



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 08-00414
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

July 31, 2008

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines H (Drug Involvement and E (Personal Conduct). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted his security clearance application on June 22, 2007. On April 15, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing 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 acknowledged receipt of the SOR on April 30, 2008; answered it on May 1, 2008; and requested a hearing before an administrative judge. DOHA received the request on May 5, 2008. Department Counsel was ready to proceed on May 16, 2008, and the case was assigned to me on May 20, 2008. DOHA issued a notice of hearing on June 2, 2008, scheduling the hearing for June 18, 2008. I convened the hearing as scheduled. Government Exhibits (GX) 1, 2, and 4 were admitted in evidence without objection. GX 3 was admitted in part. Applicant testified on his own behalf, presented the testimony of two witnesses, and submitted Applicant's Exhibits (AX) A through T, which were admitted without objection. The record closed on June 18, 2008. DOHA received the transcript (Tr.) on June 27, 2008.

Evidentiary Rulings

Department Counsel offered GX 5, a personal subject interview extracted from a report of investigation, without calling an authenticating witness as required by the Directive ¶ E3.1.20. I explained the authentication requirement to Applicant, and he declined to waive it (Tr. 39). GX 5 was not admitted. The same personal subject interview is included in the DOHA interrogatories offered as GX 3. I admitted GX 3 except for the part containing GX 5 (Tr. 41-42).

Applicant offered three recent decisions by DOHA administrative judges involving Guideline H (AX S, T, and U). Department Counsel did not object. I admitted the three decisions, recognizing that security clearance decisions are fact-specific and that decisions of other administrative judges are not binding precedent.

Findings of Fact

In his answer to the SOR, Applicant admitted all the allegations. His admissions in his answer to the SOR and at the hearing are incorporated in my findings of fact.

Applicant is a 31-year-old senior solutions architect for a federal contractor providing information technology services. He received a bachelor's degree in business administration in December 1999. He worked for a federal contractor from May 2000 to March 2005, and he has worked for his current employer since April 2005. He does not have a security clearance (Tr. 8).

The president and chief executive officer of Applicant's current employer has known him since he was hired and worked closely with him. He described Applicant as an employee whose technical expertise, knowledge of the government marketplace and ability to implement complex technical solutions has been invaluable. He states that Applicant has always demonstrated sound judgment, reliability, integrity, and "unquestionable" professionalism in dealing with customers and colleagues (AX A).

The company official who hired Applicant for his current position testified Applicant "far exceeded" his expectations (Tr. 60-61). He testified Applicant has never been unreliable, untrustworthy, exhibited questionable judgment, or violated any

company rules (Tr. 61). He testified Applicant did not sign any documents acknowledging that drug use was against company policy, because the company has no such policy (Tr. 61-62). Finally, he testified he was unaware of Applicant's use of illegal drugs until three or four weeks before the hearing (Tr. 63).

One of Applicant's co-workers testified that Applicant is a "highly valued member" of their team. He testified Applicant exhibits initiative and is very reliable (Tr. 71). Applicant disclosed his previous drug use to this witness before the hearing. The witness was unaware of any company policy prohibiting off-duty drug use (Tr. 73-75).

Applicant's performance appraisals from his present and former employers uniformly praise him for his technical expertise, communication skills, and concern for customers (AX E, F, and K). The only negative comment in his appraisals states that he voluntarily takes on too much work (AX E). He has received numerous pay raises and bonuses (AX G, H, I, and J). He has been trained and certified in several additional technical skills while working for his current employer (AX M, N, and O).

Applicant executed a Questionnaire for Public Trust Position (SF 85P) on October 19, 2000, in which he disclosed using marijuana from October 1995 to April 1999 (GX 2). Applicant testified he believed the application was submitted to enable him to work on a specific government contract, but that he did not have access to classified or sensitive data while working on that contract (Tr. 78).

In his security clearance application dated June 22, 2007, Applicant disclosed using ecstasy (MDMA) about six times between January 2002 and January 2007, using cocaine about 15 times between December 2003 and December 2006, using marijuana about 75 times between September 1993 and October 2006, using pain killers without a prescription about four times between January 2002 and January 2006, using hashish once in March 1998, using mushrooms once in September 1996, and using lysergic acid diethylamide (LSD) once in December 1995. He corroborated his disclosures of drug use during an interview by a security investigator on October 31, 2007 (GX 4), and he admitted them in his answer to the SOR.

Applicant's one-time uses of hashish, mushrooms, and LSD were in college. After college, Applicant used ecstasy about once a year, usually with college friends at the beach. He always obtained it from his former college roommate, and he used it with his former roommate and his roommate's wife (GX 4 at 3). He used cocaine about five times a year, usually at house parties with his former roommate and his roommate's wife. The cocaine was supplied by his former roommate (GX 4 at 4). Applicant last used ecstasy and cocaine in December 2006, on New Year's Eve. He also used marijuana at parties, obtained either from his former roommate or "friends of friends." His last use of marijuana was in October 2006 (GX 4 at 4).

Applicant did not use pain killers recreationally, but for pain relief. On one occasion his father gave him a prescription pain killer to relieve the pain of having wisdom teeth extracted.

Applicant testified he is very serious about his career, his health, his girlfriend, and his family. He testified he no longer associates with drug users. However, he admitted on cross-examination that he and his former college roommate are still friends, explaining that his former roommate no longer uses illegal drugs (Tr. 90). He testified his girlfriend was present on a few occasions when he used drugs, but that she does not use drugs (Tr. 89-90). In early August 2008, Applicant and his girlfriend are moving to another city, which will further separate him from his past drug use (Tr. 82-83).

Applicant and his girlfriend have dated for about five and a half years and lived together for the last two years. His girlfriend submitted a statement expressing her belief that Applicant has matured and put his drug use behind him. She does not use drugs and does not desire to associate with drug users. (AX B).

Applicant's personal physician for the past three years describes him as reliable, trustworthy and of sound judgment. He is aware of Applicant's history of drug use and believes he does not need any treatment or rehabilitation for his past drug use (AX C).

Applicant voluntarily underwent urinalysis testing for drugs in June 2008, twelve days before the hearing. All tests were negative (AX Q). At the hearing, he submitted a signed and notarized statement of intent to never use illegal drugs again, stating that he understands that any use of illegal drugs will result in immediate revocation of any security clearance (AX R).

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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.

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

The SOR alleges multiple instances of illegal drug use between December 1995 and January 2007. The concern under this guideline is as follows: “Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.” AG ¶ 24. This guideline encompasses use or misuse of “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). AG ¶ 24(a)(1). 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 ¶ 24(b).

Disqualifying conditions under this guideline include “any drug abuse,” and “illegal drug possession, including cultivation, processing, manufacture, purchase, sale,

or distribution; or possession of drug paraphernalia.” AG ¶ 25(a) and (c). The evidence in this case raises these two disqualifying conditions.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 25(a) and (c), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns raised by drug involvement may be mitigated by showing that “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.” AG ¶ 26(a). The first prong of ¶ 26(a) (“happened so long ago”) focuses on the recency of drug involvement. There are no “bright line” rules for determining when conduct is “recent.” The determination must be based on a careful evaluation of the totality of the evidence. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” *Id.*

Applicant’s last illegal drug use was about 17 months before the hearing, a significant period of time. However, this 17-month period of abstinence must be considered in the context of 13 years of illegal drug use. Applicant and his long-time girlfriend, who disapproves of drug use, began living together about two years ago. Applicant has become more concerned about his health, apparently recognizing the deleterious effects of drug abuse. He has rapidly advanced in pay and responsibility at work. His family doctor believes he requires no treatment or rehabilitation. His focus has shifted from parties with old college friends to his girlfriend, his job, and his future. He is highly respected at work, and his security clearance application is strongly supported by senior officials as well as colleagues at his company. I conclude the first prong of AG ¶ 26(a) (“so long ago”) is established.

AG ¶ 26(a) is not fully established, however, unless the conduct in question does not cast doubt on Applicant’s current reliability, trustworthiness, or good judgment. One factor demonstrating his current reliability is the absolute candor he has displayed throughout the security clearance process. His full disclosure of his drug involvement in his security clearance application was the only evidence of drug abuse. He was candid, open, sincere, and credible at the hearing. He told his supervisors and peers about his drug abuse before the hearing. I conclude AG ¶ 26(a) is established.

Security concerns arising from drug involvement also may be mitigated by evidence of “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; (4) a

signed statement of intent with automatic revocation of clearance for any violation.” AG ¶ 26(b)(1)-(4).

In October 2007, Applicant told a security investigator he was “clean” and never intended to use illegal drugs again. He repeated the same promise at the hearing. He testified he no longer associates with drug users, but he admitted maintaining his friendship with his primary supplier of cocaine and ecstasy in their post-college years, explaining that his friend no longer uses drugs. I am not satisfied that AG ¶ 26(b)(1) (“disassociation from drug-using associates”) is established, but I am satisfied AG ¶ 26(b)(3) (“appropriate period of abstinence”) and AG ¶ 26(b)(4) (“signed statement of intent”) are established. Applicant used the phrase “immediate revocation” instead of “automatic revocation,” but his intent clearly was to satisfy AG ¶ 26(b)(4). In light of his company’s lax drug policies, it is unlikely that Applicant’s supervisors will vigorously monitor his compliance with the statement of intent, but the statement nevertheless demonstrates the sincerity of his intention to refrain from further drug abuse.

