



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



In the matter of:)
)
) ISCR Case No. 15-00654
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: *Pro se*

03/31/2016

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns under Guidelines H (drug involvement) and E (personal conduct). Clearance is denied.

Statement of the Case

On July 22, 2014, Applicant submitted a Questionnaire for National Security Positions (SF-86). On September 29, 2015, the Department of Defense Consolidated Adjudications Facility (DOD 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 DOD CAF was unable to find that it is clearly consistent with the national interest to grant 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 or revoked.

Applicant answered the SOR on October 19, 2015, and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM), dated December 4, 2015, was provided to him by letter on that same day. Applicant received the FORM on December 17, 2015. He was given 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not submit any information within the 30-day period. The case was assigned to me on March 15, 2016.

Procedural Matters

Department Counsel moved to amend SOR ¶ 1.a to reflect the beginning date of Applicant's marijuana use from "June 2006" as stated in the SOR to "June 2007," to conform to the evidence.¹ There being no objection, Department Counsel's motion is granted.

Findings of Fact

Applicant admitted all the SOR allegations. After a thorough review of the record, I make the following findings of fact.

Background Information

Applicant is a 30-year-old software engineer employed by a defense contractor since July 2014. He was previously employed by a defense contractor from August 2008 to June 2011, and was granted a security clearance in October 2008. (Items 3, 4, 5)

Applicant was awarded a bachelor's degree in May 2008 and was awarded a master's degree in May 2014. (Item 3) He has never married and has no dependents. Applicant did not serve in the armed forces. (Item 3)

Drug Involvement/Personal Conduct

Applicant self-reported his drug use on his July 2014 SF-86. However, on his August 2008 SF-86, he denied any illegal drug use. (Items 3, 4) On his July 2014 SF-86, Applicant disclosed that he used marijuana experimentally from about June 2007, pre-dating his August 2008 SF-86, through about August 2013. (Item 3) He estimates that subsequent to being granted a secret security

¹ See FORM at 2, *fn* 9.

clearance, he used marijuana approximately four times. (Item 3) Applicant also purchased marijuana on one occasion in 2010. (Item 2)

Applicant admits that he deliberately failed to disclose his marijuana use that pre-dated his August 2008 SF-86 because he was concerned that he would be terminated and his priority at the time was to maintain his career and financial independence. (Item 2)

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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. 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 overarching adjudicative goal is a fair, impartial, and commonsense 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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 applicant concerned.” See Exec. Or. 10865 § 7. See *also* Executive Order 12968 (Aug. 2, 1995), § 3.1. 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 about 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).

Drug Involvement

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

[u]se 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.

AG ¶ 25 describes eight drug involvement-related conditions that could raise a security concern and may be disqualifying. Three of those drug involvement disqualifying conditions are applicable in this case:

(a) any drug abuse, defined as the illegal use of a drug or use of a legal drug in a manner that deviates from the approved medical direction;

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, or sale or distribution; or possession of drug paraphernalia;² and

(g) any illegal drug use after being granted a security clearance.

The Government established its case through Applicant's admissions and the evidence presented.

AG ¶ 26 provides four potentially applicable drug involvement mitigating conditions:

(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) 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;

(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,

²AG ¶ 24(a) defines "drugs" as substances that alter mood and behavior, including:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances.

without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

None of the drug involvement mitigating conditions are fully applicable. Applicant used marijuana over a six-year time frame when he was an adult. His illegal drug use, which admittedly began while he was in college, extended well into his entry into the workforce. Applicant's illegal drug use also occurred after he was granted a security clearance that he received based on his untruthful representations when he applied for his clearance in 2008.

Although Applicant last used marijuana in August 2013, this period of abstinence, when weighed against other facts from the record, is not enough to ensure that he will not use drugs in the future. Lastly, it is unclear from the record regarding his willingness to disassociate from drug-using associates and contacts. Further corroboration is required regarding Applicant's ability and commitment to refrain from further drug use and that he is drug-free.

Personal Conduct

AG ¶ 15 articulates 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 seven personal conduct concerns that could raise a security concern and may be disqualifying. Two of those disqualifying conditions are applicable in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or

duress such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing....“

The Government established these conditions through Applicant's admissions and the evidence presented.

AG ¶ 17 provides seven potential 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.

Applicant's drug use, purchase of marijuana, and use of marijuana while holding a security clearance is cross-alleged under Guideline E. None of the mitigating conditions under this concern are applicable for the reasons discussed under Guideline H. Additionally, these same facts regarding Applicant's illegal drug use raise a separate and significant security concern about his judgment and willingness to comply with rules that cannot be mitigated simply by his no longer claiming to use marijuana.

Applicant's concealment of relevant and material information demonstrates a lack of candor required of cleared personnel. The Government has an interest in examining all relevant and material adverse information about an applicant before making a clearance decision. The Government relies on applicants to truthfully disclose that adverse information in a timely fashion, not when it is perceived to be prudent or convenient.

Further, an applicant's willingness to report adverse information about himself provides some indication of his willingness to report inadvertent security violations or other security concerns in the future, something the Government relies on to perform damage assessments and limit the compromise of classified information. Having failed to provide an adequate explanation for his failure to list his previous drug use on his SF-86, his conduct suggests he is willing to put his personal needs ahead of legitimate Government interests.

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 relevant 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.

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). My

comments in the Analysis section are incorporated in the whole-person discussion.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant receives credit for his employment as a defense contractor. Apart from his brief statements in his SOR answer, he provided insufficient evidence corroborating rehabilitation. If other favorable evidence exists, Applicant did not provide it. Drug use, especially while holding a security clearance, is inconsistent with the standards required of those entrusted with holding a security clearance.

Lastly, in requesting an administrative determination, Applicant chose to rely on the written record. In so doing, however, he failed to submit sufficient information or evidence to supplement the record with relevant and material facts regarding his circumstances, sufficiently articulate his position, and mitigate the security concerns. By failing to provide such information, and in solely relying on the evidence presented in his SOR response, precluding a favorable credibility assessment, security concerns remain.

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 and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines. Applicant has not fully mitigated or overcome the Government's case. For the reasons stated, I conclude he is not 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:	AGAINST APPLICANT
Subparagraphs 1.a – 1.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a – 2.b:	Against Applicant

Conclusion

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

ROBERT J. TUIDER
Administrative Judge