



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



In the matter of:)
)
-----) ISCR Case No. 07-01247
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Eric H. Borgstrom, Esquire, Department Counsel
For Applicant: Pro Se

January 31, 2008

Decision

CREAN, Thomas M., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on July 7, 2006. On August 28, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines H (Drug Involvement) and E (Personal Conduct). (Item 1) The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), 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 answered the SOR in writing on September 20, 2007. He admitted the allegations under Guideline H. He denied under Guideline E a deliberate intent to deceive when answering a question on his security clearance application. He elected to have the matter decided on the written record in lieu of a hearing. (Item 2)

Department Counsel submitted the Government's written case on November 20, 2007. Applicant received a complete file of relevant material (FORM) on December 6, 2007, and was provided the opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions within 30 days. He has not responded with additional information. The case was assigned to me on January 28, 2008. Based upon a review of the case file and the pleadings, eligibility for access to classified information is denied.

Procedural Issues

There are six allegations in the SOR of drug use or possession alleged under Guideline H. One of the allegations is based on Applicant's admission that he will continue to use marijuana in the future unless required to stop by his employer or to obtain a security clearance. Allegation 2b under Guideline E (subparagraph 2.b) is based on the same factual circumstances as listed in allegation 1.e under Guideline H. The government notes in the FORM that these acts raise security issues for Personal Conduct under AG ¶ 16(d)¹.

The essence of the security concern for Applicant is his use of marijuana. His use of an illegal drug both in the present and in the future is clearly covered under the security concern and disqualifying conditions for Guideline H, Drug Involvement. The plain language of the disqualifying condition cited by the government under Guideline E (Personal Conduct) is for adverse information not explicitly covered under any other guidelines that may not be sufficient by itself for an adverse determination. In this case, Applicant's use of marijuana is explicitly covered under Guideline H, and is adequate for an adverse determination under Guideline H (Drug Involvement). Accordingly, the subparagraph 2.b allegation under Guideline E (Personal Conduct) is not appropriate, is dismissed, and will not be further considered.

Findings of Fact

Applicant admitted the factual allegations under Guideline H. He denied a deliberate falsification on his security clearance application concerning his response to ever being charged or convicted of an offense involving illegal drugs. I thoroughly and carefully reviewed the case file and the pleadings. I make the following findings of fact.

Applicant is a 31-year-old college graduate employed by a defense contractor as an associate engineer since May 2006. He is not married. While in college, Applicant was employed by another defense contractor as a co-op student employee. (Item 3) He

¹Credible 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, including disruptive violent, or other inappropriate behavior in the workplace."

is proud to use his expertise working for the defense contractor in support of national security. (Item 4, at 7)

Applicant admitted that he first used marijuana in 1993 when he was seventeen. He admitted to continually using marijuana at least once a month since 1993. When interviewed on December 1, 2006, he admitted his last use of marijuana was November 24, 2006. Applicant admitted to purchasing marijuana every two or three months for personal use. He denied ever selling or cultivating marijuana. He denied using any other illegal or controlled substance. (Item 4 at 4) Applicant stated "I will stop using marijuana at any time that I am required to by my employer or in order to obtain a security clearance. While I use marijuana socially and find it relaxing, it does not affect either my ability to perform in the workplace or to participate in society." (Item 4 at 7)

Applicant admitted he was issued a ticket for possession of marijuana in July 1997. He pled no contest and was told if he had a clean record after one year, the charge would not appear on his record. He believed the charge was dismissed. He admitted he was charged with possession of marijuana in April 1998. He was placed in a diversion program and required to perform community service and attend Narcotics Anonymous. He completed the required programs and to the best of his knowledge the charge was expunged from his record. (Item 4 at 5) He did not provide any documents showing the offenses were dismissed or removed from his records.

Applicant answered "no" to question 23d on his security clearance application asking if he had ever been charged with or convicted of any offense(s) related to alcohol or drugs. Applicant admits to the two arrests and charges for possession of marijuana. Applicant appeared in court after each offense and was placed in a type of diversion program for each offense. He completed each program. Applicant did not respond "yes" to the question because he thought he only had to list convictions and to the best of his knowledge he was never convicted of either offense. (Item 4, at 5) He interpreted the question as pertaining only to criminal convictions. (Item 2).

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised Administrative Guidelines. 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 over-arching adjudicative goal is a fair, impartial and common sense 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. 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, the Applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The 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 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.

Analysis

Guideline H, Drug Involvement

The 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. Drugs are mood and behavior altering substances, and include those listed on the Controlled Substances Act of 1970. Marijuana is listed as a drug in the Controlled Substance Act of 1970. Drug abuse is the illegal use of a drug or the use of a legal drug in a manner that deviates from approved medical direction. (AG ¶ 24)

Applicant’s admission to using and purchasing marijuana from 1993 until November 2006 raises Drug Involvement Disqualifying Conditions (DI DC) ¶ 25(a) (any drug use), and DI DC ¶ 25(c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution).

I have considered the Drug Involvement Mitigating Conditions (DI MC) and find none apply. Applicant’s last admitted use was days before his most recent interview which makes his use recent and frequent, therefore (DI MC) ¶ 26(a) (the behavior happened so long ago, was so infrequent, or happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual’s

current reliability, trustworthiness, or good judgment) does not apply. Applicant stated he intends to use marijuana in the future unless requested to stop by his employer or to obtain a security clearance. This clearly shows his intent to use in the future and is not a demonstrated intent to stop using marijuana. DI MC ¶ 26(b) (a demonstrated intent not to abuse 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) does not apply. Applicant failed to demonstrate that he has no desire to abuse drugs in the future. He has not even demonstrated that he may be on the road to such a position. Applicant has established that he is a drug user with no intent to stop using drugs. Guideline H is decided against Applicant.

Personal Conduct

A security concern is raised because conduct involving questionable judgment, untrustworthiness, unreliability, 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 ¶ 15) Personal conduct is always a security concern because it asks the central question does the person's past conduct justify confidence the person can be entrusted to properly safeguard classified information. The security clearance system depends on the individual providing correct and accurate information. If a person conceals or provides false information, the security clearance process cannot function properly to ensure that granting access to classified information is in the best interest of the United States Government. Applicant's failure to list the charges for marijuana possession on his security clearance application raises security concerns under Personal Conduct Disqualifying Condition (PC DC) ¶ 16(a) (the deliberate omission concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history, or similar form used to conduct investigations, to determine security eligibility or trustworthiness).

Applicant denied intentional falsification. He states he answered the questions because he thought the question only required a yes answer for criminal convictions. While there is a security concern for an omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for a security clearance, every omission, concealment, or inaccurate statement is not a falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully. The wording of the question is very plain that it pertains to both charges and convictions. As an engineer and college graduate, Applicant can easily understand the extent of the question. Applicant's understanding that the question pertained only to convictions is not credible. The available information shows his failure to list the drug charges was knowing and willful. Applicant failed to establish he did not deliberately provide false information on the security clearance application with intent to deceive. The false answer with intent to deceive is established. I find against Applicant as to Personal Conduct.

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) 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 the facts and circumstances surrounding this case. I considered that Applicant has used drugs for at least thirteen years. He intends to stop using drugs only if directed to do so by his employer or for security clearance purposes. In addition, he was not completely truthful in providing information on the security clearance application concerning drug related criminal charges. Overall, the record evidence leaves me with questions and doubts as to Applicant's future abuse of drugs and his judgment, reliability, trustworthiness, and willingness to follow rules and regulations. He has not established that he is suitable for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his abuse of marijuana.

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
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Dismissed

Conclusion

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

THOMAS M. CREAN
Administrative Judge