



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



In the matter of:)
)
) ISCR Case No. 08-01583
)
)
Applicant for Security Clearance)

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: Alfred S. Donau III, Esq.
Michael B. Grayson, Esq.

September 18, 2009

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated Personal Conduct concerns, but he has not mitigated Drug Involvement security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On January 30, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines H and E, Drug Involvement and Personal Conduct. The action was taken under Executive Order (EO) 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 (DoD) for SORs issued after September 1, 2006.

Applicant answered the SOR on February 27, 2009, and requested a hearing before an administrative judge. The case was assigned to me on July 2, 2009. DOHA issued a notice of hearing on July 16, 2009, scheduling the hearing for August 6, 2009. The hearing was convened as scheduled. The Government offered Exhibits (GE) 1 through 5, which were received without objection. Applicant testified on his own behalf, called three witnesses, and submitted Exhibits (AE) A through G, which were received without objection. The record was held open for Applicant to submit additional information. Applicant submitted a document, which was marked AE H, and admitted without objection. Department Counsel's memorandum is marked Hearing Exhibit (HE) I. DOHA received the transcript of the hearing (Tr.) on August 13, 2009.

Findings of Fact

Applicant is a 55-year-old engineer employed by a defense contractor. He has worked for his current employer since 1996. He worked for the same company from 1980 to 1992, when the company had a different name. He held a security clearance from about 1980 through 1992. He worked for a different company from 1992 through 1996. That company did not require him to hold a clearance. When he returned to his current employer in 1996, he reapplied for a security clearance. It was granted, and he continues to hold a Secret clearance. He has a master's degree in systems engineering. He has been married since 1979, and has a 12-year-old child.¹

Applicant started smoking marijuana in college, and then did not smoke marijuana for an extended period. He smoked marijuana again during the period between about 1992 and 1993, when he did not have a clearance. He stated that he did not smoke marijuana between 1993 and May 2005, when he started smoking marijuana again. He estimated that he smoked marijuana on about 25 to 30 occasions between May 2005 and April 2006. He testified that he smoked marijuana on the weekends, "basically every weekend or two during a month." Applicant had a security clearance while he was using marijuana in 2005 and 2006. He was aware of his company's anti-drug policy, as well as the DoD's position against illegal drug use. He purchased the marijuana he used from a man he met at a bar.²

Applicant was driving to work on May 1, 2006. He was stopped by the facility's security officers for a random vehicle inspection as he entered the facility. The officers found a small amount of marijuana inside a wooden case. Applicant was arrested for unlawful possession of marijuana and possession of drug paraphernalia. He pled guilty to possession of drug paraphernalia. He entered a diversion program. He completed the program, and the charges were dismissed.³

¹ Tr. at 23-27, 44-45, 67-68; GE 1, 2.

² Tr. at 33-36, 44-47, 57, 62-63, 68; Applicant's response to SOR; GE 1-5; AE A.

³ Tr. at 29-32, 57-59; Applicant's response to SOR; GE 1-4; AE D.

When Applicant's employer was informed about the incident at the gate, the company directed him to take a urinalysis drug test on May 1, 2006. He tested positive for the metabolites of tetrahydrocannabinol (THC), the active ingredient in marijuana. His company suspended him without pay for 30 days. He was also denied salary raises and bonuses for two years.⁴

Applicant signed a "Last Chance Agreement" with his employer on June 5, 2006. Under the terms of the agreement, Applicant agreed to participate in the company's counseling/rehabilitation program. He agreed to submit to unscheduled drug and/or alcohol testing at any time up to 24 months from the date of the agreement. He also agreed that his employment was conditioned on him remaining drug-free.⁵

Applicant attended an outpatient chemical dependency program three days each week from about May 3, 2006, through June 21, 2006. He successfully completed the program. The discharge summary, signed by a licensed independent substance abuse counselor (LISAC), listed a diagnostic impression of cannabis dependence. The prognosis was good. The LISAC wrote in a letter dated June 16, 2006, that Applicant had been quite cooperative in group and helpful to other group members. She wrote that his prognosis was favorable. He completed six months of aftercare. He also attended Narcotics Anonymous (NA) meetings. He has taken a number of drug tests after the incident. Other than the original positive test taken on May 1, 2006, he has never tested positive.⁶

Applicant's company detailed his arrest in an adverse information report submitted to the Defense Security Service (DSS). Applicant discussed his arrest and marijuana use during an interview with an Office of Personnel Management (OPM) investigator on June 21, 2007. He told the investigator that he smoked marijuana on an estimated basis of twice weekly to twice monthly from May 2005 through April 2006.⁷

Applicant testified that he will not use illegal drugs again. He has dissociated himself from any drug-using associates and contacts. His wife is a noted scientist. She is vehemently opposed to illegal drug use, and putting foreign substances and toxins in the body. Applicant signed an affidavit stating that if clear and convincing evidence of future illegal drug use is established, he would voluntarily and without further process give up his security clearance.⁸

Applicant submitted Questionnaires for National Security Positions (SF 86) on April 24, 2007, and again on August 8, 2008. The answers on both SF 86s were

⁴ Tr. at 29, 72; Applicant's response to SOR; GE 4; AE G.

⁵ Tr. at 31-33, 36-37, 63; AE F.

⁶ Tr. at 33-34, 65-67; Applicant's response to SOR; GE 5; AE B, E.

⁷ GE 3, 4.

