



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 12-01034

Appearances

For Government: Gregg Cervi, Esq., Department Counsel

For Applicant: *Pro se*

05/29/2013

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated drug involvement security concerns, but mitigated personal conduct concerns. Eligibility for access to classified information is denied.

Statement of the Case

On November 29, 2012, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOD adjudicators could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether his clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended, DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the Adjudicative Guidelines (AGs) implemented by the DOD on September 1, 2006.

Applicant responded to the SOR on December 21, 2012, and requested a hearing. The case was assigned to me on April 5, 2013, and was scheduled for hearing on May 6, 2013, by video teleconference. A hearing was held on the scheduled date for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At the hearing, the Government's case consisted of six exhibits (GEs 1-6); Applicant relied on one witness (himself) and one exhibit (AE A). The transcript (Tr.) was received on May 10, 2013.

Summary of Pleadings

Under Guideline H, Applicant allegedly: (a) used marijuana, with varying frequency, from approximately 1977 to at least September 2010; (b) continued to use marijuana after he was granted a security clearance in July 2009; (c) continued to use marijuana after he was granted access to sensitive compartmented information (SCI) in March 2009; (d) continued to use marijuana after he was granted a top secret (TS) clearance in July 2008; and (f) continued to use marijuana after he was granted a secret clearance in September 2004.

Under Guideline E, Applicant allegedly (a) used marijuana while holding security clearances between 1977 and at least September 2010, and (b) omitted his use of marijuana when completing his security clearance application (e-QIP) in July 2003.

In his response to the SOR, Applicant admitted all of the allegations covering his drug activities and SF-86 omissions. He provided no explanations.

Findings of Fact

Applicant is a 54-year-old systems technologist for a defense contractor. He seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Background

Applicant married in June 1987 and divorced his spouse in October 1989. (GE 1) He has no children from this marriage. Since 1998, he has cohabited with his girlfriend. (GE 4; Tr. 30) Applicant earned a diploma from a technical vocational institute in April 1995. (GE 1) He claims no military experience.

Applicant's drug history

Applicant was introduced to marijuana in 1977 during his first year in college. (GE 5) He tried cocaine a few times in the early 80s and never used it again. He continued smoking marijuana for another 15 years, sometimes at parties or while hiking with friends. It relaxed him in his younger years. (GE 5) When he purchased it, he did so with friends for sharing purposes. (GE 5) By 1992-1993, Applicant had ceased using marijuana.

Applicant resumed his use of marijuana while on vacation with his girlfriend in Jamaica in 2000. (GEs 4 and 5; Tr. 31-34) He used it socially with his friends over a four-day period approximately eight times. Applicant continued using marijuana after he had been granted a secret security clearance by DOD in September 2004. His girlfriend does not use marijuana, but was probably aware of his using it on his Jamaica trip. (Tr. 30-32)

Applicant continued to use marijuana after he was granted an interim TS security clearance by DOD in July 2008, and he continued using marijuana after he was granted a TS security clearance by DOD in November 2008. He continued to use marijuana after he was granted access to SCI in March 2009. (GE 4) In August 2009, he used marijuana in social situations over a four-day period. (GE 4; Tr. 34-35) On these occasions, he often smoked the substance using a pipe, taking two puffs each time with his friends. He attributed mid-life crisis issues to his continuing use of marijuana. (GE 4) He described his use as "just old friends getting together and behaving like we were younger." (GE 5)

In September 2010, Applicant was on a canoeing and hiking trip with old friends when he smoked marijuana over 10 times over a four-day period. (GE 4; Tr. 35-36) Before this trip, he had received no briefing or training on DOD requirements of self-reporting. (Tr. 37-38) He expressed shame and remorse for his actions and poor judgment and understands the potential repercussions of his behavior. He has not used marijuana since his last use in September 2010 (GEs 1, 4, and 5; Tr. 41), and has restricted his contact with those friends who use drugs. (Tr. 43-44) However, he has never received drug counseling or subjected to random drug testing by his employer.

Applicant's e-QIP omissions

In completing his security clearance application (e-QIP) in July 2003, Applicant intentionally omitted his prior use of marijuana in 2000. (GE 3) He repeated his omissions when completing his July 2008 e-QIP. (GE 2) Not until he completed a third e-QIP in March 2011 did he disclose his past marijuana activity. (GE 1) He attributed his past omissions to embarrassment and immaturity. (GE 5)

After admitting using marijuana in his 2011 e-QIP, Applicant was notified that his security clearance was suspended. (GE 4) He accepted full responsibility for his actions and recognized "what a stupid and irresponsible thing this was to do." (GE 4)

When interviewed in January 2012 by an agent from the Office of Personnel Management (OPM), Applicant disclosed his lengthy history of marijuana usage. In this interview he expressed profound remorse for his errors of judgment. (GE 4)

Endorsements

Applicant is well regarded by his supervisor. He did not furnish personnel evaluations or evidence of civic contributions. (AE A)

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns." These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c)

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the revised AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. "[S]ecurity-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). And because all security clearances must be clearly consistent with the national interest, the burden of persuasion must remain with the Applicant.

Viewing the issues raised and evidence as a whole, the following adjudication policy concerns are pertinent herein:

Drug Involvement

The Concern: 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. AG ¶ 24.

Personal Conduct

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, 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 ¶ 15.

Burden of Proof

A decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. *See United States v. Gaudin*, 515 U.S. 506, 509-511 (1995). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. "[S]ecurity-clearance determinations should err, if they must, on the side of denials." *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). And because all security clearances must be

clearly consistent with the national interest, the burden of persuasion must remain with the Applicant.

Analysis

Applicant is a well-regarded systems technologist who presents with a considerable history of drug involvement. Principal security issues in this case center on Applicant's drug involvement and his omitting his drug use in security applications he completed in 2003 and 2008.

Drug concerns

Over a 33-year period between 1977 and September 2010), Applicant used marijuana regularly in social settings with friends and contacts. Use of illegal drugs, (inclusive of marijuana) is proscribed by both state law and federal law (see 21 U.S.C. § 802, *et seq.*). Some of his marijuana use occurred while he possessed a security clearance.

Applicant's admissions to using illegal drugs raise initial security concerns over risks of recurrence as well as judgment issues. On the strength of the evidence presented, three disqualifying conditions of the AGs for drug abuse are applicable: DC ¶ 25(a), "any drug abuse," DC ¶ 25(c), "illegal possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia," DC ¶ 25(g), "any illegal drug use after being granted a security clearance."

Applicant's recurrent use of marijuana over a 33-year period raises questions over the strength of his abstinence commitments. Because of the recency and recurrent nature of his marijuana usage (inclusive of periods when he possessed a security clearance), Applicant's involvement with the drug cannot be considered fully mitigated. Too little time has elapsed since Applicant's last use in September 2010 (less than three years) to absolve him of security concerns over risks of recurrence.

Applicant has made noticeable gains in his efforts to mitigate his past drug activities. Still, his recurrent use of marijuana over a significant period of time (over 33 years) has been followed by a relatively brief period of self-imposed abstinence, and has not been accompanied by any cognizable counseling or programmatic rehabilitation. Considering the regularity and recurrent nature of his marijuana use over a lengthy period of time, many of the mitigating conditions for drug involvement are not available to Applicant.

To his credit, Applicant has ceased contact with friends who use drugs since his last use of marijuana in September 2010. His efforts warrant the application of MC ¶ 26(b)(1), "disassociation from drug-using associates and contacts," and MC ¶ 26(b)(2),

“changing or avoiding the environment where drugs were used,” to the merits of his situation.

More recently, Applicant has exhibited candor about his marijuana usage and his past associations with friends and contacts involved in drug activities. Applicant’s assurances that he no longer uses illegal drugs are encouraging. He has a lengthy history of recurrent drug use after significant periods of abstinence. Under these circumstances, more time is needed to facilitate safe predictions that he is not a recurrence risk.

From a whole-person perspective, Applicant has established independent probative evidence of his overall honesty, trustworthiness, and understanding of DOD policy constraints on the use of illegal substances. He lacks enough positive reinforcements, however, to facilitate safe predictions he is at no risk of recurrence.

Considering the record as a whole, at this time there is insufficient probative evidence of sustainable mitigation to safely predict he will refrain from illegal drug use in the foreseeable future. Taking into account all of the facts and circumstances surrounding Applicant’s drug activities over a 33-year period, he does not mitigate security concerns with respect to the allegations covered by subparagraphs 1.a through 1.f of the SOR.

Personal conduct concerns

Security concerns are raised as well over Applicant’s judgment, reliability, and trustworthiness under Guideline E as the result of his recurrent use of illegal drugs while holding a security clearance and his omissions of his marijuana use in the e-QIPs he completed in 2003 and 2008. By omitting his marijuana usage, Applicant failed to furnish materially important background information about his illegal use of drug that was needed for the Government to properly process and evaluate his security clearance applications.

To be sure, questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, are each core policy concerns of the personal conduct guideline. (AG ¶ 15) The same concerns that attach to Applicant’s repeated drug involvement apply with equal force to the judgment concerns associated with his drug activities under the personal conduct guideline and essentially duplicate one another.

For the reasons stated, Applicant’s drug-related activities do not warrant any independent cognizance under the personal conduct guideline. See ISCR Case No. 06-20964, at 6 (April 10, 2008). Subparagraph 2.a, accordingly, is resolved favorably to Applicant.

Twice, Applicant omitted his past marijuana usage when completing his security applications: once in 2003 and once again in 2008. His e-QIP omissions invite application of DC ¶¶ 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 16(d)(3), “a pattern of dishonesty or rule violations.”

Applicant fully disclosed his drug involvement in the e-QIP he completed in 2011 and was candid about his drug usage and his errors in judgment when later queried by the OPM agent who interviewed him in January 2012. MC ¶ 17(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,” applies to Applicant’s situation.

Applicant’s repeated omissions of his marijuana use when completing e-QIPs in 2003 and 2008, while serious, were corrected by Applicant on his own volition in the e-QIP he executed in March 2011. His actions are isolated when considered in juxtaposition to the impressions of his supervisor about his overall honesty and reliability. Mitigation credit is available to him under MC ¶ 17 (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.”

In making a whole-person assessment of Applicant’s omissions, consideration is given to both his stated reasons for omitting his marijuana use in his e-QIPs, his voluntary election to set the record straight with his admissions of drug usage, and the positive overall impressions he forged with his supervisor about his honesty and trustworthiness. Evaluating all of the facts and circumstances developed in the record, Applicant mitigates security concerns associated with the allegations covered by subparagraph 2.b of the SOR covering his e-QIP omissions.

Formal Findings

In reviewing the allegations of the SOR in the context of the findings of fact, conclusions, and the factors and conditions listed above, I make the following separate formal findings with respect to Applicant's eligibility for a security clearance.

GUIDELINE H (DRUG INVOLVEMENT):	AGAINST APPLICANT
Subparas. 1.a through 1.f:	Against Applicant
GUIDELINE E (PERSONAL CONDUCT):	FOR APPLICANT

Subparas. 2. a and 2.b:

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 Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge