



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



In the matter of:)
)
-----) ISCR Case No. 07-18453
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Stephanie C. Hess, Esquire, Department Counsel
For Applicant: *Pro Se*

March 31, 2009

Decision

HOWE, Philip S., Administrative Judge:

On February 1, 2007, Applicant submitted his Security Clearance Application (SF 86). On July 9 2008, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H (Drug Involvement) and E (Personal Conduct). 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 August 6, 2008, and requested his case be decided on the written record in lieu of a hearing.

On January 28, 2009, Department Counsel submitted the Department's written case. A complete copy of the file of relevant material (FORM) was provided to the

Applicant. He was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant received the file on February 3, 2009. Applicant filed a response to the FORM on March 1, 2009, within the 30 day time allowed that would have expired on March 3, 2009.

I received the case assignment on March 16, 2009. 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, dated July 9, 2008, Applicant admitted the factual allegations in all the subparagraphs of the SOR. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is 55 years old, widowed in April 2006 from his second wife, and has no children. He was divorced from his first wife. He has worked for defense contractors for the past 27 years. He has a degree in electrical engineering, and is about to finish a master's degree in software engineering. (Items 3-6)

Applicant had a security clearance from October 1972 until July 1976 and from October 1980 until November 1990. The Government again granted Applicant a security clearance from April 1995 until the present. (Item 4, Question 26)

Applicant used marijuana on a regular basis from September 1976 until early November 1989, and purchased it from 1976 to 1988. Applicant received an unfavorable determination in August 1990 by a Directorate for Industrial Security Clearance Review (DISCR) Administrative Judge in a non-hearing case at the Applicant's request, which decision was affirmed by the DISCR Appeal Board in November 1990, on this drug involvement issue. The Administrative Judge in 1990 also found Applicant experimented with amphetamines, and occasionally purchased and used hashish. Applicant's answer of July 9, 2008 to the SOR admitted the marijuana use and purchases in the 1980s, selling marijuana, cultivating marijuana plants, using amphetamines until August 1981, and purchasing and using hashish until June 1980, though no starting dates were given. (Items 3 and 6)

Applicant admitted using marijuana several times a week from February 2006 until May 2007. He admits using the marijuana to cope with his second wife's cancer, and her death in April 2006. Applicant admitted using marijuana while holding a security clearance in 1999. He also admitted using marijuana after submitting his SF-86 in February 2007 while holding a security clearance. (Items 3 and 4)

Applicant was also found in the 1990 decision to have falsified his security clearance application by failing to disclose his marijuana and other drug use during the 1976 to 1980 time period, and his drug use while holding a secret security clearance.

He admitted this allegation again in his Answer of July 2008. Applicant's answer claims he passed two drug tests in 1990 and two tests in 1993, with negative results. (Item 3)

Applicant answered his February 2007 SF-86 in "Section 24: Your Use of Illegal Drugs and Drug Activity" by admitting his illegal drug use in the past seven years, denying ever using illegal drugs while holding a security clearance, and denying illegally purchasing or receiving any narcotic, cannabis, or other illegal drug. In fact, Applicant used marijuana while holding his most recent security clearance, and he received marijuana between February 2006 and May 2007 from his brother-in-law. Applicant made an unsworn declaration in his interview on May 23, 2007 with a Government investigator that the marijuana "made him feel relaxed, hungry, tired and sleepy." Applicant also told the investigator that he never used "any other illegal drugs." He also claimed he never "bought, sold, or cultivated marijuana" which was contrary to the findings of fact in the 1990 DISCR decision that he cultivated and sold marijuana up to two years before the decision, and his use of other drugs did occur, though some years earlier. Applicant told the investigator in 2007 that he did not intend to use marijuana in the future because it was illegal. The 1990 decision cites Applicant's statement in May 1990 that he had resolved not to use marijuana in the future. (Items 4-6)

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, and 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

AG ¶ 24 expresses the security concern pertaining to illegal drugs:

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.

(a) 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;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying:

(a) any drug abuse (see above definition);

- (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.

Applicant admits to using marijuana as recently as May 2007. AG ¶ 25 (a) applies. He has illegally possessed marijuana at various times since 1976, even after receiving an unfavorable security clearance decision in 1990. AG ¶ 25 (c) applies. Applicant used marijuana while holding security clearances before 1990, as determined in the 1990 DISCR decision, and during his current security clearance from 1995 to the present. AG ¶ 25 (g) applies. Applicant declared in 1990 and again in 2007 that he would not use marijuana in the future. His repeated use after his earlier declaration makes his current statement unbelievable. He failed to “clearly and convincingly commit to discontinue drug use” based on his repeated conduct and assertions that marijuana helps him relax and cope with stress. AG ¶ 25 (h) applies.

AG ¶ 26 provides conditions that could mitigate security concerns arising under this guideline:

- (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.

Reviewing each of these mitigating conditions, it is clear that none apply. Applicant's recent use and extensive history of past use cast doubt on his current reliability, and particularly his trustworthiness and good judgment. After having an adverse decision made against him in 1990, and being a mature adult with a college degree, he disregarded the law and continued to use marijuana for his personal pleasure. He has not demonstrated over the past 18 years that he will not abuse drugs in the future. Particularly serious is Applicant's repeated use of marijuana while holding a security clearance. The record evidence does not support the application of the the last two mitigating conditions, AG ¶ 26 (c) and (d),

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.

Under AG ¶ 15, the following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; and,

(b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

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;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information:

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and,

(4) evidence of significant misuse of Government or other employer's time or resources.

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another

country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group;

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment; and,

(g) association with persons involved in criminal activity.

Applicant was found in 1990 to have falsified his security clearance application by not disclosing his marijuana and other illegal drug use. He failed again to disclose on his most recent security clearance application his use of marijuana while holding a security clearance. AG ¶ 16 (a) applies. His repeated use of marijuana over many years makes him vulnerable to exploitation, manipulation, or duress because his activities might affect his personal, professional, or community standing. AG ¶ 16 (e) applies.

AG ¶ 17 provides six conditions that could mitigate security concerns:

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

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully.

(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;

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

(f) the information was unsubstantiated or from a source of questionable reliability; and,

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

None of these mitigating conditions apply to Applicant's situation. He has not made prompt and good-faith efforts to correct the omissions on his security clearance application, the SF-86. There is no evidence he got bad advice from a lawyer or other authorized person to make his answers lack full disclosure. The repeated use of marijuana by an adult professional while holding a security clearance is not a minor offense. Nor has Applicant obtained counseling for his long-term marijuana use.

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.

AG ¶ 2(c) requires each case must be judged on its own merits. 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 is a mature 55-year old professional electrical engineer. He has a history of smoking marijuana since 1976. He used amphetamines and hashish in the 1980s. He purchased marijuana for his own use before 1990, and then again in 1999 and 2006 to 2007. He has not changed his behavior, nor acknowledged the wrongfulness of his conduct. He regards marijuana as relaxing and sleep-inducing. There is no rehabilitation shown, and it is likely his marijuana use will recur. Applicant has shown a consistent lack of judgment and refusal to seek professional help with his multi-year history of illegal drug use.

Furthermore, on two security clearance applications he falsified his answers by failing to deliberately disclose his continued use of marijuana while holding a security clearance both times. Applicant is not credible in anything he stated in his Answer

about marijuana and his usage in the future. Because of his mendacious answers on two Government security clearance applications as he sought security clearances in the 1990 and 2007, he is not to be believed on any of his assertions.

Overall, the record evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant did not mitigate the security concerns arising from his drug involvement and personal conduct. I also conclude the "whole person" concept against Applicant.

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 to 1.d:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a to 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.

PHILIP S. HOWE
Administrative Judge