



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



In the matter of:)
)
) ISCR Case No. 08-01751
)
)
Applicant for Security Clearance)

Appearances

For Government: Ray T. Blank, Jr., Esq., Department Counsel
For Applicant: *Pro Se*

June 23, 2008

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the security concerns raised by his drug involvement and criminal conduct. Eligibility for access to classified information is denied.

On February 20, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guidelines H, Drug Involvement and Guideline J, Criminal 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 on March 17, 2008, and requested a hearing before an Administrative Judge. The case was assigned to me on April 29, 2008. DOHA issued a notice of hearing on May 20, 2008, and the hearing was convened as scheduled on June 4, 2008. The Government offered Exhibit (GE) 1, which was received without

objection. Applicant testified on his own behalf, but did not submit documentary evidence. DOHA received the transcript of the hearing (Tr.) on June 16, 2008.

Procedural Ruling

Notice

I advised Applicant of his right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. Applicant affirmatively waived his right to 15 days notice.

Findings of Fact

Applicant is a 24-year-old employee of a defense contractor. He has a Bachelor of Science degree awarded in June 2007. He has been with his current employer since July 2007. He is single with no children.¹

Applicant first smoked marijuana in about 2000, when he was in high school. He continued to smoke marijuana on an occasional basis until about 2002, when his marijuana use increased to about once or twice a month. He also experimented with methylenedioxymethamphetamine (MDMA), commonly known as “ecstasy,” on about two occasions in 2001, and he used psilocybin mushrooms about two times in 2002 to 2003.²

Applicant decided during his last semester of college that he would stop taking illegal drugs. He has not used any illegal drugs since March 2007. He stated unequivocally that he will never use illegal drugs again. His employment is in a different city than where he went to college. His current friends and associates do not use drugs.³

Applicant submitted a Questionnaire for National Security Positions (SF 86), certified as true on October 4, 2007. He completely listed his illegal drug use in the questionnaire. He also fully discussed his drug use during his background interview several months later. His parents are also aware of his past drug use. He has not been through any type of drug rehabilitation program or received drug counselling. He is willing to sign a statement of intent with automatic revocation of clearance for any violation.⁴

¹ Tr. at 29, 32; GE 1.

² Tr. at 24-28; Applicant’s response to SOR; GE 1.

³ Tr. at 18-21, 30.

⁴ Tr. at 15-16, 21, 29, 40; GE 1.

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 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 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 *a/so* 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. Two are potentially applicable in this case:

- (a) any drug abuse; and
- (b) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

Applicant's drug possession⁵ and use are sufficient to raise the above potentially disqualifying conditions.

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

⁵ Drugs must be possessed in order to be used.

Applicant admitted using illegal drugs up until March 2007. His drug use was too recent for him to receive the benefit of AG ¶ 26(a). He made a conscious decision to stop using illegal drugs in March 2007. He graduated college and obtained a good job with an established company. He no longer associates with people who use drugs. He is willing to sign a statement of intent with automatic revocation of clearance for any violation. AG ¶ 26(b) is applicable.

Guideline J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant's illegal drug use constituted criminal activity. This raises both of the above disqualifying conditions.

Four Criminal Conduct Mitigating Conditions under AG ¶¶ 32(a)-(d) are potentially applicable:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) evidence that the person did not commit the offense; and
- (d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Applicant last used illegal drugs in March 2007. That is too recent to apply AG ¶ 32(a). There is no evidence that Applicant was unduly pressured or coerced into using

drugs. AG ¶ 32(b) is not applicable. Applicant stopped taking drugs, graduated college, and obtained a good job. That is evidence of rehabilitation. AG ¶ 32(d) has been raised as a factor for consideration.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall 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 is 24 years old. He presented himself as someone who has matured and moved past the experimentations of youth. He has been completely forthright about his drug use throughout the process. I found him to be a truthful, credible witness. However, he chose to break the law every time he used illegal drugs. That causes a concern. While he is clearly headed in the right direction, he simply does not have a sufficient track record of drug-free, law-abiding living at this time to justify the granting of 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 has not mitigated the security concerns arising from his drug use and criminal 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
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Conclusion

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

Edward W. Loughran
Administrative Judge