



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



In the matter of:

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ISCR Case No. 07-16947

Applicant for Security Clearance

Appearances

For Government: Emilio Jaksetic, Esquire, Department Counsel

For Applicant: Thomas McCarthy, Jr., Esq.

April 23, 2009

Decision

O'BRIEN, Rita C., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated the security concerns raised under the guidelines for drug involvement and personal conduct. Accordingly, his request for a security clearance is denied.

Applicant requested a security clearance by submitting an Electronic Questionnaire for Investigations Processing (e-QIP) on April 12, 2007. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office

of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request.

On November 4, 2008, DOHA issued to Applicant a Statement of Reasons (SOR), which specified the basis for its decision – security concerns addressed in the Directive under Guidelines H (Drug Involvement) and E (Personal Conduct) of the Revised Adjudicative Guidelines (AG).²

Applicant signed his notarized Answer on December 5, 2008, in which he admitted to allegations ¶¶ 1.a. through 1.c. under Guideline H. Under Guideline E, he admitted to SOR ¶ 2.a, which cross-references allegations 1.a. through 1.c. He denied allegations 2.b. and 2.c., which allege deliberate falsification of information he provided on his security clearance application. Applicant also requested a hearing before an administrative judge.

Department Counsel was prepared to proceed on December 29, 2008, and the case was assigned to me on the following day. DOHA issued a Notice of Hearing on January 9, 2009. However, on January 30, 2009, Applicant's counsel requested a continuance, and Department Counsel did not object. I granted the request by Order dated February 2, 2009. An Amended Notice of Hearing was issued on February 3, 2009, re-setting the hearing for February 25, 2009. I convened the hearing as scheduled. During the hearing, the government offered eight exhibits, marked as Government Exhibits (GE) 1 through 8, which were admitted without objection. Applicant testified on his own behalf and did not offer exhibits. DOHA received the transcript on March 3, 2009.

Findings of Fact

Applicant's admissions in response to the SOR are admitted as fact. After a thorough review of the pleadings, Applicant's response to the Statement of Reasons, and the record evidence, I make the following additional findings of fact.

Applicant, 34 years old, earned a bachelor's degree in 1998 in physics. He has been working toward a master's degree in aerospace engineering since 2003 (Tr 25). He is single and does not have children. Applicant worked as a webmaster in the late 1990s, and has been employed as a research engineer since 2000 (GE 1). He received his first

¹ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

² Adjudication of this case is controlled by the Revised Adjudicative Guidelines, approved by the President on December 29, 2005, which were implemented by the Department of Defense on September 1, 2006. The Revised Adjudicative Guidelines supersede the guidelines listed in Enclosure 2 to the Directive, and they apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

interim security clearance in 1998, and a final secret clearance in approximately March 2001. In 2007, he submitted an application for a higher level clearance (Tr 24; 98).

Applicant was diagnosed with Attention Deficit Disorder at the age of 12 and remains on medication for that illness. Since 2001, he also has been treated for anxiety and depression, and currently takes medication for those conditions. He also takes medication for high blood pressure and high cholesterol (GE 3; Tr 37; 93-94).

Although many of his friends used illegal drugs during college, Applicant did not. However, after college, he used marijuana five times between 1999 and 2005. He first used it in 1999, with his former college roommates. He was willing to try it because he trusted them to help him if anything went wrong while he used the drug. He also used it with his cousin in August 2004; in summer 2005 with his partner and his partner's friend; a fourth time with his partner and a friend in October 2005; and a fifth time at a party he and his partner gave on New Year's Eve, 2005 (GE 3; Tr 35-36). Applicant used the drug in response to pressure from his partner and his friends, and because of his desire to feel like part of the group (Tr 85). In response to his statement that marijuana did not have much of an effect on him (Tr 84), he was asked,

Mr. Jaksetic: Then why did you use it on a variety of occasions over several years?

Applicant: It was totally peer pressure. In that, not one instance did I ever use it alone. I was surrounded by people I trusted. They were doing it, so I, you know, had to feel part of the group and that's you know, what I, what I did.

At the time he used marijuana, between 1999 and 2005, Applicant was 24 to 30 years old, and held a security clearance (Tr 74).³ He was aware that marijuana use was illegal (Tr 31; 83). He no longer associates with his cousin or the friends with whom he used marijuana. He is no longer in a relationship with the partner with whom he used marijuana and steroids (Tr 38).

In approximately 2001 or 2002, Applicant used psychedelic mushrooms. He was with close friends whom he trusted. He testified that he accepted tea that they had prepared, and after he drank it, they informed him that it was made from psychedelic mushrooms (Tr 40; 83-84). However, during his Subject Interview, he stated that he drank the tea because of peer pressure (GE 3). Applicant reviewed the Interrogatories that contain the report of his Subject Interview (GE 3). He made numerous hand-written corrections to the report to be sure that "...whoever reads them understand (*sic*) exactly

³ Applicant testified that during three of the five times he used marijuana he held an active security clearance (Tr 99). However, according to the dates he provided in GE 3, he used marijuana a total of four times between 2004 and 2005, all of which occurred after he received a final secret clearance in 2001 (Tr 24).

what, you know, what was going on with me, and so, you know, so there was no, you know, questions about anything.” (Tr 44). He made no corrections to the section where he stated that he drank the tea as a result of peer pressure. As he corrected other sections that he believed to be wrong, but left that statement uncorrected, I find that Applicant was aware that he was accepting a drink made from an illegal drug, and drank it anyway because of pressure from his friends to do so. He has not used mushrooms since that time (Tr 40-41; 72-73). He no longer associates with the friends with whom he used psychedelic mushrooms (Tr 71-72).

In about the summer of 2005, Applicant and his partner decided that they would try anabolic steroids. Applicant agreed to use steroids because he wished to improve his looks by increasing his muscle size. He also felt pressure from friends, and especially from his partner, to use the drug (Tr 94-96). By pooling their money, he and his partner were able to afford the drug, and bought it on the internet. Each course of steroids required a once-per-week injection for about three months (Tr 29-30). He and his partner injected each other, on a weekend or on a Monday morning before work. Applicant took three separate courses of steroids: March to June 2005; December 2005 to February 2006; and October to December 2006. Each course involved 12 shots, for a total of 36 injections (GE 3; Tr 74). The drug increased his muscle size, but also had negative side effects. Applicant discontinued use because he did not look well, the drug could negatively affect his blood pressure and cholesterol, and it interfered with his prescription medications (GE 2; Tr 93-94). Applicant testified that he was aware that using illegal drugs was inconsistent with holding a security clearance (Tr 75), but also stated that when he used steroids, he did not think about the fact that he was holding a security clearance (Tr 97). When he used anabolic steroids, Applicant was aware it was illegal to use them without a prescription (Tr 83; 93-94). He is no longer with the partner with whom he used anabolic steroids (Tr 38).

When Applicant completed his Security Clearance Application on April 12, 2007, he answered question 24.a. concerning drug use, by stating that he used anabolic steroids three times between March 2005 and December 2006. In response to question 22, he did not disclose a job termination (GE 1). The government alleges that he deliberately falsified his answers to both questions.

When describing his anabolic steroid use, Applicant stated that he used the drug three times because he considered each course of steroids as one use. He described his answer as similar to the way a course of antibiotics would be described (Tr 46), where a person would mention having taken a certain antibiotic once, even though he or she ingested medication several times a day for 10 days. At his subject interview in May 2007, Applicant explained he used anabolic steroids once a week for twelve weeks, during three separate courses, or 36 total injections (GE 3).

Applicant answered No to question 22 on his security clearance application. The question asked whether or not he had left employment for any of the following reasons: terminated for cause; quit to avoid termination for cause; left by agreement following

allegations of misconduct or unsatisfactory performance; or left under any other type of unfavorable circumstance (GE 1). Applicant was employed by a company as an associate project manager from January to November 2000. Approximately 11 months after he started, his employer informed him that he “was not working out” and that he would be leaving the company (Tr 54). He was not accused of misconduct (Tr 57). He testified there was no “mutual agreement” to leave the job, because he did not want to leave it (Tr 57). However, Applicant also testified, and explained in his Interrogatory response (GE 4), that he was unhappy because his assignments were not what he had been promised (Tr 53), that he felt underutilized and marginalized, that he did not agree with his supervisor’s approach to tasks (Tr 59-60), and that he “welcomed” leaving the company (Tr 60). Applicant testified that the company was unhappy with his performance (Tr 82):

Mr. Jaksetic: Would it be fair to say, basically from your testimony as I understand it and your answer to the interrogatories, they weren’t happy with your performance and you weren’t happy with the situation, correct?

Applicant: Yes.

Applicant believes that he was not fired, but laid off, because he received unemployment compensation after he left. He testified that he was required to answer either “Yes” or “No” on his security clearance application, and because none of the choices described his situation; he answered “No” without further explanation. When he completed the Interrogatory response in July 2008, he was not required to answer “Yes” or “No,” so he selected the option that came closest to describing his situation -- “Left a job by mutual agreement following allegations of unsatisfactory performance” -- and then wrote an explanation of the circumstances (all facts from GE 3 and Tr 53-60).

Applicant's Answer to the SOR contained several attachments. A 2002 performance evaluation rated him as a “Successful Contributor” and included a letter from his program manager describing Applicant as an energetic team member who has been assigned increasingly difficult tasks. A letter from one co-worker described him as intelligent, and a skillful project manager, with excellent communication skills. Two other co-workers described him as an honest, trustworthy, and professional employee who abides by program and company policies.

Policies

Each security clearance decision must be a fair, impartial, and common-sense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the Revised Adjudicative Guidelines (AG).⁴ Decisions must also reflect consideration of the “whole

³ Directive. 6.3.

person” factors listed in ¶ 2(a) of the Guidelines.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guideline H (Drug Involvement) and Guideline E (Personal Conduct).

A security clearance decision is intended only to resolve the questions of whether it is clearly consistent with the national interest⁵ for an Applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an Applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the Applicant to refute, extenuate or mitigate the government’s case. Because no one has a “right” to a security clearance, an Applicant bears a heavy burden of persuasion.⁶ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or his own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an Applicant’s suitability for access in favor of the government.⁷

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.

⁴ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁵ See *Egan*, 484 U.S. at 528, 531.

⁶ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

The facts raise two disqualifying conditions: AG ¶ 25(a) (*any drug abuse*) and AG ¶ 25(g) (*any illegal drug use after being granted a security clearance*). Applicant admits to using three illegal substances: marijuana, psychedelic mushrooms, and anabolic steroids. Applicant was granted his security clearance in 1998 and admits that he used illegal drugs while he held a clearance. Both conditions apply.

Guideline H also includes two relevant mitigating conditions. The first, AG ¶ 26(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*), cannot be applied. Applicant's last use of anabolic steroids was in December 2006, a little more than two years ago, which is not distant in time. He used the illegal drug weekly for three-months at a time, repeating the process three times over an extended period of more than one-and-one-half years. His use of illegal drugs did not occur under unique circumstances, but with friends, partners, and at social gatherings. In addition, he used illegal drugs because he felt pressured by friends and/or his partner. His repeated acquiescence to such pressure indicates a willingness to follow others, even when it leads to actions that are against the law. His conduct raises doubts about his good judgment and reliability and his ability to follow rules and regulations. His illegal drug use, while holding a security clearance, is not mitigated.

Mitigating condition AG ¶ 26(b) is also relevant:

(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.

Partial mitigation is available under AG ¶ 26(b)(1) and (b)(3). It appears from the record that Applicant has not used illegal drugs since December 2006, and that he does not associate with the people with whom he used drugs in the past. In particular, he is no longer in a relationship with the partner with whom he used both marijuana and anabolic steroids. Although these factors weigh in Applicant's favor, they must be viewed in light of the period of time during which he willingly engaged in illegal drug use: intermittent use of marijuana over a six-year period, and repeated courses of illegal drugs over a period of almost two years. In 2005 alone, he used marijuana three times and received approximately 12 illegal injections of steroids. Each time he used marijuana or received an injection, Applicant made a decision to engage in an illegal activity. Each decision was made while he was a mature adult. And each decision was made while he held a

security clearance. His willingness to engage repeatedly in illegal activity raises doubts about his ability to avoid illegal drugs in the future. Overall, AG ¶ 26(b)(1) and (b)(3) are insufficient to mitigate Applicant's disqualifying conduct. I find against Applicant on Guideline H.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern about 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.

Applicant's illegal drug use is cross-alleged under Guideline E of the SOR. His repeated use of illegal drugs raises serious questions about his judgment, trustworthiness and willingness to comply with rules and regulations. However, these same qualities are at issue under Guideline H. As these issues are more appropriately considered under that Guideline, i will not separately address Applicant's illegal drug use under Guideline E.

The government also alleges under Guideline E that Applicant deliberately falsified answers he provided to two questions on his security clearance application. The first falsification alleged is his disclosure of three uses of anabolic steroids; the government contends that Applicant deliberately misrepresented the extent of his anabolic steroid use, because he should have listed 36 uses. The government also alleges that Applicant deliberately failed to disclose the circumstances under which he left a previous employer. The allegations implicate AG ¶ 16(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*).

Application of AG ¶ 16(a) requires deliberate falsification. Applicant's failure to list each individual injection of anabolic steroids was not intentional. His disclosure of serious negative information – his marijuana, psychedelic mushroom, and anabolic steroid use – shows that he did not intend to hide relevant information from the government. His disclosure put the government on notice that drug use was an issue that required further investigation, and it was explored in a Subject Interview one month after he submitted his application. Although the difference between three uses and 36 uses is substantial, his disclosure of three uses was reasonable in light of his

interpretation of his three courses of drug use. I conclude that Applicant did not deliberately falsify his response about the extent of his drug use.

However, the situation is not the same as to Applicant's failure to inform the government about the circumstances under which he left his employment in 2000. He testified that none of the choices provided in the security clearance application described the circumstances under which he left his job. Yet when he later responded to the government's Interrogatories (GE 4), Applicant was provided with the same question and the same choices that were available to him on the security clearance application. When he completed the Interrogatory response, he selected one choice, and wrote an explanation. He could have responded in this manner when he completed his application, because it allows for an explanation, both under the specific question, and at the end of the application under "Additional Comments." I conclude that Applicant deliberately failed to inform the government about his termination, and disqualifying condition AG ¶ 16 (a) applies.

Guideline E contains factors that can mitigate disqualifying conditions. The following conditions are relevant:

AG ¶ 17(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts);

AG ¶ 17(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);

AG ¶ 17(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).

Applicant's falsification about his job termination is unmitigated. Falsification of information provided to the government is not minor, and the record contains no evidence that he sought to correct the falsification. Such conduct reflects negatively on his trustworthiness and good judgment. AG ¶¶ 17(a) and 17(c) do not apply.

Whole Person Analysis

Under the whole person concept, an administrative judge must evaluate the Applicant's security eligibility by considering the totality of the Applicant's conduct and all the circumstances. An 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance must be an overall common-sense judgment based upon careful consideration of the guidelines and the whole person concept. Under each guideline, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant decided to engage in serious, criminal conduct by using illegal drugs numerous times over the years between 1999 and 2006. His last use was a little more than two years ago, when he was a mature adult of 31 years. Applicant's recent abstinence is insufficient to overcome his history of drug use. Most troubling is the refrain that repeats in all his explanations for using drugs: he succumbed to peer pressure. Applicant repeatedly followed what others suggested, even though he was an adult, and even though they encouraged him to violate the law. His conduct demonstrates a willingness to place his own desire to fit in above the government's need for trustworthiness in those to whom it grants access to classified information. That Applicant used illegal drugs while he held a security clearance, and did not even consider, at the time, the fact that he held a clearance, underscores that he does not understand the nature of this obligation. Those who hold security clearances enter into a fiduciary relationship based on trust. The government cannot place its confidence in those who unthinkingly violate that trust.

Overall, the record evidence fails to satisfy the doubts raised about Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from the cited adjudicative guidelines.

Formal Findings

Paragraph 1, Guideline H	Against Applicant
Subparagraph 1.a. – 1.c.	Against Applicant
Paragraph 2, Guideline E	Against Applicant
Subparagraph 2.a:	Against Applicant

Subparagraph 2.b:
Subparagraph 2.c:

For Applicant
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 allow Applicant access to classified information. Applicant's request for a security clearance is denied.

RITA C. O'BRIEN
Administrative Judge