



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



In the matter of:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 07-04145

Appearances

For Government: Ray T. Blank, Jr., Department Counsel
For Applicant: *Pro Se*

March 6, 2009

Decision

TESTAN, Joseph, Administrative Judge:

On July 9, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to applicant detailing the security concerns under Guideline E. 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 29, 2008, and requested an Administrative Determination by an Administrative Judge (AJ). Department Counsel issued a File of Relevant Material (FORM) on October 29, 2008.¹ Applicant did not file a response to the FORM. The case was assigned to me on February 13, 2009. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

¹ Within the FORM was a Motion to Amend the SOR by, among other things, adding Guideline H. The motion is denied.

Findings of Fact

Applicant is a 53 year old employee of a defense contractor.

Applicant used marijuana “once every couple of months with friends” in 1995 (Exhibit 6). He used cocaine once in November 2003. His cocaine use was discovered during a random drug screening at his place of employment on the day following his cocaine use. His use of both drugs occurred while he was holding a security clearance and/or a special access clearance. Both clearances were suspended following this positive drug test.

In a signed, sworn statement he gave to an OPM/DOD investigator in October 2006 (Exhibit 5), applicant stated the following while discussing his cocaine use: “I had never used any illegal drugs before and decided to try it,” and “I have never used any illegal drug before this incident and I have not used any since.” These statements were false because, as noted above, he had used marijuana in 1995. In his response to the SOR, applicant admitted that he deliberately failed to disclose his marijuana use when he made these false statements.

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 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.

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.b., "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative" may be disqualifying. This disqualifying condition is applicable because applicant deliberately provided false material information to the OPM/DOD investigator.

Paragraph 17 sets forth conditions that could mitigate security concerns. Under Paragraph 17.a., it may be mitigating if "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts." The evidence establishes that applicant revealed his marijuana use to an OPM/DOD investigator in December 2007, a little over a year after he concealed it from a different OPM/DOD investigator. Even if it is assumed applicant voluntarily came clean before being confronted with the facts, waiting over a year to do so hardly constitutes a "prompt, good-faith effort" to correct the facts. Accordingly, this mitigating condition is not applicable.

"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 with a recent history of deliberately providing false material information to the Government. He provided no evidence from independent sources (e.g., family, friends, coworkers, neighbors) that would support a finding that this act of dishonesty was out of character for him, or that he is likely to be truthful with the Government in the future. Without such evidence, I have no choice but to conclude he failed to mitigate the security concerns arising from Guideline E.

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

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