



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



In the matter of:

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) ISCR Case No. 14-04987
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Applicant for Security Clearance

Appearances

For Government: Andre M. Corrales, Esq., Department Counsel
For Applicant: *Pro se*

08/15/2016

Decision

WHITE, David M., Administrative Judge:

Applicant falsified two security clearance applications concerning his illegal drug involvement before and during the years he held a security clearance. Resulting security concerns were not mitigated. Based on a review of the pleadings and exhibits, eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SF-86) on May 9, 2013.¹ On October 22, 2015, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guidelines H (Drug Involvement) and E (Personal Conduct).² The

¹ Item 3. He also submitted Item 4, his first SF-86 on Oct. 21, 2008.

² Item 1.

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*, that came into effect in the Department of Defense on September 1, 2006.

Applicant submitted his written answer to the SOR on November 13, 2015, and requested that his case be decided by an administrative judge from the Defense Office of Hearings and Appeals (DOHA) on the written record without a hearing.³ Department Counsel submitted the Government's written case on January 4, 2016. A complete copy of the File of Relevant Material (FORM)⁴ was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM.

Applicant signed the document acknowledging receipt of his copy of the FORM on February 7, 2016. He submitted additional material within the succeeding 30 days, and made no objection to consideration of any contents of the FORM other than to comment on inaccuracies contained therein. Department Counsel had no objection to Applicant's FORM response, and it is admitted into the record as Applicant's Exhibit (AE) A. DOHA assigned the case to me on March 1, 2016.

Findings of Fact

Applicant is 31 years old. He has worked as a software engineer for a defense contractor since October 2008. He graduated from high school and entered college in 2003, earning a bachelor's degree in May 2009. He has never married and has no children. In his FORM response, he said that he recently relocated across the country and purchased a house with his girlfriend.⁵

In his answer to the SOR, Applicant admitted the truth of the seven allegations concerning his drug involvement, and admitted the truth of the nine allegations concerning his personal conduct.⁶ Applicant's admissions, including those contained in his July 18, 2015 answers to DOHA Interrogatories (Item 5), are incorporated into the following findings of fact.

³ Department Counsel's File of Relevant Materials included only the first three pages of Applicant's answer to the SOR and the forum selection/signature/notarization page as Item 2. Applicant provided a full copy of his answer to the SOR with his response to the File of Relevant Materials. It has been fully considered and will be cited as, "AE A," below.

⁴ Department Counsel submitted eight Items in support of the SOR allegations. The FORM was improperly dated January 4, 2015, vice 2016.

⁵ Item 3; AE A. Applicant moved to a state that has legalized recreational marijuana use under state law.

⁶ Item 2; AE A.

Applicant said that he started using marijuana during the summer of 2003. From then until March 2012, he smoked it with varying frequency that averaged about once or twice per week.⁷ He admitted that he used psychedelic mushrooms provided by friends on three separate occasions in 2007 and 2008.⁸ On New Year's Eve 2007, and again on a camping trip during the summer of 2010 or 2011, Applicant crushed Adderall pills, that were prescribed for a friend, into powder and inhaled the drug for which he did not have a prescription.⁹

During a sworn security interview on August 1, 2012, Applicant said that he purchased marijuana about three or four times per year since he started smoking it. He said that he never sold or distributed it, but often shared marijuana with his friends in social situations. He said that he stopped using marijuana after a March 2012 polygraph examination because he decided it was not worth the stress of being confronted about it again by security personnel. He also said that he would not use marijuana in the future while holding a security clearance, but had not made a final decision as to whether he would resume use in the future. He further told the investigator that, "to be one-hundred percent honest, you should not believe me," concerning whether he would continue smoking marijuana while holding a clearance.¹⁰

In his July 2, 2013 security interview, which he affirmed under oath on July 18, 2015, Applicant said that he may have purchased small amounts of marijuana on three or four occasions between 2003 and 2008. He further said that from 2008 to March 2012 he purchased marijuana about four times per year. On other occasions, he used marijuana provided for free by friends.¹¹

Applicant first applied for a security clearance in October 2008, and was granted a Top Secret clearance in February 2009. On May 12, 2009, he signed a "Personnel Security Advisory" document, as required under the security policies of another Government agency, for whom he was performing work under contract at the time. In that document he acknowledged that, as a condition of receiving or retaining a security clearance and eligibility for access to the agency's information and facilities, improper use of drugs was strictly prohibited. As a result of his subsequent illegal use of marijuana and Adderall, that agency revoked Applicant's clearance on October 26, 2012.¹²

⁷ Item 5; Item 6; AE A..

⁸ Item 2; Item 6; AE A.

⁹ Item 2; Item 6.

¹⁰ Item 6.

¹¹ Item 5.

¹² Item 2; Item 6; Item 7; Item 8; AE A. The revocation was approved by the Deputy Chief of that agency's Adjudications Division on Nov. 5, 2012. It became final on Apr. 4, 2013, after Applicant did not appeal that revocation decision.

Applicant answered, “No,” in response to the question in Section 24.a on his first SF-86 in October 2008, which asked whether he had illegally used any controlled substance in the last seven years. During his August 1, 2012 sworn security interview, he said that he did not disclose his illegal drug use during the preceding five years on that SF-86, or during his January 15, 2009 interview conducted by an investigator from the Office of Personnel Management (OPM), because he was worried that if he disclosed this information it would cause his security processing to be immediately terminated.¹³

On May 9, 2013, after his previous clearance had been revoked, Applicant submitted the SF-86 security clearance application that is currently under adjudication, with his certification that all statements therein were true, complete, and correct to the best of his knowledge and belief. He acknowledged that intentionally falsifying information on that form was a Federal crime, and could result in denial of his clearance and debarment from Federal service. Nevertheless, as he now admits, he intentionally falsified his answers to four questions in Section 23 of that SF-86 concerning his history of illegal drug activity. He responded, “No,” to the questions that asked: whether he had illegally used any drugs during the past seven years; whether he had illegally purchased any drugs during that period; whether he had ever illegally used or otherwise been involved with a controlled substance while possessing a security clearance; and whether he had intentionally misused prescription drugs during the past seven years.¹⁴

During his July 2, 2013 OPM interview, he said that he answered those questions incorrectly because he had ‘compelling anecdotal evidence’ that if he had answered them in the affirmative he would not have ever been granted a clearance, without which he would not be able to work on the most meaningful and compelling work in his company. He also declined to discuss the identity of the people with whom he used drugs, or specifics concerning where they did so. He stated in his answer to the SOR, “As much as I may be obliged to cooperate with the government, I am certainly much more strongly obliged not to betray the trust developed over many years that these people now have in me. . . . To be blunt, no job is worth the bonds that I’ve developed with these people.”¹⁵

Applicant’s responses to the SOR and FORM contain extensive commentary describing his opinions about why the Government should not be concerned about his history of drug abuse before and after being granted his previous clearance, or his intentional falsification of two security clearance applications because he knew that being honest would probably disqualify him from clearance eligibility. A sampling of his statements is provided for illustration of these views:

¹³ Item 4; Item 6.

¹⁴Item 3; Item 5; AE A.

¹⁵ Item 2; Item 3; Item 5; AE A.

My behavior discussed above demonstrates the benign and irreprehensible nature of the transgressions cited. It should be plainly visible that the activities I've engaged in during my free time have had no detrimental impact on my work, or on national security. So why, in this case, are they cause for such concern when other commonplace behaviors are tolerated? One is tempted to explore the possibility that the inconsistent treatment of various minor offenses stems from the deep-seated ideologies supported by politics, though that debate is outside the scope of this discussion. In any case, since **it is clear that minor missteps committed by otherwise responsible people do not raise concerns regarding trustworthiness, reliability, or willingness to defend the nation's interests**, I must assert that Guideline H does not apply in this situation. (Emphasis in original.)¹⁶

Regarding his statement to an investigator in August 2012, that he would not use marijuana while holding a security clearance, but had not made a final decision as to whether or not he will ever use marijuana in the future, Applicant stated:

I fail to see why I should be compelled to forsake such a harmless pastime in an era where our nation is on the cusp of making this substance accessible medically or even recreationally. Furthermore, it is not a forgone conclusion that I will be in the service of the government indefinitely. As such, what arguments could possibly persuade me to make such a permanent and arbitrary decision? What I may or may not do in the distant future, when the law may have changed or when my service to the government has ended, is not within the government's authority to question. If I am forced to conclude that the government would simply prefer not to work with people such as me, based on hypotheticals and conjecture, then I must consider whether this is a government which deserves the use of my talents. Again, **I am loathe to believe that a modern, progressive government such as ours would be capable of such arbitrary decision making**, though the [SOR allegation] gives pause. Not only is [the allegation] incendiary in nature: it adds no value to the arguments against me. (Emphasis in original)¹⁷

