



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



In the matter of:)
)
) ISCR Case No. 07-04161
)
)
Applicant for Security Clearance)

Appearances

For Government: Ray T. Blank, Jr., Esq., Department Counsel
For Applicant: James W. Green, Esq.

June 26, 2008

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the security concerns raised by his drug involvement and security violations. Eligibility for access to classified information is denied.

On November 1, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline H, Drug Involvement; Guideline K, Handling Protected Information; and 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 on November 27, 2007, and requested a hearing before an Administrative Judge. The case was assigned to another Administrative Judge on March 13, 2008. DOHA issued a notice of hearing on April 9, 2008, scheduling the hearing for May 21, 2008. Applicant requested that the hearing be

conducted in a different location. The case was reassigned to me on April 15, 2008. Another notice of hearing was issued on May 20, 2008, and the hearing was convened as scheduled on June 4, 2008. DOHA received the transcript of the hearing (Tr.) on June 16, 2008.

Procedural and Evidentiary Rulings

Notice

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

Evidence

The Government offered Exhibits (GE) 1 through 9, which were received without objection. Applicant testified on his own behalf, called four witnesses, and offered Exhibits (AE) A through R, which were received without objection. I granted Applicant's request to keep the record open until June 11, 2008, to submit additional matters through Department Counsel. One document was submitted immediately after the hearing, marked as AE S, and admitted. Applicant submitted three documents after June 11, 2008. The documents were marked AE T through V. AE U and V were admitted without objection. Department Counsel objected to AE T, a statement by Applicant dated June 13, 2008, on the basis that the statement amounted to additional testimony by Applicant without affording Department Counsel the opportunity to cross-examine the Applicant. The objection to AE T is overruled and it is admitted. The memo from Applicant's counsel is Hearing Exhibit (HE) I; Department Counsel's memo is HE II.

Findings of Fact

Applicant is a 52-year-old engineer for a defense contractor. He has a Master of Science degree awarded in 1983. He has been with his current employer since 1984. He is divorced with three children, ages 22, 20, and 15.¹

Applicant first smoked marijuana when he was in his teens. He continued to use marijuana sporadically until about 1982. He was interviewed for a background investigation on October 2, 1984, and provided a signed statement. He admitted his drug use and stated "I do not intend to ever use any illegal substance again." Applicant was granted a security clearance in about January 1985, and has held once since.²

Applicant started smoking marijuana again some time after October 1984. He estimated that he started smoking marijuana again in about 1987. He submitted a Security Clearance Application (SF 86) on November 19, 2001. He admitted to using

¹ Tr. at 79, 86, 100, 128; GE 1, 2.

² Tr. at 92, 101-102; GE 1, 2, 4.

marijuana while holding a security clearance “less than 168” occasions between May 1, 1985 and May 1, 2001.³ He wrote:

[T]he use was rare and infrequent and more of a spiritual or medical nature. I no longer do so. The number of times is an estimated maximum. Never was I under the influence during work. I never compromised national security or safety of others. I have diligently worked to promote the safety and security of my country.⁴

Applicant was interviewed for his background investigation on June 13, 2003, and provided another signed statement. He discussed his marijuana use in the statement. He wrote:

My drug use involved pot and was used to relax and reduce stress. I live where it is not considered a terrible thing. I no longer smoke and have found other ways to reduce stress and relax. Meditation and yoga work better and provide more clarity of mind. . . I did not get involved with growing, transport or sales of pot. If I use pot in the future it would need to be prescribed by my doctor.⁵

Applicant started smoking marijuana again in about 2004. He smoked marijuana about once a month until April 2006. He would smoke in his house. Some of the marijuana was provided to him and some he purchased. Applicant submitted another Security Clearance Application on April 18, 2006. He admitted using marijuana on 84 occasions between May 1, 2001 and the date of the SF 86. He wrote that the “[u]se was rare and infrequent and more of a spiritual/medical nature,” and that he “no longer [did] so.”⁶

Applicant was evaluated on May 23, 2008, by a Doctor of Medicine (M.D.), who is certified by the American Society of Addiction Medicine. He found that Applicant met the criteria for cannabis abuse without physiological addiction. He wrote:

He and I discussed this, and he recognizes his responsibility in his treatment. As such, it is very likely that he can succeed in a program of recovery, as highly functioning individuals (doctors and attorneys for instance, for whom there is good data) have an extremely high success rate in staying clean and sober. Such a program might require [Applicant] to be in weekly psychological counselling for 3-5 years, submit to random observed urine testing, attend 12-step meetings, and of course, agree not to use any mind altering substances.

³ Tr. at 103-107; Applicant’s response to SOR; GE 1.

⁴ GE 1.

⁵ GE 4.

⁶ Tr. at 109, 128; Applicant’s response to SOR; GE 2.

In summary, I believe [Applicant] has an excellent prognosis for recovery, as he clearly understands his need to embrace recovery to put his cannabis abuse in the past.⁷

Applicant stopped drinking alcohol as he is aware that he must stop using all substances. He submitted to drug tests on April 15, 2008, and May 12, 2008. Both tests reported negative for alcohol and controlled substances, including marijuana. He regularly attends Alcoholics Anonymous (AA) meetings and is on track to attend 90 meetings within 90 days. He is in treatment with a psychotherapist and will meet every other month with the doctor who performed his evaluation. He testified that he no longer associates with anyone who uses drugs. He stated that he will never use illegal drugs again and signed a statement of intent with automatic revocation of clearance for any violation.⁸

Applicant works in a secured area. The area has four doors, each protected by two locks. One lock opens with the swipe of a card. The secondary lock is secured by a combination. The area also has an alarm system. When Applicant left the secured area on the evening of May 25, 2005, the card lock was secured and he engaged the alarm system, but he left the secondary lock unsecured. Another employee later in the evening did the same thing. No classified information was compromised. Applicant received additional training as a result of the security violation.⁹

Applicant was the last to depart the secured area on the evening of September 8, 2005. He set the alarm, but again left the combination lock unsecured on one of the doors. There was no compromise of classified information. He was again directed to receive additional training.¹⁰

A Security Monitor and Alternate Security Monitor are assigned to the secured area each week. Their duties are to ensure that no classified materials are left unattended, verify that the safes are secured, verify that the individual room card readers are activated to prevent entry, secure the closed area by securing the combination spin dial door lock, test the card readers, activate the alarms, and issue the last-one-out badge ensuring the area is secured for the night. Applicant was assigned to be the Security Monitor on December 5, 2005. He again set the alarm, but left the combination lock unsecured on one of the doors. He also failed to issue the last-one-out badge. There was no compromise of classified information. He was again directed to receive additional training. Applicant has not had any subsequent security violations.¹¹

⁷ AE R.

⁸ Tr. at 93, 118-127; AE N-V.

⁹ Tr. at 82-85,129; Applicant's response to SOR; GE 3, 6-9.

¹⁰ *Id.*

¹¹ *Id.*

Three co-workers and Applicant's sister testified on his behalf. Numerous character letters were also submitted. He is described as honest, intelligent, truthful, dedicated, trustworthy, and a man of integrity. His performance appraisals are excellent.¹²

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 to be used 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, Administrative Judges apply the guidelines 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.

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 the 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.

¹² Tr. at 19-77; AE A-M.

Section 7 of Executive Order 10865 provides that adverse 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

The security concern relating to the guideline for Drug Involvement is set out in AG ¶ 24:

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.

Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. Three are potentially applicable 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.¹³

Applicant purchased and used marijuana while holding a security clearance. That raises the above potentially disqualifying conditions.

Three Drug Involvement Mitigating Conditions under AG ¶ 26 are potentially applicable:

- (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;

¹³ Applicant was diagnosed with cannabis abuse, which could raise AG ¶ 26(d), “diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence.” This was not alleged in the SOR and is not considered for disqualifying purposes, but will be considered under the whole person.

(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; and

(d) 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.

