



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 16-02704

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: *Pro se*

10/24/2017

Decision

TUIDER, Robert, Administrative Judge:

Guideline E (personal conduct) security concerns are mitigated; however, Guideline H (drug involvement) security concerns are not mitigated. Clearance is denied.

Statement of the Case

On November 4, 2016, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines H and E. On December 2, 2016, Applicant responded to the SOR, and elected to have the case decided on the written record in lieu of a hearing.

The Government's written case was submitted on January 9, 2017. 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 received the FORM on January 25, 2017. He was afforded a period of 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant timely submitted additional information within the

30-day period.¹ On October 1, 2017, the case was assigned to me. The Government exhibits, Items 1 through 9, included in the FORM are admitted in evidence.

Findings of Fact

Applicant admitted SOR ¶¶ 1.a and 1.b, with explanations; and denied SOR ¶ 2.a, with explanations. His admissions are accepted as findings of fact. Additional findings of fact follow.

Background Information²

Applicant is a 43-year-old storeroom clerk employed by a defense contractor since May 2001. He seeks to upgrade his clearance to top secret with access to sensitive compartmented information. Applicant graduated from high school in June 1992. He married in May 2001, and has no dependents. Applicant did not serve in the U.S. armed forces.

Drug Involvement and Substance Misuse

Applicant admitted using marijuana with varying frequency from about July 1992 through January 2013. (Item 4) His first marijuana use occurred on about two occasions shortly after graduating from high school. (Item 4) After his post-high school use in 1992, Applicant did not use marijuana until about April 1997. In April 1997, he moved in with a friend and used marijuana with varying frequency until about March 1998 when their friendship ended and he returned home. From the time he returned home in 1998 until the summer of 2005, he did not use marijuana. (Item 4)

In 2005, Applicant began attending weekend events with custom van enthusiasts, and occasionally used marijuana while associating with fellow van enthusiasts during the timeframe of 2005 to 2013. (Item 4) Applicant no longer attends these events and claims he no longer associates with “some of the people (he) met during those years.” (Item 4) He also stated that he has no future intent to use marijuana; however, he made similar claims during his April 7, 2003, Office of Personnel Management Personal Subject Interview (OPM PSI). (Item 7)

Applicant was granted a secret security clearance in May 2003, and used marijuana during the timeframe discussed above after he was granted a clearance. Applicant did express remorse for using marijuana while holding a security clearance stating, “I allowed myself to be influenced by people that didn’t have my best interests in mind. I was foolish and quite frankly I’m ashamed.” (Item 4)

¹ Applicant’s post-FORM submissions were marked as Item 10, and are admitted.

² The limited background information regarding Applicant was derived from the FORM and was the most current information available.

Character Evidence

Applicant submitted three reference letters: one from his manager who has known him for 17 years, one from his in-laws, and one from a couple who has known him for 20 years. The overall sense of these letters is that Applicant is responsible, honest, and well regarded as an employee, as a son-in-law, and as a friend. (Item 10)

Personal Conduct

When Applicant completed his August 11, 2001 SF-86³, he indicated that he used marijuana from April 1997 through March 1998, and did not list his two-time post-high school use in 1992, which prompted the allegation of deliberate falsification of his security clearance application for failing to disclose his entire use of marijuana. (SOR ¶ 2.a) In Applicant's SOR answer, he explained when asked by his manager to apply for a security clearance upgrade in 2013, he provided a different timeframe of marijuana use in his 2013 SF-86 in contrast to his 2001 SF-86, recalling that he used marijuana "once or twice" after graduating from high school. His purpose in adding the 1992 post-high school marijuana use was to be as thorough as his memory would allow. He added that he "never intended to supply false or misleading information."

I note that during his March 12, 2013, OPM PSI, Applicant was questioned about mistakenly not listing his stepmother and two half-brothers on his February 25, 2013, SF-86 and about mistakenly listing the FBI versus the DOD as the investigating agency for previous background investigations. (Items 5, 7, 8, 9) I also note that Applicant self-reported his past drug use and was forthcoming in previous OPM PSIs. (Items 5, 7, 8, 9)

Policies

This case is adjudicated 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), which became effective on June 8, 2017.

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

³ The FORM contains two SF-86s, one dated August 13, 2001, and the other dated February 25, 2013.

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.”

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

Drug Involvement and Substance Misuse

AG ¶ 24 articulates the security concern for drug involvement:

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 provides three conditions that could raise a security concern and may be disqualifying in this case: “(a) any substance misuse (see above definition);” “(c) illegal possession of a controlled substance . . . ;” and “(f) any illegal drug use while granted access to classified information or holding a sensitive position.”

Applicant possessed and used marijuana⁴ on numerous occasions before and after holding a security clearance. AG ¶¶ 25(a), 25(c), and 25(f) are established.

AG ¶ 26 details conditions that could mitigate security concerns:

(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) 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;

(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.

The DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th

⁴ Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule (Sch.) I controlled substances. See Drug Enforcement Administration listing at http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308_11.htm. See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.” Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

None of the mitigating conditions apply. DNI Memorandum ES 2014-00674, “Adherence to Federal Laws Prohibiting Marijuana Use,” October 25, 2014, indicates:

[C]hanges to state laws and the laws of the District of Columbia pertaining to marijuana use do not alter the existing National Security Adjudicative Guidelines An individual’s disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations. As always, adjudicative authorities are expected to evaluate claimed or developed use of, or involvement with, marijuana using the current adjudicative criteria. The adjudicative authority must determine if the use of, or involvement with, marijuana raises questions about the individual’s judgment, reliability, trustworthiness, and willingness to comply with law, rules, and regulations, including federal laws, when making eligibility decisions of persons proposed for, or occupying, sensitive national security positions.

Applicant used marijuana on varying occasions from July 1992 to January 2013, and used marijuana on varying occasions while holding a security clearance. It is unfortunate that Applicant did not adhere to the prohibition against using drugs in general and specifically while holding a security clearance. Applicant’s assurances of future drug avoidance ring hollow in light of his previous promises to avoid drug use during his April 7, 2003, OPM PSI followed by ten years of marijuana use on varying occasions. Drug involvement security concerns are not mitigated.

Personal Conduct

AG ¶ 15 articulates the security concern for drug involvement:

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.

AG ¶ 16 describes one conditions that could raise a security concern 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 eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant stated when he completed his August 11, 2001, SF-86 he did not deliberately intend to falsify his security clearance. On that SF-86 he listed marijuana use from April 1997 to March 1998 putting the Government on notice of past marijuana use. Applicant self-reported his marijuana use and emphasized that it was never his intent to provide misleading information or to falsify his answers. I also note that he made other mistakes or failed to report required information when completing his most recent SF-86 that were viewed as honest mistakes.

Based on the available information, it appears Applicant became confused or was careless when completing his 2001 SF-86. His lack of attention to detail cannot be imputed as a willful and deliberate attempt to undermine the investigative process. Although the information he provided regarding his past marijuana use on his SF-86 proved to be incorrect, as was other information he provided, I attribute these lapses to carelessness and am satisfied that he did not deliberately and intentionally fail to disclose his delinquent debts with intent to deceive.⁵ I find “For Applicant” in the Findings section of this decision with respect to SOR ¶ 2.

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

⁵ The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant’s intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant’s intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

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 the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H and E in my whole-person analysis. Unmitigated drug involvement security concerns lead me to conclude that grant of a security clearance to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With more effort towards documented drug abstinence and compliance with applicable regulations, he may well be able to demonstrate persuasive evidence of his security clearance worthiness.

In closing, Applicant chose to rely on the written record versus a hearing. In so doing, however, and with regard to drug involvement, he failed to submit sufficient evidence to supplement the record with relevant and material facts regarding his circumstances or articulate his position limiting my assessment that discussed in the FORM. In particular, his evidence did not adequately address the drug involvement concerns outlined in AG ¶¶ 26(a) and 26(b), and my decision was limited to that discussed in the FORM. I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, and the AGs, to the facts and circumstances in the context of the whole person. Personal conduct security concerns are mitigated; however, drug involvement security concerns are not mitigated.

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 and 1.b:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Clearance is denied.

ROBERT TUIDER
Administrative Judge