



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



In the matter of:)
)
) ISCR Case No. 12-07648
)
Applicant for Security Clearance)

Appearances

For Government: John Bayard Glendon, Esq., Department Counsel
For Applicant: *Pro se*

10/30/2014

Decision

RIVERA, Juan J., Administrative Judge:

Applicant’s history of drug-related criminal conduct while possessing a top secret clearance, and the falsification of his 2005 security clearance application (SCA) continue to raise security concerns. His lack of judgment and unwillingness to comply with the law raise questions about his reliability, trustworthiness, and ability to protect classified information. Clearance denied.

Statement of the Case

Applicant submitted his most recent SCA on June 14, 2011, requesting the continuation of a top secret security clearance granted to him in 2006. The Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline E (personal conduct) and Guideline H (drug involvement) on May 7, 2014.¹ Applicant answered the SOR on June 5, 2014, and requested a hearing before an administrative judge. The case was assigned to me on August 12, 2014. The

¹ The DOD acted under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (AG), implemented by the DOD on September 1, 2006.

Defense Office of Hearings and Appeals (DOHA) issued the notice of hearing on August 26, 2014, scheduling a hearing for September 10, 2014.

At the hearing, the Government offered three exhibits (GE 1 through 3). Applicant testified, presented two witnesses, and submitted seven exhibits (AE 1 through 7). All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on September 25, 2014.

Findings of Fact

Applicant admitted all the SOR allegations, with explanations. His admissions are hereby incorporated as findings of fact. After a thorough review of all the evidence, including his testimony and demeanor while testifying, I make the following additional findings of fact:

Applicant is a 37-year-old employee of a defense contractor. He completed his bachelor's degree in management information systems in 2002, and a master's degree in applied information technology in 2013. He and his wife have known each other since high school, and they were married in September 2005. They have no children.

Applicant illegally used marijuana from January 2001 until at least January 2009. (GE 3) He claimed that he used marijuana one or two times a year, every other year. He used marijuana socially, at parties with friends, and usually under the influence of alcohol. He illegally used cocaine one time in 2007. (GE 3; Tr. 43-44)

Applicant submitted his first SCA in May 2001, while attending college. After graduating from college, Applicant was hired by a defense contractor in 2002. He did not disclose any illegal drug use in his 2001 SCA. Shortly thereafter, he was granted a security clearance at the secret level. Applicant continued his illegal drug use after being granted a secret level clearance.

In November 2005, Applicant submitted an SCA requesting an upgrade of his clearance to top secret. He again deliberately failed to disclose his history of illegal drug use. Subsequent to his submission of the 2005 SCA, Applicant was interviewed by a government investigator about his entries in the 2005 SCA. Applicant deliberately made false statements to the investigator when he denied any prior illegal drug use. He was granted eligibility to a top secret clearance in 2006. Applicant continued his illegal drug use, including a one use of cocaine in 2007, after being granted a top secret clearance.

Applicant was hired by his current employer, a government contractor, in April 2009. Approximately six months after he was hired, Applicant's employer requested his access be upgraded by another government agency (Agency) for Applicant to be eligible to work classified contracts with that Agency. As part of the background investigation process, Applicant participated in a full-scope polygraph assisted interview. During the interview process, Applicant disclosed his prior history of illegal drug use. Applicant claimed that after this interview, he started to openly share his prior

illegal drug use with family, friends, and coworkers to avoid any possible coercion. (SOR Answer)

Applicant submitted his most recent SCA to the DOD on June 14, 2011, requesting the continuation of the top secret security clearance granted to him in 2006. In response to questions on Section 23 (Illegal Use of Drugs or Drug Activity) of his 2011 SCA, Applicant disclosed he used marijuana and cocaine from 2001 to 2009, while possessing security clearances since 2002. Applicant was interviewed by a government investigator in July 2011. During the interview, Applicant told the investigator that he did not disclose his history of illegal drug use in any of his prior security clearance investigations because he did not want to admit using drugs. (GE 3)

In his December 2013 response to DOHA interrogatories, Applicant stated that his failure to disclose his history of illegal drug use in his prior SCAs caused him "extreme disappointment." He attributed his poor decision to inattentive behavior caused by his attention deficit hyperactivity disorder (ADHD). He averred that his failure to take his medication impaired his decision-making process.

In his answer to the June 2014 SOR, Applicant explained that when he completed his 2001 SCA he was unfamiliar with the security clearance process, and the omission of his illegal drug use was inadvertent. Concerning his 2005 SCA, he stated: "I hastefully completed the TS application under the primary mindset that he would never truly need it . . . I was unsure if I needed to share my past with people whom I didn't know at my new job." Applicant was 25 years old when he completed his 2005 SCA.

At his hearing, Applicant presented the testimony of his wife and his current supervisor. Applicant is considered to be a highly dedicated, valuable employee with excellent performance. He has demonstrated integrity and displays good character, knowledge and professionalism. His references recommend Applicant retain his top secret access without reservations. Applicant's wife has known Applicant since they were in high school. She has been aware of his illegal drug use because he has confided with her through the years. She claimed she never saw Applicant using illegal drugs, and that she never condoned his use of drugs.

Applicant and his wife claimed that they changed their lifestyle after they moved to their current residence in March 2009. Before their move, they were into socializing with friends and going to parties. Now they live a family-focused lifestyle with limited socialization. Applicant repeatedly expressed disappointment about his past criminal behavior. He stated that it took him a long time to mature, and he carried his college lifestyle into his 20s. He claimed that he currently socializes infrequently with his past drug-using friends from college and from his prior neighborhood. He claimed that they have moved on from their college lifestyle. Applicant submitted a signed statement of intent with automatic revocation of clearance for any violation to show his resolution to not abuse any drugs in the future. (AE 2)

Policies

Eligibility for access to classified information may be granted “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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Guideline H, Drug Involvement

AG ¶ 24 articulates the security concern for 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.

Between January 2001 and January 2009, Applicant illegally used marijuana and cocaine. He illegally used drugs while possessing a secret level security clearance from 2002 to 2006, and a top secret clearance from 2006 to 2009.

AG ¶ 25 describes a condition related to drug involvement that could raise a security concern and may be disqualifying in this case:

- (a) any drug abuse;
- (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.

AG ¶ 26 provides two 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; 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.

I find that none of the above Guideline H mitigating conditions fully apply. Applicant claimed that his most recent illegal drug-related behavior occurred in 2009. As such, his illegal drug-related behavior could be considered temporally remote. Notwithstanding, considering that Applicant illegally use drugs after being granted a secret level clearance in 2002, and continued his illegal drug use after he was granted a top secret clearance in 2006, I find that his illegal drug use continues to cast doubt on his current reliability, trustworthiness, judgment, and his ability to comply with the law, rules and regulations.

Because of his age, education, and his experience working for a government contractor and possessing a security clearance, Applicant knew or should have known

of the adverse legal and security clearance consequences he would face as a result of his illegal use of marijuana and cocaine. Applicant's illegal drug use is a violation of the trust placed in him by the Government.

Applicant promised to never use illegal drugs in the future, and submitted a signed statement of intent with automatic revocation of clearance for any violation; however, his promise holds little weight. Applicant was aware of the criminal prohibition against the illegal use of drugs, and of the adverse consequences to his ability to hold a security clearance if he illegally used drugs. That did not stop him from using illegal drugs between 2002 and 2009 while possessing a security clearance.

Moreover, Applicant has a history of being dishonest, falsifying SCAs, and making false statements to government investigators about his past illegal drug-related behavior. He claimed that he changed his lifestyle, and that he has matured; however, he continues to occasionally associate with some of his drug-using friends.

Guideline E, Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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 personal conduct security concerns are based on the same facts alleged under the drug involvement guideline, incorporated herein, and the fact that he falsified his 2005 SCA. Applicant claimed that he omitted his drug-related behavior from his 2001 SCA (not alleged) because he was unfamiliar with the clearance process and unaware of his responsibilities. I find that he deliberately falsified his 2001 and 2005 SCAs because he was ashamed of his criminal behavior, wanted to hide his illegal drug use, and believed it was the only way he would be considered for the job or a security clearance.

Applicant's criminal behavior and falsifications trigger the applicability of the following disqualifying conditions under AG ¶ 16:

(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;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative; 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.

AG ¶ 17 lists six conditions that could potentially mitigate the personal conduct 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; and

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

Considering the evidence as a whole, I find that none of the mitigating conditions apply. Applicant made no effort to correct his falsifications until he participated in a polygraph assisted interview. His past criminal behavior and current falsifications raise serious questions about his reliability, trustworthiness, judgment, and his ability to protect classified information.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c).

Applicant is a 35-year-old employee of a government contractor. He has worked for government contractors since 2001, was granted a secret clearance in 2002, and a top secret clearance in 2006. He is considered to be a valuable worker with excellent character. In his references' opinion, Applicant is honest, dependable, reliable, and trustworthy.

Nevertheless, Applicant's long history of drug-related criminal conduct while possessing a top secret clearance, the falsification of his 2005 SCA, and his false statements to government investigators, continue to raise security concerns. Considering the evidence as a whole, Applicant's lack of judgment and unwillingness to comply with the law raise questions about his reliability, trustworthiness, and ability to protect 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 denied.

JUAN J. RIVERA
Administrative Judge