



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



In the matter of:)	
)	
)	ISCR Case No. 14-03549
)	
Applicant for Security Clearance)	

Appearances

For Government: Candace L. Garcia, Esq., Department Counsel
For Applicant: *Pro se*

10/05/2015

Decision

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate the security concerns arising under Guidelines H (drug involvement) and E (personal conduct). Eligibility for access to classified information is denied.

Statement of the Case

On February 6, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H and E. DOD CAF took that action 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) implemented by DOD on September 1, 2006.

The SOR set forth reasons why DOD CAF could not find under the Directive that it is clearly consistent with the national interest to continue Applicant's security clearance. On February 24, 2015, Applicant answered the SOR and elected to have a decision based on the administrative record in lieu of a hearing. On May 15, 2015,

Department Counsel prepared a File of Relevant Material (FORM) that contained documents identified as Items 1 through 7. A complete copy of the FORM was mailed to Applicant on June 8, 2015, and he received it on June 18, 2015. He was given 30 days from its receipt to file objections or submit matters in refutation, mitigation, or extenuation. He timely provided a response to the FORM that has been marked as Item 8. In his response, Applicant indicated that he wanted the seven documents in the FORM to be considered. Department Counsel had no objection to Applicant's response to the FORM. The case was assigned to me on July 31, 2015.

Findings of Facts

Applicant is a 32-year-old employee of a defense contractor. He has worked for his current employer since July 2012. He earned an associate's degree in 2008. He has never been married and has no children.¹

Under Guideline H, the SOR alleged that Applicant used marijuana at least twice between June 2005 and January 2012 (SOR ¶ 1.a); that he used marijuana after being granted security clearance eligibility in September 2003 and October 2007 (SOR ¶¶ 1.b and 1.c); and that he used marijuana after being granted sensitive compartmented information (SCI) eligibility in June 2008 (SOR ¶ 1.d). Under Guideline E, the SOR alleged that Applicant falsified his responses to two questions concerning illegal drug use in an Electronic Questionnaire for Investigations Processing (e-QIP) dated October 22, 2007 (SOR ¶¶ 2.a and 2.b); and that he wrongfully hacked into computers in August 2010 (SOR ¶ 2.c). In his Answer to the SOR, Applicant admitted the Guideline H allegations, denied the two falsification allegations, and admitted the computer hacking allegation.²

On October 22, 2007, Applicant submitted an e-QIP. In that e-QIP, he responded "No" to Question 24a that asked, "Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana . . . ?". He also answered "No" to Question 24b that asked, "Have you ever illegally used a controlled substance while . . . possessing a security clearance . . . ?". In this e-QIP, he noted that he was granted a Secret clearance in September 2003.³

During an Office of Personnel Management (OPM) interview on January 28, 2008, Applicant disclosed he used marijuana once in the previous 18 to 24 months and indicated that he had no interest in using marijuana in the future. He further indicated he forgot about his one-time marijuana use when he completed his e-QIP and, when he remembered it, he could not make any changes to the e-QIP. The summary of the interview noted this marijuana use occurred while he held a security clearance.⁴

¹ Items 3 and 4.

² Items 1 and 2.

³ Item 4.

⁴ Item 6.

On August 8, 2012, Applicant submitted another e-QIP. In this e-QIP, he disclosed that he smoked marijuana twice. He indicated that his first marijuana use was in June 2005 and his last use was in January 2012. He stated his first use was experimental and second was a “mistake due to despair and regret from a bad relationship, a bad job, and feeling unable to solve it.” He further noted that he had made significant changes to his living and working environment and his quality of life has improved so that he will be able to avoid such situations in the future. In this e-QIP, he noted that he was granted a Secret clearance in March 2004 and access to SCI in February 2008. He also disclosed that he engaged in “educational/intellectual hacking” in August 2010, and that he had ceased computer hacking.⁵

In an OPM interview in April 2013, Applicant volunteered that he experimented with marijuana twice. His first use of marijuana occurred with another individual in June 2005. The other individual obtained the marijuana. Applicant stated the second and last time he used marijuana was in January 2012. This second use occurred with another individual at that person’s home. He stated that he never sold or distributed illegal drugs and has not received any drug treatment or counseling. He also stated that he no longer uses marijuana and has no intent to use it in the future. In his response to interrogatories, he acknowledged that he held a security clearance when he used marijuana on both of those occasions and further noted that he was attending therapy for an anxiety disorder.⁶

In the April 2013 OPM interview, Applicant also volunteered that he hacked into and gained unauthorized access to computers in August 2010. He acknowledged that he hacked into the computers knowing it was illegal. He engaged in that conduct to see if he could do it and did not obtain any monetary gain from doing so. He stated that he will never engage in computer hacking again.⁷

In his Answer to the SOR, Applicant stated that he has taken steps to reduce the risk of using marijuana again. He moved from the area where he used marijuana. He also recently started counseling with a therapist and psychiatrist to aid him in making better decisions and prevent him from exercising poor judgment in the future. He stated that he did not deliberately falsify his 2007 e-QIP. He noted his 2007 e-QIP was completed during the school year and mistakes occurred when he was tired and rushed to complete it. He noted that he corrected the mistakes during an interview following submission of that e-QIP. An examination of his 2007 e-QIP reveals that, since his earlier investigation, he updated information pertaining to his address, educational achievements, employment activity, people that knew him, and prior investigation.⁸

⁵ Item 3.

