



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



In the matter of:)
)
) ISCR Case No. 07-04251
SSN:)
)
Applicant for Security Clearance)

Appearances

For Government: Candace Le'l, Esquire, Department Counsel
For Applicant: *Pro Se*

October 21, 2009

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant's eligibility for access to classified information is denied.

Applicant submitted his Security Clearance Application (SF 86) on April 3, 2006, and resigned it on January 23, 2007. The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines H and E on April 7, 2009. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on April 16, 2009. He answered the SOR in writing on April 30, 2009. DOHA received the request on May 4, 2009. Although he did not request a hearing before an administrative judge, Department Counsel did. Department Counsel was prepared to proceed on June 9, 2009, and I received the case assignment on June 11, 2009. DOHA issued a notice of hearing on June 29, 2009, and I convened the hearing as scheduled on July 23, 2009. The government offered six exhibits (GE) 1 through 6, which were received and admitted into evidence without objection. Applicant testified on his own behalf. He submitted 12 exhibits (AE) A through L, which were received and admitted into evidence without objection. The record closed on July 23, 2009. DOHA received the transcript of the hearing (Tr.) on July 31, 2009.

Procedural and Evidentiary Rulings

Notice

Applicant received the hearing notice on July 9, 2009. At the hearing, I advised Applicant of his right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. Applicant affirmatively waived his right to 15 days notice. (Tr. 10-11.)

Amendment to the SOR

In SOR allegation 2.e, the government alleges that Applicant answered “yes” to question c in Section 24 of his security clearance application completed on January 23, 2007, then alleges that he falsified this answer when he did not disclose his varying marijuana use through 2004. The SOR is amended to reflect that Applicant answered “no” to this question.¹

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a to 2.g of the SOR, with explanations. He denied he intentionally falsified his answers. He also provided additional information to support his request for eligibility for a security clearance.

Applicant, who is 49 years old, works as a network electronics technician for a Department of Defense contractor. He has worked as an electronics technician for 10 years, and has held a clearance without incident since 1996.²

Applicant married his first wife in 1980 at age 19. They separated in 1993 and divorced in 1996. He has two sons, ages 27 and 20, from this marriage. He married his

¹GE 1.

²*Id.*; Tr. 29-31.

second wife in 2001 and they divorced in 2005. They did not have any children. He married his present wife in 2007. He has one grandchild.³

Applicant graduated from high school and attended a community college for two years. As a high school student in 1977 and 1978, he tried marijuana on two different occasions. He also used marijuana in 1978 and 1979 while a college student. After a night of heavy drinking in college, he thinks he may have used cocaine twice on one occasion. His recall on this issue is vague.⁴

Applicant began regular use of marijuana after he married in 1980 and throughout his 13-year marriage. When the opportunity presented, he smoked marijuana at family gatherings with his first wife's family. He did not smoke marijuana in his home, but remembers smoking marijuana on two occasions in his driveway with his brother-in-law. He could not estimate the number of times he smoked marijuana with his first wife's family. He indicated it was hit or miss, not everyday or once every week. He never purchased the marijuana he smoked during this period. When his marriage ended, he stopped his marijuana use.⁵

In 1996, Applicant befriended a man undergoing treatment for cancer. By 1998, his friend had become very ill and was confined to bed. His friend asked Applicant to obtain marijuana, which Applicant did on one occasion. As an expression of gratitude, his friend offered him a one-hitter pipe, meaning a one puff size pipe, which Applicant accepted. He smoked marijuana, thereafter, on rare occasions between 1998 and 2004. Applicant acknowledged that he should not have taken the pipe or purchased the marijuana, and that he knew smoking marijuana was illegal. He acknowledged that he smoked marijuana while holding a security clearance. Applicant last used marijuana in early 2004, more than five and one-half years ago.⁶

In early 2004, Applicant sought a security clearance through another federal government agency. Because he discussed his drug use with the polygraph examiner prior to his test, the polygraph examiner did not ask him questions about drugs. Rather, the polygraph examiner asked him questions about "hacking" into government computers, which he vehemently denied. Subsequently, this agency denied him a security clearance.⁷

Applicant completed his first SF-86 on August 18, 1997. He answered "yes" to the following question about his drug use:

³GE 1; Tr. 28, 58-59.

