



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



In the matter of:)
)
XXXXXXXXXX, XXXXX) ISCR Case No. 11-12730
)
Applicant for Security Clearance)

Appearances

For Government: Tovah A. Minster, Esq., Department Counsel
For Applicant: *Pro se*

06/28/2013

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns under Guideline H (drug involvement), but was able to mitigate security concerns under Guideline E (personal conduct). Clearance is denied.

Statement of the Case

On May 25, 2011, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On January 22, 2013, the Department of Defense (DOD) issued a statement of reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guidelines H and E. The SOR detailed reasons why DOD was unable to find that it is clearly consistent with the national interest to continue a security clearance for Applicant, and it recommended that his

case be submitted to an administrative judge for a determination whether his clearance should be continued or revoked.

Applicant answered the SOR on February 25, 2013,¹ 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 March 20, 2013, was provided to him by letter dated March 20, 2013. Applicant received the FORM on April 3, 2013. He was afforded a period of 30 days to file objections and submit material in refutation, extenuation, or mitigation.

In response to the FORM, Applicant timely submitted a response dated April 23, 2013. By a forwarding memorandum dated May 6, 2013, Department Counsel indicated that she did not object to Applicant's FORM response. The case was assigned to me on May 8, 2013.

Findings of Fact

Applicant admitted SOR ¶ 1.a and denied SOR ¶ 2.a, with explanations. He provided an additional explanation and clarification of his SOR answers in his FORM response. His admissions and explanations are incorporated as findings of fact. I make the following additional findings of fact.

Applicant is a 27-year-old engine mechanic, who has been employed by a defense contractor since January 2010. He graduated from high school in June 2004. (Items 5 and 6.) He has attended college-level courses in 2012 and 2013 in a program leading to an associate in science degree in technical management. (FORM response.) Applicant's e-QIP indicates that he has never married and has no dependents. (Item 5.) Applicant lives with a significant other and her five-year-old son. (FORM response.)

Drug Involvement/Personal Conduct

Applicant served in the U.S. Air Force from July 2004 to December 2008, and was honorably discharged as an E-4. (Items 5 and 6.) He was granted a secret security clearance while in the Air Force. (Items 5 and 9.) In January 2009, he began serving in the Air Force Reserve. When Applicant reported for his monthly drill weekend August 2010, he was informed that he had failed his July 2010 urinalysis as a result of testing positive for marijuana, and was placed on inactive status. As of June 2011 when he was interviewed by an Office of Personnel Management (OPM) investigator, he was in the process of being administratively separated from the Air Force Reserve for failing his July 2010 urinalysis. (Item 6.)

Applicant does not dispute his July 2010 urinalysis test results. (Items 6 and 8, FORM response.) He subsequently reported his drug test failure to his defense

¹ The date on the first page of Applicant's SOR answer is February 24, 2013; however, the signature page of his SOR answer is dated February 25, 2013.

contractor employer. (Items 6 and 8, FORM response.) Applicant submitted negative test results from a drug test administered on April 6, 2013, by an independent drug lab. (FORM response.)

During his June 2011 OPM interview, Applicant denied using any illegal drugs or using any illegal drugs while holding a security clearance. (Item 6.) He reiterated those denials in his November 2012 response to DOHA interrogatories. (Item 7.) He explained in his FORM response:

My intent has not been to interfere with this process. I gave an account of an extremely questionable situation and severely underestimated the seriousness of the ramifications caused afterwards. I wish to explain why I initially labeled this as a “misunderstanding” and not a mistake, which will expand on my document dated February 24. On my vacation in 2010, there were many parties I went to where alcohol and marijuana were available. Numerous occasions there was a “hot box” environment I was involved in which may account for positive urinalysis results. With alcohol a factor, it is possible I did partake in smoking marijuana and retain no memory of it. It is also possible I smoked a cigarette laced with marijuana. I did not know all the people at these events nor what they were capable of. Please note this event was almost 3 years ago and difficult to recall exactly what happened and when. If I was already intoxicated with alcohol, it could be difficult to realize marijuana was also effecting (sic) me, thus not seizing “hot box” environments. At this time it (is) also worth noting that alcoholism is not an issue with me. Like many people, I have a few now and then but nothing serious since that vacation. (FORM response.)

I was having a good time with no thought as to what could happen and no thought to my foolishness I now clearly see. It was naïve and I clearly now see it was a mistake to be in such questionable situations. It was also a mistake to not take this case seriously enough. As I did not actually use marijuana intentionally, I saw no need to justify my actions. I don't know if I simply thought this would disappear or what, but I should have taken steps much sooner to mitigate and/or extenuate this. (FORM response.)

This explanation is consistent with his previous explanation provided in his June 2011 OPM interview, his SOR answer, and his November 2012 response to DOHA interrogatories. (Items 4, 6, and 7.)

Applicant stated that his significant other, with whom he has been living in a “spouse-like” relationship since April 2009, occasionally used marijuana while around her friend during Applicant's vacation before his failed urinalysis. (Item 6.) He added that his significant other is not involved in illegal drug use and has not possessed or used drugs since they have lived together in their current location. Applicant supports her and her five-year-old son. (FORM response.) He has not participated in a drug treatment program. (Item 6.)