⁸ Tr. at 25-26, 35, 43, 53; AE H.

consistent. He listed his arrest for possession of paraphernalia in May 2006, on both SF 86s. He also listed his marijuana use between 2005 and 2006. He listed that he had a security clearance since 1996. Question 24b asked:

Have you ever illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official; while possessing a security clearance; or while in a position directly and immediately affecting the public safety?⁹

Applicant answered “No” on both SF 86s. He misread the question. He provided the requested information elsewhere on both questionnaires.¹⁰ There was no intent to falsify that question on the SF 86s.

Three witnesses testified on Applicant’s behalf. His job performance has been outstanding. They are completely aware of Applicant’s drug use. They do not question his reliability, honesty, trustworthiness, or good judgment. They recommend that he retain his security clearance. Applicant also submitted numerous awards and certificates attesting to his outstanding job performance.¹¹

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 to be used 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, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense 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

⁹ GE 1, 2.

¹⁰ Tr. at 39-42; Applicant’s response to SOR; GE 1, 2

¹¹ Tr. at 71-81; AE C.

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 the 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 adverse 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

The security concern relating to the guideline for Drug Involvement is set out in AG ¶ 24:

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.

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

The guideline notes several conditions that could raise security concerns under AG ¶ 25. Six are potentially applicable in this case:

- (a) any drug abuse;
- (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; and

(g) any illegal drug use after being granted a security clearance.

Applicant possessed and used marijuana while holding a security clearance. He tested positive for the metabolites of THC, the active ingredient in marijuana. AG ¶¶ 25(a), 25(b), 25(c), and 25(g) are applicable as disqualifying conditions.

There is no evidence that Applicant received a diagnosis by a duly qualified medical professional of drug abuse or drug dependence. AG ¶ 25(d) is not applicable. The discharge summary from Applicant's outpatient chemical dependency program, signed by a licensed independent substance abuse counselor, listed a diagnostic impression of cannabis dependence. That is sufficient to raise AG ¶ 25(e) for consideration as a disqualifying condition.

SOR ¶ 1.b alleges marijuana use that is also alleged in SOR ¶¶ 1.e and 1.f. SOR ¶ 1.b is concluded for Applicant.

Three Drug Involvement Mitigating Conditions under AG ¶ 26 are potentially applicable:

(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;

(4) a signed statement of intent with automatic revocation of clearance for any violation; 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.

Applicant started smoking marijuana while in college. He quit using marijuana until he left his job in 1992. His new job did not require a security clearance. He smoked marijuana on several occasions in about 1992 and 1993. Applicant would have been about 38 to 39 years old at the time. He quit again until 2005, when he was about 50 years old. He smoked marijuana regularly while holding a security clearance, until he was caught with marijuana in his car on May 1, 2006, while entering his company's facility. After he was caught, Applicant completed a drug treatment program and his aftercare requirements. The licensed independent substance abuse counselor gave him a favorable prognosis. He has dissociated himself from his drug-using associates and contacts. There is no evidence of any drug abuse since May 2006. He signed what amounts to a statement of intent not to abuse any drugs in the future, with automatic revocation of clearance for any violation. AG ¶¶ 26(b) and 26(d) are applicable.

There is no bright-line rule as to whether conduct is recent. Applicant has not used illegal drugs in more than three years. However, his drug use was very extensive; occurred over a long period of time; and was interrupted by other long periods of abstinence followed by additional drug use. Applicant returned to illegal drug use when he was 50 years old and held a security clearance. He knew it was illegal, against his company's anti-drug policy, and counter to the DoD's position against illegal drug use. He also did it knowing that his wife was vehemently opposed to illegal drug use. I am unable to make a determination that illegal drug use is completely in his past. Applicant's drug use continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 26(a) is not applicable.

In sum, I conclude that security concerns are still present despite the presence of some mitigation.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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. The following mitigating condition is potentially applicable:

(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.

Applicant incorrectly answered the same question on two Questionnaires for National Security Positions. However, as discussed above, the requested information was provided elsewhere on the questionnaires. There was no intent to deceive or mislead. AG ¶ 16(a) is not applicable. SOR ¶¶ 2.a and 2.b are concluded for Applicant.

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 relevant 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. I have incorporated my comments under Guidelines H and E in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment. Applicant is an intelligent, mature, highly-regarded engineer for a defense contractor. That makes his choice to return to illegal drug use at the age of 50, while holding a security clearance, all the more disturbing. His drug use was halted when he was arrested with drugs in his possession, while entering his company's facility in May 2006. Since then, he has checked all the boxes to attempt to establish that he is drug-free and trustworthy. However, he has gone long periods in the past without abusing illegal drugs, and then returned to drug use. I am not convinced that he will not return again to illegal drug use. Moreover, even if Applicant never uses illegal drugs again, his illegal drug use while holding a security clearance, knowing it was illegal, counter to his company's and DoD's policy, and against his wife's wishes, raises serious doubts about his judgment, reliability, and trustworthiness. Three plus years of abstinence does not mitigate his numerous incidents of extremely poor judgment, disregard for the law, and violation of the trust placed in him while holding a security clearance.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated Personal Conduct concerns, but he has not mitigated Drug Involvement security concerns.

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
Subparagraph1.a:	Against Applicant
Subparagraph1.b:	For Applicant
Subparagraph1.c:	Against Applicant
Subparagraph1.d:	For Applicant
Subparagraph1.e:	Against Applicant
Subparagraph1.f:	Against Applicant
Subparagraph1.g:	Against Applicant
Paragraph 2, Guideline E:	For APPLICANT
Subparagraphs 2.a-2.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge