



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



In the matter of:)
)
) ISCR Case No. 10-10121
)
Applicant for Security Clearance)

Appearances

For Government: Philip J. Katauskas, Esq., Department Counsel
For Applicant: *Pro se*

February 2, 2012

Decision

RIVERA, Juan J., Administrative Judge:

Applicant illegally used drugs from 1985 until December 2009. He used drugs after he was employed by a government contractor in December 2006, and after he was granted a security clearance. Moreover, he deliberately falsified his security clearance application (SCA) when he failed to disclose his illegal marijuana use during the seven years preceding his SCA. Clearance is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on June 21, 2007, and he was granted a security clearance. He used marijuana around December 2009. After reviewing the results of the ensuing 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 September 6, 2011, DOHA issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline H (Drug Involvement) and Guideline E (Personal Conduct) of the adjudicative guidelines (AG).² Applicant answered the SOR on October 4, 2011, and he elected to have his case decided on the written record in lieu of a hearing. A copy of the file of relevant material (FORM), dated October 27, 2011, was provided to him by transmittal letter dated October 27, 2011. Applicant received the FORM on November 11, 2011. He was allowed 30 days to submit any objections to the FORM and to provide material in extenuation and mitigation. He did not respond to the FORM, and he provided no additional information. The case was assigned to me on January 23, 2012.

Findings of Fact

Applicant admitted the three factual SOR allegations under Guideline H. He denied the single Guideline E allegation. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, including his answer to the SOR and his statement to a government investigator, I make the following additional findings of fact.

Applicant is a 43-year-old employee of a defense contractor. He attended high school from 1983 until 1987, when he received his diploma. Applicant married his wife in May 1994, and they were divorced in February 2004. He has a son, age 13, and a daughter, age 10, of this marriage. Applicant started working for his current employer, a government contractor, in December 2006. He submitted his first SCA in June 2007, and was granted a security clearance at the secret level shortly thereafter.

Section 24 of his June 2007 SCA asked Applicant whether in the last seven years he had used any controlled substance, including marijuana. Applicant answered "Yes," and disclosed that he illegally used marijuana seven times during 2003. He explained that at the time "[he] was having a really hard time with [his] divorce and made a stupid decision." (Item 5, SCA)

In December 2009, Applicant tested positive for marijuana on a random drug test ordered by his employer. In March 2010, he was interviewed by a government investigator about his use of marijuana. Applicant told the investigator he started using marijuana at age 16, because his family and friends were also using marijuana. He continued to use marijuana as an adult because it helped him to deal with stress and his panic attacks. Since age 16, he used marijuana approximately three times a month. He purchased marijuana from his cousin to meet his needs. Until he participated in the December 2009 random drug test, Applicant never made any attempts to stop using marijuana.

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

After Applicant tested positive for marijuana, his employer reaffirmed its policy against the use of illegal drugs. Applicant was given the option to either resign or stop using illegal drugs. Applicant indicated that his job was very important to him and vowed to stop using drugs. In January 2010, Applicant's employer referred him to three weeks of substance abuse counseling. At the end of the counseling, Applicant tested negative for the use of illegal drugs.

Applicant stated that he participated in aftercare treatment with Narcotics Anonymous (NA), once every one to two weeks. Additionally, his family doctor issued him a prescription to curtail his anxiety. Applicant provided no up-to-date evidence as to whether he was required to attend further aftercare treatment, the period he participated (or has been participating) in aftercare treatment, whether he has been diagnosed with substance abuse or dependence, or whether he has remained abstinent since his March 2010 interview.

Applicant told the investigator that his substance abuse counseling was helping him. He claimed he stopped using marijuana, and that he never used any other illegal drugs. He promised never to use any illegal drugs in the future. Applicant averred he had stopped associating with family members and friends who use illegal drugs.

Policies

The Secretary of Defense may 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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, a clearance decision is merely an indication that the Applicant has or 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 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 purchased, possessed, and used marijuana from 1983 until December 2009 (age 40). He used marijuana while working for a government contractor, and after he was granted a security clearance. Applicant knew the use of marijuana was illegal and that his employer had a policy against the use of marijuana.

AG ¶ 25 provides three drug involvement disqualifying conditions that 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
 - (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 illegal marijuana use spanned a period of approximately 26 years, and his use was not infrequent. He started using marijuana in 1983, at age 14, and his use extended until December 2009, when he was 40 years old. He illegally used marijuana socially, and not under extraordinary circumstances. He knew that his possession and use of marijuana was

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.

illegal and that it would adversely affect his ability to hold his job and a security clearance.

Applicant claimed he last used marijuana in December 2009. He told the investigator in March 2010 that he was abstinent, and he promised not to abuse drugs in the future. He participated in substance abuse counseling provided by his employer and attended NA for an unknown period. He also claimed that he had disassociated from his marijuana-using family members and friends.

Notwithstanding, Applicant illegally used marijuana after he started working for a government contractor, and after he was granted a security clearance. I do not find his questionable behavior is mitigated by the passage of time because of the lengthy period during which he used marijuana, his age at his most recent use, and his use of marijuana while working for a government contractor and while possessing a security clearance.

Moreover, he falsified his June 2007 SCA when he deliberately failed to disclose the extent of his marijuana use and provided misleading information. The SCA made him aware of the Government's serious concerns about federal or government contractor personnel using illegal drugs. Notwithstanding, he used marijuana after he was granted a security clearance.

Applicant presented no current documentary evidence about any counseling or aftercare treatment program. He presented no evidence of a recent diagnosis or prognosis concerning his illegal drug use. In light of Applicant's age, experience, the period he used drugs, his possession of a security clearance, and his recent history of illegal marijuana use, his promise not to use drugs without corroboration (e.g., clear evidence of lifestyle changes, statements from those who know him about his disassociation from his drug-using friends, or a competent medical diagnosis and prognosis) is not sufficient to show his use of drugs is unlikely to recur.

Considering the record evidence as a whole, Applicant's past questionable behavior still casts doubt on his reliability, judgment, and willingness and ability to comply with the law. His 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 2007 SCA when he failed to disclose he illegally used marijuana from 1985 until at least June 2007. He failed to disclose the period and extent of his drug use. His falsification triggers 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; and
- (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

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 falsification until he was confronted by a government investigator after he tested positive for marijuana. He falsified his SCA to hide from his employer and the Government his long-term illegal marijuana use. His falsification is a serious offense. His questionable behavior is likely to recur and it casts doubt on his current reliability, trustworthiness, and judgment. Guideline E is decided against Applicant.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c). Applicant claimed he stopped using marijuana in December 2009, because he wants to continue with his career. Apparently, he has done well working for his employer.

Considering Applicant's age, his 26 years of illegal marijuana use, the recency of his last drug use, and his falsification of his SCA, his promise to not use illegal drugs in the future without corroboration is not sufficient to show his questionable behavior is unlikely to recur. At this time, the record evidence fails to convince me of Applicant's eligibility and suitability for a security clearance, and of his ability to comply with the law.

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
Subparagraph 1.a:	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 eligibility for a security clearance to Applicant. Clearance is denied.

JUAN J. RIVERA
Administrative Judge