



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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SSN: -----) ISCR Case No. 08-08609
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Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esquire, Department Counsel
For Applicant: *Pro Se*

November 17, 2009

Decision

MALONE, Matthew E., Administrative Judge:

Based upon a review of the pleadings, the government’s exhibits (Gx.), Applicant’s exhibits (Ax.), and Applicant’s testimony, his request for a security clearance is denied.

On or about March 5, 2008, Applicant submitted a Questionnaire for Sensitive Positions (SF-86) to obtain a security clearance required for his job with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) twice sent interrogatories to Applicant to obtain clarification of and/or additional information about adverse information in his background.¹ Based on the results of the background investigation, including Applicant’s response to the interrogatories, DOHA adjudicators

¹ Authorized by DoD Directive 5220.6, Section E3.1.2.2.

were unable to make a preliminary affirmative finding² that it is clearly consistent with the national interest to continue Applicant's access to classified information. On May 8, 2009, DOHA sent Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns addressed in the revised adjudicative guidelines (AG)³ under Guideline E (personal conduct) and Guideline H (drug involvement).

Applicant timely responded to the SOR and requested a hearing. The case was assigned to me on July 24, 2009. Pursuant to a Notice of Hearing issued on August 10, 2009, I convened the hearing on August 27, 2009, at which the parties appeared as scheduled. The government presented three exhibits (Gx. 1 - 3). Applicant testified on his own behalf. DOHA received the transcript of hearing (Tr.) on September 8, 2009.

Findings of Fact

The government alleged in the SOR that Applicant used marijuana or hashish with varying frequency between September 2001 and September 2006 (SOR ¶ 1.a(1)); between 1983 and 1988 (SOR ¶ 1.a(2)); between 1976 and 1977 (SOR ¶ 1.a(3)); and between 1967 and 1974 (SOR ¶ 1.a(4)). It was also alleged that he sold marijuana in 2006 (SOR ¶ 1.b); that he used LSD about five times between October 1967 and August 2004 (SOR ¶ 1.c); that he used hallucinogenic mushrooms in June 2003 and August 2005 (SOR ¶ 1.d); that he used cocaine in 1972, 1975, 1977, and 1985 (SOR ¶ 1.e); that he used quaaludes in 1972 (SOR ¶ 1.f); that he used amphetamines in 1968 and 1970 (SOR ¶ 1.g); that he was charged with possession of marijuana with intent to sell in 1968 (SOR ¶ 1.h); that he used mescaline in about 1967 (SOR ¶ 1.i); and that he used opium in 1967 (SOR ¶ 1.j)

The government further alleged in the SOR that Applicant stated, during a December 13, 1977, subject interview with a DoD investigator, that if drug use would jeopardize his suitability for access to classified information, he would cease all future drug use (SOR ¶ 2.a); and that, in August 1993, he told a DoD investigator that he last used marijuana in 1988 and that he would not use it again (SOR ¶ 2.b). Applicant admitted all of the SOR allegations without explanation or qualification. In addition to the facts established by his admissions, I make the following findings of relevant fact.

Applicant is 60 years old and is an engineer working for a defense contractor. His area of expertise and principal interest is in the design and installation of visual flight simulators. He has worked for his current employer since July 2007. He has worked for defense contractors in the past, but most recently worked for companies outside this arena in jobs that did not require a security clearance. When Applicant submitted his current SF-86, he disclosed an extensive history of involvement with and use of illegal drugs beginning around 1967 and continuing until at least 2006. As alleged and

² Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

³ Adjudication of this case is controlled by the revised adjudicative guidelines, approved by the President on December 29, 2005, which were implemented by the Department of Defense on September 1, 2006. Pending official revision of the Directive, the revised adjudicative guidelines replace the guidelines listed in Enclosure 2 to the Directive.

admitted to in the SOR, the drug Applicant used, bought, sold, and possessed most often was marijuana. However, he also used cocaine, LSD, hallucinogenic mushrooms, cocaine, mescaline, quaaludes, amphetamines, and opium. In response to DOHA interrogatories, Applicant stated that his “drug use has been experimental and somewhat extensive over the years.” (Gx. 3)

Applicant previously held a security clearance from 1974 until 1989, and again in the 1990s until 1998. (Tr. 42 - 43) Each time he has applied for a security clearance, he has disclosed his drug use. However, when interviewed on at least two occasions (in 1977 and 1993) during prior background investigations, he stated that he understood that involvement with illegal drugs could jeopardize his suitability for access to classified information and that he did not intend to use drugs in the future. However, after each such statement, Applicant resumed using illegal drugs. In some cases, he has used drugs with which he had not experimented in several years. For example, Applicant used cocaine in 1972, 1975 and 1977. Eight years later, in 1985, he decided to use it again. There is a similar gap in his use of LSD. He used it in 1967 and 1968, then again 32 years later in 2000. (Gx. 2)

Applicant’s most recent use of illegal drugs occurred between 2003 and 2006. He used drugs during this period in response to peer pressure. He was active in a social group that was active in environmental issues in the western United States. Drug use was very common among members of that group and they viewed with suspicion people who did not at least smoke marijuana. (Gx. 2; Tr. 32 - 36)

Applicant has also bought and sold marijuana. He was arrested in 1968 and charged with possession with intent to sell. However, his most recent transactions have been among friends, consisting of small amounts for personal use. As to the allegation that he sold marijuana in 2006, Applicant asserted that the sale price was \$50 and that he sold the marijuana to be rid of it.

Applicant avers that he has made lifestyle changes supportive of an intent to refrain from future illegal drug use. Primarily, he insists that he has quit drinking heavily and enjoys being sober. He feels he is healthier and more active as a result of not smoking marijuana or taking other drugs. (Gx. 2; Tr. 28)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁴ and consideration of the pertinent criteria and adjudication policy in the Revised Adjudicative Guidelines (AG). Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the “whole person” concept, those factors are:

⁴ Directive. 6.3.

(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.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under AG ¶ 15 (Guideline E - Personal Conduct) and AG ¶ 24 (Guideline H - Drug Involvement).

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁵ for an applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁶

A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. Thus, the government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.⁷

Analysis

Drug Involvement

The government presented sufficient information to support all of the factual allegations under Guideline H. (SOR ¶¶ 1.a - 1.j) Applicant began using, buying, selling,

⁵ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁶ See *Egan*, 484 U.S. at 528, 531.

⁷ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

and possessing illegal drugs around 1967, when he was about 18 years old. By his own admission, his drug use has been “extensive over the years.” Although not specifically alleged, Applicant’s testimony indicated that he used drugs in the 1970s and 1980s while holding a security clearance through his work with defense contractors. The facts established through the government’s information and through Applicant’s admissions raise a security concern addressed in AG ¶ 24 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.

(a) Drugs are defined as mood and behavior altering substances, and include:

(1) 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 (2) inhalants and other similar substances;

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

More specifically, available information requires application of the disqualifying conditions listed at AG ¶ 25(a) (*any drug abuse (see definition [at AG ¶ 25(a)]*) and AG ¶ 25(c) (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*). AG ¶ 25(g) (*any illegal drug use after being granted a security clearance*), and AG ¶ 25(h) (*expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use*).

By contrast, available information does not support application of any of the mitigating conditions listed at AG ¶ 26. Given his lengthy history of frequent drug use over the past 32 years, Applicant’s apparent abstinence from illegal drugs since 2006 is insufficient to show that his drug use is not recent. Accordingly, the mitigating condition at 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*) does not apply.

Applicant claimed that he has made changes in his circumstances supportive of a sober, drug-free lifestyle. However, in view of repeated failures to follow through on statements to government investigators that he would no longer use drugs, despite knowing that involvement with illegal drugs would jeopardize his suitability for a clearance, he has not presented sufficient information to support his claim. The mitigating condition at AG ¶ 26(b) (*a demonstrated intent not to abuse any drugs in the future, such as: (1) dissociation 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) does not apply. In short, Applicant has failed to mitigate the security concerns about his extensive history of involvement with illegal drugs.

Personal Conduct

A security concern may exist when, as stated in AG ¶ 15, available information reflects

[c]onduct 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.

The government alleged, and Applicant does not contest, that in two subject interviews during prior background investigations, Applicant stated that he would no longer use illegal drugs. After making one such statement in 1977, he used cocaine at least once in 1985, and marijuana from 1985 until 1987. When he was interviewed again in 1993, he stated that he last used marijuana in 1988 and would not use it again. However, he resumed using marijuana in 2001. He also experimented thereafter with LSD and hallucinogenic mushrooms. In both interviews, Applicant stated that he understood that using illegal drugs would have an adverse impact on his suitability for a security clearance.

The general security concern stated in AG ¶ 15 applies to Applicant's long-term involvement with illegal drugs, which he knew at all times to be criminal conduct. He engaged in that conduct despite holding a security clearance, and despite full awareness that such conduct is incompatible with the basic personnel security program policies. Applicant's conduct also requires application of the disqualifying condition at 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*). Viewed together with all of the available information bearing on Applicant's drug use, Applicant deliberately tried to mislead the government about his past drug use and about his intentions regarding future drug use. By contrast, Applicant has presented no information that would support any of the mitigating conditions listed at AG ¶ 17. On balance, he has failed to mitigate the security concerns about his judgment and lack of candor.

Whole Person Concept

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guidelines E and H. I have also reviewed the record before me in the context of the whole person factors listed in AG ¶ 2(a). Applicant used illegal drugs willingly and extensively for over 37 years. Although he is presumed, at age 60, to be a mature and responsible adult, his conduct for most of his life does not support that presumption. He knowingly and repeatedly engaged in illegal conduct, at times while holding an active security clearance. While he now claims he will no longer use drugs, similar claims in the past have

proved unreliable. A fair and commonsense⁸ evaluation of this record shows it is highly probable that Applicant will use illegal drugs in the future, thus perpetuating the doubts raised by the government's information about his ability or willingness to protect the government's interests as his own. Because protection of the national interest is paramount in these determinations, such doubts must be resolved for the government.⁹

Formal Findings

Formal findings 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 - 1.j:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a - 2.b:	Against Applicant

Conclusion

In light of all available information, it is not clearly consistent with the national interest for Applicant to have access to classified information. Request for a security clearance is denied.

MATTHEW E. MALONE
Administrative Judge

⁸ See footnote 4, *supra*.

⁹ See footnote 7, *supra*.