



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



In the matter of:)
)
) ISCR Case No. 08-08918
)
)
Applicant for Security Clearance)

Appearances

For Government: Fahryn E. Hoffman, Esquire, Department Counsel
For Applicant: *Pro Se*

December 8, 2009

Decision

RIVERA, Juan J., Administrative Judge:

Applicant failed to mitigate the drug involvement security concern arising from his long-term use of five illegal drugs. He mitigated the personal conduct security concern. Eligibility for access to classified information is denied.

Statement of the Case

On April 16, 2008, Applicant submitted a security clearance application. On April 14, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, detailing the basis for its preliminary decision to deny Applicant eligibility for a security clearance, citing security concerns under Guideline E (Personal Conduct) and Guideline H (Drug Involvement). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated

January 1987, as amended (Regulation); and the revised adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and it recommended referral to an administrative judge to determine whether eligibility should be granted, denied or revoked.

On April 20, 2009, Applicant responded to the SOR allegations and requested a hearing before an administrative judge. The case was assigned to me on June 9, 2009. DOHA issued a notice of hearing on June 15, 2009. The hearing was convened as scheduled on July 23, 2009. The government offered Government Exhibits (GE) 1 through 5, which were admitted without objection. Applicant testified on his own behalf, presented the testimony of one witness, and submitted Applicant Exhibit (AE) 1, which was admitted without objection. DOHA received the transcript of the hearing (Tr.) on July 31, 2009.

Findings of Fact

Applicant admitted all SOR allegations, except for SOR ¶ 2.d, which he denied. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, and having considered Applicant's demeanor and testimony, I make the following additional findings of fact.

Applicant is a 27-year-old assistant project manager working for a defense contractor. He attended college at a prestigious U.S. university, and received a Bachelor of Science (electrical engineering) degree in 2005. He has never been married.

Applicant started using marijuana illegally around 1997-1998, when he was attending 8th grade, at age 14-15. He initially used marijuana out of curiosity and because he was immature. He continued to use marijuana with varying frequency all the way through high school and college. He estimated he used marijuana 60 or more times from January 1997 through April 2006. During this period, Applicant also purchased and sold marijuana. Applicant graduated from college in December 2005. Between January and April 2006, he went back to college to visit with his friends. During this period, he used marijuana and cocaine infrequently.

Applicant described his use of cocaine as opportunistic. His college roommate and other friends used cocaine, and Applicant would share their cocaine when offered. He used cocaine approximately four to five times from about July 2001 through April 2006.

Applicant illegally used mushrooms approximately three times from about January 2000 through March 2004 (Tr. 79). However, Applicant illegally possessed

mushrooms until around May 2007. In April 2006, Applicant was working for a contractor in a supervisory position. He accepted mushrooms as collateral for a \$60 loan he made to a subordinate employee. When Applicant's supervisor asked him whether he had purchased or accepted illegal mushrooms from a subordinate, Applicant lied to retain his job (Tr. 56). Applicant claimed he threw away the illegal mushrooms in May 2007, when he found the mushrooms during a house move.

Applicant used ecstasy approximately three to four times from about January 1999 through April 2002. He used prescription pain pills without a prescription approximately ten to twelve times from January 1999 through June 2006. This was Applicant's last use of any illegal drug.

Applicant knew that his use of drugs was illegal. Applicant continues to associate with many of his drug-using friends, most of whom he has known since high school, for approximately 12 years. Applicant admitted being in contact with the college roommate who used to provide him with cocaine, and with many other friends with whom he used illegal drugs. He was in contact with his drug-using friends until at least around December 2008. He claimed that even though he knew many of his friends used illegal drugs in the past, he does not know whether they currently use illegal drugs.

In November 2000, at age 18, Applicant applied for a service delay-entry program, seeking to be admitted into a nuclear program job. He wanted to follow up on the footsteps of other family members serving their country in the military. As part of the application process, Applicant submitted a security clearance application. In his answer to question 27 (asking whether since age 16, or in the last seven years, he had illegally used any controlled substance, including: marijuana, cocaine, mushrooms, ecstasy, and medications without prescription), he answered "Yes" and disclosed he used marijuana only twice from 1999 to 2000. He deliberately failed to disclose the full extent and frequency of his use of marijuana, cocaine, mushrooms, ecstasy, and medications without prescriptions, as discussed above.

