



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



In the matter of:)
)
) ISCR Case No. 11-10095
)
Applicant for Security Clearance)

Appearances

For Government: Eric H. Borgstrom, Esquire, Department Counsel
For Applicant: *Pro se*

09/13/2012

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings and exhibits, Applicant's eligibility for access to classified information is denied.

Statement of the Case

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on April 6, 2010. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) on February 15, 2012, detailing security concerns under Guideline H, drug involvement, and Guideline E, personal conduct. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *Adjudicative Guidelines For Determining Eligibility for Access to Classified Information* (AG) implemented on September 1, 2006.

Applicant acknowledged receipt of the SOR on February 23, 2012. He submitted an undated, notarized, written response to the SOR allegations and requested a decision on the written record in lieu of a hearing.

Department Counsel prepared a file of relevant material (FORM) and mailed Applicant a complete copy on July 9, 2012. Applicant received the FORM on July 16, 2012. He had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. He did not submit a response. DOHA assigned this case to me on September 7, 2012. The Government submitted five exhibits, which have been marked as Items 1-5 and admitted into the record. Applicant's response to the SOR has been admitted as Item 2, and the SOR has been admitted as Item 1.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.b and 2.a of the SOR. His admissions are incorporated herein as findings of fact. He denied the factual allegations in ¶¶ 1.a and 2.b - 2.d of the SOR.¹ He also provided additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant, who is 56 years old, works as a budget and financial analyst for a Department of Defense contractor. He began working with his employer in October 2009. He works part-time as a tax preparer during tax season.²

Applicant has held a secret security clearance since 2002. He previously held a security clearance beginning in 1976. In 2008, a Department of Defense contractor hired Applicant and requested him to apply for a higher level security clearance. Applicant completed the security clearance application (SF-86). He acknowledged marijuana use between 2001 and 2008 on the application. Shortly thereafter, his employer laid him off when the project for which he was hired to work did not materialize. After his lay-off, he received a letter advising that his security clearance for the higher level clearance was not being processed because he showed poor judgment in using marijuana. The letter did not advise him that his existing secret clearance was being denied. In 2010, his security officer could not determine the status of his

¹When SOR allegations are controverted, the Government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the Government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the Government must establish a nexus between the existence of the established facts and events and a legitimate security concern." See ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted). 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. 08-06605 at 3 (App. Bd. Feb. 4, 2010); ISCR Case No. 08-07290 at 2 (App. Bd. Nov. 17, 2009).

²Item 3.

clearance because the system reflected “inactivity” on his clearance and the security officer advised him that he needed to reapply for a security clearance.³

When he completed his SF-86 in 2008, Applicant listed a 1996 driving under the influence (DUI) arrest, foreign business travel, and use of marijuana between 2001 and 2008 on 10 occasions. When he completed his e-QIP in 2010, Applicant admitted marijuana use three times on one weekend in March 2006 and use of marijuana while holding a security clearance. He also listed his 1996 DUI, job lay-off, and business travel abroad in 2005 and 2006. When meeting with the Office of Personnel Management (OPM) investigator, Applicant discussed his foreign contacts while on business travel.⁴

During his interview with the OPM investigator, Applicant discussed his marijuana use in 2006 while holding a security clearance. He explained that he and his brother smoked a marijuana joint each day on a weekend camping trip a week after their sister died. He used the marijuana with the intent to relieve his sadness. The marijuana only made him sleepy. His brother provided the marijuana. He has not used any marijuana since this time, and his brother advised him that he is not using marijuana. During his interview with the OPM investigator, Applicant stated that he did not have an intent to use drugs in the future, but he has not signed a written statement of his intent.⁵

When he completed his e-QIP on April 6, 2010, Applicant answered “yes” to question 1.a in Section 23 (Illegal Use of Drugs or Drug Activity), when he was asked about his use of illegal controlled substances in the last seven years, and listed the three time weekend use of marijuana in March 2006. The SOR alleges that he falsified this answer because he did not acknowledge his use of marijuana about 10 times between 2001 and 2008, which he listed on his June 23, 2008 SF-86. The SOR also alleges falsification of material facts to the OPM investigator for his failure to admit to the broader use of marijuana as identified in his June 2008 SF-86.⁶

In his response to the SOR, Applicant asserts that he truthfully answered this question in 2008 and 2010. He explained that when he answered the question in April 2008,⁷ he thought the question asked for “ever used” because the prior question asked if he “ever used” marijuana while holding a security clearance. He, thus, listed use of 10 times because he smoked marijuana when he was in high school in the 1970s. He stopped using marijuana in 1976. On the security clearance applications, the question

³Item 2 - Item 5.

⁴Item 3 - Item 5.

⁵Item 5.

⁶Item 1; Item 3- Item 5.

⁷Applicant completed his 2008 SF-86 in June and his 2010 e-QIP in April. He has mixed up his months in his answer.

about “ever used” drugs while holding a security clearance comes after the question about past drug use in the 2008 SF-86 and the 2010 e-QIP. In addition, the questions in Section 21 through 29 of the 2010 e-QIP and questions 19 through 42 on the 2008 SF-86 routinely switch between “ever” and “the last seven years” when requesting information from an applicant.⁸

When he completed his e-QIP in April 2010, Applicant answered “no” to question 1.b in Section 25, which asked if his security clearance had ever been denied, suspended, or revoked. He explained to the OPM investigator that he received a letter in 2008 advising that processing of his security application for the higher level clearance had ceased because he showed poor judgment in using marijuana. In his response, he indicated that his request for a higher level security clearance would not be approved because of his marijuana use. In both instances, he stated that he understood his secret level clearance remained in effect, as nothing in the letter indicated that this clearance had been denied, suspended or revoked.⁹

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate,

⁸Item 2 - Item 4.

⁹Item 2; Item 5.

or mitigate facts admitted by applicant or proven by Department Counsel. . . .” An applicant has the ultimate burden of persuasion for obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk an 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.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to 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.

(a) Drugs are defined as mood and behavior altering substances, and include:

(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;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

AG ¶ 25 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

(a) any drug abuse (see above definition);

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

(g) any illegal drug use after being granted a security clearance.

Applicant acknowledged using marijuana three times in 2006, while he held a security clearance. While he did not purchase the marijuana, he possessed the marijuana when he smoked it. Security concerns are established under AG ¶¶ 25(a), 25(c), and 25(g).

The Drug Involvement guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 26(a) through 26(d), and the following are potentially applicable:

(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.

Applicant's use of marijuana was infrequent. His decision to use this illegal drug showed bad judgment. He has not used marijuana in over six years. He does not associate with drug users, and his brother has ceased his use of marijuana. Applicant told the OPM investigator that he has no future intent to use any illegal drugs. While I am persuaded that Applicant is not likely to abuse marijuana in the future, and favorable findings are returned as to SOR allegations 1.a., that does not end the inquiry in this case.

Although Applicant intends not to use drugs in the future, he breached a special trust when he used marijuana, an illegal drug, while he held a security clearance. He knew that marijuana was an illegal drug, and he knew, or should have known, that the use of an illegal drug violated his security clearance requirements. Despite this knowledge, he decided to smoke marijuana on at least three occasions. I find that his breach of the trust given him outweighs the other mitigating factors regarding his drug involvement and entitlement to a security clearance. Applicant has failed to fully mitigate the security concern under Guideline H.

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

AG ¶ 16 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

(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;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information; 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,

For AG ¶ 16(a) to apply, Applicant's omission must be deliberate. The Government established that Applicant omitted material facts from his April 2010 e-QIP, when he failed to acknowledge his marijuana use in the same context as he acknowledged his marijuana use in his 2008 SF-86. This information is material to the evaluation of Applicant's trustworthiness and honesty. In his response, he denied an intent to hide information from the Government about his marijuana use in his e-QIP. When the allegation of falsification is controverted, the Government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or

circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred.¹⁰

Applicant acknowledged marijuana use over a seven-year period of time in his June 2008 SF-86. Two years later, he again acknowledged using marijuana, but limited his time frame to March 2006. By acknowledging his marijuana use in June 2008, Applicant placed the Government on notice that he used marijuana in the seven years prior to completion of his SF-86. He again admitted to marijuana use in 2010. Because the Government had the information about his use of marijuana between 2001 and 2008, Applicant did not deprive the Government of unknown information about himself. Applicant provided other negative information about himself, including a DUI arrest and being laid off from his job. In 2008, Applicant applied for an upgrade of his security clearance. Before his background investigation had been completed, his employer laid him off because there was no work. Within two months of his lay off, he received a letter advising that the processing of his security clearance application had stopped because he admitted to smoking marijuana in his application. He did not understand from this letter that his clearance had been denied. To his knowledge, his existing security clearance remained in effect. Reviewing all the information in this record, I find that Applicant did not intentionally falsify his e-QIP in 2010. SOR allegations 2.b and 2.c are found in favor of Applicant.

To establish its case under AG ¶ 16(b), the Government must establish intentional conduct, not simply an omission by the Applicant. Proof of intentional conduct requires showing an Applicant's state of mind at the time he met with the OPM investigator. When he met with OPM investigator, Applicant explained the circumstances surrounding his use of marijuana in March 2006, which is the only time he used marijuana in the previous seven years. The Government is aware of Applicant's marijuana use because he self reported his drug use. He did not try to hide his conduct from the Government, and thus, he had no reason to hide information from the OPM investigator. The Government has not established that Applicant intentionally provided false and misleading information to the OPM investigator. SOR allegation 2.c is found in favor of Applicant.

With respect to the personal conduct concerns involving Appellant's drug involvement while holding a security clearance, the pertinent disqualifying conditions are AG ¶ 16(c) and AG ¶ 16(e)(1). Certainly, Appellant's drug use while holding a security clearance violates both criminal rules in our society, and the rules for holding a security clearance. These disqualifying conditions are raised as to SOR allegation 2.a.

The Personal Conduct guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 17(a) through 17(g), and the following is potentially applicable:

¹⁰See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

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

The mitigating condition outlined in AG ¶ 17(e) applies to Applicant's drug involvement as his family members and security officials are well aware of this conduct. Applicant has taken the positive step of disclosure, eliminating any vulnerability to exploitation, manipulation or duress. I do not believe Applicant would compromise national security to avoid public disclosure of his past marijuana use. Any personal conduct security concerns, pertaining to his use of marijuana are dealt with more thoroughly under the specifically, pertinent guidelines in this decision. He has mitigated the security concerns under Guideline E.

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 an 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.

Under AG ¶ 2(c), 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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant provides for his family and generally complies with the rules of society. He, however, decided to use marijuana, an illegal drug, three times in one weekend in 2006. At this time he held a security clearance, and he knew that such illegal activity was prohibited for him. He exercised poor judgment when he decided to smoke marijuana and breached the Government's trust in him when he made this decision. While I find that he

did not falsify his e-QIP, his breach of the special trust given to him by the Government prevents me from granting him a security clearance.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his personal conduct under guideline E, but he has not mitigated the security concerns arising from his drug involvement under Guideline H.

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
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant
Subparagraph 2.c:	For Applicant
Subparagraph 2.d:	For Applicant

Conclusion

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

MARY E. HENRY
Administrative Judge