



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



In the matter of:)
)
) ISCR Case No. 08-08858
)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esq., Department Counsel
For Applicant: *Pro Se*

May 22, 2009

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated Drug Involvement, Criminal Conduct, and Personal Conduct security concerns. Eligibility for access to classified information is denied.

On December 17, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline H, Drug Involvement; Guideline J, Criminal Conduct; 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 in writing on January 26, 2009, and elected to have the case decided on the written record in lieu of a hearing. Department Counsel submitted the government's written case on February 27, 2009. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an

opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on March 19, 2009. As of May 8, 2009, he had not responded. The case was assigned to me on May 18, 2009.

Findings of Fact

Applicant is a 36-year-old employee of a defense contractor. He has a bachelor's degree, which was awarded in March 2008. He is married and has a four-year-old child.¹

Applicant started smoking marijuana in about 1986. He estimated that he smoked marijuana about ten times before he entered high school in 1988. He smoked marijuana on a weekly or monthly basis during the four years he was in high school. From the time he graduated high school in 1992 through July 2002, he smoked marijuana on a daily or weekly basis depending on its availability. He stopped smoking marijuana in July 2002.²

Applicant applied for a security clearance in March 2003. He was interviewed for his background investigation in April 2003. He started smoking marijuana again in about June 2003. He would smoke marijuana at home with his wife. His security clearance was denied in January 2004 because of his drug use. He smoked marijuana on a monthly and occasionally weekly basis until January 2004, when he and his wife stopped smoking marijuana prior to the conception of their child. The child was born in December 2004.³

Applicant and his wife did not smoke marijuana while their child was nursing. They started smoking marijuana again in about May 2006, after the child was no longer nursing. He smoked marijuana again on a monthly and occasionally weekly basis. He also took methylenedioxymethamphetamine (MDMA), which is known as ecstasy, on two different occasions in 2007. Applicant and his wife again decided to stop smoking marijuana in about April 2008, when their child was three years old. Their child was getting to the age that the child could understand what they were doing, and they wanted to set a good example for the child. They also decided to have another child, which further reinforced their decision.⁴

Applicant acknowledged that his drug use cost him a clearance which has hindered his options for job advancement. He indicated that he does not intend to use illegal drugs in the future no matter the outcome of this process. He still has a few friends that have used drugs in the past. He is uncertain if they still use drugs. His contact with those friends is minimal and he does not frequent places where drugs are

¹ Item 4.

² Items 3, 5.

³ *Id.*

⁴ *Id.*

used. He is willing to undergo any form of drug testing to ensure that he remains drug-free.⁵

Applicant submitted a Questionnaire for National Security Positions (SF 86), and certified that his answers were true on June 13, 2008. Section 24b 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?

Applicant answered “Yes,” and stated that between “01/2001 (Estimated)” and “01/2008 (Estimated)” he used marijuana 21 times. He added that it was “[o]ccasional usage 3-4 times a year over the date period indicated. None since that time.”⁶ He did not list his ecstasy use in 2007. He underreported the frequency of his marijuana use and he misstated the last time he used marijuana. In his response to the SOR, Applicant admitted to SOR ¶ 4.a, which alleged that he intentionally falsified the SF 86 by omitting his ecstasy use.⁷ He did not respond to the FORM in which Department Counsel specifically commented that Applicant intentionally falsified the SF 86. After considering all the evidence, I find that Applicant intentionally falsified his SF 86 by omitting his ecstasy use.

Applicant revealed his full drug use when he responded to DOHA interrogatories on November 12, 2008.⁸

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

⁵ Item 4.

⁶ Item 5.

⁷ There is no paragraph 3 in the SOR. The SOR does not allege that Applicant falsified the SOR by underreporting his marijuana use. It only alleges that he did not disclose that he used ecstasy. The underreporting of his marijuana use will not be used for disqualification purposes. It is considered as circumstantial evidence on whether he intentionally falsified the SF 86 by omitting his ecstasy use.

⁸ Item 4.

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 *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. Two are potentially applicable in this case:

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

Applicant's drug possession⁹ and use are sufficient to raise AG ¶¶ 25(a) and 25(c) 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 stopped smoking marijuana in about July 2002, before he applied for a security clearance in March 2003. He started smoking marijuana again in about June 2003, after he was interviewed for his background investigation in April 2003. His security clearance was denied in January 2004 because of his drug use. He and his wife stopped smoking marijuana again around the same time period, which was prior to the conception of their child. They started smoking marijuana again in about May 2006, after their child was no longer nursing. He regularly smoked marijuana and used ecstasy on two occasions until he stopped using drugs in April 2008. Their child was getting to the age that the child could understand what they were doing and they wanted to set a good example. They also decided to have another child, which further reinforced their decision. Applicant also realized that his drug use had adversely

⁹ Drugs must be possessed in order to be used.

affected his career. He indicated that he does not intend to use illegal drugs in the future no matter the outcome of this process, and he is willing to undergo any form of drug testing to ensure that he remains drug-free.

There is no bright-line rule as to whether conduct is recent. Applicant has not used illegal drugs in about 13 months. However, his drug use was very extensive; occurred over a long period of time; and was interrupted by other periods of abstinence followed by additional drug use. I am unable to make a determination that illegal drug use is completely in his past. His drug use continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 26(a) is not applicable. Applicant has indicated a firm intent not to abuse drugs in the future. He does not receive full mitigation under AG ¶ 26(b) for the same rationale discussed above.

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.

It is a criminal offense to possess and use marijuana and MDMA. The evidence is sufficient to raise the above disqualifying conditions.

Two Criminal Conduct mitigating conditions under AG ¶ 32 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; 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 violated the law every time he used illegal drugs. His last use was about in April 2008. He intentionally provided false information on his SF 86 in June 2008, which constituted a federal crime. His criminal acts cast doubt on his reliability, trustworthiness, and good judgment. There is insufficient evidence of rehabilitation at this time to find any mitigating condition 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 disqualifying condition is 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;

Applicant intentionally falsified his SF 86 in June 2008. AG ¶ 16(a) is applicable as a disqualifying condition.

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;

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

(f) the information was unsubstantiated or from a source of questionable reliability.

Applicant revealed his full drug use when he responded to DOHA interrogatories on November 12, 2008. While he receives credit for finally being honest, that is insufficient to establish a mitigating condition. I find that no mitigating conditions are applicable.

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. I have incorporated my comments under Guidelines H, J, and E in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment. Applicant used illegal drugs for many years. He underreported his drug use on his SF 86. While he appears sincere in his statement that he does not intend to use drugs again, he had previous periods of abstinence followed by drug use. It is also difficult to gauge true sincerity from the written word. He appears to be on the right track, but at this time, concerns remain about his 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 has not mitigated Drug Involvement, Criminal Conduct, and Personal Conduct security concerns.

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
Subparagraphs 1.a-1.f:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 4, Guideline E:	AGAINST APPLICANT
Subparagraph 4.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