Character Evidence

Applicant's work performance evaluations covering the period of January 2001 to December 2012 reflect that he is a capable employee, who is making a contribution at his work site. (Item 4.) He submitted a reference letter from a senior engine technician, who has worked with Applicant over the past three years. His reference described Applicant as a "solid and dependable employee with a high degree of integrity and quality consciousness." He further stated that Applicant "has many skills and value to bring to an organization." (FORM response.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AGs. In addition to brief introductory explanations for each guideline, the AGs list potentially disqualifying conditions and mitigating conditions, which are useful 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by "substantial evidence,"² demonstrating, in accordance with the Directive, that it is not clearly consistent with the

² See Directive ¶ E3.1.14. "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "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).

national interest to grant or continue an applicant's access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to applicant to produce evidence "to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15. 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).³

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 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.

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* Executive Order 12968 (Aug. 2, 1995), Section 3.

Analysis

Drug Involvement

AG ¶ 24 articulates the drug involvement security concern:

[u]se of an illegal drug^[4] 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.

³ "The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

⁴ 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.

Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c).

AG ¶ 25 describes eight conditions that could raise a security concern and may be disqualifying in this case:

- (a) any drug abuse;⁵
- (b) testing positive for illegal drug use;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;
- (d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;
- (e) evaluation of drug abuse or drug dependence by a licensed clinical social worker who, is a staff member of a recognized drug treatment program;
- (f) failure to successfully complete a drug treatment program prescribed by a duly qualified medical professional;
- (g) any illegal drug use after being granted a security clearance; and
- (h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

AG ¶¶ 25(a), 25(b), and 25(g) apply. Applicant tested positive for marijuana on a urinalysis in July 2010, while holding a security clearance. Applicant does not dispute the validity of the urinalysis test, but offers an “unknowing or passive inhalation” defense.

Applicant’s explanation of how his July 2010 urinalysis could have tested positive for marijuana raises questions about his trustworthiness and good judgment. He offered no credible or convincing evidence such as the nanogram level of his test results, witness testimony or statements to support his “unknowing or passive inhalation” defense, or testimony upon which a credibility assessment could be made. In short, I do not accept Applicant’s explanation as credible.

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;

⁵ 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.”

- (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.

AG ¶¶ 26(a) and 26(b) partially apply. Although it has been over two years since his urinalysis, the explanations Applicant provided about how he could have tested positive lack credibility and substantiation. While Applicant's motivation to stop using or not to use illegal drugs is evident, his explanations of how he could have tested positive while holding a security clearance undercut receiving full mitigation. None of the other mitigating conditions 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 and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes five conditions that could raise a security concern and may be disqualifying in this case:

- (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;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior . . . ; and (3) a pattern of dishonesty or rule violations . . . ; 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 ¶¶ 16(a) through 16(d) do not apply. As indicated under the drug involvement guideline, there is credible adverse information that is sufficient for an adverse determination under Guideline H. However, AG ¶ 16(e)(1) applies because his drug abuse while holding a security clearance creates a vulnerability to exploitation, manipulation, or duress, and such conduct adversely affects Applicant's professional standing. There is substantial evidence of this disqualifying condition, and further inquiry about the applicability of mitigating conditions is required.

AG ¶ 17 provides seven conditions that could mitigate security concerns in this case:

(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.

AG ¶¶ 17(a) through 17(d), and 17(f) do not apply. No falsification or failure to cooperate in the security clearance application process was alleged, although Applicant's credibility has come into question as a result of his explanations for testing positive for marijuana.

AG ¶ 17(e) applies and mitigates concerns under AG ¶ 16(e)(1). Applicant disclosed his drug abuse to his employer, which is a positive step to reduce or eliminate vulnerability to exploitation, manipulation, or duress. Federal security officials are well aware of his history of drug abuse. It is unlikely that anyone could use Applicant's history of drug abuse to coerce him into compromising classified information.

AG ¶ 15 indicates that poor judgment can cause reliability and trustworthiness concerns, resulting in disqualification under the personal conduct guideline. Judgment issues under the personal conduct guideline are more specifically addressed in this case under the drug involvement guideline. I find for Applicant under Guideline E because those judgment issues are a duplication of the judgment concerns previously discussed under Guideline H.

Whole-Person Analysis

In all adjudications, the protection of our national security is the paramount concern. The adjudicative process is a careful weighing of a number of variables in considering the “whole-person” concept. It recognizes that we should view a person by the totality of his or her acts, omissions, and motivations as well as various other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances and applying sound judgment, mature thinking, and careful analysis. Under the whole-person concept, 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 a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Although there is insufficient whole-person evidence to support reinstatement of Applicant’s clearance and access to sensitive information at this time, he presented some positive whole-person evidence.

Applicant honorably served in the Air Force from July 2004 to December 2008. The only evidence of drug involvement is Applicant’s one-time urinalysis failure. Applicant states that he does not use drugs nor does he associate with drug users. He provided evidence of a negative drug test administered as recently as April 2013. Applicant has a stable job and a stable home life. He supports his significant other and her five-year-old son. Applicant is working towards earning an associate’s degree. His work performance evaluations and his work-related reference are positive.

However, Applicant’s use of illegal drugs while holding a security clearance is a significant breach of trust. His “unknowing or passive inhalation” defense and various theories on how he could have tested positive appear as attempts to undermine the process. His use of illegal drugs while holding a security clearance indicates a lack of judgment, and raises unresolved questions about his reliability and trustworthiness. Personal conduct concerns are mitigated as a duplication of the drug involvement concerns. Drug involvement concerns are not mitigated.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 12968, the Directive, the Regulation, the AGs, and other cited references to the facts and circumstances of this case in the context of the whole person. For the reasons stated, I conclude Appellant is not eligible for access to classified information and assignment to a sensitive position.

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:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

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

ROBERT J. TUIDER
Administrative Judge