



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)	
)	
-----)	ISCR Case No. 08-10189
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: *Pro Se*

August 31, 2009

Decision

MOGUL, Martin H., Administrative Judge:

On February 6, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H, E, and J for Applicant. 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 responded to the SOR (RSOR) in writing on March 26, 2009, and requested a hearing before an Administrative Judge. I received the case assignment on April 16, 2009. DOHA issued a Notice of Hearing on April 22, 2009, and I convened the hearing on June 11, 2009. The Government offered Exhibits 1 through 3, which were received and entered into evidence without objection. Applicant testified on his own behalf, and he submitted no exhibits. At the request of Applicant, the record remained open until June 25, 2009, to allow Applicant to offer post hearing character letters. No evidence was submitted. DOHA received the transcript of the hearing (Tr) on June 18,

2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

In his RSOR Applicant admitted SOR allegations 1.a. through 1.g., under Guideline H, 2.a. under Guideline E, and 3.b. under Guideline J. He denied 2.b. and 3.c., with no response given for 3.a. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 29 years old. He is not married, and he has no children. Applicant works for a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 (Guideline H - Drug Involvement)

The SOR lists seven allegations regarding illegal drug involvement under Adjudicative Guideline H. As stated above, all of these allegations were admitted by Applicant in the RSOR, although his testimony, as will be reviewed below, differed from the SOR in terms of dates of usage. They will be discussed in the same order as they were listed in the SOR:

1.a. The SOR alleges that Applicant used marijuana, with varying frequency, from approximately 1998 to at least 2007. At the hearing, Applicant testified that he actually last used marijuana in May 2007, and from 2005 till his last use in 2007, there were times when he used marijuana every day and other times when it was used approximately two times a week (Tr at 28). From 1999 until 2005, he generally used it on a daily basis, and most of what he used he purchased from friends (Tr at 34). Applicant testified that although he was marijuana dependent, he intends to never use marijuana again (Tr at 52-53).

1.b. The SOR alleges that Applicant used cocaine, with varying frequency, from approximately 1998 to at least 2007. He testified that he last used cocaine on one occasion in 2007, and before that his last usage had been in 1999 (Tr at 29-30). He estimated that he used cocaine, which he purchased from friends, a total 20 times.

1.c. The SOR alleges that Applicant used hallucinogens, with varying frequency, from approximately 1998 to at least 2007. He testified that he last used hallucinogens, specifically mushrooms, on one occasion in either 2006 or 2007, and before that his last usage had been in 1999 or 2000. He estimated that his total mushroom usage was less than four times (Tr at 29-31).

1.d. The SOR alleges that Applicant used depressants, with varying frequency, from approximately 1998 to at least 2007. He testified that he last used depressants, specifically the prescription drug, Xanax, in 2004 or 2005, and he estimated that he used it in total 20 times. He also purchased Xanax from friends. (Tr at 32-33).

1.e. The SOR alleges that Applicant used stimulants, with varying frequency, from approximately 1998 to at least 2007. He testified that he last used stimulants or speed in 1999, and he estimated that he only used it 2 times in total (Tr at 34-37).

1.f. The SOR alleges that Applicant spent approximately \$200 per month on illegal substances. Applicant testified that this average purchase amount, that he estimated to be correct, continued on for a period of many years (Tr at 37-38).

1.g. The SOR alleges that Applicant distributed and/or sold marijuana to his friends between 1998 and 2007. Applicant testified that he did sell marijuana to his friends over a period of many years, although he had no estimate as the total amount he sold (Tr at 45-46).

Paragraph 2 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he exhibited conduct involving questionable judgement, lack of candor, dishonesty or unwillingness to comply with rules and regulations.

2.a. Applicant executed a Security Clearance Application (SCA), which was certified on May 14, 2008 (Exhibit 1). Question #24 of the SCA asked if, since the age of 16 or in the previous seven years, whichever is shorter, had Applicant illegally used any controlled substance? Applicant answered "No" to this question, and he listed no illegal substances. The Government alleges, and the evidence is clear that Applicant should have included all of his illegal drug usage as included in subparagraphs 1.a. through 1.e., above. In his RSOR, Applicant wrote in response to this allegation, "I admit, but I never saw this form before or held a clearance. I was unaware it was for the DoD I thought it was a job application."

At the hearing Applicant conceded that he knew he was not being honest in completing this SCA, but he claimed that he thought it was only part of the job application, not a Government questionnaire to apply for a security clearance. He did not include any of his illegal drug usage, because he thought it could potentially hurt his chances of getting a job (Tr at 38-43).

2.b. During a July 8, 2008 interview with an authorized investigator for the Department of Defense, Applicant indicated that he last used illegal substances and/or prescription medication prescribed to someone other than himself, when he was 25 years old, in approximately 2005, rather than his actual last usage which was in at least 2007.

