



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



In the matter of:)	
)	
SSN:)	ISCR Case No. 08-11420
)	
Applicant for Security Clearance)	

Appearances

For Government: D. Michael Lyles, Esquire, Department Counsel
For Applicant: *Pro se*

March 1, 2010

Decision

MASON, Paul J., Administrative Judge:

Based on a review of the case file, pleadings, exhibits, and testimony, Applicant's eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted his Electronic Questionnaires for Investigations Processing (SCA, GE 1) on December 8, 2006.¹ On September 30, 2008, Applicant was interviewed by an investigator of the Office of Personnel Management (OPM) concerning drug involvement. In his interrogatory answers dated January 8, 2009, Applicant checked "Yes," that he agreed with and adopted the investigator's summary of the September 30, 2008, interview, and that it could be used in evidence (GE 2). On April 27, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under drug involvement (Guideline H), and personal conduct (Guideline E). The action was taken pursuant to Executive Order

¹ Under E3.1.15. of the Directive, Subparagraph 2.a. of the SOR is amended by changing the date to November 14, 2006 to conform the allegation to the date Applicant signed the SCA (GE 1 at 7).

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 made effective within the Department of Defense for SORs issued on or after September 1, 2006.

Applicant furnished his answer to the SOR on June 9, 2009. DOHA issued a notice of hearing on August 31, 2009, for a hearing on September 16, 2009. The hearing was held as scheduled. At the hearing, two exhibits (GE 1 and GE 2) were admitted in evidence without objection to support the government's case. Applicant testified. The record remained open until September 30, 2009 (Tr. 47), to allow Applicant an opportunity to submit additional evidence. No evidence was submitted. DOHA received the transcript on September 24, 2009. The record closed on September 30, 2009.

Findings of Fact

The SOR alleges drug involvement (Guideline H) and personal conduct (Guideline E). Applicant admitted subparagraphs 1.a. through 1.d., but denied subparagraph 1.e., alleging that he still associates with individuals that used drugs with him in the past. He admitted both allegations under personal conduct (Guideline E) in Paragraph 2.

Applicant is 22 years old. It is not clear from the record when he was married. In his SCA (GE 1) he was single on December 8, 2006, the day he signed the SCA. His daughter was born on February 1, 2006 (GE 1 at 2). Applicant has been employed by a defense contractor since November 2006. Currently, he is an installation technician hoping to become an electronics technician, then an engineering technician (Tr. 27).

Drug Involvement

Applicant was nervous when he began his testimony. He had some difficulty providing a history of his drug use (Tr. 13-17). He told the OPM investigator in September 2008, that he smoked an average of one marijuana cigarette a day between ages 15 and 17 (GE 2). Applicant told the investigator he stopped using marijuana in 2004 (Id.). He testified he quit using marijuana in 2005 after beginning a relationship with his former wife (Tr. 13-14).

Marital discord developed between Applicant and his former wife in April 2008. He resumed using marijuana two or three times a week, and after being granted a security clearance on March 31, 2007. He took a random drug test and registered positive for marijuana in June 2008. His employer referred him to outpatient counseling (Tr. 16).

The counseling, which began in June 2008, consisted of individual therapy with a counselor for at least seven or eight sessions (GE 2, interview). Applicant completed the counseling in November 2008 (Tr. 16). Applicant's counselor wrote a report indicating that Applicant was a high risk for marijuana use but not drug dependent (GE 2, interview). Applicant testified that he no longer associates with friends who used marijuana with him in the past (Tr. 25).

Applicant finally told his wife to leave in April 2008 and she departed with his car and their child (Tr. 18-20). Applicant obtained a divorce on August 3, 2009 (*Id.*).

Personal Conduct

On December 8, 2006, Applicant completed a SCA. In response to question 24a. (use of drugs since 16 or in the last seven years), Applicant answered "no." In his answer to the SOR, he admitted he intentionally concealed his marijuana use. At the hearing, he confirmed his deliberate concealment of his drug use to get a job (Tr. 26).

Whole Person Information

During the course of his testimony, Applicant referred to documentation that he indicated he could obtain (Tr. 11, 23-25, 29, 30-33). Though he was provided two weeks to submit documentation regarding his job performance, negative drug test results, and his drug counselor's post therapy report, Applicant did not submit additional documentation.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). Each guideline lists potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information. These guidelines are flexible rules of law that must take into consideration the complexities of human behavior.

The administrative judge's ultimate adjudicative goal is to reach a fair and impartial decision that is based on common sense. The decision should also include a careful, thorough evaluation of a number of variables known as the "whole person concept." Finally, 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. Reasonable 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 sensible, 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.I.14., the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶E3.I.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 in demonstrating it is clearly consistent with the national interest to grant him security clearance access.

Analysis

Drug Involvement

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 or regulations.

Applicant's drug involvement falls within the scope of AG ¶ 25(a) (*any drug abuse*); 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*). Marijuana, an illegal drug, is defined by the guideline as a mood and behavior altering substance. In June 2008, Applicant tested positive for marijuana. He used the drug with varying frequency from 2002 to June 2008. The most bothersome aspect of Applicant's marijuana use is that he used the drug while holding a security clearance. The government has established a case of drug abuse under the drug involvement guideline.

Applicant has the burden of presenting evidence in explanation, mitigation, and extenuation, that meets his ultimate burden of persuasion. AG ¶ 26(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*) does not apply because his drug use did not stop until June 2008, less than two years ago. Applicant was using the drug two or three times a week for several months. His decision not to furnish probative documentation in support of his good job performance, negative drug tests, and written drug report verifying he completed drug therapy, continues to have a negative impact on his current reliability, trustworthiness, or good judgment.

AG ¶ 26(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 are used*, (3) *an appropriate period of abstinence*, and a signed statement of intent with automatic revocation of clearance for any violation) provides four actions an applicant may take to demonstrate he intends to maintain drug

abstinence in the future. While Applicant stresses that he no longer associates with drug users as set forth in AG ¶ 26(b)(1), he provided insufficient evidence to support his position. He provided insufficient evidence to substantiate his claim that he abstains from environments where drugs are used (AG ¶ 26(b)(2)).

Whether an appropriate period of abstinence from illegal drug use AG 26 (b)(3) is sufficient depends on the facts and circumstances of each case. Applicant did not stop using marijuana until he was caught in June 2008, less than two years ago. He used the drug while holding a security clearance. A longer period of abstinence is necessary under these circumstances. Without a written declaration of intent to forego future drug use (AG 26(b)(4)), Applicant has not provided sufficient evidence under any of the four avenues of demonstrating an intent to refrain from all drug use in the future. The drug involvement guideline is resolved against Applicant.

Personal Conduct

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.

This guideline applies to intentional attempts to conceal or omit information from an SCA. Applicant's admission of both subparagraphs of paragraph 2 of the SOR establishes that he deliberately concealed drug information because he needed the job. AG ¶ 16(a) (*deliberate omission or falsification of relevant facts from any personnel security questionnaire to determine security clearance eligibility or trustworthiness*) applies to Applicant's deliberate concealment of his drug history.

Applicant's decision to resume marijuana use in April 2008 brings his conduct within AG ¶ 16(d) (*credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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. This includes but is not limited to: . . . (3) a pattern of rule violations*); . . .). Applicant's resumption of marijuana use constitutes a violation of not only the law, but also the Department of Defense policy against illegal drug use.

There are three mitigating conditions (MC) that are potentially applicable to the circumstances in this case. Those conditions are: AG ¶ 17(a) (*the individual made prompt, good-faith efforts to correct the omission, concealment or falsification, before being confronted with the facts*); AG ¶ 17(c) (*the offense was 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); and AG ¶ 17(d) (the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate stressors, circumstances, or factors that caused untrustworthy, unreliable or other inappropriate behavior, and such behavior is unlikely to recur).

Applicant receives no mitigation under AG ¶ 17(a) or AG ¶ 17(c). While his marijuana use stopped two years before his deliberate concealment of that information in December 2006, he demonstrated poor judgment in April 2008 by resuming use of the drug while holding a security clearance. The fact that his wife and child suddenly left him in April 2008, was clearly a traumatic event. However, her departure does not excuse him from breaking the law while holding a security clearance.

Applicant receives limited mitigation under AG ¶ 17(d) because he acknowledges he used marijuana and he had drug counseling. But his admission of drug use and counseling is insufficient to overcome his deliberate falsification of his earlier drug use, and his drug use between April and June 2008. The personal conduct guideline is found against Applicant.

Whole Person Concept

I have examined the evidence with the disqualifying and mitigating conditions in my ultimate findings against Applicant under the drug and personal conduct guidelines. I have also weighed the circumstances within the context of nine variables known as the whole person concept. In evaluating the relevance of an individual's conduct, the administrative judge should consider the following factors:

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 the participation was 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.

Applicant used marijuana daily between ages 15 and 17. He claims he stopped using the drug in 2005. During a period of marital discord in April 2008, Applicant resumed using the drug about two or three times a week. By resuming marijuana use, Applicant violated the drug laws and the zero tolerance policy of the Department of Defense against drug use while holding a security clearance. The credit Applicant receives for stopping his marijuana use in June 2008 is tempered by the fact he was caught using marijuana by a random drug test.

Applicant has the burden of proving his security worthiness. He testified he had favorable job performance evidence, a favorable drug report, and negative test results. His decision not to reinforce his testimonial claims with independent evidence raises a reasonable inference that the evidence does not exist. Applicant has not demonstrated it is clearly consistent with the national interest to restore his security clearance. Accordingly, the drug involvement and personal conduct guidelines are found against Applicant.

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 (Drug Involvement, Guideline H): AGAINST APPLICANT

Subparagraph 1.a.	Against Applicant
Subparagraph 1.b.	Against Applicant
Subparagraph 1.c.	Against Applicant
Subparagraph 1.d.	Against Applicant
Subparagraph 1.e.	Against Applicant

Paragraph 2 (Personal Conduct, Guideline E): AGAINST APPLICANT

Subparagraph 2.a.	Against Applicant
Subparagraph 2.b.	Against Applicant

Conclusion

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

Paul J. Mason
Administrative Judge