



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



In the matter of:

)
)
) ISCR Case No. 07-03270
)
)
)

Applicant for Security Clearance

Appearances

For Government: Rita C. O'Brien, Esquire, Department Counsel

For Applicant: *Pro Se*

March 28, 2008

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the case file, pleadings, and exhibits, I conclude that Applicant has failed to rebut or mitigate the government's security concerns under the Drug Involvement, Personal Conduct, and Criminal Conduct adjudicative guidelines.

Applicant submitted his Security Clearance Application (SF 86), on August 11, 2006. On November 26, 2007, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H (Drug Involvement), Guideline E (Personal Conduct), and Guideline J, (Criminal Conduct). DOHA's action was taken pursuant to 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 December 18, 2007. In his answer, Applicant requested that his case be determined on the record in lieu of a hearing. The Government compiled its File of Relevant Material (FORM) on January 31, 2008. The

FORM contained documents identified as Items 1 through 10. A copy of the FORM was provided to Applicant on January 31, 2008, with instructions to submit any additional information and/or objections within 30 days of receipt. Applicant received the file on February 5, 2008. He filed additional information within the required time period. On March 5, 2008, the case was assigned to me for a decision.

Findings of Fact

The SOR contains five allegations of disqualifying conduct under Guideline H, Drug Involvement, four allegations of disqualifying conduct under Guideline E, Personal Conduct, and six allegations of disqualifying conduct under Guideline J, Criminal Conduct. (Item 1.) Applicant admitted, with explanations, three allegations under Guideline H. He admitted in part, with explanation, one Guideline H allegation, and he denied one Guideline H allegation, with explanation. He admitted, with explanation, three allegations under Guideline E, and he denied in part, with explanation, one allegation under Guideline E. He admitted all six allegations under Guideline J, with explanations. (Item 3.) His admissions are incorporated herein as findings of fact.

Applicant is 45 years old, married, and employed by a defense contractor. He has held a security clearance since 1997. (Item 4.)

The SOR alleged disqualifying conduct under Guideline H, Drug Involvement. On about November 25, 2003, when he was 41 years old, Applicant was charged with Possession of Marijuana. On about May 10, 2004, he was convicted of Possession of Marijuana and sentenced to 30 days (suspended), fined \$50.00, and assessed \$140.00 in court costs. His driver's license was also suspended. (Item 7 at 6; Item 10.)

On about September 2, 1986, Applicant was charged with the felony offense of Possession of Marijuana With Intent to Distribute after police seized a marijuana plant he was growing in his backyard. He was convicted of a misdemeanor charge of Possession of Marijuana, sentenced to 30 days (suspended), and fined \$100. (Item 6 at 3-4; Item 9 at 2.)

In about 1985 or 1986, Applicant was charged with Possession of Marijuana. The Possession of Marijuana charge was dismissed because the evidence was lost. (Item 6 at 3.)

In signed, sworn statement to an authorized investigator in April 1996, Applicant reported he purchased and used marijuana from about 1979, when he was a freshman in high school, until about 1990. He reported using marijuana two to three times weekly. He also reported that during the five year period from 1985 to 1990, he used cocaine about twice a year when he was at parties and it was offered to him. (Item 6 at 2-3.)

Applicant voluntarily reported his use of marijuana and cocaine in the signed, sworn statement made to an authorized investigator on April 25, 1996. In his answer to the SOR, he denied using cocaine and characterized the SOR allegation of his cocaine use as "false information." In his answer to the SOR, he also stated he had stopped

using marijuana in 1986. In his response to DOHA interrogatories, dated June 25, 2007, Applicant stated he had used cocaine only once in the early 1980s. (Item 3; Item 6; Item 8 at 2.)

The SOR also alleged additional disqualifying conduct under Guideline J, Criminal Conduct. On or about November 22, 1980, Applicant was charged and convicted of Larceny when he was caught stealing gasoline. He was fined \$100 and received a period of unsupervised probation. (Item 6 at 4.)

In October 1981, Applicant was charged with Assault. He was convicted, required to pay his victim's medical bills, and placed on supervised probation for one year. (Item 5 at 3; Item 6 at 4.)

In about August 1992, Applicant was arrested and charged with a "hit and run" following a traffic accident. In January 1993, the charge was reduced to Reckless Driving. Applicant was sentenced to pay a fine, and his driver's license was restricted for 90 days. (Item 7 at 6.)

In about 1985 or 1986, at the time he was charged with Possession of Marijuana, Applicant was also charged and convicted of Drinking in Public. He was sentenced to pay a fine. (Item 6 at 3.)

Applicant completed a security clearance application (SF-86) on August 11, 2006. Question 23 a on the SF-86 reads as follows: **"Your Police Record a. Have you ever been charged with or convicted of any felony offense?"** Applicant responded "no" to Question 23 a and failed to disclose that he had been charged with Possession of Marijuana With Intent to Distribute, a felony offense. (Item 4; Item 6; Item 9.)

Question 23 d on the SF-86 reads: **Your Police Record d. Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?"** Applicant responded "no" to Question 23 d and failed to disclose that he had been charged with or convicted of Possession of Marijuana on three occasions and with Drinking in Public on one occasion. (Item 4; Item 6; Item 7.)

When he completed his SF-86, Applicant signed and dated a statement certifying the truthfulness of his answers. The statement that Applicant signed and certified reads as follows:

My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both. (See section 1001 of title 18, United States Code.)

In his answer to the SOR, Applicant stated he thought he was obligated to report on his SF-86 only criminal activity or drug and alcohol charges and convictions occurring in the last ten years. (Answer to SOR.)

Applicant was sent a series of Interrogatories Concerning Drugs by an authorized representative of the U.S. Government. Applicant was asked to respond to the following question: **"1. Have you used any narcotic, depressant, stimulant, hallucinogen (to include LSD or PCP) and/or any Cannabis (to include marijuana and hashish), except prescribed by a licensed physician?"** Applicant responded to the Interrogatories with sworn and notarized statements dated May 3, 2007 and June 25, 2007. He answered "yes" to the question about illegal drug use. However, he listed only marijuana use and listed his frequency of use as "a few times" from "1982 to 1985." He stated that the quantity of his use was "a couple of drags off a joint each time." He failed to list the marijuana use he reported in a signed sworn statement in April 1996 as occurring from 1979 to 1990, sometimes as frequently as two to three times weekly. He also failed to list cocaine use from 1985 to 1990 as reported to an authorized investigator in April 1996. (Item 6; Item 7.)

The Interrogatories Concerning Drugs also asked Applicant to identify when he stopped using illegal substances. In response, Applicant answered: "1985 (only used marijuana)." This statement was not consistent with his earlier sworn statement that he had used marijuana from 1979 to 1990 and had used cocaine twice yearly from 1985 to 1990. (Item 6; Item 7.)

Applicant signed and notarized his answers to the interrogatories, stating that they were true and correct to his best knowledge and belief. (Item 7; Item 8.)

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©, 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 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.

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 H, Drug Involvement

An individual’s use of an illegal drug or misuse of a prescription drug raises questions of reliability and trustworthiness because drug use or misuse can impair judgment and raise questions about the person’s ability or willingness to comply with laws, rules, and regulations. Guideline H, ¶ 24. Guideline H defines drugs as *mood and behavior altering substances*. . . . Drugs 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*. Guideline H, ¶ 24(a)(1) and ¶ 24(a)(2). The Guideline further defines drug abuse as *the illegal use of drug or use of a legal drug in a manner that deviates from approved medical direction*. Guideline H, ¶ 24(b).

Applicant admitted using marijuana and cocaine, illegal drugs, with varying frequency, from about 1979 to 1990. His most recent conviction of possession of marijuana occurred in 2004.

Applicant’s conduct raises security concerns under Disqualifying Condition (DC) 25(a) and (DC) 25(c) of Guideline H.¹

¹DC 25(a) reads: “any drug use.” DC 25(c) reads: “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.”

