



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 08-07711
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Gregg Cervi, Esquire, Department Counsel
For Applicant: *Pro Se*

August 18, 2009

Decision

LYNCH, Noreen, Administrative Judge:

Applicant submitted his most recent Security Clearance Application (SF 86) on March 26, 2008. On December 2, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR)¹ detailing the security concerns under Guidelines H and E for Applicant. 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, answered the allegations, and requested a decision on the record. When the government amended the SOR on January 22, 2009, Applicant requested a hearing before an administrative judge. I

The government amended the SOR to incorporate additional allegations after Applicant answered the original SOR.

received the case assignment on June 2, 2009. DOHA issued a notice of hearing on June 11, 2009, and I convened the hearing as scheduled on July 9, 2009. The Government offered Exhibits (GE 1-6), which were received without objection. Applicant testified on his own behalf and presented Exhibits (AE A-D) which were admitted into the record without objection. DOHA received the transcript on July 17, 2009. Based upon a review of the record, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural and Evidentiary Rulings

Department Counsel referenced the amended SOR at the hearing. The amended SOR added an allegation under Guideline H: ¶ 1.e “You used both LSD and cocaine approximately 20 times each. You used these drugs up to approximately 1998.” The SOR allegation ¶ 1.a was amended to add at the end of the allegation, “and your LSD and cocaine use as set forth in subparagraph ¶ 1.e above.”² Finally, the amended SOR added ¶ 2.c stating, “You falsified material facts on a Security Clearance Application, executed by you on August 20, 2004, in response to question 27. Your Use of Illegal Drugs. You answered “yes” and disclosed marijuana use 10 times from 1997 to 2000. You deliberately failed to disclose your marijuana use up to the execution of the application as set forth in subparagraph ¶ 1.a, and you deliberately failed to disclose your LSD and cocaine use as set forth in subparagraph ¶1.e above.

Findings of Fact

In his Answer to the original SOR, Applicant admitted the factual allegations in ¶¶ 1.a through 1.d of the SOR. He also admitted the allegations in ¶ 2.a through 2.b. In his Answer to the amended SOR, Applicant denied the three new allegations.

Applicant is a 36-year-old employee of a defense contractor. He graduated from high school in 1992 and obtained an undergraduate degree in 2004 (Tr. 25). He is single. Applicant has an eight-year-old son from a relationship for whom he has joint custody (Tr. 61). He has worked in a professional capacity in the electrical engineering field for his entire career. He has been with his current employer since 2002 (Tr. 55).

Applicant used marijuana before attending high school. He estimates that his first use was in the seventh grade in 1987 (Tr. 74). Applicant considered himself a heavy user during high school and early college years until 1993 or 1994 (Tr. 75). He would receive the marijuana from his friends (Tr. 80). On December 27, 1994, Applicant was arrested and charged with possession of marijuana which he had in his car. On September 28, 1995, the case was dismissed (deferred adjudication). Applicant was on probation for one year (GE 5).

When the SOR was amended, the new allegations were framed in that order. This accounts for the seeming illogical reference to 1.e above.

From 1995 until 2008, Applicant admits using marijuana perhaps 300 - 500 times. He could not give an accurate number of times (Tr. 68). He acknowledged that he was a "regular user" (Tr. 69). He admitted that he used marijuana while his son was at home (Tr. 82). Applicant's response to the SOR is inconsistent concerning the use of marijuana. When he answered the SOR, Applicant included information about use of cocaine and LSD. He estimated that he used those drugs about 20 times each and the last time was approximately ten years ago (Answer, dated December 22, 2008).

Applicant completed his first security clearance application in July 2002. He responded "no" to question 27 concerning use of illegal drugs and drug activity. However, he disclosed an arrest for marijuana that occurred in 1995 in response to question 26. He admitted that he falsified material facts on the 2002 SF 86 in his answer to the original SOR. He wrote that there was no excuse for either the falsification of the SF 86 or his use of marijuana while holding a security clearance. He elaborated in that answer that he did not list the drug use out of ignorance and fear. Applicant listed his illegal drug use for another employment application and he did not get the job. He decided that he wanted this position and would list his marijuana use on the security clearance application after he won the job. He admitted that he did not list the other drugs (LSD or cocaine) or the frequency out of fear (Answer, dated December 22, 2008).

Applicant completed another security clearance application in 2004. In response to question 27 concerning use of illegal drugs and drug activity, he responded "yes" and disclosed use of marijuana. He listed the dates of use from January 1997 until August 2000 (GE) 2. He responded "no" to question 28 concerning the illegal use of drugs while holding a security clearance (Tr. 82).

Applicant held a top secret clearance in 2004 (Tr. 56). He also held access to Sensitive Compartmented Information (SCI) for another agency until 2009. During that time, Applicant admitted he used marijuana.

On February 25, 2008, Applicant failed a random drug test while working for his employer. He tested positive for marijuana metabolites (GE 6). He held a security clearance at that time. Applicant was aware of the drug policy for the company. His employer referred him to the Employee Assistance Program (EAP) as a condition of employment after the positive test result in 2008. Applicant was referred to a 12-week psycho-educational series based on the belief that his marijuana use was sporadic and recreational (AE A). Applicant did not report any other substance use during the program. He completed the series in July 2008. During that time he submitted to unlimited random drug and alcohol screening. Applicant's expressed intent was to replace marijuana with meditation (AE A).

In Applicant's December 2008, answer to the original SOR, he explained that he also used LSD and cocaine during high school and/or college. He estimated the amount of use as much less than the marijuana use. He believed that perhaps he used each

drug approximately 20 times. He could not remember the exact dates. He concluded in that answer that the “majority of the times I used these drugs were prior to 1995.”

Applicant summarized in that original answer to the SOR that he was an honest person by nature but when he filled out the forms he felt “really stigmatized” and did not know that he should just list everything and let the decision be made. He referred to his expertise in the workplace. He also emphasized that he did not need rehabilitation and was not referred for further treatment after the EAP program. Applicant cites his involvement with his son as evidence of reliability and trustworthiness. He would do anything that is now required to retain a security clearance (Answer, dated December 22, 2008).

In that same answer, Applicant wrote that if you knew him you would not question his character or abilities. He knew that his employer has confidence in his work. He stressed that the company retained him despite the 2008 positive test result. Applicant expressed his love of his work. He also noted his community involvement with his son’s sports. He understood that the drug use was wrong. He explained that he was lonely after his relationship ended and if he used marijuana he could put things in perspective (Answer, dated December 22, 2008).

In May 2008, Applicant was interviewed by the Office of Personnel Management (OPM) investigator (GE 4). He admitted a history of marijuana use during his employment for the research institute since 2002. He told the investigator that he agreed to a policy of random drug testing as a condition for employment. However, he continued to use marijuana for relaxation during the more than six years of employment. He used a pipe when he smoked. He acknowledged purchasing the marijuana from an associate. He elaborated that when he spoke to the psychologist with the EAP program, he reported no problem with illegal drug use and that he only used marijuana to relax. He stated he was never addicted to marijuana. The admission concerning the number and frequency of use is different than the admission in Applicant’s answer to the SOR and at the hearing (Tr. 42).

In response to the amended SOR, Applicant denied that he used both LSD and cocaine approximately 20 times until approximately 1998. He also denied that he falsified his 2004 security clearance application. He explained that it would be impossible to remember the exact dates he used cocaine or LSD. He stated that he denied a falsification on the 2004 application because the use of cocaine and LSD was out of the seven-year time period (Tr. 44).

At the hearing, Applicant explained that he never told his employer that he regularly used marijuana prior to the positive test result in 2008 (Tr. 108). He also admitted that he used cocaine and LSD (Tr. 109). He believed that he used cocaine in high school but was not sure if that was the last time (Tr. 110). He did not recall how many times he used cocaine. He used LSD in high school and believed the last time was in 1996 (Tr. 113). He was adamant that this use was not relevant to his honesty or trustworthiness. He also was firm that he was not trying to hide anything. He stated that

breaking the law does not necessarily reflect on a person's trustworthiness (Tr. 148). In response to a question from Department Counsel, Applicant noted that he did not tell the psychologist about the cocaine and LSD use because he did not ask. He believed he told someone else in the program about the cocaine use (Tr. 114).

Applicant's employer recommended that Applicant retain his security clearance. He applauded his dedication, ability and technical accomplishments (AE B). His supervisor since 2004 describes Applicant as an exceptional worker who consistently completes projects quickly and accurately. His work is accurate, excellent and comprehensive (AE C). Applicant is a good engineer. He has a calm demeanor and his focus on work is consistent with one who manages his time well (AE D).

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 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 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.

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

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.

The guideline notes several conditions that could raise security concerns. Under AG & 25(a), Any drug abuse[@] is potentially disqualifying. Under AG ¶ 25(b) “testing positive for illegal drug use” is disqualifying. Under AG ¶ 25(c) “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia” is also potentially disqualifying. Applicant admitted his use of marijuana in varying amounts and frequency spanning a period from about 1995 until February 2008. In 1995, he was charged with possession of marijuana. He also admitted using cocaine and LSD approximately 20 times each. He failed a random drug test in February 2008. These disqualifying conditions apply in this case.

Under AG ¶ 25(g) “any illegal drug use after being granted a security clearance” is a disqualifying condition. Applicant used marijuana while holding a security clearance. He used marijuana during the entire time that he was employed from 2002 until 2008. His use of marijuana while holding a security clearance was not an isolated event but a pattern of behavior. He tested positive for marijuana in February 2008.

The guideline also includes examples of conditions that could mitigate security concerns arising from drug involvement. Under AG ¶ 26(a), the disqualifying condition may be mitigated where Athe behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment.[@] Applicant-s pattern of illegal drug use (marijuana or cocaine) continued from a young age to adult

maturity. He was a mature adult working for a company and violating the drug policy when he continued to use illegal drugs. He did not stop using marijuana prior to the February 2008 positive test. This shows poor judgment and lack of trustworthiness given the fact that he had a security clearance during that time. I do not find that this mitigating condition applies.

Under AG ¶ 26(b), it may be mitigating where there is Aa 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.” This is not a factor for consideration in this case for the reasons discussed above.

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. Under AG ¶ 16(a) a disqualifying condition exists when there is “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 eligibility or trustworthiness, or award fiduciary responsibilities.” Under AG ¶ 16(b) a disqualifying condition exists when “deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.” Applicant executed several security clearance applications from 2002 until 2008. He admitted that he falsified information concerning his illegal drug use out of fear and ignorance. He wanted to gain a position and feared that he would not if he was truthful about his drug use. He knew that he used LSD and cocaine and did not list either drug on his 2004 security clearance application. Applicant failed to disclose illegal drug use while holding a security clearance for many years. His behavior and personal conduct are disqualifying as they raise questions about his judgment, reliability, and willingness to comply with the law.

After considering the mitigating conditions under AG ¶ 17, I find that none of them apply in this case.

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 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 and conclude that they are not sufficient to overcome the government's case. Applicant is a mature, well-educated professional. He served in a professional capacity for his entire career. He has held secret and top secret security clearances. He used marijuana during his time with his current employer. He never felt there was a problem. He failed a drug test at work and did not disclose the full extent of his drug use. He attended the EAP program and believes that since he was allowed to remain with his employer, despite the drug test in 2008, that he has proved his reliability and trustworthiness.

Applicant completed three security clearance applications during his years of contract service. He deliberately omitted information concerning his illegal drug use on more than one occasion. He made no attempt to correct his falsifications prior to being confronted. He does not equate his protracted marijuana use, despite his employer's drug policy, with untrustworthiness, dishonesty or poor judgment.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility, judgment, and suitability for a security clearance. For all the reasons discussed above, I conclude Applicant has not mitigated the security concerns arising from his 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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant

Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-c:	Against Applicant

Conclusion

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

Noreen A. Lynch
Administrative Judge