Applicant admitted to using illegal drugs up until April 2006. His drug use was too recent and too extensive for him to receive the benefit of AG ¶ 26(a). He has not used drugs since April 2006. He no longer associates with people who use drugs. He signed a statement of intent with automatic revocation of clearance for any violation. AG ¶ 26(b) is applicable. Applicant has not completed a prescribed drug treatment program, but he has a favorable prognosis by a duly qualified medical professional. AG ¶ 26(d) is partially applicable.

Guideline K, Handling Protected Information

The security concern relating to the guideline for Handling Protected Information is set out in AG ¶ 33:

Deliberate or negligent failure to comply with rules and regulations for protecting classified or other sensitive information raises doubt about an individual's trustworthiness, judgment, reliability, or willingness and ability to safeguard such information, and is a serious security concern.

AG ¶ 34 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

- (g) any failure to comply with rules for the protection of classified or other sensitive information; and
- (h) negligence or lax security habits that persist despite counseling by management.

Applicant committed three very similar security violations in 2005. The above disqualifying conditions have been established.

Conditions that could mitigate Handling Protected Information security concerns are provided under AG ¶ 35. The following are potentially applicable:

(a) so much time has elapsed since the behavior, or it has happened so infrequently or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities; and

(c) the security violations were due to improper or inadequate training.

There is no evidence that the violations were due to improper or inadequate training. AG ¶ 35(c) is not applicable. It has been about two and a half years since the last violation. There has not been a recurrence of the problem. There are indications from the evidence, including the witnesses' testimony and statements, that Applicant now demonstrates a positive attitude toward the discharge of his security responsibilities. AG ¶¶ 35(a) and 35(b) have been raised as factors for consideration.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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.

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

(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 told DoD personnel on several occasions that he would not use illegal drugs in the future, and then went back to using them again while holding a security clearance. There is no evidence that he purposely lied in those statements. He simply was unable to keep his promises. It is, however, personal conduct that could create a vulnerability to exploitation, manipulation, or duress. AG ¶ 16(e) has been established.

Conditions that could mitigate Personal Conduct security concerns are provided under AG ¶ 17. The following are potentially applicable:

(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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

The discussion under the guideline for Drug Involvement is equally appropriate for this guideline. Because of his repeated broken promises that he would refrain from drug use, I am unable to find the conduct is unlikely to recur. AG ¶¶ 17(c) and 17(d) are not applicable. Applicant has been open and honest about his drug use and has not used illegal drugs in more than two years. This has reduced his vulnerability to exploitation, manipulation, and duress. AG ¶ 17(e) is applicable.

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 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 used illegal drugs for many years while holding a security clearance. On three separate occasions he stated he would not use drugs again, and then went back to using drugs. He now states for a

fourth time that he will not use drugs again. His assertions simply cannot be taken at face value.

Applicant committed three security violations in 2005. Security violations are one of the strongest possible reasons for denying or revoking access to classified information, as they raise very serious questions about an applicant's suitability for access to classified information. Once it is established that an applicant has committed a security violation, he or she has a very heavy burden of demonstrating that he or she should be entrusted with classified information. Because security violations strike at the very heart of the industrial security program, an Administrative Judge must give any claims of reform and rehabilitation strict scrutiny. In many security clearance cases, applicants are denied a clearance for having an indicator of a risk that they might commit a security violation (e.g., alcohol abuse, delinquent debts or drug use). Security violation cases reveal more than simply an indicator of risk.¹⁴ The frequency and duration of the security violations are also aggravating factors.¹⁵ Despite his favorable character evidence, Applicant has not met his heavy burden of showing that it is clearly consistent with the national interest to continue his security clearance.

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 drug use and security violations.

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
Paragraph 2, Guideline K:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 1.a:	For Applicant

¹⁴ ISCR Case No. 03-26888 (App. Bd. Oct. 5, 2006).

¹⁵ ISCR Case No. 97-0435 at 5 (App. Bd. July 14, 1998).

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interest of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge