



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



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| In the matter of: |) | |
| |) | |
| ----- |) | ISCR Case No. 08-07765 |
| SSN: ----- |) | |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Eric Borgstrom, Esquire, Department Counsel
For Applicant: *Pro Se*

March 25, 2010

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant completed a security clearance application on or about January 3, 2002. On July 27, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) enumerating security concerns arising under Guideline H (Drug Involvement), Guideline E (Personal Conduct), 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, which are effective for SORs issued after September 1, 2006.

In an August 10, 2009, response, Applicant admitted all allegations set forth in the SOR and requested a hearing on the matter. DOHA assigned the case to me on October 7, 2009. For medical reasons, Applicant requested that the hearing be delayed. Department Counsel and Applicant later agreed to a hearing date of January 22, 2010. A notice of hearing was issued to that effect on November 13, 2009. Applicant's convalescence was protracted. The hearing was then rescheduled for February 9, 2010. I convened the hearing as rescheduled. Applicant gave testimony

and presented no documents. Applicant was given through February 19, 2010, to submit any additional documentation. Department Counsel offered eight documents, admitted as exhibits (Exs.) 1-8 without objection. The transcript (Tr.) of the proceeding was received on February 18, 2010. In the interim, between February 12, 2010, and February 15, 2010, Applicant emailed two documents to Department Counsel, who forwarded those materials to me on March 9, 2010. Noting no objection, I accepted them into the record as exhibits (Exs.) A-B. With Applicant's materials received, the record was closed on March 9, 2010. Based on a review of the testimony, submissions, and exhibits, I find Applicant failed to meet his burden under Guideline E, leaving personal conduct security concerns unmitigated. Security clearance denied.

Findings of Fact

Applicant is a 55-year-old vice-president and finance manager for a government contractor. He has been with his current employer for 14 years. Applicant has a bachelor of science degree in accounting and a post-graduate certificate in a related field. He is married. Applicant has a history of intermittent drug abuse spanning from 1970 to 2006, during which he used and purchased marijuana, an illegal substance.

As a teenager, Applicant used marijuana about once every month or two between 1970 and about 1972. He then started working and he "just kind of got away from it."¹ He completed college in 1983, where he may have used marijuana on rare occasions.² He then entered the workforce as a professional. By 1988, he had been granted a security clearance.³ He used the drug again between 1996 and 1999, abusing the drug "a couple of times a month" as an escape from marital stress.⁴ In the interim, he denied drug use on a 1996 security clearance application. In about February 1997, he was granted Sensitive Compartmented Information (SCI) access by another agency. By 2000, Applicant had divorced his first wife and quit using marijuana.⁵

In 2005, Applicant started dating again. The couple soon married and remain married today. The presence of her son in their household was stressful. To alleviate that stress, he again used marijuana from 2005 until about October 2006. Eventually, on October 6, 2006, he reluctantly confessed to investigators that he had been using marijuana.⁶ He also disclosed the fact to his employer. He expressed his desire to quit

¹ Tr. 18.

² Tr. 38.

³ Tr. 39.

⁴ Tr. 41.

⁵ Tr. 44.

⁶ Tr. 52. During the interview for his SCI access renewal, Applicant's disclosure was made after hours of questioning concerning a variety of issues, including all the answers on his SF-86. While he ultimately admitted past and more recent marijuana use, he miscalculated some of the specific dates of incidents where marijuana was present or involved during the interview and on his SF-86. He did not intend to mislead interviewers with regard to specific dates. See, e.g., Tr. 54-55.

using marijuana for good. Around the same time, he tested positive for marijuana during a job-related urine screening and hair follicle testing in October 2006.⁷ He was then treated for marijuana use through his employer's employee assistance program (EAP) from December 2006 until February 2007. He was referred to a Licensed Clinical Drug and Alcohol Counselor (LCDAC) and his treatment was overseen by a medical doctor. His program was "consistent with the standard of care provided by a one-time offense for marijuana."⁸ During the program, Applicant tested negative for marijuana six times over a 12-month period. At the completion of the program, his prognosis was deemed "excellent" by both the counselor and the medical doctor. The doctor, the regional medical director of a health system and medical review officer of workplace drug testing for Applicant's employer, wrote that Applicant's program was a "required drug treatment counseling program" and he noted that Applicant's long-term prognosis was "excellent."⁹ Applicant consulted a medical doctor regarding drug use in 2009 as a follow-up "minor session."¹⁰

The EAP and counseling helped Applicant understand stress was the root of his reliance on marijuana. He now recognizes what causes him stress and deals with such factors without resort to drugs. He has changed his group of acquaintances and social venues to avoid drugs. He began exercising, focusing on home projects, and concentrating on his "whole new life change."¹¹ His wife no longer uses marijuana, it is not permitted in their home, and they avoid acquaintances who use it.¹² He notes that "at this point I'm very clean. Every day it's been three and a half years almost, three years four months. I can honestly tell you it feels good. It feels good not to carry that weight of doing the wrong thing."¹³ He has no intention of using drugs again in the future. Applicant signed a statement of intent not to use drugs again. It has a clause for automatic revocation of a security clearance for any future violation of the prohibition against drug use.¹⁴ He is genuinely contrite and embarrassed about his past drug use and his failure to disclose it earlier.¹⁵ He has been drug-free since at least October 6, 2006. In March 2007, however, his SCI access was revoked by another government agency.

⁷ Tr. 27.

⁸ Ex. B (Doctor's Letter, dated Feb. 15, 2010). See also Tr. 62.

⁹ *Id.* The doctor noted that the "drug treatment program was coordinated by" the EAP for Applicant's employer, with initial intake and evaluation made by that body prior to referral to an addiction specialist and subsequent counseling and education.

¹⁰ Tr. 61.

¹¹ Tr. 28.

¹² Tr. 48.

¹³ *Id.*

¹⁴ Ex. A. (Letter of Intent, dated Feb. 12, 2010).

¹⁵ See, e.g., Tr. 31.

Applicant has always known marijuana is a proscribed substance. He also knew that its use was prohibited while having access to classified information.¹⁶ He never used marijuana on the job or went to work while feeling its effects. He never drove a vehicle while impaired by the drug. Moreover, Applicant never sold marijuana or any other drugs, although he may have shared any marijuana he was using when a friend was present.¹⁷

In completing his January 3, 2002, SF-86, Applicant denied having used illegal drugs since the age of 16 or in the preceding seven years (Question 27). He also denied ever using illegal drugs while employed and maintaining a security clearance (Question 28). At the time he certified his SF-86, he knew that he had a security clearance and SCI access.¹⁸ Applicant stated that he rushed through the application and, in the process, miscalculated the dates of his drug use. He acknowledges that his drug use had, at the time, continued until 2000. He stated that his negative answers were a “mistake” and that his answers were “wrong.”¹⁹ In his response to the SOR, however, Applicant admitted that his answers were false.²⁰ He ultimately stated, “I’d have to say [his drug use] was omitted on purpose because I was headed down the path of wanting to stop and just didn’t.”²¹

Policies

When evaluating an applicant’s suitability for a security clearance, an 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. 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. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the “whole person concept.” The administrative judge must consider all 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

¹⁶ Tr. 44.

¹⁷ Tr. 43.

¹⁸ Tr. 57.

¹⁹ Tr. 55-56.

²⁰ Response to the SOR, dated Aug. 10, 2009; Tr. 58-59.

²¹ Tr. 59.

on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

The government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .”²² The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant.²³

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). “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”²⁴ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.²⁵

Based upon consideration of the evidence, Guideline H (Drug Involvement), Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) are the most pertinent to this case. Conditions pertaining to these adjudicative guidelines that could raise a security concern and may be disqualifying, as well as those which would mitigate such concerns, are set forth and discussed below.

Analysis

Guideline H – Drug Involvement

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

²² See *also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

²³ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

²⁴ *Id.*

²⁵ *Id.*

because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.²⁶ "Drugs" are defined as mood and behavior altering substances, and include 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 inhalants and other substances.²⁷ "Drug abuse" is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.²⁸

Applicant admitted he used marijuana with varying frequency between 1970 and at least 1972, from 1996 until at least 1999, and from 2005 until October 2006. During some or all of those times, he purchased the illegal drug. His use of marijuana continued after he was granted a security clearance and access to SCI. He tested positive for marijuana during a drug screening in 2006 and was treated for marijuana use as a first-time offender from December 2006 until about February 2007. Such facts give rise to Drug Involvement Disqualifying Condition AG ¶ 25(a) (any drug abuse), AG ¶ 25(b) (testing positive for drug use), and AG ¶ 25(g) (any illegal drug use after being granted a security clearance).

While Applicant's infrequent teenage use may be dismissed as a youthful indiscretion, his adult use was mostly in response to problems at home, such as his separation and his step-son. After quitting marijuana in early October 2006, he completed an EAP and a treatment/counseling program, where he learned alternative methods for dealing with stress and received an excellent prognosis. In 2009, he again met with a medical doctor regarding drug use as a follow-up "minor session."

In the interim and since, Applicant has demonstrated good judgment and behaved responsibly. He is now committed to staying drug free and has changed his lifestyle to accommodate that change. Together, he and his wife avoid people and places associated with drugs. He clearly recognizes that a return to drugs could jeopardize his job of 14 years. He has signed a statement of intent to not use drugs again lest his security clearance be revoked. He has fully divulged all aspects of his past drug use, demonstrated contrition, and detailed how his life has improved since becoming drug-free and open about his past drug use. Drug Involvement Mitigating Condition AG ¶ 26(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), AG ¶ 26(b)(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, based on the facts presented, AG ¶ 26(d) (satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare

²⁶ AG ¶ 24.

²⁷ *Id.* at ¶ 24(a)(1-2).

²⁸ *Id.* at ¶ 24(b).

requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional) apply. Drug use security concerns are mitigated.

Guideline E – Personal Conduct

Security concerns arise from matters of personal conduct because “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.”²⁹ In addition, “any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process” is of special interest.³⁰ Here, personal conduct concerns arose because Applicant denied having used illegal drugs since the age of 16 or in the seven years preceding in his January 2002 SF-86, and because he denied using illegal drugs while possessing a security clearance.³¹ Additionally, he only revealed his past drug use during an October 2006 interview with an agent from another agency after hours of interrogation. Such facts are sufficient to raise Personal Conduct Disqualifying Condition AG ¶ 16(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) and AG ¶ 16(b) (deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative). Consequently, the burden shifts to Applicant to mitigate the resultant security concerns.

Applicant denied his teenage use of marijuana and his use of the illegal drug between 1996 and 1999 when he completed his January 2002 SF-86. He did not correct his falsification until his October 2006 interview, where he stalled in directly answering questions regarding his past drug use before finally divulging his past and recent marijuana use. As a result, his SCI access was revoked. In light of these facts, Personal Conduct Mitigating Condition AG ¶ 17(a) (the individual made prompt, good-faith effort to correct the omission, concealment, or falsification before being confronted by with the facts) does not apply. Similarly, Applicant actively concealed a history of marijuana use dating from 1970 until 2006 for over 35 years before reluctantly admitting the truth in October 2006. Therefore, AG ¶ 17(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) does not apply.

²⁹ AG ¶ 15.

³⁰ *Id.*

³¹ Similar denials were noted on his 1996 application.

Applicant's eventual honesty and disclosure must be commended. While Applicant ultimately disclosed the truth, his drug use and his disclosure occurred years after he received a security clearance and access to SCI, access which was ultimately revoked. Moreover, his October 2006 disclosure did not occur until hours into his interview with investigators. Therefore, AG ¶ 17(e) (the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress) does not apply. None of the other mitigating conditions apply. In the absence of mitigating conditions, personal conduct security concerns remain.

Guideline J – Criminal Conduct

The concern under this guideline is that “criminal activity creates doubt about a person’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.”³² In completing and certifying his SF-86 answers as “true, complete, and accurate to the best of [his] knowledge,” Applicant understood that “a knowingly and willfully false statement on this form can be punished by fine or imprisonment or both.”³³ In his response to the SOR, he admitted that his answers regarding past drug use and use of illegal drugs while holding a security clearance (Questions 27-28) were false. Therefore, Criminal Conduct Disqualifying Condition AG ¶ 31(a) (a single serious crime or multiple lesser offenses) and AG ¶ 31(c) (allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted) apply. Consequently, it is Applicant’s burden to mitigate the security concerns raised.

In October 2006, Applicant ultimately disclosed his past drug use. Since that time, he has changed his lifestyle regarding drugs, been forthcoming, expressed contrition over both his drug use and his past falsifications, and demonstrated genuine remorse over his lapses of judgment with regard to concealment of required information. His falsifications represent aberrations in an otherwise crime-free personal history. Meanwhile, he has excelled in his professional life and otherwise demonstrated veracity and good judgment. Given such factors, Criminal Conduct Mitigating Condition AG ¶ 32(a) (so much time has elapsed since the criminal behavior happened, 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) and AG ¶ 32(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 service) apply. Criminal conduct security concerns are mitigated.

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 an applicant’s

³² AG ¶ 30.

³³ Ex. 1 (SF-86, dated Jul. 25, 1996) and Ex. 2 (SF-86, dated Jan. 3, 2002), *citing to* 18 U.S.C. § 1001.

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 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, as well as the "whole person" factors. Speaking in Applicant's favor, he is a mature, educated, and successful businessman. He and his wife eschew people and places associated with drugs. He spends his free time pursuing physical activity and working on home improvements. Applicant quit using marijuana after using it intermittently over a majority of his life. He did so through counseling which helped him learn that he relied on the drug during times of stress, and he now knows how to handle stress through alternative means. He successfully completed an EAP referral that included counseling by a licensed professional and was overseen by a medical doctor. Last year, he voluntarily followed up with his rehabilitation with a medical doctor. Applicant now handles stress appropriately. He has no intention of using marijuana again and was given an excellent prognosis by a medical doctor. Applicant mitigated drug use security concerns.

Of more immediate concern are Applicant's falsifications on his 1996 and 2002 SF-86 forms, as well as his initial reluctance to divulge the truth regarding his drug use to interviewers in 2006. While he raised sufficient mitigating conditions for these actions under the criminal conduct guideline, concerns raised under the guideline for personal conduct remain. Applicant started using drugs in 1970. The documentary evidence shows that he concealed his drug use from at least the time he certified his 1996 SF-86 until 2006, while his testimony indicates the concealment probably dated back to at least 1988.³⁴ Consequently, he failed to take corrective action for 10 to 18 years, at which point he only reluctantly disclosed his drug use to investigators during a lengthy interview. Whether 10 or 18 years, the delay is significant. Of equal or greater significance is the fact that he used marijuana while maintaining a security clearance and had access to SCI. Both the security clearance vetting process and the maintenance of a security clearance are built on a foundation of trust, candor, trustworthiness, and reliability. Applicant's concealment and his use of marijuana while possessing a security clearance and access to SCI undermined that foundation to its

³⁴ Applicant's testimony indicates he had a security clearance as far back as at least 1988. Tr. 39.

core. Although Applicant has demonstrated the requisite qualities for one seeking access to sensitive information for the past three-and-a-half-years, more time or further rehabilitative efforts are needed to mitigated personal conduct security concerns. With security concerns regarding personal conduct unmitigated, I conclude it is not clearly consistent with national interest to grant Applicant a security clearance. Clearance denied.

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:

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| Paragraph 1, Guideline H: | FOR APPLICANT |
| Subparagraph 1.a: | For Applicant |
| Subparagraph 1.b: | For Applicant |
| Subparagraph 1.c: | For Applicant |
| Subparagraph 1.d: | For Applicant |
| Subparagraph 1.e: | For Applicant |
| Paragraph 2, Guideline E: | AGAINST APPLICANT |
| Subparagraph 2.a: | Against Applicant |
| Subparagraph 2.b: | Against Applicant |
| Subparagraph 2.c: | Against Applicant |
| Subparagraph 2.d: | Against Applicant |
| Subparagraph 2.e: | Against Applicant |
| Paragraph 3, Guideline J: | FOR APPLICANT |
| Subparagraph 3.a: | For Applicant |

Conclusion

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

ARTHUR E. MARSHALL, JR.
Administrative Judge