



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



In the matter of:)	
)	
)	ISCR Case No. 07-17019
)	
Applicant for Security Clearance)	

Appearances

For Government: Emilio Jaksetic, Esquire, Department Counsel
For Applicant: *Pro Se*

October 30, 2008

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the case file, pleadings, and exhibits, I conclude that Applicant failed to rebut or mitigate the Government's security concerns under Guideline H, Drug Involvement. His eligibility for a security clearance is denied.

Applicant submitted an Electronic Questionnaire for Investigations Processing (EQIP) on July 30, 2007. He completed and signed a Questionnaire for Non-Sensitive Positions (SF-85) on May 31, 2005 and August 3, 2005. On June 5, 2008, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing the security concerns under Guideline H, Drug Involvement. 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.

On June 30, 2008, Applicant answered the SOR in writing and elected to have a hearing before an administrative judge. The case was assigned to me on August 19, 2008. I convened a hearing on September 24, 2008, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called no witnesses and introduced six exhibits, which were marked Ex. 1 through 6 and admitted to the record without objection. Applicant testified on his own behalf, called one witness, and introduced three exhibits, which were marked Exs. A, B, and C. Applicant's exhibits were admitted to the record without objection.

DOHA received the transcript (Tr.) of the hearing on October 2, 2008.

Findings of Fact

The SOR contains three allegations of disqualifying conduct under AG H, Drug Involvement (SOR ¶¶ 1.a. through 1.c.). In his Answer to the SOR, Applicant admitted the three allegations and provided additional information. Applicant's admissions are admitted as findings of fact.

Applicant is 29 years old, never married, and employed as an information technology consultant by a government contractor. In 2001, he earned a bachelor's degree. He first went to work for his present employer in 2003. In 2005, he resigned to attend graduate school. In November 2006, he was rehired by his employer. (Ex. 1; Tr. 39-40.)

A project manager from Applicant's employer testified as a witness for Applicant. He stated that he had known Applicant professionally since August 2007, and he observed that Applicant was dependable, hardworking, even tempered, and respectful. Applicant's witness testified that on the day before his due process hearing, Applicant discussed with him the reasons for the government's concern about Applicant's security worthiness. (Tr. 25-27.)

In 1998, when he was about 19 years old and a college sophomore, Applicant began to use marijuana. For eight years, between 1998 and September 2006, Applicant used marijuana approximately 186 times. Between 2002 and 2004, he used cocaine approximately four times. He used ecstasy one time in 1999. Applicant avers he has not used illegal drugs for two years and will never use illegal drugs again. (Tr. 42-45; Ex. 1 at 44; Ex. 3 at 7.)

Applicant sought psychological counseling in 1999, and he continued in weekly psychotherapy sessions for nine years. During that time, he discussed his drug use with his therapist, but did not recall his therapist advising him not to use drugs. His use of cocaine and ecstasy occurred in the company of others. While he used marijuana with others, he also used it when alone for relaxation and to control anxiety or nervousness. He denied purchasing drugs. (Tr. 48, 61-63, 70-74.)

In the summer of 2002, Applicant moved in with a friend who introduced him to cocaine. In the company of this friend, Applicant's use of marijuana increased. His friends supplied him with marijuana. In 2004, a coworker gave him marijuana. (Tr. 74-77.)

Applicant admitted he used illegal drugs until September 2006. He stated that he stopped using illegal drugs in September 2006. He stated he no longer associated with the individuals with whom he had used illegal drugs. He also stated he had found ways to cope with stress that did not involve illegal drug use. In his answer to interrogatories from DOHA, he said he stopped using marijuana because drug use was incompatible with his core values, and he prided himself on being an honest and law-abiding person. At his hearing, he defined his core values as "kindness, empathy, understanding, honesty, integrity, trustworthiness . . . [and] abiding by the law." (Tr. 48, 56, 77-78, 82-83; Ex. 3 at 7-8.)

In 2005, Applicant completed a SF-85. Question 14 on the SF-85 reads, in pertinent part, as follows:

In the last year, have you used, possessed, supplied, or manufactured illegal drugs? When used without a prescription, illegal drugs include marijuana, cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), stimulants (cocaine, amphetamines, etc.), depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.) (NOTE: Neither your truthful response nor information derived from your response will be used as evidence against you in any subsequent criminal proceeding.)

Applicant responded "no" to Question 14. On August 3, 2005, he signed and certified the following statement about his answers on the SF-85: "My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both. (See section 1001 of title 18, United States Code.)" (Ex. 2 at 5.)

At his hearing, Applicant explained his answer to Question 14 as follows:

Unfortunately, I chose to lie on that occasion because I was afraid of losing my job. I did not understand, and no one had explained to me, exactly what the ramifications would be if I was truthful, and I was very afraid that if I answered "yes" that [I] would be terminated. So in that case, that concern overrode, you know, my principle [of] being honest. (Tr. 84.)

Falsification of his SF-85 was not alleged on the SOR.

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, the administrative judge applies these guidelines 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

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness 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 ¶ 24(a) defines drugs as "mood and behavior altering substances." The definition of drugs includes "(1) drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances." AG ¶ 24(b) defines drug abuse as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction."

The relevant Guideline H security concern in this case is referenced at AG ¶ 25(a) of the Drug Involvement guideline. The record shows that Applicant's admitted illegal use of marijuana began in about 1998, when he was 19 years old and continued until 2006, when he was 27 years old. During that time he also used cocaine four times and ecstasy one time. He used illegal drugs while employed by a federal contractor. This conduct casts doubt on his reliability, trustworthiness, and good judgment. It also raises security concerns about his ability or willingness to comply with laws, rules, and regulations. I conclude that Applicant's illegal drug use raises security concerns under AG ¶ 24 and AG ¶ 25(a).

Several Guideline H mitigating conditions might apply to the facts of Applicant's case. If Applicant's drug use happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on his current reliability, trustworthiness, or good judgment, then AG ¶ 26(a) might be applicable in mitigation. If Applicant demonstrated an intent not to abuse any drugs in the future by disassociation from drug-using associates and contacts, changing or avoiding the environment where drugs were used, abstaining from drug use for an appropriate period, and signing a statement of intent with the automatic revocation of his security clearance for any violation, then AG ¶ 26(b) might be applicable.

The record shows that Applicant's drug use is not recent, but it is of sufficient duration to demonstrate a consistent lifestyle choice. His illegal drug use began when he was a sophomore in college and continued in his post-college and professional life until two years ago, when he was 27 years old. While Applicant stated he had not used marijuana since September 2006, he failed to provide evidence corroborating his statement about his abstinence from friends and others who knew him socially. Applicant stated he had changed his behavior and activities after his last use of marijuana in September 2006 and his subsequent decision to abstain from illegal drugs. These decisions are still somewhat recent and the lifestyle change is of insufficient duration to demonstrate a positive and permanent change in behavior. I conclude that

AG ¶¶ 26(a) and 26(b) do not fully apply in mitigation to the security concerns raised by the facts in Applicant's case.

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. Applicant himself provided information about his drug use that was alleged on the SOR. His one-time use of ecstasy in 1999 was an isolated use of that illegal drug. He has expressed an intent to permanently abstain from illegal drugs in the future, and his manager was positive in his evaluation of Applicant's professional skills.

I have also considered the Applicant's falsification of Question 14 on his SF-85 as a part of this whole person analysis. Conduct not alleged in the SOR may be considered: "(a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3." ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (citations omitted). Additionally, the Appeal Board has determined that even though crucial security concerns are not alleged in the SOR, the Judge may consider those security concerns when they are relevant and factually related to a disqualifying condition that was alleged in the SOR. ISCR 05-01820 at 3 n.4 (App. Bd. Dec. 14, 2006) (citing ISCR Case No. 01-18860 at 8 (App. Bd. Mar. 17, 2003) and ISCR Case No. 02-00305 at 4 (App. Bd. Feb. 12, 2003)). I conclude that Applicant's deliberate falsification of his drug use on his SF-85 and his expressed motivation for the falsification occurred when he was a mature adult. (AG ¶ 2(a)(4)). His motivation for the falsification raises concerns about his credibility, trustworthiness, and

ability to put the government's interests before his own in the protection of classified information. AG ¶ 2(a)(7).

Overall, the record evidence leaves me with questions and doubts at the present time as to Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate the security concerns arising from his drug involvement.

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:	For 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.

Joan Caton Anthony
Administrative Judge