



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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XXXXXXXXXXXX, XXXXX) ISCR Case No. 15-00628
)
Applicant for Security Clearance)

Appearances

For Government: Braden Murphy, Esq., Department Counsel
For Applicant: *Pro se*

03/10/2016

Decision

TUIDER, Robert J., Administrative Judge:

Applicant mitigated security concerns pertaining to Guidelines H (drug involvement) and E (personal conduct). Clearance is granted.

Statement of the Case

On May 29, 2012, Applicant submitted a Questionnaire for National Security Positions (SF-86). On July 27, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleged security concerns under Guidelines H and E. The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be continued, denied, or revoked.

On August 7, 2015, Applicant responded to the SOR. On September 9, 2015, Department Counsel was ready to proceed. On September 28, 2015, DOHA assigned Applicant's case to me. On October 30, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice, setting the hearing for November 17, 2015. Applicant's hearing was held as scheduled. At the hearing, Department Counsel offered Government Exhibits (GE) 1 through GE 3, which were received into evidence without objection. Applicant testified and offered Applicant Exhibits (AE) A through AE C, which were received into evidence without objection. I held the record open until December 18, 2015, to afford the Applicant an opportunity to submit additional evidence. Applicant timely submitted AE D, which was received into evidence without objection. On November 25, 2015, DOHA received the hearing transcript (Tr.).

Findings of Fact

Applicant admitted all of the SOR allegations with explanations. Applicant's answers are incorporated as findings of fact. After a thorough review of the evidence, I make the following additional findings of fact.

Background Information

Applicant is a 61-year-old logistics engineer employed by a defense contractor since May 2012. He had previously worked for the same employer from June 2000 to May 2011. He seeks to retain his security clearance. Applicant held a security clearance while he was in the U.S. Navy, discussed below, and since he began working in the defense industry in 1981. Cumulatively, Applicant has successfully held a security clearance for 42 years. (GE 1; Tr. 13, 17-19, 26-27, 32-33)

Applicant graduated from high school in June 1973. He served in the Navy from September 1971 to September 1975, and was honorably discharged as a radioman second class (pay grade E-5). He attended several service schools while in the Navy and it was while he was in the Navy he was awarded his high school diploma. (GE 1; Tr. 21-23, 26) Appellant married in October 1977 and his wife passed away in February 2011, after almost 34 years of marriage. He has four adult stepchildren, and has an adult son from his marriage. A second son from his marriage passed away. (GE 1; Tr. 23-26)

Drug Involvement/Personal Conduct

The basis of Applicant's past drug involvement and personal conduct concerns are derived from his self-disclosure during his periodic renewal for a security clearance in 2012. Applicant used marijuana approximately four to five times from fall 2011 to January 2012. When he completed his May 2012 SF-86, he denied using illegal drugs or controlled substances in the preceding seven years or ever being involved with a drug or controlled substance while holding a security clearance. (SOR ¶¶ 1.a – 1.b, 2.a – 2.b; SOR response; GE 2; Tr. 30, 38-39, 42-45)

In September 2012, Applicant contacted his facility security officer (FSO) for the purpose of marking a “first hand report” – to report his marijuana use and to correct his May 2012 SF-86. His FSO directed him to use the company website or provide corrections during his Office of Personnel Management Personal Subject Interview (OPM PSI). On September 12, 2012, during his OPM PSI, he revealed his past marijuana use and corrected his May 2012 SF-86 answers relating to past drug use. (SOR answer; GE 2, Tr. 29-31, 46-47)

After Applicant’s wife of 34 years passed away in February 2011, he took a three-month medical leave of absence from work and consulted with a psychiatrist, who prescribed “very heavy anti-depressants.” He said he was able to emerge from a “dark spot,” adding that anti-depressants “tend to alter your behavior a little bit.” Applicant was introduced to marijuana by a female friend (FF). FF offered him marijuana, and he accepted it as a means to deal with his grief. Applicant described his marijuana use as taking “one or two puffs on a joint as [FF] had.” He has not used marijuana since January 2012 stating he “didn’t like it” and recognizing that it was wrong. He described his marijuana use as an “aberration” as a result of not thinking clearly as a result of intense grief following his wife’s death and being prescribed anti-depressants. (SOR answer; GE 2; Tr. 12, 29-31, 33-40, 53-58)

Since he last used marijuana in January 2012, Applicant does not “even go near anybody” who uses marijuana including FF. (Tr. 32-41, 44, 47-48, 54) He also submitted a notarized statement of intent dated November 25, 2015, to never use illegal drugs again with automatic revocation of clearance for any violation. (Tr. 48-50; AE D)

Character Evidence

Applicant submitted a work-related reference letter from his manager, who has supervised him for four years. His manager stated that Applicant also reported his marijuana use and failure to report such use on his May 2012 SF-86 to him. (Tr. 52-53; AE A) Applicant’s manager described this situation as one that “represents . . . infrequent and very unique circumstances that are unlikely to recur and does not cast doubt on [Applicant’s] reliability, trustworthiness or good judgment.” His manager recommends that Applicant’s security clearance be continued. (AE A)

Applicant submitted work performance reviews for the years 2013 and 2014. These reviews document above average performance and clearly show that Applicant is an employee who is making a significant contribution to his company and the national defense. (AE B – AE C)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.” *Department of the Navy v.*

Egan, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant Applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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.

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the [A]pplicant concerned.” See Exec. Or. 10865 § 7. See *also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication the Applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the Applicant to rebut, explain, extenuate, or mitigate

the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Drug Involvement

AG ¶ 24 articulates the security concern pertaining to drug involvement:

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 Government established its case under Guideline H through Applicant’s admissions and the evidence presented. Applicant fully disclosed the circumstances surrounding his marijuana use in his SOR response, in his OPM PSI, and during his hearing.

A review of the evidence supports application of three drug involvement disqualifying conditions. AG ¶ 25(a): “any drug abuse (see above definition);”¹ AG ¶ 25(c) “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia;” and AG ¶ 25(g) “any illegal drug use after being granted a security clearance.”

Considering the totality of the circumstances in this case, I find application of drug involvement mitigating conditions AG ¶ 26(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 AG ¶ 26(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; and (4) a signed statement of intent with automatic revocation of clearance for any violation.”

Concerning AG ¶ 26(a), there are no “bright line” rules for determining when conduct is “recent.” The determination must be based “on a careful evaluation of the totality of the record within the parameters set by the Directive.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in

¹ AG ¶ 24(b) defines drug abuse as the illegal use of a drug or use of a legal drug in a manner that deviates from approved medication direction.

ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation."²

AG ¶ 26(a) applies. Applicant's last drug use was in January 2012, approximately 47 months before his hearing. His drug use ended at that time when he realized that drug use was incompatible for someone in his position and was specifically prohibited while holding a security clearance. The absence of evidence of more recent or extensive drug use and his promise not to use illegal drugs in the future eliminate doubts about his current reliability, trustworthiness, and good judgment with respect to abstaining from illegal drug use.³

AG ¶ 26(b) lists four ways Applicant can demonstrate his intent not to abuse illegal drugs in the future. He disassociated from drug-using associates and submitted a signed statement of intent with automatic revocation of clearance for any violation. Applicant has abstained from drug use for about 47 months and has had no difficulties in doing so. AG ¶ 26(b) applies.

² ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge's decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle change and therapy. For the recency analysis the Appeal Board stated:

Compare ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) ("The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.") (citation format corrections added).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, considered the recency analysis of an administrative judge stating:

The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

³In ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004), the Appeal Board reversed an unfavorable security clearance decision because the administrative judge failed to explain why drug use was not mitigated after the passage of more than six years from the previous drug abuse.

Applicant's work performance evaluations support the notion that his work behavior is not indicative of someone having a drug problem. Quite to the contrary, he is viewed as a valuable employee, who is reliable, dependable, and professional. Applicant's value to the defense industry is supported by his manager, and by his own credible testimony and evidence presented. At his hearing, Applicant acknowledged that drug abuse is incompatible with his future career. He expressed a steadfast commitment to continue lifestyle changes consistent with total abstinence of marijuana or any other illegal drugs.

Personal Conduct

AG ¶ 15 articulate the security concern 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 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 one condition 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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

The Government established its case under Guideline E through the evidence presented. Applicant fully disclosed the circumstances surrounding the falsification of his security clearance application in his SOR response, in his OPM PSI, and during the hearing. A review of the evidence supports application of personal conduct disqualifying condition AG ¶ 16(a).

AG ¶ 17 provides seven conditions that could mitigate security concerns in this case:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon

being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

It was particularly helpful to observe Applicant and listen to his testimony during his hearing, as well as, reviewing the evidence he offered. Applicant came forward after completing his 2012 SF-86 and disclosed his past marijuana use as well as his failure to report his past marijuana use on his SF-86 to his FSO, his manager, and during his OPM PSI. It is clear from the facts that Applicant disclosed his omissions before being confronted with any information that made it appear likely anyone would discover his marijuana use or omission on his SF-86.

Throughout the process, Applicant showed considerable maturity and expressed remorse. A significant period of time has elapsed and Applicant's behavior was isolated to a very limited time of his life following the devastating loss of his wife. Since his last drug use, 47 months had elapsed before his hearing. Applicant has disassociated himself from the individual with whom he used marijuana and signed a statement of intent with automatic revocation of security clearance for any drug violation. Applicant continues to have the full support of his company. AG ¶¶ 17(a), 17(c), 17(d), 17(e), and 17(g) are applicable. Guideline E concerns are mitigated; however, assuming the AGs under this concern are not applicable, security concerns are separately mitigated under the whole-person concept, *infra*.

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 the 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.

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.

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. AG ¶ 2(c). The discussion in the Analysis section under Guidelines H and E is incorporated in this whole-person section. However, additional comments are warranted.

Applicant has been and is willing to maintain conduct expected of one entrusted with a security clearance. His employment history to date is indicative of stability and a strong work ethic. This support and self-introspection should ensure his continued success. Applicant demonstrated the correct attitude and commitment to remaining drug-free. I also considered his successfully holding a security clearance for 42 years and his conduct under question as an aberration of his otherwise stellar behavior following the loss of wife of 34 years.

Applicant was forthright and candid in his SOR response, in his OPM PSI, and at his hearing about his failure to disclose his past drug use and SF-86 omissions.⁴ Considering his demeanor, testimony, and evidence presented, I believe Applicant has learned from his mistakes, and his questionable behavior is unlikely to recur. I find Applicant has presented sufficient evidence of rehabilitation.

⁴ISCR Case No. 05-03554 at 4-6 (App. Bd. Aug. 23, 2007) discussing factors an administrative judge should consider when making credibility determinations including consistency of statements). See *also* ISCR Case 09-05655 (App. Bd. Aug 24, 2010).

In sum, Applicant presented sufficient evidence to explain, extenuate, or mitigate the security concerns raised. Applicant met his ultimate burden of persuasion to obtain a favorable clearance decision. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my “careful consideration of the whole-person factors”⁵ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. For the reasons stated, I conclude he is eligible for access to classified information.

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:	FOR APPLICANT
Subparagraphs 1.a to 1.b:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a to 2.b:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Clearance is granted.

Robert J. Tuidier
Administrative Judge

⁵See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).