Applicant testified that he did not believe he provided incorrect information to the investigator, regarding the dates of his drug usage. He argued that the dates that are the basis of the SOR allegation are taken from the information he furnished to the investigator. However, in reviewing the statement made to the investigator as part of a Report of Investigation (ROI), which was verified in Exhibit 3, it appears that Applicant did identify his last usage of marijuana in 2005, when he was 25, not the correct date of 2007, as he has admitted. Additionally, the dates that were used in the SOR, came from Applicant's responses to interrogatories, which is also part of Exhibit 3. Finally, while it is not alleged in the SOR, it indicates in the ROI that Applicant stated he only used cocaine on two occasions, which contradicts his testimony at the hearing, that he used cocaine on 20 times, as referred to in 1.c., above.

Paragraph 3 (Guideline J - Criminal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in criminal conduct.

3.a. Applicant's conduct, reviewed above in Paragraph 1, subparagraphs a. through g., constitutes criminal conduct. All of Applicant's drug usage, drug purchase and drug sale did constitute illegal conduct.

3.b. Applicant's conduct, reviewed above in Paragraph 2, subparagraphs a. and b., constitutes criminal conduct. Applicant also committed criminal conduct by furnishing incorrect information to the Government on an SCA and to an investigator.

3.c. Applicant's conduct, reviewed above in Paragraph 2, constitutes a violation of Federal Law, Title 18, United States Code, Section 1001, which is a felony. Applicant's furnishing incorrect information also is a violation of Title 18, United States Code, Section 1001, which is a felony.

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 useful 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 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 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 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

With respect to Guideline H, the Government has established its case. Applicant's improper and illegal drug abuse, including primarily the possession, and use, for many years of marijuana, and other illegal substances as well, is of great concern, especially in light of his desire to have access to the nation's secrets. Applicant's overall conduct pertaining to his illegal substance abuse clearly falls within Drug Involvement Disqualifying Condition (DC) 25. (a) (any drug abuse) and (c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution).

Based on the Applicant's many years and frequency of use of illegal substances, and his lack of candor in the information about his drug involvement that he furnished to the Government, I can not conclude at this time that Applicant's conduct comes within any Mitigating Condition (MC).

In this case, the Government has met its initial burden of proving by substantial evidence that Applicant has used illegal drugs for many years under Guideline H. Applicant, on the other hand, has failed to introduce persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's case against him. Accordingly, Paragraph 1 Guideline H of the SOR is concluded against Applicant.

Guideline E - Personal Conduct

With respect to Guideline E, the evidence establishes that Applicant furnished to the Government incomplete, untruthful answers regarding the extent of his drug involvement on an SCA that he executed on May 14, 2008, and during an interview with a Government investigator on July 8, 2008.

The Government relies heavily on the honesty and integrity of individuals seeking access to our nation's secrets. When such an individual intentionally falsifies material facts or fails to furnish relevant information to a Government investigator, it is extremely difficult to conclude that he nevertheless possesses the judgment, and honesty necessary for an individual given a clearance. In this case, I conclude that Applicant knowingly and willingly failed to give complete, honest answers regarding his drug usage to the Government.

In reviewing the Disqualifying Conditions (DC) under Guideline E, I conclude that DC 16. (a) applies because of Applicant's deliberate omission, concealment, and falsification of relevant facts from a personnel security questionnaire, which was used to determine security clearance eligibility. DC (b) also applies since Applicant deliberately provided false relevant information to the Government investigator. I can not find that any Mitigating Condition (MC) applies in this paragraph.

Applicant's conduct, considered as a whole, exhibits questionable judgement, unreliability, and a lack of candor. I resolve Paragraph 2, Guideline E, against Applicant.

Guideline J, Criminal Conduct

The Government also established by substantial evidence that Applicant engaged in criminal conduct, by his using illegal substances for many years, and knowingly providing false and misleading information to a Government investigator and on a security questionnaire, the last two of which are felonies.

DC 31. (a), a single serious crime or multiple lesser offenses, applies in this case. DC 31. (c), allegations or admissions of criminal conduct, regardless of whether the person was formally charged, is also applicable to this case. There is no MC under Criminal Conduct. Paragraph 3, Guideline J is found against Applicant

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 commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

I have considered the potentially disqualifying and mitigating conditions under Guidelines H, E, and J in light of all the facts and circumstances surrounding this case. Based on all of the reasons cited above, including Applicant's long history of using marijuana and other illegal drugs, and his lack of honesty and candor with the information he furnished to the Government, I find that the record evidence leaves me with serious questions and doubts as to Applicant's eligibility and suitability for a security clearance under the whole person concept. For all these reasons, I conclude Applicant has not mitigated the 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
Subparagraph 1.a. -1.g.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a.-2.b.:	Against Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraph 3.a.-3.c.:	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.

Martin H. Mogul
Administrative Judge