Several Mitigating Conditions (MC) under Guideline H might be applicable to Applicant's case. If the drug abuse 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*, then MC 26(a) might apply. If Applicant intended not to abuse drugs in the future and demonstrated that intent in one of the four ways specified in the Guideline, then MC 26(b) might apply.² Additionally, drug abuse that is of security concern can be mitigated under MC 26(d) by *satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional*.

The record shows that Applicant admitted to cocaine use from 1985 to 1990, although he later denied cocaine use. His denial contradicted his sworn testimony to an authorized investigator and lacked credibility. He admitted his marijuana use began in about 1979 and continued intermittently to 2003. Thus, while much of his marijuana and cocaine use occurred in the past, his 2004 conviction for marijuana possession is recent, and Applicant provided no credible evidence to corroborate his assertion that he no longer uses either drug and has no intent to use them in the future. Applicant failed to provide evidence he had satisfactorily completed a prescribed drug treatment program. His recent conviction for marijuana possession raises concerns about his current reliability, trustworthiness and good judgment. None of the Guideline H MCs apply to Applicant's drug use.

Guideline E - Personal Conduct

Personal 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.* Guideline E, ¶ 15.

Applicant completed and signed a SF-86 on August 11, 2006. In response to Question 23 a, he denied ever being charged with or convicted of any felony offense. In response to Question 23 d, he denied he had ever been charged with offenses related to alcohol or drugs. In a signed sworn statement to an authorized investigator in 1996, Applicant had admitted a felony offense and provided additional evidence of drug and alcohol offenses. Through Applicant's admissions and the record evidence, the Government established a prima facie case that Applicant deliberately falsified his answers to Question 23 a and 23 d on the SF-86. The burden of proof thus shifted to Applicant to rebut or mitigate the Government's allegations.

²Specific examples of demonstrated intent that might apply under MC26(b) are as follows: (1) *disassociation from drug-using associates and contacts*; (2) *changing or avoiding the environment where drugs were used*; (3) *an appropriate period of abstinence*; and (4) *A signed statement of intent with automatic revocation of clearance for any violation*.

In his answer to the SOR, Applicant stated he though he was obliged to report only felonies and drug and alcohol offenses that had occurred in the ten years prior to the time he completed his August 11, 2006 SF-86. The relevant questions ask if an applicant had ever been charged or convicted of a felony or ever charged or convicted of offenses related to alcohol and drugs. At the time he completed his SF-86, Applicant had held a security clearance for at least 10 years. His assertions that he misunderstood the questions lack credibility.

Applicant was asked to respond to Interrogatories Concerning Drugs. While, in his responses, he admitted illegal drug use, he listed only his marijuana use, and further stated that he used marijuana only a few times from 1982 to 1985. He stated that he stopped using illegal substances in 1985, and further stated he had only used marijuana. He failed to list the marijuana use he had reported in a signed, sworn statement to an authorized investigator in April 1996 as occurring from 1979 to 1990, sometimes as frequently as two to three times a week. He also failed to list cocaine use from 1985 to 1990 as reported to the authorized investigator in April 1996.

Under Guideline E, a security concern is raised by an individual's *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*. Guideline E, ¶ 16(a). Applicant's admitted conduct also raises security concerns under Guideline E Disqualifying Conditions (DC) 16(b), and 16 (e)(1). DC 16(b) reads as follows: *deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative*. DC 16(e)(1) reads as follows: *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*.

Two Guideline E mitigating conditions (MC) might be applicable to Applicant's conduct. Pursuant to MC 17(a), personal conduct security concerns might be mitigated if *the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts*. Pursuant to MC 17(e), personal conduct security concerns might be mitigated if *the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress*.

