



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 07-12539

Appearances

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

November 17, 2008

Decision

WHITE, David M., Administrative Judge:

Applicant used marijuana and cocaine regularly from 1997 to 2006. He also sold both drugs, experimented with others, and was convicted of drug possession twice during that period. He has abstained from drug use since entering inpatient rehabilitation in February 2006. He has changed his lifestyle, has an excellent work record for 30 months, and is committed to continued abstinence. Applicant is making significant progress but, given his long history of criminal substance abuse, insufficient time has passed to demonstrate permanent behavioral change. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Applicant submitted his Electronic Questionnaires for Investigation Processing (e-QIP), on March 27, 2007. On May 30, 2008, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H, 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 acknowledged receipt of the SOR on August 8, 2008. He answered the SOR in writing on August 11, 2008. On August 25, 2008, Applicant indicated that he desired to have a hearing during a telephone conversation with Department Counsel, and that he would send a fax to document that request. The next day, Department Counsel indicated that he also desired a hearing and would so request pursuant to Directive ¶ E3.1.7. On August 27, 2008, Applicant submitted the fax requesting a hearing before an administrative judge. (Hearing Exhibits (HE) I and II.) Department Counsel was prepared to proceed on September 2, 2008, and the case was assigned to me on the following day. DOHA issued a notice of hearing on September 3, 2008, and I convened the hearing as scheduled on September 25, 2008. The Government offered exhibits (GE) 1 through 4, which were admitted without objection. The Government also offered HE IV, comprising two sections of the Controlled Substances Act of 1970 and one section of Title 21 of the Code of Federal Regulations, to support a request that I take administrative notice of the facts that marijuana, cocaine, ecstasy (MDMA), and methamphetamine are controlled substances. Applicant had no objection, and administrative notice was taken of these facts. Applicant testified on his own behalf, and submitted exhibits (AE) A through I, which were admitted without objection. Applicant's supervisor also testified for him. I granted Applicant's request to leave the record open until October 17, 2008, to permit him to obtain and submit additional evidence. DOHA received the transcript of the hearing (Tr.) on October 2, 2008. On October 13, 2008, Applicant submitted the additional evidence to Department Counsel, who forwarded it without objection to its consideration on October 15, 2008. This evidence was admitted, marked AE J, and the record was closed.

Findings of Fact

In his Answer to the SOR, Applicant admitted all of the factual allegations concerning drug involvement, and criminal conduct. Applicant's admissions, including those contained in his responses to DOHA Interrogatories (GE 3 and 4), are incorporated in the following findings.

Applicant is a 42-year-old blaster/painter employed by a defense contractor. He has worked for his present employer since April 2006. He has rapidly qualified to perform many certified technical functions, and has been a "stellar employee," according to his project manager and supervisor. (AE A through J; Tr. at 73-75.) He has never held a security clearance.

On his e-QIP, Applicant admitted to using marijuana and crack cocaine more than 50 times each between January 1997 and February 2006. (GE 1 at § 24.) He later described his use as twice per month, using both drugs together during this period. (GE 3 at 2; Tr. at 49.) This computes to be more than 200 uses over that nine year period. In

July 2005, Applicant was diagnosed to be Cannabis dependent, in remission. (GE 4 at 5.)

Applicant was arrested for possession of marijuana on February 17, 2001, was convicted after pleading guilty, and was sentenced to serve one day in jail, pay a fine, and undergo a drug evaluation. He failed to undergo that drug evaluation before being arrested again and charged with felony methamphetamine possession, contempt of court, and driving without a license on June 6, 2005. He then obtained a drug evaluation, so the contempt of court charge was dropped. He pled guilty to methamphetamine possession and was sentenced to 14 days in jail, a fine, and 12 months probation including drug treatment. (GE 1 at § 23; GE 2 at 2-3.) He stated during the hearing that the methamphetamine belonged to his cousin, but he pled guilty because he did not want to turn his cousin in. (Tr. at 57-58, 88-89.)

Applicant admitted in his answer to the SOR and during his hearing that he used ecstasy (MDMA) twice, and used methamphetamine once, all prior to February 2006. During the same 1997 to 2006 period, he admitted to selling marijuana and cocaine on multiple occasions to obtain funds to pay bills and support his drug habit. He also admitted testing positive for marijuana and cocaine in January 2006 in connection with admission to the court-ordered drug treatment program. (Answer to SOR; Tr. at 54-57.) I took administrative notice that marijuana, cocaine, MDMA and methamphetamine are all controlled substances under the Controlled Substances Act.

Applicant successfully completed a 28-day intensive inpatient detoxification and drug treatment program on March 20, 2006. (GE 4 at 4; Tr. at 49-52, 56.) He then successfully completed his outpatient aftercare program on October 13, 2008. (AE K at 4; Tr. at 51-52.) He signed a statement of intent not to abuse any drugs in the future with automatic revocation of clearance for any violation. (AE K at 5.) He is subject to random drug testing at least once a year, and anytime based on suspicion of impairment or during an incident investigation by his employer. (Tr. at 73, 75.) He has ended all contact with former drug-involved associates, and dedicated himself to providing a good example for his children and involvement in his church. (Tr. at 59-60, 62, 69-71.) Applicant testified openly and honestly about his past drug abuse, and convincingly declared his intent never to abuse drugs in the future. His supervisor, the regional project manager, was a no-nonsense and highly credible witness, who knows about his past, monitors him closely, will tolerate no relapses, and vouched strongly for his rehabilitation, present trustworthiness and reliability.

