



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



In the matter of:

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ISCR Case No. 16-01393

Applicant for Security Clearance

Appearances

For Government: Caroline Heintzelman, Esq., Department Counsel

For Applicant: *Pro se*

07/30/2018

Decision

WHITE, David M., Administrative Judge:

Applicant failed to mitigate the security concerns arising from his marijuana use while holding a security clearance, and denial of his drug abuse history while attempting to renew his clearance. National security eligibility for access to classified information is denied.

History of Case

Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) on April 14, 2015, seeking to renew his eligibility for a security clearance. On January 6, 2017, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline H (Drug Involvement) and Guideline E (Personal Conduct). This 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 effective within the DoD after September 1, 2006.

Applicant answered the SOR in writing on February 8, 2017 (Answer), and requested a decision based on the administrative (written) record, without a hearing. On March 27, 2017, a Defense Office of Hearings and Appeals (DOHA) department counsel reviewed the case and requested a hearing before an administrative judge. DOHA assigned the case to me on April 4, 2017. DOHA issued a Notice of Hearing on July 10, 2017, setting the hearing for July 25, 2017. On that date, Department Counsel offered Government Exhibits (GE) 1 through 3 into evidence. Applicant testified and offered Applicant Exhibits (AE) A through C into evidence. All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on August 1, 2017.

The SOR in this case was issued under the adjudicative guidelines that came into effect within the DoD on September 1, 2006. Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines*, implemented new adjudicative guidelines that came into effect on June 8, 2017. All national security eligibility determinations issued on or after June 8, 2017, are to be decided using the new *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), as promulgated in Appendix A of SEAD 4. I considered the previous adjudicative guidelines, as well as the new AG, in adjudicating Applicant's national security eligibility. This decision is issued pursuant to, and cites, the new AG; but my decision would be the same under either set of guidelines.

Findings of Fact

Applicant admitted, with explanations, all of the SOR allegations concerning his drug involvement and his false denials concerning that history in two e-QIPs and two security interviews. These admissions and the supporting evidence admitted at the hearing establish the following facts.

Applicant is 57 years old. He is married with two adult children. He graduated from high school in June 1979, and has taken some college courses. He has been employed by a major defense contractor since October 1979, and seeks renewal of the security clearance he has held since 1987 in connection with that employment. He has no military service. (GE 1; GE 3; Tr. 6-8, 28, 31, 55.)

Applicant used marijuana and cocaine while he was in high school. He stopped when he was hired by the defense contractor because he was informed that drug abuse, in addition to being illegal, was not permitted under the company's drug-free workplace policy. While he was on vacation with friends during 1989, he used marijuana again; and was arrested, charged, and fined for possession of the marijuana (under three ounces) that he was carrying during a traffic stop. Applicant falsified his October 1, 2004 e-QIP, submitted for periodic review of his security clearance, by answering, "No," to the question in Section 24 asking if he had ever been charged with or convicted of any offense(s) related to alcohol or drugs. He also falsified his April 14, 2015 e-QIP by answering, "No," to the Section 22 question that asked whether he had ever been charged with a drug-related offense. He acknowledged that he should have answered,

“Yes,” and disclosed this information on both his 2004 and his 2015 e-QIPs, but attributed those failures to carelessness rather than intentional concealment. He provided a copy of his May 5, 1992 DD Form 398 *Personnel Security Questionnaire*, submitted for his first clearance periodic review, on which he disclosed his 1989 marijuana use and his arrest, charge, and fine for marijuana possession. (Answer; GE 1; GE 2; GE 3; AE B; Tr. 32-35, 41-44.)

On October 23, 2013, Applicant was arrested and charged for driving under the influence (DUI), after he was found unconscious with a .14 BAC at a traffic intersection.¹ In preparation for his DUI court proceedings, Applicant’s attorney advised him to undergo a voluntary drug/alcohol assessment before being required to do so. He therefor underwent an assessment in November 2013, during which he disclosed that he had used marijuana six times during the preceding year. He said this occurred during various parties and social settings when he shared marijuana that was being passed around. Although Applicant did not report his 1989 arrest for marijuana possession during this evaluation, he disclosed that he had used both marijuana and cocaine while he was in high school. (Answer; GE 3; Tr. 35-40.)

Applicant certified and submitted his most recent periodic-review e-QIP on April 14, 2015, in which he provided false negative responses to several questions concerning his past drug abuse. He disclosed his 2013 DUI arrest, but answered, “No,” when asked if he had ever been charged with any other offense involving alcohol or drugs. He also answered, “No,” to the questions asking whether he had illegally used any drugs in the last seven years, or while possessing a security clearance. He acknowledged that he should have answered these questions, “Yes,” and disclosed his 1989 marijuana possession charge, and his 1989 and 2012-2013 marijuana use while holding his security clearance. He offered no credible justification for these falsifications, but claimed that he was not attempting to conceal or deceive the Government concerning his history of drug abuse. (Answer; GE 1; Tr. 42-46.)

Applicant was interviewed by an investigator from the Office of Personnel Management (OPM) on November 23, 2015, in connection with his periodic clearance review. He told the investigator that he had never illegally used or otherwise been involved with drugs or controlled substances while possessing a security clearance. (Answer; GE 3; Tr. 46-49.)

Applicant was interviewed again on March 10, 2016, and confronted by the OPM investigator with a report of his 1989 arrest and charge for marijuana possession that, contrary to his earlier denial, occurred while he held a security clearance. Applicant claimed this omission from his e-QIP and interview was inadvertent, said that he had no

¹ This incident was not alleged in the SOR, which cited no security concerns under the Criminal Conduct or Alcohol Consumption guidelines. The DUI arrest and charge are included in these findings only to describe the circumstances under which his most recent admitted drug abuse came to light. Applicant’s conviction of this DUI charge was overturned on appeal because the arresting officer was outside her territorial jurisdiction when she arrested him. (AE A.)

similar incidents, and told the investigator that he had never bought, sold, or used any other illegal drugs except for his high school use of marijuana. The OPM investigator then confronted Applicant with his drug/alcohol assessment admission of having used marijuana six times during the preceding year at various social settings and parties. Applicant confirmed that he had done so, but declined to provide additional information due to his concern about jeopardizing his employment with the defense contractor. The OPM investigator did not, therefore, confront him about his false denial of cocaine use while in high school. Applicant admitted that he concealed his drug use from his employer and the OPM due to concerns about its adverse effect on his employment. (Answer; GE 3; Tr. 37-38, 49-54.)

Applicant's most recent annual progress review described him as an excellent team leader with the utmost respect from management and his peers. It described his mentorship of less experienced employees and his availability to guide them in the right direction. (AE C.)

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant's national security 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(b) and 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 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

According to Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "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 applies for national security eligibility 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 eligibility for access to classified information or assignment in sensitive duties. 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 information.

Section 7 of EO 10865 provides, "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* 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 under the guideline for drug involvement and substance misuse are set out 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.

AG ¶ 25 describes three conditions that could raise security concerns and may be disqualifying in this case:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant was has held a security clearance since 1987. He illegally used and, separately, possessed marijuana in 1989. He also illegally used marijuana on multiple occasions during 2012 and 2013. The evidence supports security concerns under all three of these disqualifying conditions.

AG ¶ 26 provides two conditions that could possibly mitigate the drug-related security concerns raised in this case based on Applicant's explanations:

- (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) 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;
- (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 abused marijuana on multiple occasions in 1989, 2012, and 2013 despite knowing that drug abuse was prohibited while holding a security clearance, by his employer, and under Federal law. His most recent admitted use was in late 2013. This pattern of drug abuse did not occur under such circumstances that recurrence could reasonably be found to be unlikely. Insufficient evidence was submitted to diminish the resulting doubts concerning his current reliability, trustworthiness, and good judgment. Mitigation under AG ¶ 26(a) was not established.

Applicant now acknowledges his illegal use and possession of marijuana over the course of many years while holding a security clearance, but failed to provide evidence of actions to overcome these problems, or establish a pattern of abstinence. His pattern of concealment and contradictory statements concerning his drug abuse greatly increases the likelihood that such abuse will recur. He never claimed to have permanently stopped misusing marijuana, or profess an intention not to resume such drug abuse in the future. He accordingly failed to establish mitigation under AG ¶ 20(b). Other potential mitigating conditions are inapplicable in the absence of prescription drug abuse or any form of drug treatment.

Guideline E: Personal Conduct

AG ¶ 15 expresses the security concerns 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during the national security investigative or adjudicative processes.

AG ¶ 16 describes two conditions that could raise security concerns and may be disqualifying 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 clearance 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 admitted that he falsified his 2004 and 2015 e-QIP clearance applications, and statements during 2015 and 2016 OPM interviews concerning his history of drug abuse. This evidence establishes substantial security concerns under AG ¶¶ 16(a) and 16(b), shifting the burden to Applicant to mitigate such concerns.

AG ¶ 17 includes three conditions that could mitigate security concerns arising from Applicant's personal conduct:

(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; and

(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.

Applicant did not provide evidence that would support mitigation under any of the foregoing conditions. His explanations for his multiple false statements attempting to conceal what he admitted was knowing and wrongful drug abuse were manifestly deliberate. This is serious misconduct with respect to his national security eligibility, which he made neither prompt nor good-faith efforts to correct before being confronted during OPM interviews. Applicant failed to meet his burden to mitigate his admitted personal conduct.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility 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.

According to AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the applicable 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 a mature adult, who is accountable for his choices. He illegally abused marijuana on multiple occasions while holding a security clearance for more than 25 years, and falsified several security clearance applications and interviews to conceal his drug abuse. He provided insufficient evidence to demonstrate rehabilitation or other permanent behavioral changes. The potential for pressure, exploitation, or duress related to this pattern of conduct remains undiminished, and recurrence was not shown to be unlikely.

Overall, the evidence creates significant doubt as to Applicant's judgment, reliability, eligibility, and suitability for a security clearance. He failed to meet his burden to mitigate the security concerns arising under the guidelines for drug involvement and substance misuse, 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 and 1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a through 2.f:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant a security clearance. National security eligibility is denied.

DAVID M. WHITE
Administrative Judge