Applicant provided no credible evidence to mitigate his failure to disclose his felony charge and his offenses related to drug and alcohol. Applicant was a mature adult when he failed to disclose his felony charge, his drug and alcohol charges, the kinds of drugs he used, and the duration and frequency of his use. Although he knew, or should have known, the importance of telling the truth to the Government, he had reason to attempt to conceal this derogatory information about his trustworthiness. His assertions that his falsifications occurred by mistake because he did not read the questions carefully were not credible. He did not make good-faith efforts to correct his omissions, concealment, or falsifications before being confronted with the facts, and he did not take positive steps to reduce or eliminate the vulnerability to exploitation,

manipulation, or duress caused by his concealment of this derogatory information relating to his lack of trustworthiness. I conclude that MC 17(a) and MC 17(e) do not apply to the facts of Applicant's case.

Guideline J, Criminal Conduct

The Government's concern under the Criminal Conduct revised adjudicative guideline is that a history or pattern of criminal activity creates doubt about an individual's judgment, reliability, and trustworthiness. Criminal conduct also raises doubts about a person's ability or willingness to comply with laws, rules, and regulations. Guideline J, ¶ 30.

Two conditions could raise a security concern and may be disqualifying: Disqualifying Condition (DC) 31(a): *a single serious crime or multiple lesser offenses* and DC 31(c): *allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.*

The record in this case shows that Applicant was charged with felony Possession of Marijuana With Intent to Distribute in 1986. In 1985 or 1986 and in 2003, he was charged with possession of marijuana. He admitted purchasing and using marijuana from 1979 to 1990. He also admitted using cocaine about twice a year from 1985 to 1990. His deliberate falsifications in his answers to Questions 23 a and 23 d on his SF-86 and his deliberate falsifications in response to Interrogatories Concerning Drugs also constitute criminal activity under 18 U.S.C. § 1001. In addition to his drug-related criminal conduct, Applicant was charged with larceny (1980), assault (1981), hit and run (1992), and drinking in public (1985). Applicant's admitted criminal activity raises security concerns under Disqualifying Conditions (DC) 31(a) and 31(c) of Guideline J.

Two mitigating conditions under Guideline J might apply to the facts of Applicant's case. Applicant's admitted criminal conduct might be mitigated under Mitigating Condition (MC) 32(a) if he provided credible evidence to show that *so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.* Applicant's criminal activity is recent and raises concerns about his reliability, trustworthiness, and good judgment. He provided no credible evidence to substantiate a conclusion that the conduct is unlikely to recur. Accordingly, I conclude MC 32(a) is inapplicable.

Applicant's admitted criminal conduct might be mitigated under MC 32(d) if he provided *evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.* Applicant failed to show that sufficient time had passed to reasonably conclude his criminal activity had ceased and would not be repeated in the future. Accordingly, I conclude the evidence fails to show successful rehabilitation and MC 32(d) does not apply.

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) 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 the facts and circumstances surrounding this case.

Applicant's admissions and the record evidence establish recent drug use and criminal activity. The record evidence also supports a conclusion that Applicant's falsifications on his SF-86, dated August 11, 2006, and his falsification of his responses to interrogatories were deliberate, raising serious concerns about his judgment, reliability, and trustworthiness. Applicant has failed to demonstrate that he is not a security risk.

In ISCR Case No. 98-0761 at 3 (Dec.27, 1999), DOHA's Appeal Board states that an administrative judge, in deciding an Applicant's security worthiness, "must consider the record as a whole (Directive Section F.3.) and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*." I have considered the record as a whole and have evaluated Applicant's conduct under the whole person concept of the Directive. I conclude that he has failed to demonstrate that it is clearly consistent with the national interest to grant him a security clearance.

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

Paragraph 2, Guideline E:

AGAINST APPLICANT

Subparagraph 2.a:

Against Applicant

Subparagraph 2.b:

Against Applicant

Subparagraph 2.c:

Against Applicant

Subparagraph 2.d:

Against Applicant

Paragraph 3, Guideline J:

AGAINST APPLICANT

Subparagraph 3.a:

Against Applicant

Subparagraph 3.b:

Against Applicant

Subparagraph 3.c:

Against Applicant

Subparagraph 3.d:

Against Applicant

Subparagraph 3.e:

Against Applicant

Subparagraph 3.f:

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.

JOAN CATON ANTHONY
Administrative Judge