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(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Section 7 of Executive Order 10865 provides that "Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

A person applying for access to classified information seeks to enter 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.

Analysis

Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to 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." AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Disqualifying conditions raised by the SOR allegations and asserted by Department Counsel are: "(a) any drug abuse;" "(b) testing positive for illegal drug use;"

and “(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.”

Applicant admitted long-term regular use of marijuana and crack cocaine over a nine-year period ending in February 2006. He tested positive for both substances in January 2006. He also admitted experimental use of MDMA and methamphetamine. He was arrested for, and convicted of, criminal possession of drugs in 2001 and 2005, and admitted selling drugs that he possessed on multiple other occasions during this period. This conduct squarely raises substantial security concerns under the foregoing AG provisions.

AG ¶ 26 provides conditions that could mitigate security concerns. Mitigating conditions raised by this record include: “(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;” “(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; and, (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's drug possession and use occurred over at least nine years, and as recently as February 2006. While he has abstained for two and a half years, he was diagnosed with Cannabis dependence in remission. His efforts to date are highly commendable, but balanced against the length and frequency of his drug abuse, it is premature to conclude that it is unlikely to recur and no longer casts doubt on his judgment and reliability (¶ 26(a)). Applicant provided substantial evidence of intent not to abuse drugs in the future, including his statement that he has disassociated from drug-using contacts, his abstinence since his inpatient treatment, and his signed statement of intent with automatic revocation (¶ 16(b)). As noted above, however, the period of abstinence is insufficient at this point to fully mitigate security concerns. Finally, he provided proof of successful completion of inpatient intensive treatment and outpatient aftercare programs, but provided no prognosis by a duly qualified medical professional (¶ 26(d)).

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct, “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.” AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. Disqualifying conditions asserted by the Government were: “(a) a single serious crime or multiple lesser offenses;” and “(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally

prosecuted or convicted.” The crimes alleged in the SOR include Applicant’s arrests for, and convictions of drug possession in 2001 and 2005, the latter of which was charged as a felony. Applicant pled guilty to and admitted to commission of both offenses.

AG ¶ 32 provides conditions that could mitigate security concerns. Applicant’s recent abstinence, completion of inpatient and outpatient treatment programs, good work performance, and lifestyle changes create some mitigation under two of them. These are: “(a) 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;” and, “(d) there is 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.”

For mitigation analysis, Applicant’s SOR-listed criminal conduct and his criminal history must be evaluated as a whole, not piece by piece. In addition to his two convictions, Applicant admitted to multiple drug sales and regular illegal use of drugs between 1997 and 2006. All of these crimes involved illegal substance abuse, and were indicative of poor judgment and a lack of self-control, as well as a willingness to flaunt rules and regulations. Given the length and frequency of this conduct up until February 2006, Applicant did not establish strong mitigation of the concerns arising from his criminal history. His recent outstanding employment record, job training, treatment program successes, and period of abstinence from drug involvement are evidence that support successful rehabilitation. The length and frequency of his former criminal activity, however, lead to the conclusion that on balance it is still too soon to be confident that such behavior is unlikely to recur, and no longer casts doubt on his reliability, trustworthiness and judgment.

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 established by the record evidence. 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 conduct of security concern involved a pattern of recurring drug-abuse related offenses. He successfully completed inpatient and outpatient drug treatment programs. All offenses and drug abuse of concern occurred when he was mature and fully responsible for his choices. He voluntarily participated in drug abuse on a regular basis for over nine years. At this point, he has abstained for two and a half years, which is a good start toward demonstrating that such conduct will not recur.

There is no evidence that Applicant was pressured to commit any offense by anything beyond normal life pressures to which he remains subject. He has made positive lifestyle changes, and gained a positive influence in his recent employment by a very supportive supervisor. His behavior and good work performance since February 2006 create an excellent beginning in establishing a record of more responsible and trustworthy conduct, and provide a sound basis on which to build eligibility for a security clearance in the near future. The quantity and recency of drug abuse and criminal acts, however, preclude a present judgment that Applicant has met his burden of mitigating the security concerns raised by the undisputed evidence in this record.

Overall, the record evidence leaves me with sufficient doubts as to Applicant's present eligibility and suitability for a security clearance that I must conclude he has not met his burden to mitigate the security concerns arising from drug involvement and criminal conduct considerations. His successful continuation of abstinence from drug abuse or other criminal activity and outstanding work performance should support a more favorable conclusion in the relatively near future.

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
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Against Applicant

Paragraph 2, Guideline J:

AGAINST APPLICANT

Subparagraph 2.a:

Against Applicant

Subparagraph 2.b:

Against Applicant

Conclusion

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

DAVID M. WHITE
Administrative Judge