⁴Tr. 28, 33, 50-51, 66.

⁵*Id.* at 33-36.

⁶*Id.* at 37-41, 59-60.

⁷*Id.* at 42-43, 45-46, 61.

Question 27: Your Use of Illegal Drugs and Drug Activity-Illegal Use of Drugs

Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc), hallucinogenics (LSD, PCP, etc.), or prescription drugs? (*emphasis supplied*)

He indicated that he used marijuana one to two times a month between January 1989 and May 1994. He answered “no” to the other drug related questions.⁸

On October 23, 1997, Applicant met with an investigator and signed a written statement. In his statement, Applicant admitted using marijuana one time in high school and smoking it one to two times a month between 1989 and 1994 with his brother-in-law. He denied purchasing or manufacturing marijuana during this time. He also expressed an intent to never use illegal drugs in the future.⁹

Applicant completed an electronic form of the SF-86 on April 3, 2006. Concerning his drug use, he answered “yes” to Question 24B, acknowledging he illegally used drugs as a public safety official. The document fails to provide his explanation for his positive answer. He answered “no” to the other two drug questions. He also acknowledged that he was denied a security clearance by another federal agency. He explained that he had a close family friend who died of cancer. His friend smoked marijuana to control his nausea and pain, and Applicant smoked a small amount with his friend while holding a security clearance. He also explained that he forgot to list his use on his SF-86 for the other federal agency, but told the polygraph examiner upon his arrival for his polygraph test.¹⁰

On January 23, 2007, Applicant completed his e-QIP. He again answered “yes” to Question 24b and admitted using illegal drugs while possessing a security clearance. He explained his answer, stating he used marijuana with his sick friend once in 1998. He answered “no” to the other two drug questions, which ask about his drug use and illegal purchase and manufacture for the last seven years. He acknowledged that another federal agency had denied him a security clearance, indicating his clearance had been denied because of his drug use while holding a security clearance.¹¹

Applicant met with an investigator on January 2, 2008 in a public restaurant. He reviewed his marijuana use with the investigator. He admitted smoking marijuana twice

⁸GE 4; Tr. 60-63.

⁹GE 6.

¹⁰GE 2.

¹¹GE 1.

in 1997 or 1978 with friends either to experiment or in response to peer pressure. He did not purchase this marijuana. He also admitted smoking marijuana with his sick friend and purchasing marijuana on one occasion for his friend. He denied any other use of marijuana or other illegal drugs. He denied intentionally falsifying his e-QIP, stating that he forgot about his marijuana use.¹²

Applicant characterizes his failure to acknowledge his drug use on his SF-86 and e-QIP and during his interview as forgetfulness, panic, fear, and scared. He denied a deliberate intent to falsify his answers.¹³

Applicant's supervisors and co-workers described him as an excellent, dedicated, reliable, and dependable worker. He performed all the duties required by his job very well. He is an invaluable asset to his company. One co-worker discussed Applicant's failure to satisfactorily address questions about events in Applicant's past and the issue of Applicant's trustworthiness. He believed Applicant answered incorrectly out of fear, anxiety and an extreme source of personal embarrassment. He stated that Applicant's conduct does not reflect Applicant's true character. Applicant received good performance reviews.¹⁴

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 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 access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based

¹²GE 5.

¹³Tr. 52-55, 64-75.

¹⁴AE A; AE B; AE C; AE D; AE E; AE F; AE G; AE H; AE I; AE J.

on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under 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 applicant or proven by Department Counsel. . . .” An applicant has the ultimate burden of persuasion as to obtaining 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 an 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 Executive Order 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

AG ¶ 24 expresses 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.

(a) Drugs are defined as mood and behavior altering substances, and include:

(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;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying:

- (a) any drug abuse (see above definition);
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (g) any illegal drug use after being granted a security clearance.

Applicant first smoked marijuana as a high school student. He started regularly smoking marijuana following his marriage to his first wife. When they separated, he stopped his marijuana use. When a friend became seriously ill with cancer in 1998, he purchased marijuana on one occasion for his friend. When his grateful friend offered him marijuana, he accepted the gift. He then smoked marijuana occasionally for the next six years while holding a security clearance. The government established its case under the disqualifying conditions in AG §§ 24, 25(a), 25(c), and 25(g).

Under AG ¶26(a), Applicant can mitigate the government's security concerns about his drug use if he shows that his use was not recent, infrequent, not likely to recur, and does not cast doubt on his "current reliability, trustworthiness, or good judgment". He can also mitigate the government's security concerns by showing a demonstrated intent not to abuse any drugs in the future, such as disassociation from drug-using associates, changing his environment, an appropriate period of abstinence, and, a signed statement of intent with automatic revocation of clearance for any violation. See AG ¶ AG 26(b)(1)-(4). Applicant stopped using marijuana over five and one-half years ago, which is a sufficient time of abstinence to support mitigation. However, Applicant first stopped using marijuana in 1993, then resumed his marijuana use five years later. In addition, in his 1997 interview, Applicant stated an intent not to use drugs in the future. Eighteen months later, he started smoking marijuana after he had been granted a security clearance. While he no longer associates with individuals who actively use drugs, sufficient time has not elapsed to demonstrate that he can remain away from marijuana use. By using marijuana while holding a security clearance, he breached a trust given to him by the government. He has not provided sufficient information to show that he would not breach this trust in the future. He has not mitigated the government's concerns under Guideline H.

Guideline E, Personal Conduct

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying:

- (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;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information: and

(3) a pattern of dishonesty or rule violation; 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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Applicant failed to provide clear and accurate information about his past marijuana use. In 1997, he placed the government on notice of significant marijuana use when he completed his security clearance application. He did not, however, fully disclose of his marijuana use during his meeting with the security investigator in 1997. When he completed his most recent security clearance application, Applicant had a duty to disclose that he had resumed smoking marijuana on a sporadic basis between 1998 and 2004. He did not. Instead, he minimized his marijuana use on this application and in an interview with the security investigator. His failure to be forthright about his marijuana use, particularly since 1998, was intentional.

Applicant has little memory of using cocaine on one occasion in college in 1978 or 1979. His failure to disclose his one-time use of cocaine is not intentional. When he met with the security investigator in 1997, it had been more than 18 years since he may have used cocaine after a night of drinking. When he met with the investigator in 2008, his possible use of cocaine had been nearly 30 years earlier. The failure to recall conduct while drunk and after a considerable length of time is not unreasonable. With the exception of SOR allegations 2.d.(2) and 2.g, the government has established its case under AG ¶¶ 16(a), 16(c), 16(d)(1) and (3), 16(e) and Guideline E.

Applicant may mitigate the government's security concerns under AG ¶ 17 if he can establish:

(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 states that he no longer smokes marijuana and that he no longer associates with people who use marijuana. In 1997, Applicant stated that he did not intend to use marijuana in the future, yet within 18 months, he started smoking

marijuana again. His reasoning for not being truthful on his security clearance application and with the investigator supports a denial of his clearance rather than provides a rationale for mitigating the government's case. He has not mitigated the government's security concerns under Guideline E.

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 an applicant's conduct and all 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.

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 decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. The evidence in support of denying a security clearance to Applicant under the whole person concept is more substantial than the evidence in support of a grant. Applicant used marijuana on a regular basis for at least 15 years. In 1997, he expressed an intent not to use marijuana. After a nearly five-year abstinence and within 18 months of his stated intent not to use marijuana again, he resumed smoking marijuana on a sporadic basis for another six years. While he stopped his marijuana consumption over five years ago and no longer associates with his former in-laws, he needs more time to demonstrate that he will not use marijuana in the future. More importantly, Applicant has not been forthright about his past marijuana use when recently providing information. He is embarrassed and ashamed of his past conduct, which could make him vulnerable to coercion, pressure, and exploitation. His failure to provide clear and accurate information about his past drug use reflects poorly on his judgment and trustworthiness.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude that Applicant has not mitigated the security concerns arising from his drug involvement and personal conduct.

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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant
Subparagraph 2.d(1)	Against Applicant
Subparagraph 2.d(2)	For Applicant
Subparagraph 2.e:	Against Applicant
Subparagraph 2.f:	Against Applicant
Subparagraph 2.g:	For Applicant

Conclusion

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

MARY E. HENRY
Administrative Judge