



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



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ISCR Case No. 11-04158
)	
Applicant for Security Clearance)	

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: *Pro se*

01/08/2013

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns regarding Guidelines H (Drug Involvement) and E (Personal Conduct). Clearance is denied.

Statement of the Case

On May 25, 2010, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP).¹ On August 10, 2012, in accordance with DoD Directive 5220.6, as amended (Directive), the Department of Defense issued Applicant a Statement of Reasons (SOR) alleging facts that raised security concerns under Guidelines H (Drug Involvement) and E (Personal Conduct). The SOR further informed Applicant that based on information available to the Government, DOD adjudicators could not make the preliminary affirmative finding it is clearly consistent with the national interest to grant or continue Applicant's security clearance.

¹ Applicant had submitted an e-QIP dated December 21, 2005, in conjunction with a previous background investigation. Answers he provided on that e-QIP formed the basis of several falsification allegations in this case.

Applicant responded to the SOR in writing in an undated response, 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 October 4, 2012, was provided to him, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. DOHA transmittal letter is dated October 11, 2012, and Applicant received the FORM on October 17, 2012. Applicant did not submit information within the 30-day time period after receiving a copy of the FORM. The case was assigned to me on November 29, 2012.

Findings of Fact

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

Background Information

Applicant is a 47-year-old project manager, who has worked for a defense contractor since November 1997. He graduated from high school in June 1983, and attended, but did not complete a semester of college from August 1983 to October 1983. Applicant served in the U.S. Army as an enlisted person from September 1984 to November 1986, and received an honorable discharge. He remained in the inactive reserves from November 1986 to November 1990. Applicant married in June 1997 and has two minor children.

Drug Involvement/Personal Conduct

Applicant used marijuana from 1978 through at least February 2012 except for a break of two years while he was on active duty in the Army from 1984 to 1986. He has used marijuana as frequently as daily. At the time of his June 2010 Office of Personnel Management (OPM) subject interview, he was using marijuana two-to-three times a week. As of 2010, Applicant was purchasing marijuana about twice a month. During his OPM interview, Applicant also stated that he believed he was dependent on marijuana, but recently claimed that he is no longer dependent because he has decreased his use "substantially."

Applicant admitted to driving under the influence of marijuana and sought counseling in about 1998 due to the effects his marijuana use was having on his marriage. Applicant also has a February 1991 drug-related arrest for possession of marijuana, possession with intent to distribute, and possession of paraphernalia. The charges were nolle prossed.

Applicant has repeatedly falsified information about his drug use history. He was first granted a security clearance in 1997. He was granted an interim secret clearance in December 2005, a final secret clearance in April 2006, an interim top secret clearance

in 2010, a final top secret clearance in June 2010, and a final secret clearance again in March 2011.

Applicant deliberately falsified his December 2005 e-QIP by failing to disclose his long-term illegal drug use and 1991 drug arrest. Subsequent to receiving his interim and final security clearances, he continued to use marijuana frequently. Applicant's next e-QIP was completed in May 2010, wherein he deliberately falsified this form by failing to disclose his illegal drug use, illegal drug use while holding a security clearance, his illegal drug purchases and possession of marijuana, and his 1991 drug arrest. He admitted his falsifications were deliberate because he feared consequences related to his employment if he disclosed his illegal drug activity.

Policies

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). 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 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 meeting the criteria contained in the 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 overarching 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.

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. Adverse clearance decisions are made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the [a]pplicant 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 on any express or implied determination as to applicant's allegiance, loyalty, or patriotism. It is merely an indication 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 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

Drug Involvement

AG ¶ 24 articulates the security concern concerning 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’s long-term use of marijuana from 1978 to 2012, his continued use of marijuana after being granted several security clearances, his purchase of marijuana, and his drug-related arrest fulfill AG 25(a), “any drug abuse;”² AG 25(c) “illegal drug possession, including cultivation, processing, manufacture, purchase, sale or distribution; or possession of drug paraphernalia; and AG 25(g) “any illegal drug use after being granted a security clearance” under Guideline H.³

²AG ¶ 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.”

³AG ¶ 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.

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.

Applicant has used marijuana for the vast majority of his life and his frequency of marijuana use ranged from daily to two-to-three times a week. He used marijuana well into adulthood and while holding a security clearance. He also has no period of abstinence. None of the mitigating conditions under Guideline H apply.

Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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

Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule (Sch.) I controlled substance. See Drug Enforcement Administration listing at http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308_11.htm. See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Applicant clearly provided false information on his 2005 and 2010 e-QIPs by failing to disclose his illegal drug use, drug use while holding a security clearance, illegal drug purchase and possession, and his drug-related arrest. Specifically, 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” applies to Applicant’s e-QIP falsifications.

Additionally, Applicant’s continued marijuana use after being granted several security clearances demonstrates a lack of reliability and good judgment, implicating AG 16(e) “personal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress ...”

AG ¶ 17 provides seven potentially applicable personal conduct mitigating conditions:

- (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.

Applicant has not mitigated the Guideline E concerns either. He lied about his history of illegal drug use and, as a result, was granted a security clearance. He then abused that trust granted him by the U.S. Government and continued to use marijuana while holding a clearance. He then lied again about his drug use in his most recent e-QIP. These circumstances raise significant concerns about his judgment and reliability that are not mitigated. Finally, Applicant made no effort to correct his e-QIP falsifications prior to being confronted in his subject interview, further demonstrating his poor judgment and reliability. None of the mitigating conditions under Guideline E apply.

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 the 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). I have incorporated my comments under Guidelines H and E in my whole-person analysis. Apart from the record evidence, there is little or no mitigating evidence warranting a favorable whole-person assessment in this case. Accordingly, I am limited to considering the evidence before me and as such am unable to find in Applicant's favor.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole-person. I conclude the drug involvement and personal conduct concerns are not mitigated. For the reasons stated, I conclude Applicant is not eligible for access to classified information.

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.i.: Against Applicant

Paragraph 2, Guideline E: AGAINST APPLICANT

Subparagraphs 2.a. – 2.g.: Against Applicant

Conclusion

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

ROBERT J. TUIDER
Administrative Judge