



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-16442
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel Crowley, Esquire, Department Counsel
For Applicant: Pro Se

July 11, 2008

Decision

LYNCH, Noreen, Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on July 31, 2007. On March 31, 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 acknowledged receipt of the SOR on April 16, 2008. He requested a review on the record but on April 22, 2008, Applicant requested a hearing before an Administrative Judge. I received the case assignment on May 20, 2008. DOHA issued a notice of hearing on May 30, 2008, and I convened the hearing as scheduled on June 20, 2008. The government offered Exhibits (Ex.) 1-4, which were received without objection. Applicant testified on his own behalf and submitted Exhibit A without

objection. DOHA received the transcript of the hearing (Tr.) on June 30, 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 Answer to the SOR, received April 16, 2008, Applicant admitted the factual allegations in ¶ 1.a and 1.b of the SOR. He denied all other allegations. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is a 44-year-old employee of a defense contractor. He graduated from high school in 1982 and then he enlisted in the U.S. Air Force in November of that year. When he retired in 2003, he was a master sergeant (Tr. 20). He is married. He held a top-secret security clearance for more than 20 years. He has been with his current employer since June 2007 (GE 2).

Applicant received numerous medals and commendations while in the military. He received specialized training and attended the USAF NCO academy in 1995, 1998 and 1989 (GE 3). During his career, he was promoted and given monetary recognition for his efforts. When he transitioned into the civilian work world, he obtained a civilian job with the federal government.

In March 1986, while in the military, Applicant received a non-judicial punishment for the Wrongful Use of Marijuana after testing positive during a drug urinalysis (GE 1). He was reduced in rank and ordered to forfeit \$400. He denied any use of drugs. He was counseled by an air force physician due to the Article 15 on March 28, 1986 (GE 1). At that time, he held a top secret clearance.

In October 2006, Applicant tested positive for cocaine during a random drug testing at his place of employment. He was referred to an Air Force drug and alcohol program, but he denied the use of any drug. He held a top secret clearance at the time. Applicant resigned from his employment on January 19, 2007.

Applicant completed his security clearance application on July 31, 2007. Applicant answered "no" to section 22 (your employment record), which has four questions concerning circumstances or unfavorable reasons that a person may have left employment (GE 2).

In that same 2007 security application, Applicant responded "no" to section 24(b) (use of illegal drugs and drug activity at any time). He did not note the fact that he used cocaine in October 2006 and marijuana in 1986, both times while holding a top secret clearance. Thus, he failed to list his use of illegal drugs.

The Department of Defense interviewed Applicant in September 2007 as part of his security clearance investigation. Applicant told the interviewer that he left his job in

2006 because he did not relish the commute and the congested tunnel traffic. He also commented that his wife's grandmother died and he needed to handle matters in that arena (GE 5).

At the hearing, Applicant explained that after the October positive test result, he cooperated with the command. In November and December he was on paid administrative leave. He felt after the intervening months of not being in his position that he would consider leaving for a number of reasons. He consulted with his wife and decided to leave. He noted that his boss had retired. He felt that perhaps his reputation was tarnished and that his authority might be diminished. He also noted the traffic congestion as another reason to leave. In sum, he believed he would no longer be effective in his position (Tr. 24).

Applicant described the testing procedure for the drug program to the investigator. He explained in great detail that the drug program was new and that he had helped implement the program. Applicant remarked that the restroom was dirty and the urinal and sink were taped up. He recalled taking the test and returning the specimen.

Applicant elaborated at the hearing that he received a phone call on October 30, 2006, a few days later, from the physician at the test lab that was out of state. He was informed that the test was positive for cocaine. The physician asked questions about his health and did Applicant have any recent dental work. Applicant answered "no" and also informed the doctor that he had not used cocaine. Applicant was given an opportunity at that point to request a recheck of the sample. The fee was \$150. Applicant had 72 hours to decide if he wanted this done. Applicant declined the offer.

Applicant testified that on October 31, 2006, he told his captain that he had been in the Air Force for 20 years and that he had not used cocaine. Applicant claimed that the captain filed a complaint against the lab for calling Applicant directly instead of calling the Command.

Applicant's current employer rates him as a successful contributor. He is a competent performer and valued team player. He is valued for his leadership qualities (AE A).

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

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.

The guideline notes several conditions that could raise security concerns. Under AG & 25(a), Any drug abuse^a is potentially disqualifying. AG & 25(b) "testing positive for illegal drug use" is another disqualification. Under AG ¶ 25(c) "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia" is also potentially disqualifying. Finally under AG 25(g) "any illegal drug use after being granted a security clearance" is a disqualifying condition. Applicant tested positive for marijuana in 1986 and in 2006, he tested positive for cocaine. During both time frames he had a top secret clearance. The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The guideline also includes examples of conditions that could mitigate security concerns arising from drug involvement. Under AG ¶ 26(a), the disqualifying condition may be mitigated where Athe behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual-s current reliability, trustworthiness, or good judgment.^a Applicant-s 2006 positive test result for cocaine and his denial of use casts doubt on his trustworthiness. I do not find that this mitigating condition applies.

Under AG ¶ 26(b), it may be mitigating where Aa 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." This is not a factor for consideration in this case.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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:

(a) 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;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative

I have considered all the facts and find Applicant deliberately omitted, concealed, mislead, and falsified information on security clearance application and at the hearing with respect to his answer to section 24(b). He answered the question “no.” He deliberately failed to indicate that he tested positive for cocaine in 2006 while holding a top secret clearance and failed to indicate that he tested positive for marijuana in 1986 while serving in the military possessing a security clearance.

Applicant answered “no” to section 22 (employment record). Applicant explained that he left his position in January because he felt he would no longer be an effective leader. He also mentioned the difficult commute. He was on paid leave for two months during the investigation. I do not find that the government has proved through this omission a deliberate falsification.

After considering the mitigating conditions under AG ¶ 17, I find that none of them apply in this case.

Guideline J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30, “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 regulation.”

The guideline notes several conditions that could raise security concerns. Under AG ¶ 31(a) an “single serious crime or multiple lesser offenses” may be potentially disqualifying. Also AG 31(c) “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted” is a potential disqualifying condition.

Applicant’s deliberate falsification with respect to question 24 constituted a violation of 10 U.S.C. §1001 and is sufficient to raise the disqualifying condition under criminal conduct.

The guideline also includes examples of conditions that could mitigate security concerns arising from criminal conduct. Under AG ¶ 32(a) the disqualifying condition may be mitigated where “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 current reliability, trustworthiness, or good judgment.”

Under AG ¶ 30(d) it may be mitigating where “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 the reasons discussed above, I do not find that Applicant has provided mitigation under this guideline.

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 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 served in the Air Force for more than 20 years. He received numerous award and decorations. Applicant held a top secret clearance during that time period. He has no incidents or issues with protecting information. However, in 1986, while holding a clearance, he tested positive for marijuana. He denied the use.

Applicant successfully transitioned to a position with a federal government in 2006. He was in line for a promotion. He helped develop a drug testing program, However, he tested positive for cocaine in October 2006. He denied use of cocaine. He chose not to have the test examined again because he claimed he did not want to pay the \$150 fee and that the lab did not follow proper procedures. He remained on paid administrative leave for several months and then resigned.

Despite the excellent military record and his current employer’s recommendation, I find that the two positive test results and the deliberate omission of that information on his 2007 security clearance leave me with doubts as to Applicant’s credibility.

Overall, the record evidence leaves me with questions and doubts as to Applicant’s eligibility, judgment, and suitability for a security clearance. For all the reasons discussed above, I conclude Applicant has not mitigated the security concerns arising from his drug involvement, personal conduct and criminal conduct.

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
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	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 national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Noreen A. Lynch
Administrative Judge