



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 15-00636
)	
Applicant for Security Clearance)	

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

12/29/2017

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant used marijuana while possessing a security clearance, and he lied about his illegal drug involvement. Clearance is denied.

Statement of the Case

On September 24, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline H, drug involvement, and Guideline E, personal conduct. The SOR explained why the DOD CAF was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for him. The DOD CAF took the action 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 for Determining Eligibility for Access to Classified Information* (AG) effective within the DOD on September 1, 2006.

On December 21, 2015, Applicant answered the SOR allegations and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals

(DOHA). On July 28, 2016, Applicant requested a determination without a hearing. On November 29, 2016, the Government submitted a File of Relevant Material (FORM) consisting of 12 exhibits (Items 1-12). DOHA forwarded a copy of the FORM to Applicant on November 30, 2016, and instructed him to respond within 30 days of receipt. Applicant received the FORM on December 9, 2016. The January 8, 2017 deadline for a response passed without any submission from Applicant. On October 1, 2017, I was assigned the case to determine whether it is clearly consistent with national security to grant or continue a security clearance for Applicant.

While this case was pending a decision, Security Executive Agent Directive 4 was issued establishing National Security Adjudicative Guidelines (AG) applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The AG supersede the adjudicative guidelines implemented in September 2006 and are effective for any adjudication made on or after June 8, 2017. Accordingly, I have adjudicated Applicant's security clearance eligibility under the new AG.¹

Summary of SOR Allegations

The SOR alleges under Guideline H that Applicant used marijuana on at least five separate occasions from 1980 through at least April 2008 (SOR ¶ 1.a) and that he continued to use marijuana after being granted a DOD security clearance in October 1997 and September 2007 (SOR ¶ 1.b). Under Guideline E, Applicant allegedly falsified four security clearance applications (SF 86 forms) completed in March 2007, April 2013, October 2013, and May 2014 by denying any use of illegal drugs and drug activity in the seven years (SOR ¶¶ 2.a, 2.c-2.e). Additionally, Applicant allegedly falsified his March 2007 SF 86 in also responding negatively to an inquiry concerning whether he had ever illegally used a controlled substance while possessing a security clearance (SOR ¶ 2.b). (Item 1.)

When Applicant answered the SOR, he denied the Guideline H allegations and asserted that he had last used marijuana on December 31, 1999. He indicated that his spouse confirmed that date for his last use. He denied any use of marijuana otherwise since the early 1980s. Applicant stated that he could not remember dates and occurrences during a polygraph and "did the worst thing possible, which was to make guesses." Concerning the alleged falsifications, Applicant admitted that he should have responded affirmatively in March 2007 to whether he had ever used any illegal drug while holding a security clearance (SOR ¶ 2.b). However, he asserted that he did not knowingly respond incorrectly in March 2007 because he had admitted on his 2003 and 2014 SF 86 forms that he had used an illegal drug while possessing a security clearance. He denied that he had intentionally falsified his April 2013, October 2013, and May 2014 SF 86 forms.

¹ Application of the AGs that were in effect as of the issuance of the SOR would not change my decision in this case.

Findings of Fact

After considering the FORM, which includes Applicant's response to the SOR (Item 2), I make the following findings of fact.

Applicant is a 61-year-old electrical engineer who has worked for the same defense contractor since June 1979. Applicant has also held part-time employment as a baseball umpire since 2000. (Items 2-3, 8, 10.) He and his spouse married in March 1980. They have two grown children. Applicant has held a minimum of a DOD secret clearance since an initial clearance grant in October 1997. (Items 3-7.) He was first granted a top secret clearance in July 2001. (Item 7.)

On March 14, 2007, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86). Applicant responded negatively to inquiries concerning whether he had illegally used any controlled substance in the last seven years and whether he had ever illegally used a controlled substance while possessing a security clearance. (Item 6.) On November 13, 2007, he completed another SF 86. Discrepant from his March 2007 SF 86, he responded that he had illegally used a controlled substance in the last seven years and that he had used marijuana once in January 2000 while he possessed a security clearance. (Item 5.)

On January 16, 2008, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). Applicant admitted that he had used marijuana one time, on January 1, 2000, at a party, in the last seven years. He explained that he and his spouse went outside to smoke a nicotine cigarette, and he was offered marijuana by someone he did not know. Applicant indicated that he inhaled a "couple of puffs" from a marijuana cigarette, but that he realized in retrospect that it was "a stupid thing to do." He denied any intention of using any illegal drug, including marijuana, in the future. (Item 11.)

In April 2013, Applicant's employer sponsored him for access to sensitive compartmented information (SCI). On April 9, 2013, Applicant completed and certified to the accuracy of an SF 86. He responded negatively to an inquiry into whether he had illegally used any controlled substance in the last seven years. He answered "Yes" to an inquiry concerning any illegal drug use ever while possessing a security clearance, and he disclosed that he had used marijuana one time on New Year's Eve of 1999-2000. (Item 3.)

On June 6, 2013, Applicant was interviewed by a counterintelligence representative for SCI access eligibility. During a pre-polygraph interview, Applicant indicated that he had smoked marijuana one time at a party in 1999/2000 and that he then held a DOD secret clearance. He admitted to the interviewer that he was aware of the DOD drug policy prohibiting illegal drug involvement. He attributed his use of marijuana on that occasion to poor judgment. Applicant also related that his spouse uses marijuana once a year with their neighbor, but he denied using marijuana with his spouse on those occasions. He added that some three or four years ago, he hid two marijuana cigarettes in his closet for his spouse's use. Applicant admitted that the marijuana was still in his closet. Otherwise,

Applicant denied any involvement with illegal drugs. During post-polygraph questioning, however, Applicant estimated that he used marijuana five times from the 1980s until sometime prior to April 2008, when his clearance was upgraded to top secret. He admitted using the drug with his spouse while he held a DOD security clearance for the stated reason that he “wanted to get laid.” Applicant indicated that he initially withheld the information during pre-polygraph interview because it was embarrassing. He expressed an intention not to use marijuana again before he retires. (Item 8.) Applicant was denied SCI access eligibility on January 29, 2014, because of his use of marijuana while holding a security clearance, his current possession of marijuana in his closet, and his lack of initial candor about his drug involvement on his security clearance forms and during his security interview. Applicant did not appeal the denial decision. (Items 7, 9.)

On October 15, 2013, Applicant completed and certified to the accuracy of an SF 86 for periodic reinvestigation into his security clearance eligibility. He again responded negatively to an inquiry into whether he had illegally used any controlled substance in the last seven years but answered “Yes” to an inquiry concerning any illegal drug use ever while possessing a security clearance. He disclosed that he had used marijuana one time, at a New Year’s Eve party in January 2000. He indicated that his clearance was upgraded to top secret in April 2008. (Item 4.)

On December 19, 2013, Applicant was interviewed by an authorized investigator for the OPM. Applicant indicated that he used marijuana while he held a DOD security clearance at a New Year’s Eve party in January 2000. He explained that he used the drug because everyone else was using it at the party. He asserted that it was “a one-time thing” and that he had no intention of any future use. (Item 10.)

On May 21, 2014, Applicant completed and certified to the accuracy of an SF 86. Applicant responded “No” to an inquiry concerning any illegal drug use in the last seven years. As on previous SF 86 forms, he answered “Yes” to a question regarding whether he had ever illegal used or otherwise been involved with a drug or controlled substance while possessing a security clearance and disclosed a one-time use of marijuana in January 2000 at a New Year’s Eve party. Applicant disclosed that he had been denied SCI access eligibility in January 2014 after he “failed [a] lie detector test.” (Item 12.)