⁶ Item 5.

⁷ Item 5.

⁸ Item 2.

In his Response to the FORM, Applicant submitted a Statement of Intent agreeing to forfeit his security clearance in the event he misused drugs or information systems in the future. In that Response, he acknowledged that he had a Top Secret clearance with SCI access and indicated he never had a security violation. He again reiterated that he has moved from where he used marijuana in the past.⁹

Policies

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 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 on the evidence contained in the record.

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.

⁹ Item 8.

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

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.

Applicant’s use of marijuana in 2005 and 2012 while holding a security clearance established the following disqualifying conditions under AG ¶ 25:

(a) any drug abuse; and

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

The following mitigating conditions under AG ¶ 26 are potentially applicable:

(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) 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; (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant used marijuana twice while holding a security clearance. He was 22 and 29 years old when he engaged in that conduct. His last marijuana use occurred about 45 months ago. He described his first marijuana use as experimental and his second use as a “mistake due to despair and regret from a bad relationship, a bad job, and feeling unable to solve it.” It is unknown how he would react if those stressors or similar ones recurred. In his Answer to the SOR, he stated that he recently consulted with a therapist and psychiatrist to help him make better decisions, but details about the nature and effectiveness of such counseling or treatment are unknown. Applicant indicated that he has disassociated himself from drug users, and he submitted a Statement of Intent to not use drugs in the future.

In his 2008 OPM interview, Applicant disclosed his first marijuana use and indicated that he was not interested in using that substance again. However, he later used marijuana after being granted a Top Secret clearance and SCI access. This second use, unlike the first, was not a youthful indiscretion. He had been working in the defense industry for about nine years when he used marijuana on that second occasion. His second use was a serious lapse in judgment. From the evidence presented, I am unable to find that his drug abuse happened under unusual circumstances, that it is unlikely to recur, and that it does not cast doubt on his current reliability, trustworthiness, or good judgment. I find that insufficient time has passed to conclude that he has put his wrongful drug involvement behind him. In making that finding, I note that I did not have the opportunity to hear Applicant’s testimony, observe his demeanor, or evaluate his credibility.

AG ¶¶ 26(a) and 26(b) partially apply, but is insufficient to overcome the security concerns under Guideline H.

Guideline E, Personal Conduct

AG ¶ 15 expresses 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 two 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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and

(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.

Applicant denied falsifying his 2007 e-QIP. He claimed that he forgot about his first marijuana use when he was completing that application. He later disclosed his marijuana use during an OPM interview in January 2008. Presumably, his first marijuana use and his failure to report that use on his 2007 e-QIP were considered before he was later granted a Top Secret security clearance and SCI access. His explanation about why he failed to list the first marijuana use on his 2007 e-QIP is plausible. I find that Applicant did not deliberately falsify his 2007 e-QIP by failing to disclose his then one-time drug use. AG ¶ 16(a) does not apply.

Applicant hacked into and gained unauthorized access to computers in August 2010. AG ¶ 16(c) applies.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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; and

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

Applicant's unauthorized hacking into computers must not be considered in a vacuum. It should be considered along with his use of marijuana while holding a security clearance. When viewed in its entirety, his conduct raises significant concerns about his reliability, trustworthiness, and good judgment. While he has sought the assistance of a therapist and psychiatrist to avoid making poor decisions in the future,

insufficient evidence was presented to establish that he will not engage in questionable behavior in the future. I find that none of the mitigating conditions fully apply to SOR ¶ 2.c.

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(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.

I considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment. Applicant has worked for defense contractors since 2003. Nevertheless, he has engaged in questionable conduct that raises security concerns that have not been mitigated.

Overall, the record evidence leaves me with questions and doubts as to his eligibility and suitability for a security clearance. Applicant has failed to mitigate the drug involvement and personal conduct security concerns.

Formal Findings

Formal findings 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: Subparagraphs 1.a – 1.d:	AGAINST APPLICANT Against Applicant
Paragraph 2, Guideline E Subparagraphs 2.a – 2.b: Subparagraph 2.c:	AGAINST APPLICANT For Applicant Against 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 continue Applicant's eligibility for a security clearance. Eligibility to access classified information is denied.

James F. Duffy
Administrative Judge