



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



In the matter of:)
)
) ISCR Case No. 08-09051
)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esq., Department Counsel
For Applicant: John N. Griffith, Esq.

November 15, 2010

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant has not mitigated the Drug Involvement or Personal Conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On April 13, 2010, 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 E, Personal Conduct. The action was taken under Executive Order (EO) 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 adjudicative guidelines (AG) effective for cases after September 1, 2006.

Applicant answered the SOR on May 6, 2010, and requested a hearing before an administrative judge. The case was assigned to me on August 10, 2010. DOHA issued a notice of hearing on August 11, 2010, and the hearing was convened as scheduled on

September 16, 2010. The Government offered Exhibits (GE) 1 through 6, which were admitted without objection. It also introduced two statutes for Administrative Notice, marked Appeal Exs. 1 and 2. The Applicant offered Exhibits (AE) A through R, called three witnesses, and testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on September 24, 2010.

Findings of Fact

Applicant admitted SOR allegations 2.a. and 2.b. He denies allegations 1.a., 2.c., 2.d., and 2.e. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 29-year-old employee of a defense contractor since 2003. He is married and has no children. Applicant's use of illegal substances began during his freshman year of college. A witness testified that Applicant knew it was illegal to use drugs, but tried marijuana on an experimental basis. From 1998 or 1999 through 2002, he estimates that he used marijuana 10-15 times, generally at parties to celebrate the end of a semester. In 2002, he graduated from college and in 2003, he began working for his current employer. From 2002 through 2007, Applicant was not around marijuana and did not use it. However, in 2007, Applicant and his wife were visiting Amsterdam and used marijuana on two consecutive days. Applicant possessed a security clearance at that time. Applicant's wife testified that she pressured applicant into trying it with her, as she has never used it before and was curious about marijuana. Applicant did not immediately report his marijuana use to his security office, upon returning to the U.S., because he thought that since marijuana was legal in Amsterdam, he did not do anything wrong. Applicant now vows never to use marijuana again. He signed a statement to that effect, acknowledging that if he uses marijuana again, his clearance will be revoked. Applicant provided the results of a September 2010 urinalysis to show he recently tested negative to controlled substances. (GE 1; GE 2; GE 5; AE F; AE G; AE H; AE R; Tr. 37-38, 65-78, 85, 91, 93 95-96, 99-100, 115, 122.)

In Approximately May of 2003, Applicant completed a security clearance application. He failed to disclose any drug use on this application. His pre-employment drug test showed he was negative for controlled substances. In September of 2003, he had a security clearance interview with an investigator. During that interview, he also denied any prior drug use. He wanted to keep his answers consistent. At hearing, Applicant indicated that he failed to disclose his marijuana use because he was "afraid if I admitted to using illegal drugs I would be denied my clearance and would be no longer able to work" for the government contractor. He was granted a security clearance in 2004. (GE 6; AE E; Tr. 80-82, 104, 118.)

On May 21, 2008, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). Applicant testified that he completed the questionnaire quickly. In his answer to Section 24.a. he indicated he had used marijuana two times in September 2007. Applicant failed to indicate his earlier marijuana use, from 1999 to 2002. Applicant indicated at hearing that he unintentionally omitted his earlier drug use from the e-QIP. Applicant also indicated "no" to 24.b. which

asked if he had “ever illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official; while possessing a security clearance; or while in a position directly and immediately affecting public safety?” Applicant explained that he “though that since I did it in a place that it was legal, I kind of didn’t think I did anything wrong.” (GE 1; Tr. 83, 86, 90-91, 112-113, 118)

On August 1, 2008, Applicant was interviewed by an investigator, regarding his e-QIP. Applicant discussed his September 2007 marijuana use with the investigator. The Personal Subject Interview was adopted by the Applicant on March 12, 2010, as accurately reflecting the interview. It indicated “Subject denies having any other drug-related incidents or involvement in the past 7 years.” (GE 3; GE 4.)

A second security clearance interview was conducted on April 14, 2009. Applicant testified that between the two interviews, he reviewed his e-QIP and discovered he had omitted his 1999-2002 marijuana use. He indicated that he immediately came forward with the details about his prior use at the beginning of this interview. He provided an affidavit that detailed all of his marijuana uses, as set out above. In the affidavit, he stated “I did not list this marijuana use on my application because I thought I did not have to,” when referring to his omission of his marijuana use from 1999 to 2002. At hearing, he explained that he only thought that he needed to list five years back from the date of the e-QIP. (GE 2; Tr. 88-89,

Applicant is well regarded by friends, colleagues, and supervisors. Among the many recommendations, a friend listed his attributes to include “sincerity, honesty, thoughtfulness, intelligence, responsibility, caring, and loyalty.” A former manager noted that Applicant was a “conscientious and dedicated worker.” His performance evaluations reflect that Applicant met or exceeded expectations from 2004-2009 and was on track to achieve similar ratings for 2010. He has also been the recipient of several appreciation awards, issued to him by his company. (AE A; AE B; AE C; AE D; AE J; AE K; AE L; AE M; AE N; AE O; AE P; AE Q; Tr. 35-49, 50-65.)

