



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



In the matter of:)
)
) ISCR Case No. 08-08740
)
)
Applicant for Security Clearance)

Appearances

For Government: John Bayard Glendon, Esq., Department Counsel
For Applicant: *Pro Se*

June 24, 2009

Decision

LOUGHRAN, Edward W., Administrative Judge:

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

On January 20, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, Drug Involvement and Guideline E, Personal 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 4, 2009, and requested a hearing before an administrative judge. The case was assigned to another administrative judge on May 7, 2009. DOHA issued a Notice of Hearing on May 18, 2009. The case was reassigned

to me on June 16, 2009. The hearing was convened as scheduled on June 16, 2009. The Government offered Exhibits (GE) 1 through 9, which were received without objection. Applicant testified on his own behalf but did not submit any documentary evidence. DOHA received the transcript of the hearing (Tr.) on June 22, 2009.

Findings of Fact

Applicant is a 31-year-old employee of a defense contractor. He has worked for his current employer since November 2005. He worked for a different defense contractor from about February 2003 through November 2005. He has held a security clearance since 2003. He graduated magna cum laude from college in 2000 and summa cum laude when he obtained his master's degree in 2003. He is single with no children.¹

Applicant smoked marijuana periodically from about 1996 through September 2005. He occasionally sold marijuana to his friends if he had any extra, but he did not sell for profit. He used a pill that he believes was ecstasy (MDMA) in 2003, and he took ecstasy on six to eight occasions between about July 2005 and September 2005.²

Applicant submitted a Security Clearance Application (SF 86) in February 2003. Question 27 asked:

Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.) amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.) hallucinogenics (LSD, PCP, etc.), or prescription drugs?³

Applicant answered "Yes," and stated that between "1996/08/18" and "1999/05/31" he used marijuana "no more than 10" times. This was inaccurate information because he had used marijuana on multiple occasions up to the time he submitted the SF 86. Applicant admitted that he provided false information, but stated that he was not truly briefed on the importance of the SF 86 or what a security clearance involved.⁴

Applicant was granted a Secret security clearance in 2003. He continued to use marijuana after he was granted his clearance. He had a clearance, but he did not have access to classified information. He stated that security was not emphasized at the company and he was never told about the importance of being drug-free while holding a clearance.⁵

¹ Tr. at 19-28, 84; GE 1, 6, 8.

² Tr. at 32-41, 48-54; Applicant's response to SOR; GE 1-3, 8.

³ GE 9.

⁴ Tr. at 32-37, 77-82; GE 9.

⁵ Tr. at 19-22, 32-41; Applicant's response to SOR; GE 1-3

Applicant switched jobs to work for his current employer in November 2005. He submitted another SF 86 on December 6, 2005, to upgrade his Secret clearance to Top Secret/ Sensitive Compartmented Information (TS/SCI). He answered "Yes" in response to Question 27 and stated that between "1996/08/18" and "2001/08/11" he used marijuana an "unknown" amount of times. He did not list his ecstasy use. He intentionally failed to list his ecstasy use and misrepresented the last time he used marijuana.⁶

Applicant had a polygraph and interview in January 2006, pursuant to the request to upgrade his clearance to TS/SCI. He stated during the pre-polygraph interview that he used marijuana between 1996 and 2002, and ecstasy on one occasion in 2003. After the polygraph, he admitted that he used marijuana approximately one and a half times a month from 2002 through September 2005. He told the interviewer that he did not disclose his full involvement with illegal drugs because he was told he would not receive his clearance if he used illegal drugs within one year prior to the polygraph. He did not correct the amount of times he used ecstasy.⁷

Applicant was denied access to SCI in a clearance decision statement issued on March 2, 2006. The decision was based on his drug use and the falsification of his SF 86 in December 2005.⁸

Applicant forwarded an appeal to the denial of his SCI access in a May 1, 2006 letter. He denied using marijuana between 2002 and 2005. He stated that after 2002 he only used marijuana on one occasion in September 2005. He also stated that he only used what might have been ecstasy on one occasion in 2003. Applicant intentionally misrepresented the extent of his drug use in his statement. Applicant's appeal was denied on May 24, 2006. He was informed that he could reapply for SCI access in September 2006.⁹

Applicant submitted a third SF 86 on October 11, 2006, in another attempt to upgrade his clearance to TS/SCI. He answered "Yes" in response to Question 27 and stated that between "1996/08/18" and "2005/09/30," he used marijuana an "unknown" amount of times. He listed the use of an "unknown" substance on one occasion on January 1, 2003. He intentionally did not list his ecstasy use in 2005.¹⁰

⁶ Tr. at 26-29, 41-51; Applicant's response to SOR; GE 6.

