



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



In the matter of:)
)
) ISCR Case No. 15-07652
)
Applicant for Security Clearance)

Appearances

For Government: Charles Hale, Esq., Department Counsel
For Applicant: *Pro se*

05/24/2017

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the personal conduct and drug involvement security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On April 26, 2016, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E (personal conduct) and H (drug involvement). The action was taken under Executive Order (EO) 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 (AG) implemented by the DOD on September 1, 2006.

Applicant responded to the SOR on May 9, 2016, and elected to have the case decided on the written record in lieu of a hearing. The Government's written case was submitted on June 20, 2016. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant

responded with documents that I have marked as Applicant's Exhibits (AE) A through G. The case was assigned to me on April 11, 2017. The Government exhibits included in the FORM and AE A through G are admitted in evidence without objection.

Findings of Fact

Applicant is a 46-year-old employee of a defense contractor. He has worked for his current employer or a predecessor contractor since 1992. He served on active duty in the U.S. military from 1988 until he received a general under honorable conditions discharge in 1992. He seeks to retain a security clearance, which he has held since at least 2010. He is a high school graduate. He is married without children.¹

Applicant smoked marijuana before he joined the military. He worked overseas for his company from 2005 to 2007. He resumed smoking marijuana in 2008. He intentionally failed to report his marijuana use on his Questionnaire for National Security Positions (SF 86), which he submitted in May 2010.² He smoked marijuana about once or twice a week at home by himself until he tested positive for the use of marijuana on a drug-screening test in March 2015.³

Applicant stated the test was part of a medical screening for him to work overseas. He stated that his company would have been informed that he was not qualified to work overseas, but not that he tested positive, except that he reported it to his manager. He did not lose his job, but he was issued a final warning, and he was suspended from work without pay for a week. He listed his drug use on his May 2015 SF 86, and he discussed it during his background interview in July 2015.⁴

Applicant completed drug counseling through his employer's employee assistance program (EAP). The counselor noted that Applicant "was cooperative, attentive, completed tasks as assigned and showed ownership in his treatment." Applicant stated that he has not used any illegal drugs since the positive drug test, he has passed all subsequent drug tests, and he will never use marijuana again.⁵

Applicant submitted documents and letters attesting to his excellent job performance. He is praised for his work ethic, leadership, maturity, judgment, dedication, loyalty, professionalism, and integrity.⁶

¹ Items 2, 3.

² The SOR did not allege that Applicant falsified the SF 86. Any matter that was not alleged in the SOR will not be used for disqualification purposes. It may be considered when assessing Applicant's credibility, in the application of mitigating conditions, and in the whole-person analysis.

³ Items 2, 5, 6; AE B, G.

⁴ Items 3, 4; AE G.

⁵ Items 4, 6; AE A, D, G.

⁶ AE B, C, E, F.

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 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, administrative judges apply the guidelines 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."

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 the 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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

The security concern for drug involvement is set out in AG ¶ 24:

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.

The guideline notes conditions that could raise security concerns under AG ¶ 25. The disqualifying conditions potentially applicable in this case include:

- (a) any drug abuse;⁷
- (b) testing positive for illegal drug use;
- (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 possessed and used marijuana while holding a security clearance. He tested positive for marijuana use in 2015. The above disqualifying conditions are applicable.

AG ¶ 26 provides conditions that could mitigate security concerns. 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; and
- (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; and

⁷ Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

(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 has not used marijuana since his failed drug test in March 2015. He completed his employer's drug counseling program. His counselor wrote positive things about him, but fell short of providing a favorable prognosis. Applicant promises to refrain from marijuana use in the future. However, he smoked marijuana regularly from 2008 through March 2015. He did so while holding a security clearance after lying about his marijuana use on his 2010 SF 86.

Applicant appears to be sincere, but that is insufficient to mitigate the well-established pattern of illegal drug use. His conduct continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 26(a) is not applicable, and AG ¶¶ 26(b) and 26(d) are partially applicable.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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 could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(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 . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant's failed drug test because of his marijuana use reflects questionable judgment and an unwillingness to comply with rules and regulations. It also created vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable. AG ¶

16(c) is not perfectly applicable because Applicant's marijuana use is sufficient for an adverse determination under the drug involvement guideline. However, the general concerns about questionable judgment and an unwillingness to comply with rules and regulations contained in AG ¶¶ 15 and 16(c) are established.⁸

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

- (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's company and the DOD are aware of his marijuana use. AG ¶ 17(e) is applicable, and the concerns related to Applicant's vulnerability to exploitation, manipulation, and duress are mitigated. AG ¶ 17(d) is partially applicable. However, the personal conduct concerns raised by Applicant's questionable judgment and unwillingness to comply with rules and regulations are not mitigated under the same rationale addressed in the drug involvement analysis. AG ¶ 17(c) is not applicable.

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.

⁸ See ISCR Case No. 14-03701 at 3 (App. Bd. Apr. 12, 2017).

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 the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines E and H in my whole-person analysis.

I considered Applicant's favorable character evidence. However, he smoked marijuana regularly for years while holding a security clearance after lying about his marijuana use on his 2010 SF 86.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the personal conduct and drug involvement security concerns.

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
Subparagraphs 1.a-1.c:	Against Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraph 2.a:	Against Applicant

Conclusion

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

Edward W. Loughran
Administrative Judge