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the 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 overarching 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.

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 to obtain 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 EO 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

AG ¶ 24 expresses the security concern pertaining to 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 because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations.

I have considered all of the evidence in this case and the disqualifying conditions under Drug Involvement AG ¶ 25 and especially considered the following:

(a) any drug abuse.

The Government presented sufficient information to support the factual allegation under Guideline H (SOR 1.a.). Applicant began using illegal substances in 1999 and last used marijuana in September 2007. These facts established through the Government’s information and through Applicant’s admissions raise a security concern under all of the above disqualifying conditions.

I have considered all of the evidence in this case and the mitigating conditions under Drug Involvement AG ¶ 26 and especially considered the following:

(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's use of marijuana in 1999 through 2002 was not recent, having occurred over eight years ago. However, his 2007 use was more recent. Applicant's drug use did not occur under unusual circumstances, as he used marijuana at parties, with friends. Moreover, as recently as 2007, the fact that he held a security clearance did not prevent him from engaging in this questionable conduct. While the Government failed to allege marijuana use after being granted a clearance as a separate allegation under Guideline H, such use casts doubts about Applicant's judgment. Mitigation under AG ¶ 26(a) applies in part, only in regard to his early marijuana use.

As to AG ¶ 26(b) (4), Applicant testified that he will not use marijuana in the future, and submitted a statement to that effect. However, Applicant's failure to disclose his 1999 through 2002 marijuana use on his first application, in his 2003 interview, and on his 2008 e-QIP, undermines the reliability of this statement. Further, Applicant has an ongoing relationship with his wife, with whom he used marijuana in September 2007. Only partial mitigation is available under AG ¶ 26(b) (1).

As of the date of the hearing, Applicant had not used marijuana in three years. There is no bright line defining an appropriate period of reform and rehabilitation. In some cases, three years could be interpreted as a sufficient period of abstinence. However, the fact that Applicant knowingly used an illegal drug after he was granted a security clearance, and the poor judgment shown by this conduct, weighs against a conclusion that sufficient time has passed. The partial mitigation under AG ¶ 26 does not overcome the gravity of the fact that Applicant chose to use marijuana while he held a security clearance.

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 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; and

(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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Applicant admits to the falsification of his 2003 security clearance application (unalleged) and his September 2003 interview with an investigator for DoD (allegation 2.b). The Government also presented sufficient information to establish that Applicant falsified his May 2008 e-QIP, when he answered Sections 24.a. and 24.b. (allegations 2.c. and 2.d.). His explanation that he thought he only needed to list the past five years is not credible, when the text of the question 24.a. is examined. Section 24.a. clearly asks for conduct occurring "since the age of 16 or in the last 7 years, whichever is shorter." His explanation that he thought since marijuana was legal in Amsterdam that he did not need to disclose his use with a security clearance under 24.b. is arguably credible because of the way the question is phrased. The Government has established sufficient concern under AG ¶ 16(a) to disqualify Applicant from possessing a clearance.

Further, Applicant chose to engage in an activity that he knew was illegal in the U.S., while possessing a security clearance. His personal conduct displays questionable judgment and creates vulnerability to exploitation, manipulation, or duress. AG ¶ 16(e) is disqualifying.

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

Applicant's falsification is unmitigated. Falsification of information provided to the Government cannot be considered minor. Although Applicant disclosed his 2007 drug use when he completed his 2008 application, the record contains no evidence that he sought to correct the falsification promptly after completing the 2002 application or his 2003 interview. While he contends that he came forward and admitted his 1999-2002 drug use to the investigator in his April 2009 interview, his disclosure was in no way prompt, having the opportunity to make full disclosure in his 2008 interview. Instead of coming forward in August 2008, he chose to blatantly deny any other drug use. His conduct reflects negatively on his trustworthiness and good judgment. Further, his decision to use marijuana, a substance that is illegal in the U.S., while vacationing in Amsterdam, indicates that Applicant lacks the judgment to possess a clearance. He has not shown sufficient steps to reduce or eliminate vulnerability to exploitation. AG ¶¶ 17(a), 17(c), and 17(e) do not apply.

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.

Under AG ¶ 2(c), 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.

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 and E in my whole-person analysis.

Weighing in Applicant's favor are several positive factors: he has earned a college degree, and performed successfully at work, receiving good ratings and several awards. He has the trust and support of his supervisor, friends, and co-workers. He abstained from marijuana use for three years.

However, other facts raise security concerns. Applicant used marijuana up to fifteen times between 1999 and 2002. He used marijuana in September 2007, even though he had been granted a security clearance in 2004 and he was aware that drug use was a security concern. Then he chose to hide his drug use from the Government for several years. His conduct indicates a lack of judgment and trustworthiness, and raises doubts as to whether he understands what is required of those who hold security clearances.

Overall, the record evidence fails to satisfy the doubts raised about Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from the cited adjudicative guidelines.

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
Subparagraph 1.a.:	Against 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

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.

Jennifer I. Goldstein
Administrative Judge