



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



In the matter of:)	
)	
)	ISCR Case No. 07-17365
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Emilio Jaksetic, Esquire, Department Counsel
For Applicant: Elizabeth Newman, Esquire

February 24, 2009

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the government’s security concerns under Guideline H, Drug Involvement and Guideline E, Personal Conduct. Applicant’s eligibility for a security clearance is denied.

On June 12, 2008, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing the security concerns under Guidelines H and E. 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 answered the SOR in writing on September 2, 2008, and requested a hearing before an administrative judge. The case was assigned to me on January 13, 2009. DOHA issued a notice of hearing on January 22, 2009, and after coordinating the date with both sides I convened the hearing as scheduled on February 3, 2009. The

government offered Exhibits (GE) 1 through 5. Applicant did not object and they were admitted. Applicant also offered a post-hearing exhibit marked as AE A. Department Counsel had no objection and it was admitted. DOHA received the transcript of the hearing (Tr.) on February 10, 2009.

Findings of Fact

Applicant's admissions to the allegations in the SOR are incorporated herein. Applicant admitted the allegation in subparagraphs 1.a, 1.b, 1.c, and 1.d of the SOR. He denied subparagraphs 2.a and 2.b. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 60 years old and works for a federal contractor in the information assurance field. He has had a secret clearance since approximately 1994. He is a recovering alcoholic. He is married and has three children. His youngest child, a son, now 21 years old, was born with a serious congenital heart and pulmonary disease. He has had many surgeries from the time he was born to the present. The disease he has has a high mortality rate and Applicant never knew whether the next medical issue would be debilitating or cause his son's death. Dealing with his son's illness was very stressful. Despite his illness, his son completed high school and is now in college.¹

In 2006, Applicant's son's health was deteriorating and he was becoming a "cardiac cripple", unable to walk or climb stairs. The doctors gave him three medical options, none of which were good. In desperation they agreed to an experimental corrective heart surgery. During 2006 Applicant was experiencing a high level of stress due to his son's health crises. In November 2006, his son had an experimental operation. The operation was successful, but Applicant also was confronted with the fact that his son was still sick and would never be normal or healthy. Applicant's son is presently stable, but he is not healthy.²

Some time before December 2006 Applicant's wife found marijuana and a pipe in the purse of one of their daughter's friend's who was at their house. His wife took the marijuana and placed it in a cabinet drawer in the master bathroom. Applicant was aware it was in the cabinet and did not throw it out. He did not know why he did not throw it out. He knows marijuana is illegal and he had no plans on returning the marijuana to the owner. In December 2006 Applicant used the marijuana that was found in the purse several times to address the stress he was feeling. He did not contact his Alcoholic Anonymous (AA) sponsor. He held a security clearance at the time he used marijuana.³

¹ Tr. 9, 18-22.

² Tr. 22-27, 65-68.

³ Tr. 27-32, 46.

In March 2007 Applicant began completing his security clearance application on-line. He started it and then would stop and continue it at a later time after he had gathered the pertinent information for it. Between approximately April 15 and 21 2007, he completed the application, but had not yet submitted it. He did not divulge his December 2006 drug usage.⁴

Applicant was attending a family baptism at the end of April 2007. He was not enjoying himself and left the event where his wife and children were and went home by himself. He was depressed and did not think life was worth living. He wanted to feel good and considered using alcohol but was afraid to use it. He understands from AA that any mind-altering substance is prohibited and use of marijuana is a violation of sobriety. He again used some of the marijuana that was stored in his bathroom. He did not have an explanation for why he kept the drugs in the house in the first place or after he had used the marijuana in December 2006. He stated he did not know why he did not get rid of it. He said: "I don't know, maybe I wanted to keep it around."⁵ After his April 2007 use he flushed the remainder of the marijuana down the toilet and threw the pipe away. He held a security clearance when he used marijuana on this date.⁶

Applicant contacted his AA sponsor the next day and told him he was using marijuana. He told his sponsor he wanted to get sober.

Applicant previously used marijuana from 1969 to 1970. He admitted this usage when applying for a secret security clearance in 1994. He stated on the questionnaire "marijuana-1969-1970 weekends. No intention to use....experimental and social use in late 60's early 70's."⁷

On May 3, 2007, Applicant completed and submitted his SCA. He did not change his answer on his SCA and intentionally failed to divulge his illegal uses of marijuana.⁸ He did not put any comments on the form under "additional comments." He was specifically asked if he knew when he certified and signed his SCA on May 3, 2007, that he provided false answers about his drug use. He stated:

I did. I also knew that I was going to at that point in time, knew that there was an investigation that followed and that's —I just didn't know that there was enough writing in the world to explain what I was going to do on a form.⁹

⁴ Tr. 30-32.

⁵ Tr. 53-55.

⁶ Tr. 32-35, 48.

⁷ Tr. 35, 47; GE 1.

⁸ Tr. 49-50.

⁹ Tr. 50.

Applicant did not request an interview. He waited until he was contacted by an investigator.¹⁰ Applicant vacillated on the reasons why he did not change his answer and admit his drug use. In his interview with the Office of Personnel Management (OPM) investigator on June 13, 2007, he told her that he did not intentionally fail to divulge his marijuana use, but rather forgot about the use in December 2006 and was in a hurry to complete his security questionnaire. He also told the interviewer that he submitted his SCA prior to his April 29, 2007 use. He reiterated these responses on his sworn answer to the SOR on September 2, 2008. He stated: "I was in a hurry to complete the questionnaire, forgot about the use in December, and had prepared my answer before the April use." These statements are inconsistent with his hearing testimony.¹¹ At his hearing he stated that when he certified and signed the SCA he knew he was not divulging his drug use. He said "I probably did not forget about my marijuana use." He then stated: "I knew I had used marijuana when I certified." When asked directly what his rationale was for lying on his SCA he stated: "[A]t that point in time I thought it would be better to just try to get it out in person."¹² He testified he was aware he was going to talk to an investigator, but doesn't know why he did not list his drug use on the SCA. He also stated that he knew he was going to tell the investigator and he was not sure if he would have the opportunity to explain. He admitted he did not contact the investigator prior to her interview with him. In June 2007 when he was interviewed by the OPM investigator, he divulged his drug use when she was going over the questions on his SCA. However, his explanation to the investigator for why he failed to divulge his drug use was inconsistent with his hearing testimony. On one hand he stated the reason he did not divulge it was because he wanted to tell the investigator and have an opportunity to explain. However, during his interview he told her the reason he did not reveal the illegal drug use was because he forgot about the December 2006 use and he had submitted the SCA prior to his final use. He reiterated this explanation on his sworn answer more than a year later. I find Applicant's testimony was not credible.¹³

Applicant referred himself to the employment assistance program and was subsequently referred to a psychologist. He had three appointments with the psychologist. He was diagnosed with depression and it was recommended because he did not want to take any prescribed medications, that he should continue attending AA for support. He attends AA three times a week and holds service positions at all three meetings. Since returning to AA he is more honest about his feelings and has turned his will and life over to God. He will continue to attend AA in the future because he believes

¹⁰ Tr. 51-52.

¹¹ GE 4.

¹² Tr. 71.

¹³ Tr. 35-37, 68-76. I have not considered Applicant's statements made to the investigator for disqualifying purposes, but I have considered them when evaluating his credibility and under the whole person.

it works and he has a life worth living. If something should happen to Applicant's son he would continue to use the AA program for support.¹⁴

Applicant admits that his use of marijuana was wrong and he has no intention of using it again in the future. He provided a signed document indicating that his clearance may be automatically revoked if he uses illegal drugs in the future.¹⁵ He admits he used poor judgment.

Applicant first attended AA in approximately April 2001 and cut back on his attendance in 2006.¹⁶

Applicant told the Vice President of the company where is employed about his marijuana use and that his clearance was going to be revoked. He also told the Director who he reports directly to. He was concerned about how his job would be affected if he did not have a clearance. He admitted he is embarrassed and humiliated about his drug use.¹⁷

Applicant's program director testified on his behalf. He has been his supervisor for approximately a year and a half. Applicant informed him of his drug use and that he did not intend to use drugs in the future. He also told him about the falsification. The program director considers Applicant trustworthy and would trust him with a top secret clearance. He considers Applicant an excellent worker. He was aware of Applicant's son's health problems and that when Applicant came to work for the company he was very interested in the company's health benefits.¹⁸

Applicant's former program manager and AA sponsor testified on his behalf. He has known Applicant for eight years. Since late April 2007 he has almost daily contact with Applicant and believes he wants to be sober. Applicant admitted to his sponsor that he lied on his SCA and was remorseful. He would trust Applicant with classified information.¹⁹

Applicant's wife testified on his behalf. Sometime in May 2007, Applicant admitted to her that he smoked marijuana. She believes he was depressed about their son and made a mistake. She thinks he is happier now and more relaxed. He is a good husband and a good father. She believes he was under a great deal of pressure and his

¹⁴ Tr. 37-43, 61-63, 76-77.

¹⁵ AE A.

¹⁶ Tr. 19.

¹⁷ Tr. 42-45, 57-58.

¹⁸ Tr. 59, 81-93.

¹⁹ Tr. 19, 95-104.

actions were in the past and they will not happen again. She commented that when a family has a sick child it tears some families apart, but it has made their family closer.²⁰

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.

²⁰ Tr. 106-110.

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

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. Drugs are defined as mood and behavior altering substances, and include: (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; Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.”

I have considered the disqualifying conditions under Drug Involvement AG ¶ 25 and especially considerer the following:

- (a) any drug abuse;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia, and
- (g) any illegal drug use after being granted a security clearance.

Applicant had marijuana in his house from at least November 2006 to April 2007. Applicant used marijuana on several occasions during December 2006 and again in April 2007. He held a security clearance at the time he used the marijuana. I find all of the above disqualifying conditions apply.

I have considered all of the mitigating conditions under Drug Involvement AG ¶ 26 and especially considered the following:

- (a) the behavior happened so long ago, was so infrequent or happened under circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment, and

(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 are used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant used illegal drugs in 1969 and 1970. His son was born with serious ongoing life threatening health issues. He knew marijuana was in his house in November 2006 and he did not remove it. He became depressed and stressed and used marijuana on several occasions in December 2006 while holding a security clearance. Although he felt badly that he used the drugs he still did not remove them from his house. Again in April 2007 he used the marijuana that was in his house.

Applicant has lived for 21 years under the strain of his son's fragile health. His son's health continues to be fragile and at times life threatening. Applicant held a security clearance during the occasions he used marijuana in December 2006 and April 2007. He was 58 years old at the time. It is undeniable that he was under a great deal of stress, but his decisions on more than one occasion to resort to drug use are troubling. Although he has the support from AA, I am not convinced that the circumstances under which he used illegal drugs were unusual or unlikely to recur. His willingness to jeopardize his job and the health insurance his son desperately needs leads me to question his judgment and reliability. His actions were not spontaneous. Rather he kept the marijuana in his house for a significant period of time and after his uses in December 2006 he continued to keep the drugs. This is a cause for concern. I find (a) does not apply.

Applicant sought help from his AA sponsor and is now regularly attending AA and has daily contact with his sponsor. His approach to sobriety is one day at a time. His son's health, although stable, continues to be serious. He has not used illegal drugs since April 2007. Applicant promised not to use illegal drugs again and has offered a signed statement of automatic clearance revocation. It appears he is following through with regular attendance at AA and daily contact with his sponsor. I find (b) applies.

I find the allegation in SOR ¶1.c is redundant with ¶1.a. I also find that SOR ¶1.d is not a disqualifying factor, but rather is mitigating.

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. I have specifically considered the following:

(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.

I have considered all of the facts and find Applicant deliberately failed to divulge and intentionally meant to mislead the government about his December 2006 marijuana uses and his April 2007 marijuana use. I find (a) applies.

The guideline also includes examples of conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions and especially considered the following under AG ¶ 17:

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

(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;

(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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant was aware that when he completed his SCA that he was not truthful and failed to divulge his illegal drug use. His explanation that he was going to divulge it to the investigator when he was interviewed is not believable. It is also inconsistent with his later answer to the SOR that states he merely forgot to divulge the information and had submitted his SCA before his last use. He never contacted the investigator prior to the interview to divulge the information. He vacillated during his testimony with different explanations for why he did not divulge the information. I do not find AG ¶ 17(a) applies because Applicant did not make a good-faith effort to correct the concealment. I also do not find AG ¶ 17(b) applies because his falsification was not minor, but rather serious considering the nature of the omission and the fact he held a security clearance at the time. His explanations and falsifications continue to cast doubt about his trustworthiness, reliability, and good judgment. Although Applicant has now acknowledged his drug use he seemed to have difficulty admitting his falsifications and

repeatedly contradicted himself. He was not completely honest with the investigator when he told her he submitted his SCA before the April 2007 drug use. That statement was not true. When he did admit the December 2006 drug use to the investigator he revealed that the reason for his failure to divulge it on his SCA was because he forgot. This explanation was a clear contradiction from his explanation that he wanted to have an opportunity to provide an explanation to the investigator so he did not divulge it earlier. He reiterated this explanation in his answer to the SOR. Applicant lied by not divulging his drug use on his SCA. He lied again when he explained the reason for not divulging the information was because he wanted to first have an opportunity to explain his use to the investigator. Instead he told the investigator that he forgot the drug use so did not include it. I did not find his testimony credible. I find AG ¶¶ 17(d) and (e) do not apply.

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 was 58 years old when he reintroduced illegal drug use into his life. His illegal drug use was while holding a security clearance. He is a recovering alcoholic and has been dealing with the serious medical condition of his son for his entire life. He has signed a statement and agreed to the automatic revocation of his security clearance should he abuse drugs in the future. He is committed to AA and he is in contact with his sponsor daily. Although Applicant has professed and made a firm commitment to never use illegal drugs again, I am concerned about his untruthfulness when coming to grips with why he failed to divulge his drug use. He sought help from his sponsor the day after his last marijuana use. He submitted his SCA days later on May 3, 2007, but did not change his answer. Later in June 2007, with time to reflect on his marijuana use and discuss it with his sponsor, he divulged the use to the investigator, but was not honest in telling her why he failed to

divulge it in the first place. He told the investigator that he forgot the drug use in December 2006 and the drug use in April 2007 was after he had submitted the SCA. This was not true. Both of his explanations provided to the investigator were inconsistent with his hearing testimony. If Applicant was truly committed to the tenants of AA and abstaining from future drug use he would have been consistently honest. I am unable to reconcile his commitment to abstention of illegal drug use with his explanation failing to divulge it on his SCA. Therefore I find he failed to mitigate the security concerns under the guidelines for Drug Involvement and Personal 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
Subparagraphs 1.a-1.b:	Against Applicant
Subparagraphs 1.c-1.d:	For Applicant
Paragraph, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-2.b:	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 grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge