



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



In the matter of:

Applicant for Security Clearance

)
)
)
)
)
)

ISCR Case No. 15-08688

Appearances

For Government: Adrienne Driskill, Esquire, Department Counsel

For Applicant: Donald L. Stansbarger, Esquire

July 11, 2017

Decision

ROSS, Wilford H., Administrative Judge:

Applicant used marijuana with varying frequency from 1976 to December 2013. He used marijuana from 2005 through 2007 while holding a security clearance. Applicant falsified two government questionnaires, one in 2005 and one in 2013, concerning his drug use. He also lied to a Government investigator concerning his drug use during an interview in 2015. Based on a review of the pleadings, testimony, and exhibits, eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted his most recent Electronic Questionnaire for Investigations Processing (e-QIP) on November 12, 2013. (Government Exhibit 1.) On June 15, 2016, 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). The 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*, effective within the Department of Defense after September 1, 2006.¹

Applicant answered the SOR in writing (Answer) on July 12, 2016, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on August 19, 2016. The case was assigned to another administrative judge on August 24, 2016. The case was reassigned to me on August 29, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on September 13, 2016. I convened the hearing as scheduled on October 24, 2016. The Government offered Government Exhibits 1 through 3, which were admitted without objection. Applicant offered Applicant Exhibits A through D, which were admitted without objection, and testified on his own behalf. I granted Applicant's request to leave the record open until November 10, 2016, to permit him to submit additional evidence. DOHA received the transcript of the hearing (Tr.) on November 1, 2016. On November 9, 2016, he submitted Applicant Exhibit E, to which Department Counsel had no objection. The exhibit was admitted into the record, which then closed as scheduled.

Findings of Fact

Applicant is a 69-year-old consultant to the DoD. He has a master's degree. Applicant is divorced with two children. He is seeking to retain a security clearance previously granted in connection with his consultant work with the DoD. He has held a security clearance at various times during his career.

Paragraph 1 (Guideline H – Drug Involvement and Substance Misuse)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has used illegal drugs. Applicant denied both allegations under this paragraph, with explanations.

1.a Applicant used marijuana off and on for about 40 years. The periods of use were 1976 to 1980, 1988 to 1995, 2001 to 2007, and 2009 to 2013. During those periods he would use marijuana on approximately a monthly basis. Accordingly, considering all of his periods of use, Applicant smoked marijuana somewhere between 250 and 300 times. Applicant stated that he used marijuana during times of stress. He would acquire marijuana from acquaintances. (Government Exhibit 3; Tr. 14-15, 22-30, 35-41, 67-68.)

¹ I considered the previous Adjudicative Guidelines, effective September 1, 2006, as well as the new Adjudicative Guidelines, effective June 8, 2017. My decision would be the same if the case was considered under the previous Adjudicative Guidelines.

1.b Applicant first obtained a security clearance in approximately 2005 or 2006, when he worked for a defense contractor. He held this clearance until about 2007. There is evidence that Applicant used marijuana during this period, particularly Applicant's answers to DoD interrogatories, as well as what he told an interviewer for the DoD. (Government Exhibit 3.) In his Answer, Applicant denied using marijuana during this period while holding a security clearance. He testified that his written and oral statements concerning drug use in 2006 or 2007 in Government Exhibit 3 were "an error" on his part. (Tr. 18-20, 30-35, 44-45.) I have examined all the available evidence, and also considered the questions about Applicant's credibility as an accurate reporter of his drug use, as further described below. I find that there is sufficient evidence to find that he used drugs while holding a security clearance.

Applicant stated that he has not used any marijuana since 2013, and he does not intend to use marijuana in the future. He submitted a signed statement of intent not to use illegal drugs in the future. Applicant agreed that such use could result in automatic revocation of his security clearance. (Government Exhibit 3; Applicant Exhibit E at 8; Tr. 15-16, 21-23.)

Paragraph 2 (Guideline E – Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in conduct that shows poor judgment, untrustworthiness or unreliability. Applicant denied subparagraphs 2.a, 2.b, and 2.c under this paragraph. He admitted subparagraph 2.d. The allegations will be discussed in chronological order:

2.c Applicant first filled out a Security Clearance Application on August 1, 2005. (Government Exhibit 2.) Question 27 of that application asked Applicant whether he had used marijuana within the last seven years. Applicant answered the question, "No." This was a false answer to a relevant question about Applicant's drug use. Applicant denied this allegation in his Answer, however he admitted it during his testimony at the hearing. Applicant further stated that his decision to put down a false answer was "an error in judgment." (Tr. 16-17, 43.)

2.a Applicant filled out an e-QIP on November 12, 2013. (Government Exhibit 1.) Section 23 of the questionnaire asks Applicant about his drug use history. First of all, that section asked whether Applicant had used marijuana during the previous seven years. Applicant stated, "No." This was a false answer to a relevant question concerning Applicant's drug use history. Applicant admitted his intentional falsification of this questionnaire during his testimony at the hearing. Once again, Applicant stated that his decision to put down a false answer was "an error in judgment." (Tr. 45-46, 67, 73-76.)

2.b Another part of Section 23 of Government Exhibit 1 asked Applicant, "Have you EVER illegally used or otherwise been involved with a drug or controlled substance while possessing a security clearance other than previously listed?" Applicant answered,

“No.” This was also a false answer to a relevant question about his prior drug use, since I have found that he used marijuana during the period from 2005 through 2007.

2.d Applicant was subsequently questioned by an investigator from the Office of Personnel Management on May 4, 2015. The investigator prepared a written Report of Investigation (ROI). Applicant certified in writing on May 16, 2016, that the ROI accurately reflected the information Applicant provided to the interviewer, and Applicant agreed with and adopted the investigator's summary as accurately reflecting the interview. (Government Exhibit 3.)

As part of the interview Applicant was asked whether he had used marijuana within the last seven years, or whether he had used marijuana while holding a security clearance. He answered no to both questions. The investigator goes on to report:

The Subject [Applicant] was then confronted with illegal drug use, marijuana, from 1972 to 2013 (discrepant) that was developed during the investigation. The Subject stated he didn't answer yes on his 2014 case papers nor during the interview of his illegal drug use because it is personal use and shouldn't affect his professional life. The subject felt this information is private and none of anyone's business. The Subject then stated that he didn't list it on his case papers because marijuana use is illegal and he didn't want to admit to illegal activities on his case papers nor during the interview. The Subject then decided to admit his illegal drug use because he has to be open and honest. (Government Exhibit 3 at 11-12.)

During the hearing Applicant first admitted that he actively lied to the investigator, as described above. (Tr. 20-22, 46-50.) A short time later in the hearing, Applicant testified that he had not lied to the investigator, but instead was telling the investigator about why he had previously lied on the questionnaire. Applicant's testimony on this point was disjointed and rather confusing, but basically revolved around interviews Applicant had with investigators for another Government agency. Applicant stated that during those interviews he had told the other agency about his drug use. Other than Applicant's testimony, no evidence was submitted as to the substance of the interviews with another agency. (Tr. 50-63.)

Based on all of the available information, I find that Applicant did actively lie during the interview on May 4, 2015. Support for this conclusion includes Applicant's admission of the allegation in his Answer, his affirmation of the contents of Government Exhibit 3, and his initial testimony affirming his active lying to the investigator.

Mitigation

Applicant is a man of great professional accomplishment over many years. He is well-known in his field and greatly respected. Letters of recommendation were submitted for Applicant from people who know him personally and professionally. They are all

extremely laudatory. However, none of the writers indicate any knowledge of the contents of the SOR or the nature of these proceedings. (Applicant Exhibit E at 3-7.)

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 (AG) list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's national security eligibility.

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. 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, "Any doubt concerning personnel being considered for national security eligibility 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14, requires the Government to 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 national security eligibility. 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 or sensitive information. Finally, as emphasized in Section 7 of Executive Order 10865, "Any 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.” See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Paragraph 1 (Guideline H – Drug Involvement and Substance Misuse)

The security concern relating to Drug Involvement is set forth in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual’s reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any “controlled substance” as defined in 21 U.S.C. §802. *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above. (Emphasis in original.)

I have examined the disqualifying conditions under AG ¶ 25 and especially considered the following:

- (a) any substance misuse (see above definition); and
- (f) any illegal drug use after being granted a security clearance.

The following mitigating conditions under AG ¶ 26 have also been considered, but are not controlling:

- (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:
 - (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Applicant has a 40-year history of using marijuana. While he did not use marijuana consistently during those years, he did use it over approximately a 25 year period.

Applicant knew during this entire time that his drug use was a violation of Federal law. He stopped using marijuana about three years ago, but under the particular circumstances of this case that period is insufficient to support a finding for Applicant under this guideline. Paragraph 1 is found against the Applicant.

Paragraph 2 (Guideline E – Personal Conduct)

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. Two are potentially applicable 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 national security eligibility or trustworthiness, or award fiduciary responsibilities; and

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

Applicant knowingly falsified material facts about his drug use on two Government questionnaires. One was in 2005 and the other in 2013. Applicant states that these actions were “errors of judgment.” In addition, Applicant also falsified his answers during an interview with a Government investigator. Applicant admitted doing that in his Answer, than attempted to obfuscate the facts during his hearing testimony. Applicant has been shown on multiple occasions not to be a trustworthy reporter of his own conduct. None of the mitigating conditions apply to the conduct in this case. Paragraph 2 is found against Applicant.

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(d):

(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 has not mitigated his long-term marijuana use, or his repeated falsifications to the Government. Overall, the record evidence does create substantial doubt as to Applicant’s present eligibility and suitability for national security eligibility and a security clearance.

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 and 1.b: | Against Applicant |
| Paragraph 2, Guideline E: | AGAINST APPLICANT |
| Subparagraphs 2.a through 2.d: | 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 or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

WILFORD H. ROSS
Administrative Judge