



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)	
)	
SSN:)	ISCR Case No. 07-15858
)	
Applicant for Security Clearance)	

Appearances

For Government: Jennifer Goldstein, Esquire, Department Counsel
For Applicant: Pro Se

September 9, 2008

Decision

MOGUL, Martin H., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on February 9, 2007. On April 4, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H, E, and J for Applicant. 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 responded to the SOR (RSOR) in writing on June 2, 2008, and requested a hearing before an Administrative Judge. I received the case assignment on June 26, 2008. DOHA issued a Notice of Hearing on July 9, 2008, and I convened the hearing on August 1, 2008. The Government offered Exhibits 1 through 12, which were received without objection. Applicant testified on his own behalf and one other witness testified on behalf of Applicant. He submitted Exhibits A through C, which were received without objection. DOHA received the transcript of the hearing (Tr) on August

11, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

In his RSOR Applicant admitted SOR allegations 1.a., 1.b., 1.c., and 1.d., and he denied 2.a., 2.b., and 3.a. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, and the testimony of Applicant and the other witness, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 34 years old. He is married, and he has two children. He received a Bachelor of Science degree in 1997.

Applicant works for a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 (Guideline H - Drug Involvement)

The SOR lists 4 allegations regarding illegal drug involvement under Adjudicative Guideline H. All of the allegations will be discussed in the same order as they were listed in the SOR:

1.a. Applicant used marijuana with varying frequency, at times three to six times a year, from approximately 1991 through at least December 2006.

Applicant testified that he actually last used marijuana on November 23, 2006. He testified that he has matured and also because he is a father he does not think he should use it in the future.

He testified credibly that he intends to never use marijuana again. He explained that he has committed to his girlfriend that he will not use it again. He is planning a life with his girlfriend, and he does not want drugs to play a part in that life. He also testified that using Marijuana would hurt his career, about which he is now more serious. Finally, he testified that even if he did not need a security clearance, he has made a decision that he will not use marijuana or any other illegal drug in the future.

1.b. Applicant was arrested on or about June 19, 1994, and charged with Planting and Cultivating Marijuana and or Hashish. He was detained in jail for two days. He testified that a friend gave him some marijuana plants and equipment, and Applicant set about to grow the marijuana plants. In the police report (Exhibit 5) Applicant told the police that he planned to grow the marijuana to use himself, because he was spending too much money for the marijuana. Also in the police report it states that Applicant's girl friend, whom Applicant testified is now his wife, stated that the marijuana found in their

bedroom, was for Applicant's personal use, "but occasionally he would sell it to friends." Although Applicant denied that he sold marijuana, he could give no reason for his former girlfriend, and now wife, telling the police officers that he did sell marijuana at times. Finally Applicant did concede that if the marijuana plants all grew, he considered selling the excess marijuana after he retained enough for his usage.

1.c. Applicant was arrested on or about September 26, 1998, as a result of a warrant for his arrest from a 1992 Driving Under the Influence offense, during which he was also charged with Possession of a Marijuana Cigarette. He was placed in a three month drug diversion program, at which time the drug related offense was removed from his record. Applicant testified that the warrant was also dismissed, because he had previously fulfilled all of the requirements for the 1992 arrest.

1.d. Applicant continued to use marijuana through at least December 2006, even though he was granted and possessed a security clearance from April 1998 to the present. He testified that after he first completed a SCA, he was interviewed by a Government investigator, and at that time he wrote a signed, sworn statement in which he promised that he would abstain from all drug usage in the future. Applicant conceded that he did not keep that promise, nor could he give a reason for his failure to keep his promise.

Paragraph 2 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he exhibited conduct involving questionable judgement, lack of candor, dishonesty or unwillingness to comply with rules and regulations.

2.a. the conduct as set forth under paragraph 1., above.

2.b. Applicant executed a SCA on November 29, 1997 (Exhibit 11). Question #24 of the SCA asked since the age of 16 or in the previous seven years, whichever is shorter, had Applicant illegally used any controlled substance? Applicant answered "Yes" to this question, and replied that he had used marijuana on three occasions between August 1991 to June 1993. The Government alleges that Applicant's use of marijuana was far more frequent and extensive than that listed by Applicant as discussed in subparagraph 1.a., above. At the hearing Applicant conceded that he did not include the full amount of his marijuana usage, because it could potentially hurt his chances of receiving a clearance.

2.c. During a June 18, 2007 interview with an authorized investigator for the Department of Defense, Applicant minimized his culpability in the 1994 drug cultivation arrest, as discussed in 1.b., above. In the signed, sworn statement that he made as a result of the interview (Exhibit 4), Applicant stated that a friend offered to help Applicant with his rent if he let the friend use his garage to cultivate the marijuana. At the hearing Applicant conceded that this statement was not true. Applicant also failed to identify to the investigator that packets of marijuana were also found when the police searched

Applicant's home. He did not give any reasonable explanation for his failure to give complete and truthful answers about this event to the investigator.

Paragraph 3 (Guideline J - Criminal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in criminal conduct.

3.a. Applicant's conduct, reviewed above in Paragraph 2, subparagraphs b. and c., constitutes a violation of Federal Law, Title 18, United States Code, Section 1001, which is a felony.

Mitigation

Applicant submitted performance evaluations from his employer from 2002 through 2007 (Exhibit B). The ratings were quite positive with the overall rating of no less than "Meets Requirements" and as high as "Far Exceeds Requirements." He also submitted some photographs of his family and some depicting him in his position as a children's soccer coach (Exhibit C), which he has done for five years.

Finally, a witness, who is a manager of Applicant, and has known him for more than ten years testified very positively on his behalf. However, when he was confronted with the information that Applicant had been using marijuana while possessing a security clearance and as recently as 2006, he indicated that he felt "betrayed", and that Applicant "has let a lot (*sic*) of people down obviously."

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(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 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

With respect to Guideline H, the Government has established its case. Applicant's improper and illegal drug abuse, including the possession, and use of marijuana, and his many years of continued use after receiving a security clearance is of great concern, especially in light of his continued desire to have access to the nation's secrets. Applicant's overall conduct pertaining to his illegal substance abuse clearly falls within Drug Involvement Disqualifying Condition (DC) 25. (a) (any drug abuse), (c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution), and (g) (any illegal drug use after being granted a security clearance).

Based on the Applicant's many years of use of an illegal substance, especially while holding a security clearance, and his lack of candor in the information about his drug involvement that he furnished to the Government, I can not conclude at this time that Applicant's conduct comes within any Mitigating Condition (MC).

In this case, the Government has met its initial burden of proving by substantial evidence that Applicant has used illegal drugs for many years under Guideline H. Applicant, on the other hand, has failed to introduced persuasive evidence in rebuttal,

explanation or mitigation which is sufficient to overcome the Government's case against him. Accordingly, Paragraph 1 Guideline H of the SOR is concluded against Applicant.

Guideline E - Personal Conduct

With respect to Guideline E, the evidence establishes that Applicant received a security clearance in April 1996, and yet he continued to use marijuana through at least December 2006.

Applicant's continued use of marijuana for many years, after being granted and maintaining a security clearance, shows extremely poor judgement.

Additionally, the evidence establishes that Applicant furnished to the Government incomplete, untruthful answers regarding the extent of his drug involvement on a SCA that he executed on November 29, 1997, and during an interview with a Government investigator on June 18, 2007.

The Government relies heavily on the honesty and integrity of individuals seeking access to our nation's secrets. When such an individual intentionally falsifies material facts or fails to furnish relevant information to a Government investigator, it is extremely difficult to conclude that he nevertheless possesses the judgment, and honesty necessary for an individual given a clearance. In this case, I conclude that Applicant knowingly and willingly failed to give complete, honest answers regarding his drug usage to the Government.

In reviewing the Disqualifying Conditions (DC) under Guideline E, I conclude that DC 16. (a) applies because of Applicant's deliberate omission, concealment, and falsification of relevant facts from a personnel security questionnaire, which was used to determine security clearance eligibility. DC (b) also applies since Applicant deliberately provided false relevant information to the Government investigator. I can not find that any Mitigating Condition (MC) applies in this paragraph.

Applicant's conduct, considered as a whole, exhibits questionable judgement, unreliability, and a lack of candor. I resolve Paragraph 2, Guideline E, against Applicant.

Guideline J, Criminal Conduct

The Government also established by substantial evidence that Applicant engaged in criminal conduct, by his knowingly providing false and misleading information to the Government investigator and on a security questionnaire, which is a felony.

DC 31. (a), a single serious crime or multiple lesser offenses, applies in this case. DC 31. (c), allegations or admissions of criminal conduct, regardless of whether the person was formally charged, is also applicable to this case. There is no MC under Criminal Conduct. Paragraph 3, Guideline J is found against Applicant

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) 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 have considered the potentially disqualifying and mitigating conditions under Guidelines H, E, and J in light of all the facts and circumstances surrounding this case. Based on all of the reasons cited above, including Applicant's long history of using marijuana, even while holding a security clearance, and his lack of honesty and candor with the information he furnished to the Government, I find that the record evidence leaves me with serious questions and doubts as to Applicant's eligibility and suitability for a security clearance under the whole person concept. For all these reasons, I conclude Applicant has not mitigated the security concerns.

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
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

Conclusion

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

Martin H. Mogul
Administrative Judge