⁷ Tr. at 55-61; Applicant's response to SOR; GE 2-3. The results of the polygraph are not considered for this decision, except insofar as the impact the polygraph had on Applicant providing details about his drug use.

⁸ GE 2.

⁹ Tr. at 62-65; Applicant's response to SOR; GE 4, 5. The SOR does not allege that Applicant falsified the appeal letter. Any false statements that were not alleged will not be used for disqualification purposes. All of Applicant's statements will be considered in assessing his credibility, in the application of mitigating conditions, and in analyzing the "whole person."

¹⁰ Tr. at 72-76; Applicant's response to SOR; GE 1.

Applicant had another polygraph and interview in late 2006 or early 2007. He fully discussed and admitted to his drug use. He provided a written statement on September 4, 2007, and again was truthful about his drug use.¹¹

Applicant has not used illegal drugs since September 2005. He has matured and realized that illegal drug use is inconsistent with holding a security clearance. He is willing to sign a statement of intent not to abuse any drugs in the future, with automatic revocation of clearance for any violation.¹²

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

¹¹ Tr. at 70-72, 75; GE 8.

¹² Tr. at 82-83, 89.

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. Three are potentially applicable in this case:

- (a) any drug abuse;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (g) any illegal drug use after being granted a security clearance.

Applicant possessed, used, and distributed illegal drugs. He continued to use illegal drugs after he was granted a security clearance in 2003. AG ¶¶ 25(a), 25(c), and 25(g) are applicable as 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.

Applicant started smoking marijuana at a young age and used it regularly for years. He used ecstasy in 2003 and on six to eight occasions in 2005. He continued to use illegal drugs after he submitted his SF 86 and was granted a clearance. He was dishonest about his drug use on at least four occasions. He stopped using illegal drugs in September 2005. He has matured and now realizes it is inconsistent with the responsibilities of his job and with holding a security clearance. He is willing to sign a statement of intent not to abuse any drugs in the future, with automatic revocation of clearance for any violation. AG ¶¶ 26(a) and 26(b) are applicable.

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 conditions are 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;
- (c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-

person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant intentionally falsified his SF 86 in February 2003, December 2005, and October 2006. AG ¶ 16(a) is applicable as a disqualifying condition. His drug use while holding a security clearance was also alleged under Guideline H. It establishes AG ¶¶ 16(c) and 16(e) as disqualifying conditions.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant was dishonest about his drug use on at least four occasions. He finally revealed the extent of his drug use during a polygraph and interview in late 2006 or early 2007, and again in his September 4, 2007 statement. I also found him to be credible at his hearing. While he receives credit for finally being honest, that is insufficient to overcome his multiple lies. I find that no mitigating conditions are applicable to the falsifications of his Security Clearance Applications. Applicant's drug

use while holding a security clearance is mitigated under AG ¶¶ 17(c), 17(d), and 17(e) under the same rationale discussed under the Drug Involvement guideline.

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 31 years old. He lied about his drug use on multiple occasions and continued to use illegal drugs while holding a security clearance. He deserves some credit for finally coming clean about his drug use and for abstaining from further drug use. However, I cannot ignore the number of times that he misrepresented the truth and falsified his answers during the security clearance application process over a several-year period. He appears to be remorseful, but at this time, concerns remain about his truthfulness, judgment, reliability, and trustworthiness.

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 Drug Involvement security concerns, but has not mitigated the concerns raised under the Personal Conduct guideline.

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: FOR APPLICANT

Subparagraphs 1.a-1.d: For Applicant

Paragraph 2, Guideline E: AGAINST APPLICANT

Subparagraphs 2.a-2.c: Against Applicant

Subparagraph 2.d: 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 grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge