



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 08-11937
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Gregg Cervi, Esquire, Department Counsel
For Applicant: *Pro Se*

September 25, 2009

Decision

LYNCH, Noreen, Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86) on July 1, 2008. On April 23, 2009, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR)¹ detailing the security concerns under Guideline H. 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 acknowledged receipt of the SOR, answered the allegations, and requested a hearing before an administrative judge. I received the case assignment on July 2, 2009. DOHA issued a notice of hearing on July 27, 2009, and I convened the hearing as scheduled on August 26, 2009. The Government offered Exhibits (GE 1-3),

which were received without objection. Applicant testified on his own behalf and presented Exhibit (AE A) which was admitted into the record without objection. DOHA received the transcript on September 3, 2009. Based upon a review of the record, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a through 1.f of the SOR.

Applicant is a 36-year-old employee of a defense contractor. He graduated from high school in 1991, and has attended many college courses. He is single (Tr. 26). Applicant worked in the music industry from approximately 1998 until 2006. He has been with his current employer in a full-time capacity since August 8, 2006 (GE 1).

From 1991 until 1993, Applicant illegally used LSD while at home or in a friend's home (Tr. 48). He was arrested in July 1993, and charged with Possession of Controlled Substance (LSD), a felony (GE 3). Applicant was placed on a six-year probation but was released after three years. He attended a drug education class. He resumed using illegal drugs after the probation was completed.

Applicant illegally used marijuana, cocaine and ecstasy (MDMA) from approximately 2001 until July 2008. He used the illegal drugs while working in his music studio and in his home. He used marijuana approximately 2000 times (Tr. 30). Applicant admitted that he was a daily user of marijuana. His cocaine use from 2001 until July 2008 occurred in the privacy of his home with his girlfriend (Tr. 31). He estimates that he used it approximately 100 times (Tr. 30). During this period Applicant also used ecstasy with his girlfriend in the privacy of his home. He gave different estimates of the frequency of the use (Tr. 26).

Applicant usually purchased the illegal drugs from his friends. He stated that he never sold any drugs. At the hearing, Applicant explained that he did not believe he was hurting anyone by using illegal drugs in the privacy of his home (Tr. 22). He does not believe that he needs drug counseling. He is still friends with the people with whom he used drugs (Tr. 28).

After Applicant completed his July 1, 2008, security clearance application (SF 86), he decided to use illegal drugs again as a last "hurrah". He admits using (psilocybin) "mushrooms" twice. Applicant used illegal drugs while he was working for his current employer. He did not inform his employer about his drug use until his security clearance investigation in 2008.

Applicant stopped using illegal drugs because of concerns with his current job. He does not want to lose his current position. He believes he excels in the position. He

wants to move forward with his life. He recognizes that a security clearance is needed for this job so that he can advance financially (Tr. 53).

Applicant has many letters of recommendation from his friends and former colleagues. Each one attests to his diligence, character and trustworthiness. He is considerate of others, kind, and honest (AE A). Applicant's supervisor recommends him for a security clearance. Applicant is an indispensable member of the team.

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.

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 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. 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

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.

The guideline notes several conditions that could raise security concerns. Under AG & 25(a), Any drug abuse[@] is potentially disqualifying. Under AG ¶ 25(c) “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia” is also potentially disqualifying. Applicant admitted his use of marijuana, cocaine, ecstasy, and mushrooms in varying amounts and frequency spanning a period from about 2001 to 2008. In 1993, he was charged with possession of a controlled substance. These disqualifying conditions apply in this case.

The guideline also includes examples of conditions that could mitigate security concerns arising from drug involvement. Under AG ¶ 26(a), the disqualifying condition may be mitigated where Athe behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment.[@] Applicant’s pattern of illegal drug use continued from a young age to adult maturity. He was a mature adult working for a company and violating the drug policy when he continued to use illegal drugs. He used illegal drugs until July 2008. This shows poor judgment and lack of trustworthiness, given the fact that he had applied for a security clearance during that time. I do not find that this mitigating condition applies.

Under AG ¶ 26(b), it may be mitigating where there is Aa 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; and (4) a signed statement of intent with automatic revocation of clearance for any violation.” This is not a factor for consideration in this case for the reasons discussed above.

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 and conclude that they are not sufficient to overcome the government's case. Applicant is a mature, well-educated professional. His use of illegal drugs for many years and his casual attitude about the use of drugs is cause for concern. He stopped using illegal drugs during a period of probation but resumed the illegal use after the probation ended. He believes that the use of illegal drugs in the privacy of his home is not an indicator of his trustworthiness or character.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility, judgment, and suitability for a security clearance. For all the reasons discussed above, I conclude Applicant has not mitigated 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
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

Subparagraph 1.f:

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.

Noreen A. Lynch
Administrative Judge