In response to the SOR allegations, Applicant indicated in a statement dated December 19, 2015, that he used marijuana on December 31, 1999, but not otherwise since the early 1980s. He attributed that use of marijuana to an error in judgment and apologized. Concerning his June 2013 polygraph examination for SCI access eligibility, Applicant explained that, at that time, he could not remember dates or occurrences “going back 30 years in time and consequently, [he] did the worst thing possible, which was to make guesses.” Applicant admitted that he had used marijuana after he was granted his secret clearance in October 1997, but he denied any use after September 2007. He denied any recall as to why he denied on his March 2007 SF 86 that he had ever used any illegal drug while possessing a security clearance. He asserted without corroboration that he has garnered a reputation as a knowledgeable and talented engineer in his field and that he has received numerous awards as well as a patent for his work. (Item 2.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 required to be considered 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 the adjudicative process. The administrative judge’s overall adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), 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 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. 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 that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Section 7 of EO 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

Guideline H: Drug Involvement and Substance Misuse

The security concerns about drug involvement and substance misuse are articulated 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.

Applicant indicated on security clearance applications completed in November 2007, April 2013, October 2013, and May 2014, and during interviews held in January 2008, June 2013 (pre-polygraph), and December 2013, that he used marijuana once at a New Year's Eve party for the Millennium,² after he had been granted security clearance eligibility in 1997. During a June 2013 post-polygraph interview for SCI access, however, Applicant estimated that he used marijuana five times from the 1980s to before his receipt of his top secret clearance in April 2008. Applicant now disputes the accuracy of his own post-polygraph interview statements, claiming that he made guesses about his drug use. He asserts that he used no marijuana after the early 1980s until the Millennium New Year's Eve party and none since.

The burden is on the Government of proving controverted allegations under ¶ E3.1.14 of the Directive. The Government presented no evidence incriminating Applicant in illegal drug use apart from Applicant's various accounts of his marijuana involvement. Even so, it is difficult to believe that Applicant would have indicated that he used marijuana five times if he had used marijuana only once at a party. Applicant also indicated during his June 2013 post-polygraph interview that he still had two marijuana cigarettes hidden in his closet for his spouse's use. Conclusive findings are not possible for the dates of Applicant's marijuana involvement other than that he used marijuana at the Millennium New Year's Eve's party, and that he has not used any marijuana since he was granted a top secret clearance. Applicant gave a date of April 2008 for that clearance grant on his April 2013 SF 86, during his post-polygraph interview in June 2013, and on his May 2014 SF 86, even though in response to the SOR, he stated, "I have not used marijuana after September 2007." It could be inferred that he last used marijuana in September 2007. His marijuana use in at least December 1999/early January 2000 occurred while he possessed a security clearance. He knew that marijuana was illegal under federal law and against his security clearance eligibility. Disqualifying conditions AG ¶ 25(a), "any substance misuse," and AG ¶ 25(f), "any illegal drug use while granted access to classified information or holding a sensitive position," apply.

² Applicant has variously dated his marijuana use as occurring on December 31, 1999, or January 1, 2000.

There is no evidence that Applicant has used marijuana beyond five times. AG ¶ 26(a) has some applicability in mitigation in that it was “so infrequent.” AG ¶ 26(a) provides:

(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.

However, Applicant’s illegal drug use in knowing contravention of federal law and the obligations of his security clearance eligibility casts doubt on his reliability, trustworthiness, and judgment.

AG ¶ 26(b) provides for mitigation when an individual acknowledges his drug involvement and has no intention of future drug activity:

(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including but not limited to:

- (1) disassociation from drug-using associates and contacts;
- (2) changing or avoiding the environment where drugs were used; and
- (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 indicated during his June 2013 pre-polygraph interview that his spouse uses marijuana once a year with a neighbor not in their home. During his post-polygraph interview, Applicant related that he used marijuana with his spouse. Neither AG ¶ 26(b)(1) nor AG ¶ 26(b)(2) can reasonably apply without persuasive evidence that his spouse has discontinued her marijuana use. Concerning AG ¶ 26(b)(3), Applicant did not provide a signed statement of intent, although in June 2013, he expressed an intention not to use marijuana again until he retires. There is no evidence of any marijuana use by Applicant since September 2007 or April 2008 at the latest, but he also knowingly had marijuana in his home as of June 2013. The risk of recurrence of marijuana use cannot be adequately ruled out. Applicant has showed an unacceptable disregard of the DOD drug policy by using marijuana while he held a security clearance. Concerning his use at the New Year’s Eve party, Applicant told an OPM investigator that he went outside and partook of marijuana offered to him by someone he did not know. In December 2013, he discrepantly indicated to an OPM investigator that he used marijuana at the party because everyone else was using it. He also falsely claimed to the investigator that he stopped using marijuana because “it was a one-time thing.” His denial of any intent to use marijuana again before he retires is not particularly persuasive, especially given his lack of candor during his pre-polygraph interview in June 2013 and during his OPM interview in December 2013. The drug involvement and substance misuse security concerns are not adequately mitigated.

Guideline E: Personal Conduct

The concerns about personal conduct are articulated 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 evidence shows that Applicant responded negatively to an inquiry into any illegal drug use in the last seven years on SF 86 forms completed on March 14, 2007, April 9, 2013, October 15, 2013, and May 21, 2014. On all but the March 2007 SF 86, he responded affirmatively to inquiry into any illegal drug use ever while possessing a security clearance, although he disclosed in each instance that he used marijuana only one time, at the party he attended the evening of December 31, 1999. He disclosed no drug use whatsoever when he completed his March 14, 2007 SF 86. Applicant acknowledges that he should have answered "Yes" on his March 2007 SF 86 to whether he had ever used any illegal drug while holding a security clearance because he had used marijuana at the New Year's party held on December 31, 1999. His claim to not knowing why he responded as he did is not a credible explanation and falls considerably short of rebutting the reasonable inference of deliberate falsification of his March 2007 SF 86 (SOR ¶ 2.b). AG ¶ 16(a) is implicated. It provides:

(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.

The Government's case for falsification of the SF 86 inquiry into any drug use in the last seven years of his application falls short because of the lack of specificity in the record about the dates of Applicant's marijuana use. His disclosed use of marijuana at the New Year's Eve party on December 31, 1999, was not within seven years of any of the SF 86s at issue. Applicant indicated during his post-polygraph interview in June 2013 that, from the 1980s to before receiving a top secret clearance (which he reported as April 2008), he estimated that he used marijuana five times. When he answered the SOR, he claimed no marijuana use since December 31, 1999, but he also indicated that he had not used any marijuana since September 2007. Use of marijuana in September 2007 would fall within seven years of his SF 86 forms completed on April 9, 2013, October 15, 2013, and May 21, 2014. September 2007 may well be the date of his last marijuana involvement, but there is no clear evidence to support that inference. The evidence supports a factual finding of knowing possession of marijuana by Applicant in that he had two marijuana cigarettes concealed in his home closet as of June 2013, but the relevant inquiry only covers the use

of an illegal drug. Doubts about Applicant's credibility cannot substitute for evidence of drug use.

Applicant's falsification of his March 2007 SF 86 with regard to denying any illegal drug use while possessing a security clearance is sufficient in and of itself to raise serious doubts about his judgment and reliability, however. Applicant has not shown that his representations can be trusted. He persists in claiming that he used marijuana only one time since the 1980s, even though his post-polygraph admissions indicate otherwise. Applicant has yet to demonstrate the reform required for mitigation under the AG. He has not acknowledged any deliberate falsification. Doubts persist about his personal conduct.

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 his conduct and all relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(d).³ In making the overall commonsense determination required under AG ¶ 2(a), I have to consider Applicant's circumstances when he used marijuana. He was an adult who held a DOD security clearance and knew that his marijuana use was in disregard of DOD requirements. As a clearance holder, he has an obligation of full candor, even with respect to conduct that could cost him his security clearance eligibility. It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990.) Based on the record before me, I am unable to conclude that it is clearly consistent with the national interest to continue security clearance eligibility for Applicant.

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.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT

³ The factors under AG ¶ 2(d) are as follows:

- (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.

Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	Against Applicant
Subparagraphs 2.c-2.e:	For Applicant

Conclusion

In light of all of the circumstances, 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.

Elizabeth M. Matchinski
Administrative Judge