Applicant claimed that his falsification was the result of his immaturity, his lack of understanding of the forms, and his not knowing the full extent of the consequences of his falsification. He was concerned that if he disclosed his drug use he would be rejected from the delay-entry program. Thus, he falsified the application.

Applicant also deliberately falsified material facts in his May 23, 2001, sworn statement, on security paperwork he submitted in 2003, and in a statement he provided to a Federal Bureau of Investigations agent during an interview in 2003. He admitted that in each of these occasions, he provided false statements to be consistent with the falsification he made in his November 2000 security clearance application. He was concerned he would not be considered for a job position if he disclosed the full extent of his drug use. Notwithstanding his rejection concerns, and that he was aware of the illegality of his drug-related behavior, Applicant continued to use drugs until at least June 2006. Furthermore, he possessed mushrooms until at least May 2007. In 2003, when Applicant made his false statements, he was working part-time in the security

office of a nuclear power plant. He claimed that he abstained from drugs while working at the power plant.

In his April 2008 security clearance application, Applicant disclosed, on his own and without being prompted, the full extent of his drug use, that he had falsified his November 2000 security application, and that he made false statements to security personnel in 2001 and twice in 2003. He also disclosed he failed a drug test while he worked in a nuclear program in 2001. Applicant testified that he corrected his falsification because he did not want to continue lying. He expressed remorse about his past falsifications. He wanted to correct his mistakes, provide honest answers in his April 2008 security clearance application, and have a fresh start.

Applicant recognized he has made poor choices in the past that place his judgment in question. He averred that he has matured since April 2006. He has a stable relationship with his girlfriend whom he has known for three years. She does not like drugs. They have a dog, he purchased a home, and he has a good job with a future. He would like to continue serving the United States by working with government contractors. He does not need a security clearance for his current job, but would need it if he is promoted to be a project manager

Applicant promised never to use illegal drugs again, and stated his intent never to violate the law again. He also submitted a statement of intent to never use illegal drugs in the future with automatic revocation of his security clearance for any violation (Tr. 91, AE 1).

Applicant has worked for his current employer from January 2008 to the present. He testified that he is considered to be an above-average employee. Based on his references' statements, he is considered an outstanding employee, hard working, dedicated, responsible, and diligent. None of his references, except for his girlfriend, are aware of Applicant's past drug use.

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 required 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 controlling 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.

In the decision-making process, the government has the initial burden of establishing controverted facts alleged in the SOR by “substantial evidence,”¹ demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant’s access to classified information. Once the government has produced substantial evidence of a disqualifying condition, the burden shifts to applicant to produce evidence “to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by department counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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* Executive Order 12968 (Aug. 2, 1995), Section 3.

Analysis

Guideline H, Drug Involvement

AG ¶ 24 articulates the security concern about drug involvement:

¹ See Directive ¶ E3.1.14. “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

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.

AG ¶ 25 describes eight conditions related to drug involvement that could raise a security concern and may be disqualifying. Three drug involvement disqualifying conditions raise a security concern and are disqualifying in this particular case: AG ¶ 25(a): "any drug abuse";² AG ¶ 25(b): "testing positive for illegal drug use"; AG ¶ 25(c): "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia"; and AG ¶ 25(g): "any illegal drug use after being granted a security clearance."

Between 1997 and May 2007, Applicant illegally used, possessed, and purchased drugs with varying frequency. He stopped using illegal drugs in June 2006, but possessed mushrooms until at least May 2007. His behavior triggers the applicability of AG ¶¶ 25(a), 25(b), 25(c), and 25(g).³ The other disqualifying conditions listed in AG ¶ 25 are not applicable.

AG ¶ 26 provides four potentially applicable drug involvement mitigating conditions:

(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;

(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;

² AG ¶ 24(b) defines "drug abuse" as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction."

³ AG ¶ 24(a) defines "drugs" as substances that alter mood and behavior, including:

(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.

Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Cocaine and methamphetamine are Schedule II Controlled Substances. See 21 U.S.C. § 812(c)II(a)(4) (cocaine), and II(c) (methamphetamine); *United States v. McCourty*, 562 F.3d 458 (2nd Cir. 2008) (cocaine); *United States v. Wheeler*, 535 F.3d 446 (6th Cir. 2008) (methamphetamine).

(3) an appropriate period of abstinence; and

(4) a signed statement of intent with automatic revocation of clearance for any violation.

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

After considering the above mitigating conditions, I find none fully apply. Applicant's long-term history of illegal drug use is recent. He has used drugs for most of his adult life. It was part of Applicant's lifestyle until at least May 2007, with his long-time high school and college friends. He possessed mushrooms until May 2007. He continues to associate with his drug-using friends.

Applicant receives credit for his two and one-half-year period of abstinence. He also receives credit for his signed statement of intent not to use illegal drugs with automatic revocation of eligibility for a security clearance for any violation. Notwithstanding, considering Applicant's long-term history of illegal drug use and his continued association with drug-using friends, his period of abstinence is not sufficient to show that his questionable behavior is not likely to recur. Applicant has not participated in any drug counseling or rehabilitation program. I find the drug involvement concerns are not mitigated.

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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.

Applicant deliberately falsified material facts on his 2000 security clearance application when he failed to disclose the full extent and frequency of his use of marijuana, mushrooms, ecstasy, and medications without prescription. Applicant also deliberately falsified material facts in his May 23, 2001, sworn statement, on security paperwork he submitted in 2003, and in a statement he provided to a Federal Bureau Investigator during an interview on 2003. He provided false statements to be consistent

with the falsification he made in his November 2000 security clearance application. He lied because he was concerned he would not be considered for a job position, or fired, if he disclosed the full extent of his illegal drug use. Applicant continued to use illegal drugs after he submitted his 2000 application and provided the three false statements. Notwithstanding his concerns, Applicant continued to use drugs until at least June 2006, and possessed mushrooms until May 2007.

Applicant's actions create security concerns under two disqualifying conditions: 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 security clearance eligibility or trustworthiness," and 16(e) "personal conduct or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing."

AG ¶ 17 lists seven conditions that could mitigate the personal conduct security concerns:

- (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;
- (f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant receives credit for disclosing the full extent of his drug use (*sua sponte*) in his April 2008 security clearance application. He also disclosed that he had falsified his November 2000 security application, that he made false statements to security personnel in 2001 and twice in 2003, and that he failed a drug test while he worked in a government agency nuclear program. Applicant did not want to continue lying, and he expressed remorse about his past falsifications. He wanted to correct his mistakes and provide honest answers in his April 2008 security clearance application. At his hearing, Applicant was candid and forthcoming about his drug-use history.

Applicant's falsifications are serious offenses (felony). Notwithstanding, his voluntary disclosures of his past falsifications show maturity and his willingness to comply with laws, rules and regulations. His recent behavior also demonstrates good judgment.

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.

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. AG ¶ 2(c).

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a mature, well educated man. He has been working for a defense contractor since January 2008. He is considered to be a valuable employee and is being groomed for a higher leadership position. He is considered to be hard working, dedicated, responsible, and diligent. He

has a reputation as a trustworthy and honest person. There is no evidence of any security violation. These factors show some responsibility and mitigation.

On the other hand, there are more substantial circumstances that weigh against Applicant in the whole person analysis. He has been illegally using, possessing, and purchasing drugs with varying frequency since the 1997. When he started working with a government agency in 2000, he was aware of what was required of him to be eligible for a security clearance. He deliberately continued his use of illegal drugs notwithstanding his knowledge of the legal and moral consequences of his action. He falsified his security clearance application and made three false statements because of his concerns about the adverse effects such information would have on his professional reputation and ability to hold a government job. Notwithstanding, he continued to illegally use drugs until at least June 2006, he possessed mushrooms until May 2007, and he continued to associate with his long-time drug-using friends until around December 2008.

Applicant's drug-related behavior raises doubts about his suitability to have access to classified information and his willingness to comply with laws, rules, and regulations. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising from his drug involvement.

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 E:	FOR APPLICANT
Subparagraphs 2.a - 2.d:	For Applicant

Conclusion

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

JUAN J. RIVERA
Administrative Judge