Security concerns also may be mitigated by “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.” AG ¶ 26(d). This mitigating condition is not established because Applicant has not received any drug treatment. I have considered, however, the opinion of his friend and family doctor that he does not need treatment.

Guideline E, Personal Conduct

The SOR alleges that Applicant illegally used drugs after submitting a security clearance application on October 19, 2000. The evidence indicates that Applicant applied for a trustworthiness determination, not a security clearance. Nevertheless, the government produced substantial evidence that he illegal used drugs while his application was pending and while he was working on a government contract. The relevant concern under this guideline is: “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.” AG ¶ 15.

Several disqualifying conditions are relevant to this case. A disqualifying condition may be raised by “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.” AG ¶ 16(c). A disqualifying condition also may be raised by “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.” AG ¶ 16(d). This disqualifying condition includes but is not limited to “a pattern of dishonesty or rule violations.” AG ¶ 16(d)(4). Applicant’s long history of drug abuse is sufficient to indicate questionable judgment, untrustworthiness, unreliability, and unwillingness to comply with rules and regulations. I recognize that the language of AG ¶ 16(d) suggests that it is inapplicable to conduct explicitly covered under another guideline, but the Appeal Board has construed it more broadly. See ISCR Case No. 06-20964, 2008 WL 2002589 at *5 (App. Bd. Apr. 10, 2008). Thus I conclude AG ¶ 16(c) and (d) are raised.

A disqualifying condition may be raised by “personal conduct or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person’s personal, professional, or community standing.” AG ¶ 16(e). Although Applicant’s colleagues, his girlfriend, his current supervisors, and some of his peers are aware of his history of drug abuse, there is no indication that his company’s customers, government officials supervising the contracts with his company, and the appropriate law enforcement officials are aware of it. Thus, I conclude AG ¶ 16(e) is raised.

Finally, a disqualifying condition may be raised by “association with persons involved in criminal activity.” AG ¶ 16(g). Applicant was aware that he and his drug-using friends were violating the law. Thus AG ¶ 16(g) is raised.

Since the government produced substantial evidence raising AG ¶¶ 16(c), (d), (e), and (g), the burden shifted to Applicant to rebut, explain, extenuate, or mitigate the facts. Security concerns arising from personal conduct may be mitigated if “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(c). Applicant’s drug abuse was not minor, infrequent, or committed under unique circumstances. For the reasons set out above under Guideline H, however, I conclude that his conduct is mitigated by the passage of a significant drug-free time period, and it does not cast doubt on his current reliability, trustworthiness, or good judgment. I conclude AG ¶ 17(c) is established.

Security concerns under this guideline also may be mitigated if “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.” AG ¶ 17(d). Applicant has acknowledged his illegal behavior and abstained from illegal drug use for 17 months. He claims to have disassociated himself from his former drug-using companions, but he maintains his friendship with his former college roommate who supplied him with illegal drugs in their post-college days. However, he has shifted his focus from partying with old college friends to his long-time girlfriend and his job. His most recent job appraisal, critiquing him for taking on too

much work, demonstrates his change of focus. He soon will move to another geographical location, further separating himself from his former lifestyle. I conclude AG ¶ 17(d) is established.

Finally, security concerns under this guideline may be mitigated if “(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.” AG ¶ 17(e). Applicant fully disclosed his previous drug abuse on his security clearance application, admitted it to a security investigator, and told his supervisors about it. I conclude AG ¶ 17(e) is established.

Whole Person Concept

Under the whole person concept, an 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. 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) 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 common sense judgment based upon careful consideration of the guidelines and the whole person concept. Some of the factors in AG ¶ 2(a) were addressed above, but some warrant additional comment.

Applicant was very candid, sincere, and credible at the hearing. He was very well prepared for the hearing, reflecting his appreciation for the seriousness of his misconduct. His deepening commitment to his long-time girlfriend, who disapproves of drug abuse, appears to be a major factor in his change of attitude and lifestyle. He also appears to have finally realized the detrimental health effects of drug abuse. It took him a long time to outgrow his college days, but he appears to have turned the corner and refocused his life.

After weighing the disqualifying and mitigating conditions under Guidelines H and E and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on his drug involvement and personal conduct. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25:

Paragraph 1, Guideline H (Drug Involvement):	FOR APPLICANT
Subparagraphs 1.a-1.g;	For Applicant
Paragraph 2, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge