



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-01810
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Melvin A. Howry, Department Counsel
For Applicant: *Pro Se*

November 18, 2008

Decision

TESTAN, Joseph, Administrative Judge:

On July 12, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to applicant detailing the security concerns under Guidelines H, E and J. 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 on July 25, 2008, and requested an Administrative Determination by an Administrative Judge (AJ). Department Counsel issued a File of Relevant Material (FORM) on August 26, 2008. Applicant did not file a response to the FORM. The case was assigned to me on October 21, 2008. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

Findings of Fact

Applicant is a 30 year old employee of a defense contractor.

In a November 2006 signed statement he gave to an OPM investigator, applicant admitted that he had used marijuana in August 1999 and had used Ecstasy with varying frequency from October 2000 to March 2002.¹ He then stated, "I don't intend on using any drug again because I believe it could become addictive and I've known people who use it every day and I don't want that."

Applicant gave OPM another signed statement in February 2008. In this statement, he admitted that he (1) used marijuana in 2007, (2) purchased and used Ecstasy in January 2008, and (3) "may have acted as a middle man" in the exchange of money and drugs. He also discussed his intentions regarding further drug use. He stated: "My intent on further use is not to use any illegal drugs a regular thing. I do not think I would be apt to use ecstasy again and I believe it is kind of passed me. It was nice experience but I don't think it is necessary to use in the future. I do not plan on seeking out to use drugs but if marijuana was available in a social setting I might use it again"

Applicant falsified material facts on a security clearance application (SCA) executed by him in July 2000 when he deliberately failed to disclose his 1999 marijuana use.

Policies

The President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position that will give that person access to such information." (*Department of the Navy v. Egan*, 484 U.S. 518,527 (1988).) In Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch. The President authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." (Exec. Ord. 10865, Section 2.)

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline.

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. (Directive, Paragraph E3.1.14.) Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. (Directive, Paragraph E3. 1.15.) An applicant "has the ultimate burden of demonstrating

¹The last time he used Ecstasy he was holding a security clearance.

that it is clearly consistent with the national interest to grant or continue his security clearance.” (ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).) “Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.” (Directive, Paragraph E2.2.2.)

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. (Exec. Ord. 10865, Section 7.) It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

Analysis

Guideline H, Drug Involvement

The security concern for drug involvement is set forth in Paragraph 24 of the AG, and is as follows:

Use of an illegal 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.

Paragraph 25 describes conditions that could raise a security concern and may be disqualifying: Under Paragraph 25.a., “any drug abuse” may be disqualifying. Under Paragraph 25.c., “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution . . .” may be disqualifying. Under Paragraph 25.h., an “expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use,” may be disqualifying. Applicant’s use of marijuana, purchase and use of Ecstasy, and his February 2008 statement in which he equivocated about his intentions for future drug use, raise these three disqualifying conditions.

Paragraph 32 of the AG sets forth conditions that could mitigate security concerns. I considered each of them and conclude none apply.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set forth in Paragraph 15 of the AG, and is as follows:

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.

Paragraph 16 describes conditions that could raise a security concern and may be disqualifying. Under Paragraph 16.a., the “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,” may be disqualifying. This disqualifying condition is applicable because applicant intentionally provided false, material information on the 2000 SCA.

Paragraph 17 sets forth conditions that could mitigate security concerns. I considered each of them and conclude none apply.

Guideline J, Criminal Conduct

The security concern for criminal conduct is set forth in Paragraph 30 of the AG, and is as follows:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

Paragraph 31 describes conditions that could raise a security concern and may be disqualifying: Under Paragraph 31.a., “a single serious crime or multiple lesser offenses” may be disqualifying. And, under Paragraph 31.c., an “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted,” may be disqualifying. Applicant’s intentional misrepresentation of material facts on the 2000 SCA (a felony under 18 U.S.C. 1001) raises these two disqualifying conditions.

Paragraph 32 of the AG sets forth conditions that could mitigate security concerns. I have considered each of them and conclude none apply.

“Whole Person” Analysis

Under the whole person concept, the AJ must evaluate an applicant’s security eligibility by considering the totality of the applicant’s conduct and all the circumstances. An AJ should consider the nine adjudicative process factors listed at AG Paragraph 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 Paragraph 2c, the ultimate determination of whether to grant 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 is a mature man who has a history of illegal drug use and of being less than candid about it. His use of marijuana and ecstasy after he told the DoD in 2006 he did not intend to use it again, and his failure to offer an unequivocal statement forswearing future illegal drug use when he had the opportunity to do so in 2008, makes it impossible to conclude he is unlikely to use illegal drugs in the future. For these reasons, I conclude applicant failed to mitigate the security concerns arising from Guidelines H, E and J.

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

Paragraph 2, Guideline E: AGAINST APPLICANT

Paragraph 3, Guideline J: AGAINST 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.

JOSEPH TESTAN
Administrative Judge