



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



In the matter of:)
)
) ISCR Case No. 14-01062
)
Applicant for Security Clearance)

Appearances

For Government: David Hayes, Esq., Department Counsel
For Applicant: *Pro se*

09/29/2016

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Defense Department's intent to revoke his eligibility for a security clearance to work in the defense industry. Applicant used marijuana after being granted a security clearance in 1982. He continued to use marijuana after receiving special program access and signing his employer's code of conduct prohibiting illegal drug use in 1997. He falsified the duration, frequency, and his date of last illegal drug use on three security clearance applications and in two background interviews. Clearance is denied.

Statement of the Case

On November 25, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing security concerns under the drug involvement and personal conduct guidelines.¹ DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue Applicant's security clearance.

¹ This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

Applicant timely answered the SOR and requested a hearing. On April 4, 2016, I issued a prehearing order to the parties regarding the exchange and submission of discovery, the filing of motions, and the disclosure of any witnesses.² The parties submitted documents by the April 15, 2016 deadline. At the hearing, which proceeded as scheduled on April 28, 2016, I admitted Government's Exhibits (GE) 1 through 6, Applicant's Exhibits (AE) A through F, and Hearing Exhibits I – II, without objection. The Defense Office of Hearing and Appeals (DOHA) received the transcript (Tr.) on May 10, 2016.

Procedural Issues

SOR Amendments

Without objection from the parties, SOR ¶ 2.a. is amended to read as follows:

2.a. You falsified material facts on security clearance applications, standard form 86, dated July 17, 1997, July 25, 2001, and October 18, 2006, on which you indicated you had not used illegal drugs during the seven-year scope of inquiry.³

Findings of Fact

Applicant, 60, has worked for a federal contractor since 1982. Six of Applicant's coworkers, most of whom he has worked with for more than 10 years, wrote letters of support, each recommending him for continued access to classified information. Each letter writer describes Applicant as honest, trustworthy, and reliable. Applicant completed his most recent security clearance application in October 2012, disclosing marijuana use from January 1978 to January 2011. He clarified that he used marijuana fewer than five times in the seven years before he completed the October 2012 application. He also disclosed that he used marijuana while having a security clearance and that he had no intention of using the drug in the future. The ensuing investigation revealed additional information about Applicant's clearance history and his history of illegal drug use.⁴

Applicant was first granted access to classified information in 1982. Applicant's access level was upgraded in 1997; he also received access to a special program from another government agency (AGA). As part of his special program access, he underwent polygraph examinations and interviews. He also signed a code of conduct provided by his employer, requiring that he abstain from all illegal drug use. The code of conduct warned Applicant of the potential adverse consequences of future drug use, to include loss of access. Applicant underwent periodic reinvestigations in 2001, 2006, and 2011. During his 2011 reinvestigation, Applicant discussed his history of drug use in June 2011 and July 2011 interviews. He provided conflicting information about the

² The prehearing scheduling order is appended to the record as Hearing Exhibit (HE) I.

³ Tr. 29-33.

⁴ GE 1; AE A-F.

extent, frequency, and date of his last use of marijuana. In February 2012, AGA revoked Applicant's special program access based on his history of marijuana use, his use while having a security clearance, and his violation of his employer's code of conduct regarding illegal drug use.⁵

Applicant continued to provide conflicting information about his history of drug use on his October 2012 security clearance application, during his October 2012 and January 2013 background interviews, in his answer to the SOR, and during his testimony at hearing. However, Applicant consistently admits that he began using marijuana while in high school. He also admits that he continued to use marijuana into adulthood with varying frequency, that he did so while holding a security clearance, and in violation of the code of conduct. Applicant gave several reasons for his conflicting statements. He claims that he was not trying to deceive the Government about his history of drug use, but that he could not remember it because the activity was not a large part of his life. He also explained the uncomfortable nature of the June and July 2011 interviews, during which he felt pressured to provide answers very quickly. He also cited his misunderstanding of his state's marijuana laws, which he believed changed in 2009 to decriminalize marijuana use.⁶

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). 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.

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." Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion to obtain 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 the applicant may deliberately or inadvertently fail to protect classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

⁵ GE 4-5, 6.

⁶ Answer: GE 2-3; Transcript, dated April 28, 2016.

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

Drug Involvement

Use of an illegal 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.⁷ Applicant’s history of illegal drug use, which began in high school, continued through adulthood, and after being granted a security clearance in 1982 and through at least 2011, is disqualifying.⁸

None of the drug involvement mitigating conditions apply. Given Applicant’s inconsistent statements about the duration, frequency, and date of his of last use of marijuana, it is not possible to conclude that his illegal drug use is a thing of the past or that it is unlikely to recur. Nor is his statement of intent not to use illegal drugs in the future credible. Applicant’s history of use after being granted access to classified information and having signed a code of conduct continues to cast doubt on his reliability, trustworthiness, and judgment.

Personal Conduct

The SOR alleges that Applicant falsified facts on his July 1997, July 2001, and October 2006 security clearance applications, as well as those he provided during his October 2012 and January 2013 background interviews regarding his history of illegal drug use and his illegal drug use while holding a security clearance. Applicant denies the falsification allegations. A statement is false when it is made deliberately (knowingly and willfully). An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported. The record supports a finding that Applicant’s statements were intentionally misleading.⁹

Applicant became aware in at least June 2011 that the Government was interested in his history of illegal drug use. Because an applicant is required to provide full, frank, and candid answers at all times to all inquiries made during the investigation and adjudicative process, it became incumbent on Applicant to take the time to provide accurate information about his past use of marijuana. He had at least six subsequent opportunities to do so. Instead, he provided a series of inconsistent statements, making it nearly impossible to glean the truth regarding his drug involvement. These false

⁷ AG ¶ 24.

⁸ AG ¶¶ 24(a) and (g).

⁹ AG ¶¶ 16 (a) and (b).

statements cannot be considered minor and continue to negatively reflect on Applicant's ongoing security worthiness. His actions indicate that he may not properly report or disclose adverse information in the future.

The SOR also alleges that Applicant intentionally violated his employer's code of conduct prohibiting illegal drug use. Applicant denies this allegation, offering a series of conflicting explanations. In light of the conflicting dates of marijuana use reported by Applicant, none of his explanations mitigate his actions.¹⁰ Applicant chose to use illegal drugs in direct contravention of his employer's code of conduct without thought for the potential consequences. Applicant's actions show a disregard for the fiduciary relationship he entered into with his employer and the Government upon being granted access to classified information and a special access program. Furthermore, Applicant's explanations show a failure to take full responsibility for his misconduct. None of the personal conduct mitigating conditions apply.

Whole-Person Concept

Based on the record, I have doubts about Applicant's judgment and trustworthiness. I have also considered the whole-person factors at AG ¶ 2. The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information.¹¹ Security clearance decisions are not an exact science, but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances.¹² Applicant has held a security clearance for over 30 years and special program access for the last 10 years. During that time, he has used illegal drugs and has lied to the government about it. His decision to use an illegal drug while having access to classified information and special program access shows that Applicant does not possess the good judgment or trustworthiness required of an individual to maintain such access. Clearance is denied.

¹⁰ AG ¶ 16(f).

¹¹ *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980).

¹² *Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988).

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, Drug Involvement:	Against Applicant
Subparagraphs 1.a – 1.b:	Against Applicant
Paragraph 2, Personal Conduct:	Against Applicant
Subparagraph 2.a – 2.f:	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.

Nichole L. Noel
Administrative Judge