



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



In the matter of:)
)
) ISCR Case No. 07-16873
)
)
Applicant for Security Clearance)

Appearances

For Government: Candace L. Le'i, Department Counsel
For Applicant: *Pro Se*

October 31, 2008

Decision

HEINY, Claude R., Administrative Judge:

Applicant used illegal drugs from 1997 to October 2007. Applicant has not rebutted or mitigated the government's security concerns under drug involvement. Clearance is denied.

Statement of the Case

Applicant contests the Defense Department's intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a

¹ 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.

Statement of Reasons (SOR) on June 12, 2008, detailing security concerns under drug involvement.

On June 30, 2008, Applicant answered the SOR, and elected to have the matter decided without a hearing. Department Counsel submitted the government's case in a File of Relevant Material (FORM), dated August 19, 2008. The FORM contained eight attachments (Item). On August 21, 2008, Applicant received a copy of the FORM, along with notice of his opportunity to file objections and submit material to refute, extenuate, or mitigate the potentially disqualifying conditions.

Applicant's response to the FORM was due 30 days after receipt of a copy of the FORM. Applicant's response was due on September 24, 2008. As of October 23, 2008, no response had been received. On October 23, 2008, I was assigned the case. On October 29, 2008, I received an undated response to the FORM. Government counsel having no objection to the material, it was admitted as exhibit (Ex.) A.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations of the SOR.

Applicant is a 29-year-old system analyst who has worked for a defense contractor since June 2006, and is seeking to obtain a security clearance.

In 1997, Applicant—then age 17—used crack cocaine. He has never again smoked crack cocaine and does not associate with the people present when he used it. From February 2000 to July 2004, Applicant used cocaine 15 times. This use occurred primarily with one person who has since moved from the area. In October 2007, Applicant used cocaine with a friend. Applicant regrets using cocaine on this occasion and no longer associates with this person.

From May 1996 to February 2005, Applicant used marijuana. (Item 4) In May 2001, he was charged with possession of marijuana and drug paraphernalia. The charges were dismissed. During the summer of 2004, Applicant began to re-evaluate his drug usage. In August 2004, Applicant married. He continued to occasionally use marijuana until February 2005. During this period, there were times when Applicant would abstain from using marijuana for extended periods of time. Some friends still use marijuana, but Applicant has made it clear he no longer uses marijuana and informed his friends not to bring marijuana around him.

From February 2000 to March 2002, Applicant—aged 20 to 22—used LSD six times. (Item 6) Applicant has not associated with the people he used LSD with and has abstained from further use of LSD.

In September 2008, Applicant and his wife celebrated one year in their home. In January 2008, their son was born. Applicant asserts he is drug free and intends to remain so. He also asserts the factors leading to his drug usage are no longer in his life.

The people with whom he now associates share his same goals and aspirations for raising families.

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

Drug Involvement

AG ¶ 24 expresses the security concern pertaining to drug involvement in that the 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:

- (a) any drug abuse;
- (b) testing positive for illegal drug use;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;
- (d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;
- (e) evaluation of drug abuse or drug dependence by a licensed clinical social worker who, is a staff member of a recognized drug treatment program;
- (f) failure to successfully complete a drug treatment program prescribed by a duly qualified medical professional;
- (g) any illegal drug use after being granted a security clearance; and,
- (h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

Between 1997 and October 2007, Applicant purchased and or used cocaine, LSD, and marijuana. In 2001, he was arrested for marijuana possession and drug paraphernalia possession. AG ¶ 25(a) drug abuse and AG ¶ 25(c) purchasing illegal drugs, apply.

AG ¶ 26 sets forth conditions that could mitigate security concerns.

(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;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; 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 asserts he no longer associates with those individuals with whom he used illegal drugs and will no longer use illegal drugs. Because Applicant chose to have this matter handled administratively, I am unable to test the veracity of his assertions. I am unable to evaluate his demeanor, appearance, or to form a positive determination as to his truthfulness. From the record, I am unable to find Applicant was sincere, open, and honest.

None of the conditions that could mitigate security concerns apply. AG ¶ 26(a) only partially applies because his illegal drug use appears to be infrequent. His use did not occur under unusual circumstances and his use does cast doubt on his reliability, trustworthiness, and good judgment. Additionally, illegal drugs were used over a period of ten years.

AG ¶ 26(b) does not apply. His assertion he no longer associates with drug-using friends does not apply. Applicant acknowledges some of his friends still smoke marijuana, but he has made it clear to them not to bring marijuana around him. He still sees these individuals. Additionally, I am unable to test the veracity of his statement he no longer associates with those individuals with whom he previously used illegal drugs. There is no showing he has executed a signed statement of intent with automatic revocation of clearance for any violation. It has been one year since his last use of cocaine. Considering the ten year history of his use this period of abstinence is insufficient.

AG ¶ 26(c) does not apply because prescription drugs were not abused. AG ¶ 26(d) does not apply because Applicant was never in aftercare.

In May 2001, Applicant was charged with possession of marijuana and possession of drug paraphernalia. The charges were dismissed. Without more, the only inference to be drawn from these dismissed charges that was that Applicant was on notice as to the seriousness of marijuana possession. I find for Applicant as to SOR ¶ 1.f.

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 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. In August 2004, Applicant married. However, he continued to use marijuana and cocaine after his marriage. In January 2008, his son was born, which often has a maturing effect on an individual. Applicant asserts he is drug free, intends to remain drug free, and the factors leading to his drug usage are no longer in his life. However, I have no way of ascertaining the veracity of these assertions

His last cocaine use occurred one year ago. I am unable to make a finding that illegal drugs are no longer a part of his life. The awarding of a security clearance is not a once in a life time occurrence, but is based on current disqualifying and mitigating conditions. Although the Applicant's evidence of rehabilitation is insufficient at this time, should he in the future be afforded an opportunity to reapply for a security clearance, with the passage of sufficient additional time, continued rehabilitation, and no future incidents of illegal drug usage or misconduct, he may well demonstrate persuasive evidence of his security worthiness. But that time has not yet arrived.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the drug involvement 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, drug involvement: AGAINST APPLICANT

Subparagraph 1.a-e: Against Applicant

Subparagraph 1.f: For 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.

CLAUDE R. HEINY II
Administrative Judge