Concerning his SF-86 falsifications, he said that the Guideline E allegations were, "almost entirely superfluous." He explained, "I've found myself unable to believe that our government would quibble over offenses as trivial as those described [under Guideline H in the SOR]," and "it was my belief that the government would not dwell on an issue that I (and the government, as I erroneously imagined) perceived to be so

¹⁶ AE A.

¹⁷ *Id.*

inconsequential. Clearly this is not the case, and I am now cognizant of that fact.”¹⁸ He concluded his response to the SOR with the following summary:

It is my firm belief that the evidence cited can be accurately distilled down to two statements:

I. I have recreationally and responsibly used drugs in the context of a successful, productive, and well balanced life.

II. I have attempted to downplay these activities because I *know* that these offenses are so minor that they should not cast doubt on my reliability, trustworthiness, or judgment.

To paraphrase my rebuttal above, my activities as described in item I are not a threat to national security and most certainly have not interfered with my ability to do my job. My lack of candor as described in item II is, in this case, tantamount to omitting a traffic violation from the investigation process because such things are so trivial that no question of fitness could possibly arise - who bothers to report a thing so inconsequential?¹⁹

Applicant provided a heavily redacted copy of what he described to be a recent company internal newsletter. In an article titled, “Ten Year Anniversary,” the actions by Applicant and another employee to start up one of the company’s offices were described as, “a cornerstone of our early success.” Applicant was described as someone who, “has always been a critical player in [redacted] off-site work and continues to lead commercial objectives.”²⁰

Applicant also submitted a redacted copy of a string of emails on January 22, 2016, in which he informed his supervisor that he had received the FORM and intended to respond to it. Applicant’s supervisor responded that they would do everything they could to try to protect his work share in the event of catastrophe, and expressed that he was, “happy to continue the fight.” Applicant described these comments as indicating that the supervisor is not deterred in retaining his employment with the company, “presumably due to his high regard for me.”²¹

Applicant also submitted a signed statement of intent as mitigation of security concerns under Guideline H. He said, “I, [name], intend to not make any use of any illegal drugs while holding a Security Clearance or while participating in any government

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

work. I understand that any violation will result in an automatic revocation of my clearance.”²²

Other than the internal corporate newsletter article and his supervisor’s email comments discussed above, the record lacks mitigating evidence addressing the quality of Applicant’s professional performance or his track record with respect to handling sensitive information and observation of security procedures. No character witnesses provided statements describing his judgment, trustworthiness, integrity, or reliability. I was unable to evaluate his credibility, demeanor, or character in person since he elected to have his case decided without a hearing.

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 (DCs) and mitigating conditions (MCs), which are to be 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 AG ¶ 2 describing the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 the 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, “[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Section 7 of Executive Order 10865 provides: “[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

²² *Id.*

A person applying for access to classified information seeks to enter 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. Eligibility decisions include consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information, and entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified 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 conditions that could raise a security concern and may be disqualifying. The four DCs that were raised by the SOR allegations and supported by the evidence in this case are:

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

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

(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.

Applicant admittedly used marijuana with varying frequency from about 2003 to March 2012. In 2007, and again in 2010 or 2011, he used a friend's prescribed Adderall without it having been prescribed for him. He illegally used marijuana numerous times, and Adderall once, while holding a security clearance after February 2009. He purchased marijuana on more than 15 occasions throughout his eight years of regular use. He said that he would not use illegal drugs while holding a security clearance or performing work on Federal contracts, but persistently refused to commit to discontinue any future illegal drug use. These facts support application of the foregoing DCs, shifting the burden to Applicant to prove mitigation of resulting security concerns.

AG ¶ 26 provides four conditions that could mitigate the security concerns arising from Applicant's drug involvement:

- (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;
 - (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's marijuana abuse continued more than eight years. During that time he also illegally used psychedelic mushrooms and prescription Adderall several times. He only stopped abusing drugs in March 2012, after his attempts to conceal the abuse were revealed and his employment became jeopardized. This behavior was relatively recent, given its duration, and Applicant's expressed attitude toward his past conduct precludes a finding that it is unlikely to recur. In any event, it casts doubt on Applicant's current reliability, trustworthiness, and judgment. Mitigation under AG ¶ 26(a) was not established.

Applicant consistently refused to express an intent not to abuse any drugs in the future, saying only that he would agree not to do so while holding a security clearance or doing Government work. His signed statement of intent is to the same effect. His period of abstinence since March 2012 is a start, but not persuasive when compared to more than eight years of regular drug use without regard to criminal laws and, after 2009, workplace policies prohibiting such conduct. Applicant failed to establish significant mitigation under AG ¶ 26(b).

Neither AG ¶¶ 20(c) nor (d) were raised by Applicant's circumstances or the evidence in this case. He was never prescribed Adderall, and he was neither recommended for nor involved in any drug treatment program.

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 conditions that raise security concerns and may be disqualifying. Four of those DCs are raised by the allegations and supported by the evidence 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;

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing . . .; and

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment.

Applicant admitted that he illegally purchased and used drugs on numerous occasions from 2003 until March 2012. He affirmatively certified, on two SF-86s submitted in October 2008 and May 2013, that he had not used any illegal drugs within the past seven years. He falsely denied illegal drug use during his January 15, 2009, security interview with an OPM investigator. He also falsely denied having abused prescription drugs, having abused drugs while holding a security clearance, and illegally purchasing drugs on his 2013 SF-86.

Applicant admitted during subsequent interviews that he intentionally failed to disclose his drug abuse because he thought that it would disqualify him from obtaining a security clearance. However, he refused to disclose the names of those with whom he abused drugs or the circumstances under which they did so, professing bonds of loyalty to his fellow drug abusers that outweighed any duty he felt to be honest or to cooperate with the Government from whom he seeks access to classified information. These intentionally deceptive acts demonstrated questionable judgment, untrustworthiness, lack of candor, and unwillingness to comply with rules and regulations.

Applicant's multiple attempts to conceal his drug involvement created vulnerability to exploitation or duress since he knew it would adversely affect his professional standing. His refusal to implicate drug-using friends indicates his recognition of such vulnerability. He also signed a written commitment on May 12, 2009, as a condition of employment while working for another Government agency, acknowledging that drug abuse was prohibited. He regularly violated that commitment over the following three years, and accordingly suffered revocation of his clearance.

AG ¶ 17 provides conditions that could mitigate personal conduct security concerns. Four MCs have potential applicability under the facts in this case:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (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; and
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant did not make a prompt or good-faith correction of his false denials concerning his drug abuse. He did not admit his 2008 and 2009 falsifications until

confronted with a polygraph examination in March 2012. After having lost his prior security clearance as a result of that conduct, he again falsely denied his history of drug abuse in response to four separate questions on his 2013 SF-86 because he knew it was likely to raise significant security concerns. He claims that his drug abuse was so trivial and unimportant that it should not matter that he both engaged in it and subsequently lied about it under oath. These actions do not constitute minor offenses when considering the recency, frequency, and circumstances under which they occurred. His willingness to engage in prohibited activity and then attempt to conceal potentially damaging information makes him vulnerable to exploitation or duress. He continues to deny the significance of his behavior, and has not obtained counseling or otherwise demonstrated that such conduct is unlikely to recur. Thus, Applicant failed to meet his burden to establish significant mitigation under any of these conditions.

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 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.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant is an accountable adult, who is responsible for the conduct that underlies the security concerns expressed in the SOR. His repeated drug abuse while holding a security clearance and his deliberate attempts to conceal his drug abuse from the Government demonstrated untrustworthiness, unreliability, and bad judgment.

Applicant offered insufficient evidence of counseling, rehabilitation, improved judgment, or responsible conduct in other areas of his life to offset resulting security concerns. The potential for being subjected to pressure, coercion, or duress remains largely undiminished, and he has not demonstrated a basis from which to reasonably conclude that he should be trusted to honestly disclose facts that could adversely affect national security in the future.

Overall, the record evidence leaves me with substantial doubt as to Applicant's present eligibility and suitability for a security clearance. He did not meet his burden to mitigate the security concerns arising from his drug involvement and personal conduct.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a through 1.g:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a through 2.i:	Against 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.

DAVID M. WHITE
Administrative Judge