



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



In the matter of:)	
)	
)	ISCR Case No. 05-08862
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Francisco Mendez, Esquire, Department Counsel
For Applicant: *Pro Se*

February 27, 2008

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant failed to mitigate the security concerns raised by his Personal Conduct. Eligibility for access to classified information is denied.

On July 26, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline E, Personal Conduct. 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 answered the SOR in writing in an undated response, and requested a hearing before an Administrative Judge. The case was assigned to another Administrative Judge on October 16, 2007. DOHA issued a notice of hearing on October 22, 2007, and the hearing was convened as scheduled on November 6, 2007.

The government offered Exhibits (GE) 1 through 4, which were received without objection. Applicant testified on his own behalf but did not submit any documentary evidence. DOHA received the transcript of the hearing (Tr.) on November 15, 2007.

The Administrative Judge who conducted the hearing left DOHA before a decision in this case was issued. The case was assigned to me on January 17, 2008. I contacted Department Counsel and requested he contact Applicant and see if Applicant desired that I reopen the hearing for additional evidence or if Applicant desired that I base my decision on the transcript and evidence submitted at the first hearing. Applicant requested that I reopen the hearing. DOHA issued a notice of hearing on January 23, 2008, and I reopened the hearing as scheduled on February 5, 2008. The government did not offer any additional documentary evidence. Applicant testified on his own behalf. He did not submit any documentary evidence. DOHA received the transcript of the second hearing (Tr. (2)) on February 13, 2008.

Procedural and Evidentiary Rulings

The Administrative Judge advised Applicant of his right under ¶ E3.1.8 of the Directive to 15 days notice before the first hearing. Applicant affirmatively waived his right to 15 days notice.

Findings of Fact

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

Applicant is a 32-year-old engineer for a defense contractor. He is a college graduate with a Bachelor of Science degree and a Master's degree. He is married and has a child that is about six months old.¹

Applicant attended college from 1995 to 2001. He started working as a veterinary assistant at an animal hospital when he was in high school and continued while he was in college. Applicant was involved in a number of incidents related to the animal hospital. Between about 1995 and 1998, while working at the animal hospital, Applicant killed several cats by injecting them with bleach. Applicant was the senior employee at the hospital on occasions when co-workers gave unauthorized bleach injections to cats that were scheduled to be euthanized. This was not the proper humane means to euthanize animals. A co-worker suggested to Applicant that he should try it and he did. Applicant admitted that "[once he] did it for the first time, [he] was still curious and tried a second time." When asked if the cats suffered, Applicant testified, "[I]t's hard to say, I guess." Applicant described the deaths as similar to what occurred when the cats were

¹ Tr. at 12-13; GE 1, 2.

injected with the standard medication used to euthanize animals; they would stretch out and die.² He was asked:

Q: I guess I'm trying to understand if it's the same, why even do it?

A: I mean - - I don't know. It's one of those things where you're young and you do a stupid thing and you don't think about it being that big of a deal until you think back - - think back on it. And you don't really have an excuse for it. I don't know. It's probably one of the stupidest things I've ever done.³

Applicant was required to enter the time he started and ended work at the animal hospital on a computer. Applicant learned how to manipulate the computer. On about 40 occasions between about 1995 and 1998, Applicant changed the computer to reflect that he reported to work on time, when he was actually late by about five to ten minutes. Applicant stated that he had no good reason for manipulating the computer as his boss did not care that he was several minutes late. He further stated that he did not do it for the money as he often worked after hours without pay in order to help out.⁴

The owner of the animal hospital also operated a Christmas tree business during the holidays. Applicant and other co-workers were sometimes called from the animal hospital to assist on the Christmas tree lot. This angered them and they stole money from the sale of the trees. Applicant stated that he would take \$20 here or there and estimated that the total amount that he stole between about 1995 and 1998 was \$500 or less.⁵

Between about 1999 and 2000, a co-worker at the animal hospital asked Applicant if he would provide her with a urine sample. Her husband had used marijuana. She wanted to give the urine to her husband so that he could substitute Applicant's urine for his on a drug test. Applicant stated that he felt sorry for the woman because her husband was abusive to her and he provided her with his urine on about three occasions. He stated the husband worked for a construction company and was not involved in government work.⁶

In about 2000, Applicant and his friends vandalized public restrooms by urinating all over the restroom. He stated they were drunk the first time they did it. After that they

² Tr. at 19, 56; Tr. (2) at 30-34; Applicant's Answer to SOR; GE 1, 2, 4.

³ Tr. (2) at 33.

⁴ Tr. at 19-21, 56-57; Applicant's Answer to SOR; GE 4.

⁵ Tr. at 21-23, 53; Applicant's Answer to SOR; GE 4.

⁶ Tr. at 16-19, 54-56; Applicant's Answer to SOR; GE 4.

would do it during “road trips” and other times. He estimated that he did this on about ten occasions.⁷

From about 1995 to 2004, Applicant committed copyright violations by unlawfully downloading computer software, movies, and music. This started when Applicant was in college. Applicant stated at that time it was considered unusual to purchase software instead of pirating it. He rationalized his actions by the fact that he could not have purchased the software because he did not have the money, so the companies were not really losing money. He continued the practice after he graduated from college even though he could afford to pay for the software, movies, and music. He stated he “was so accustomed to just getting them for free that it was hard to stop and start paying for them.” Applicant testified he “stopped doing it once [he] went through the security process because [he] realized this could adversely affect it.” He testified that he did not think of it as something that mattered until he was asked about it during his polygraph in about 2004.⁸

Applicant used marijuana on a number of occasions between about 1995 and 1999. The exact amount of times is unclear as he has provided varying information. Applicant submitted a Security Clearance Application (SF 86) on January 28, 2002. Question 27 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, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.) amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.) hallucinogenics (LSD, PCP, etc.), or prescription drugs?

Applicant answered “YES.” He listed the period from “1995/06/01” to “1995/06/02.” Under “NAME/FREQUENCY” he listed “MARIJUANA” and “2.”⁹

Applicant had a background interview about six to eight weeks after he submitted his SF 86. He told the investigator that he thought he used marijuana about five times, but he could not be sure. Applicant was given a polygraph for his background investigation in about 2004. He told the polygrapher that he thought he used marijuana about five times between 1995 and 1999, but it could have been more. He stated that he thought it was less than ten times but he was 100% certain it was less than 20 times. Applicant submitted another SF 86 on February 14, 2005. Applicant again answered “YES” to Question 27. He listed the period from “1994/04/01” to “1999/12/31.” Under “NAME/FREQUENCY” he listed “MARIJUANA” and “15.” Applicant wrote in the General Remarks section, “I would like to state that the number of my uses of marijuana were

⁷ Tr. at 23-24; Applicant’s Answer to SOR; GE 4.

⁸ Tr. at 24-27, 57-58; Tr. (2) at 18-20; Applicant’s Answer to SOR; GE 4.

⁹ GE 1.

estimated. I believe it was less times.” In his response to Interrogatories in May 2007, Applicant stated he still believed he used marijuana on less than ten occasions. He stated that after discussing it with his wife, he remembered that the first time was on St. Patrick’s Day in 1995, and that he did not use it after meeting his wife in December 1998. During his first hearing he testified he told the polygrapher that he was 100% sure that it was less than 15 occasions. He testified that the first time he used marijuana was in May 1995, when he went to visit a friend at a college, and it was May 1995, not June 1995, that were the two times that he was thinking of when he answered his SF 86. He testified at his first hearing that he smoked marijuana with friends from work, starting about 1996. He stated he would go to parties and some of his friends had marijuana, and “sometimes [he] would and sometimes [he] wouldn’t [use marijuana],” but “[i]t wasn’t like an all the time thing.” He also testified that he believed it was actually between five and ten times. At his second hearing, he testified that he believed he used marijuana between five and ten times and probably closer to five.¹⁰

Applicant denied intentionally falsifying the 2002 SF 86. He stated that he misinterpreted the question and that he thought the question asked him to list all the times that he had used marijuana, similar to the question that asked to list all the places that he had lived. He stated he listed the two occasions that he knew the dates that he used marijuana. He indicated that he knew he would speak with an investigator and he would tell the investigator that it was more than two occasions, but he did not have dates for the other occasions. He stated that he was not concerned that his marijuana use would affect his security clearance because of the time that had passed since he last used it. He admitted that he was concerned about his company finding out about his marijuana use. He further testified that his concern about his company finding out he smoked marijuana had nothing to do with his answer to the SF 86, and that if he was truly concerned about his company and was willing to lie on the SF 86 to conceal his drug use, that he would not have listed any use.¹¹ After considering all the evidence including Applicant’s various statements and after gauging his demeanor and credibility, I find Applicant intentionally falsified his Security Clearance Application in 2002, by listing that he only used marijuana on two occasions in 1995. I further find that Applicant was untruthful in his response to Interrogatories, in his Answer to the SOR, and during both hearings when he denied intentionally falsifying the SF 86.¹²

¹⁰ Tr. at 28-34, 39-43, 49-52; Tr. (2) at 11-17, 21, 28-29; GE 2, 4.

¹¹ Tr. at 28, 43-44; Tr. (2) at 7-11, 20-27; Applicant’s Answer to SOR; GE 4.

¹² Applicant’s false statements which were not alleged in the SOR are not considered for disqualifying purposes, but may be considered when analyzing the “whole person” and the potential application of mitigating conditions.

During Applicant's polygraph in 2004, he was told he did not pass the polygraph and was asked why he thought he did not pass.¹³ At that time Applicant revealed the information discussed above which formed the basis for the allegations in the SOR. He was denied access to Sensitive Compartmented Information (SCI) in about February 2005, based upon much of the matter that he discussed with the polygrapher and which are currently listed as allegations in the SOR.¹⁴

Applicant stated he is deeply remorseful for what he has done, that he has changed from the young man who made poor choices, and that he has learned from his mistakes. He praises his wife as the stabilizing influence in his life. He has moved away from the bad influences in college and at the animal hospital. He and his wife bought a house about five years ago and he states he no longer is involved in questionable conduct.¹⁵

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 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.

¹³ There is no evidence that Applicant actually was deceptive on his polygraph, as opposed to being told he was deceptive as part of an interview/interrogation technique. The results of the polygraph are not considered in determining the facts of this case or Applicant's credibility. The polygraph is only considered for the affect it had on Applicant admitting to his conduct.

¹⁴ Tr. at 27, 30-34, 44-47; Tr. (2) at 19; Applicant's Answer to SOR; GE 4.

¹⁵ Tr. at 34-39; Tr. (2) at 35-37; Applicant's Answer to SOR; GE 4.

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.

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 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.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; and,

(b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

(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:

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and,

(4) evidence of significant misuse of Government or other employer's time or resources.

(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.

Applicant's admitted conduct as alleged in SOR ¶¶1.a through 1.f, raises AG ¶¶ 16(c), (d), and (e). The intentional falsification of his SF 86 raises AG ¶¶ 16(a) and

16(e). The fact that Applicant was denied access to SCI in 2005, based upon the conduct that is addressed in these proceedings does not independently raise any disqualifying condition.

AG ¶ 17 provides conditions that could mitigate security concerns:

(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;

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, judgment, or willingness to comply with rules and the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Much of Applicant's conduct occurred while he was in college. The conduct in SOR ¶¶1.a through 1.e occurred in 2000, or earlier. The most recent conduct alleged was the unlawful downloading of copyrighted material as alleged in SOR ¶1.f, which ended in 2004. Applicant has made many positive changes in his life since those times. His wife is a stabilizing influence and he is a new father. They have established roots by buying a house about five years ago. He has disassociated himself from the negative influences in his life. AG ¶¶ 16(c), (d), (e), and (g) are raised for those allegations.

Applicant falsified his SF 86 in 2002, by minimizing the number of times he used marijuana, and when he used it last. He provided additional information to his background investigator several months later when he was questioned about his drug use. He provided all the information that formed the basis for the allegations in the SOR after the polygrapher told him that he failed the polygraph. Applicant provided additional information about his marijuana use in his 2005 SF 86. AG ¶¶ 16(a) and (e) are partially applicable because of those actions.

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 common sense 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. Applicant engaged in reprehensible conduct when he was younger. Along with other misconduct, he stole from his employer, manipulated his employer's timekeeping equipment, vandalized public restrooms, provided urine samples to a co-worker so that her husband could pass a drug test, and killed cats by injecting them with bleach. Applicant's actions with the cats carries such a stigma that it is difficult to say when it would no longer serve as a basis for pressure, coercion, exploitation, or duress. His misconduct goes to the heart of his trustworthiness. He receives credit for the positive changes in his life discussed above. However, Applicant intentionally falsified his SF 86. He was untruthful in his response to Interrogatories, in his Answer to the SOR, and during both hearings. Without total candor, I am unable to find that he has been rehabilitated or that there is little likelihood of continuation or recurrence of his misconduct.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his 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 E:	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
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	For Applicant

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.

EDWARD W. LOUGHRAN
Administrative Judge