing, he admitted using marijuana two times during 1998 to 2000. In November 2008, Applicant participated in a follow-up polygraph-assisted interview. This time he admitted he used marijuana since high school, and that his last use of marijuana was in July 2008, and occurred after he was granted a top secret security clearance in April 2007.

Applicant provided several explanations for his failure to disclose his illegal drug use in his two SCAs and during several interviews. Although he knew that his use of marijuana was prohibited, he believed that it was acceptable because his use was "personal and private." He also was concerned about the adverse impact his use of drugs would have on his ability to retain his job and to obtain a security clearance.

Applicant's wife currently uses marijuana. In the past, she used marijuana with him, at the same frequency and rate he used marijuana. Applicant also currently has social contact with some of his marijuana-using friends who continue to smoke marijuana in front of him. He has not participated in any substance abuse counseling or treatment. (Tr. 61-62)

Between 2008 and 2010, Applicant underwent five random drug tests, sponsored by his employer, which had negative results for drugs. Applicant testified he does not intend to use marijuana in the future. He is willing to submit himself to drug testing, as required, to show his commitment to abstain. He submitted a signed statement of intent not to use illegal drugs, with automatic revocation of clearance for any violation. Applicant expressed regret for his misconduct. He loves his family and his job. He does not want his family to be adversely impacted by his actions. He believes that his excellent job performance, which included handling a substantial budget and managing large construction projects, shows he is honest, reliable, and trustworthy.

Policies

The President of the United States 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 AG 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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 illegally used marijuana, with varying frequency, from around 1982 until July 2008. He used marijuana while working for Government contractors, and after he was granted a top secret security clearance with SCI access in April 2007.

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:

- (a) any drug abuse;³
- (c) illegal drug possession; and
- (d) any illegal drug use after being granted a security clearance.

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

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.

(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.

None of the Guideline H mitigating conditions apply. Applicant's frequent, illegal marijuana use spans a period of approximately 26 years. He started using marijuana in high school, and his use extended until July 2008 (age 41). He used marijuana socially, and not under extraordinary circumstances. Applicant falsified his 2006 and 2008 SCAs and made a false statements to a Government investigator because he was afraid he would be considered not eligible for a security clearance, or his employment with a government contractor would be terminated. He knew that his use of drugs was illegal and specifically prohibited by his employer and the Agency. Notwithstanding, he used marijuana while working for a government contractor and after he was granted a top secret security clearance with SCI access in April 2007.

Applicant believes his questionable behavior is mitigated by the passage of time because he last used drugs in July 2008, and his abstinence since demonstrates his intent not to abuse drugs in the future. He also submitted a signed statement of intent not to use illegal drugs with automatic revocation of clearance for any abuse of illegal drugs.

Applicant's actions are not sufficient to mitigate drug involvement concerns. He was made aware of the Government's serious concerns about his illegal drug use and he failed to abstain. He presented no documentary evidence to show he participated in any counseling or aftercare treatment program. He presented no evidence of a recent diagnosis or prognosis concerning his illegal drug use. He continues to associate with his marijuana-using wife and friends. Considering the evidence as a whole, Applicant's favorable evidence is not sufficient to mitigate the Guideline H security concerns.

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 deliberately falsified his 2006 and 2008 SCAs when he failed to disclose he illegally used marijuana from around 1982 until at least July 2008. He also made false statements to a Government investigator concerning the period and extent of his drug use. He used marijuana while working with a government contractor, and after he was granted a top secret security clearance with SCI access in April 2007.

Applicant's SCA falsifications, his false statement, and his use of marijuana while possessing a security clearance, trigger the applicability of the following disqualifying conditions under 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;

(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

(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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

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 that, for the same reasons discussed under Guideline H (incorporated herein), none of them apply to the facts of this case. Furthermore, Applicant made no effort to correct his falsifications until he was confronted several times during the security clearance process. His long-term use of marijuana and his three falsifications are serious offenses. His questionable behavior is likely to recur and it casts doubt on his current reliability, trustworthiness, and judgment. He illegally smoked marijuana after he was warned several times about the Agency's zero tolerance policy prohibiting the use of drugs, and while holding a top secret security clearance. He continues his association with drug-users. Thus, he is not taking steps to reduce or eliminate his vulnerability to exploitation, manipulation, or duress. Guideline E is decided against Applicant.

SOR ¶ 1.d is decided for Applicant. It does not allege misconduct, only the consequences of his misconduct.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant receives credit for his job performance. He has good endorsements from his character references. He is considered to be a truthful, highly competent, and dependable worker. He stopped using illegal drugs in July 2008. He promised never to use illegal drugs again. These factors show responsibility, good judgment, and some mitigation.

Notwithstanding, in light of Applicant's age, his 26 years of marijuana use which included drug use while working for a government contractor and possessing a top secret security clearance, his promise to not use illegal drugs in the future is not sufficient to show his questionable behavior is unlikely to recur. Serious doubts remain about Applicant's eligibility and suitability for a security clearance. Guideline E is decided against Applicant.

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 - 1.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a - 2.c, and 1.e:	Against Applicant
Subparagraph 2.d:	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.

JUAN J. RIVERA
Administrative Judge