



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 09-02312
SSN:)
)
Applicant for Security Clearance)

Appearances

For Government: Candace Le'i-Garcia, Esquire, Department Counsel
For Applicant: *Pro Se*

February 26, 2010

Decision

LYNCH, Noreen, Administrative Judge:

On October 2, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR)¹ detailing security concerns under Guideline H (Drug Involvement) and Guideline E (Personal Conduct) 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 acknowledged receipt of the SOR, answered the allegations, and requested a decision on the record. When the government amended the SOR on January 22, 2009, Applicant requested a hearing before an administrative judge. I received the case assignment on December 17, 2009. DOHA issued a notice of hearing

on January 11, 2009, and I convened the hearing as scheduled on January 26, 2009. The Government offered Exhibits (GE) 1-4, which were received without objection and admitted into the record. Applicant testified on his own behalf and presented Exhibits (AE) A-F, which were admitted into the record without objection. DOHA received the transcript on February 2, 2010. Based upon a review of the record, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural and Evidentiary Rulings

Department Counsel made a motion to amend the SOR at the hearing. The amendment changed Guideline E, SOR ¶ 2.a. to read: "You used marijuana after you had been granted a Department of Defense Industrial Security clearance in about June 2003." The motion was granted without objection.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a through 1.i. He also admitted the allegations in ¶¶ 2.b and 2.c. He denied SOR ¶ 2.a of the original SOR. In his answer to the amended SOR, Applicant admitted the allegation in ¶ 2.a, as amended.

Applicant is a 29-year-old employee of a defense contractor. He graduated from high school in 1998, and earned an undergraduate degree in May 2002 (GE 1). He obtained his graduate degree in applied physics in 2007 (AE E). He is married and has two children. He has been with his current employer since August 2002 (GE 1). He has held a security clearance since 2003 (GE 4).

From 1998 until July 2007, Applicant used marijuana. He purchased and used marijuana in social settings in college from 1998 until 2002 (Tr. 27). Applicant believed his use in his second year of college was about once a week. He did not use marijuana as frequently in his last two years of college (maybe once a month) because he was not living with his fraternity brothers. He also decided it was not good for his memory, and his finances Tr. 30).

Applicant also experimented with cocaine, hallucinogenic mushrooms, LSD, and Ecstasy. He used Ritalin, and Percocet in 2000, which were not prescribed to him (Tr. 33). He used mushrooms on two occasions between 1999 and 2001. He recalls that trying the mushrooms was a fun experience. Applicant used and purchased cocaine in 2000 until at least 2001 (Tr. 35). He estimates that he used the cocaine about five times. His last use was not pleasant. He did not feel well and became scared. He went to the hospital for fear that something was wrong. Applicant stopped using cocaine because it was a "horrifying experience" (Tr. 37). Applicant used Ecstasy in 2000 on a trip with some college friends (Tr. 39). He used LSD from 1999 until at least 2000 (Tr. 39).

Applicant completed his first security clearance application in August 2002 (GE 2). He responded "No" to question 27 concerning use of illegal drugs and drug activity. He did not report the use of any illegal drugs .

At the hearing, Applicant explained that he did not fully understand the process or the SF 86 (Tr. 59). He already had the offer of employment with the defense contractor and had undergone a background check. He did not believe that his use of drugs in college had any bearing on his employment (Tr. 60). However, he acknowledged that if the employer knew about the illegal drug use, perhaps they would not view him as desirable a candidate. This is precisely why his parents advised him not to disclose the use of the drugs (AE B). He was angry and disappointed in himself for not disclosing the information in 2002 (Tr. 63).

Applicant admits using marijuana on two occasions while working for his current defense contractor and holding a security clearance. He described an incident in July 2005, when he purchased a small bag of marijuana for \$10 (Tr. 30). He smoked the marijuana cigarettes on the beach with his college buddy. In July 2007, he was at a concert with friends and was offered a marijuana cigarette. He "put it to his lips" and inhaled a very small amount. He claims he immediately removed himself from the situation. He describes these two incidents as "spontaneous" and not a "part of a larger pattern of behavior" (Tr. 52)

Applicant completed another security clearance application in October 2008 (GE 1). In response to Section 24 concerning use of illegal drugs and drug activity, he responded "Yes" and disclosed his use of marijuana in July 2007 (one time) and July 2005 (one time). He also disclosed his use of marijuana, mushrooms, cocaine, Ecstasy, Ritalin, Percocet, and LSD during his college years.

On the 2008 security clearance application, Applicant explained the reasons why he did not disclose the illegal drug use on his 2002 security clearance application. He explained that "not until I reached section 24 and read question b, did it ever occur to me that using illegal substances while possessing a security clearance was a huge offense" (GE 1). He did not report the experimentation with drugs during college because he was afraid his employment offer would be rescinded. He claims he was naive about the security clearance process. He elaborated that he "rationalized" that his employer did not need to know of his previous experimentation because he might be viewed as a less attractive candidate. He believed that because he experimented and did not use drugs habitually, it was fine to omit the marijuana use in college. He also relied on poor advice from his parents. His parents told him that it would not be a good idea to disclose the information (Tr.88).

At the hearing, Applicant explained that he knew as early as 2003, from a colleague at work, using illegal drugs could be a security concern (Tr. 67). He recalls that he knew he had to set the record straight because "he really screwed it up big" (Tr. 67). He claimed that the next time he had an opportunity or that he had to go through a security clearance procedure, he would set the record straight (Tr. 83). Applicant also

recalled that a special agent contacted him right after he started working for his employer in 2002. He was questioned about something else, but he did not disclose his past illegal drug use.

In December 2008, Applicant was interviewed by an Office of Personnel Management (OPM) investigator (GE 3). During the interview, he disclosed his use of marijuana and the other illegal drugs in detail. He explained that none of the prior use was disclosed on the first 2002 security clearance application because “he lacked the understanding of background check procedures; he did not realize the severity of his actions; and he did not want to “expose this to an employer who had already offered him a job” (GE 3).

At the hearing, Applicant explained that he made mistakes, but they are not part of a personality or character flaw. He describes himself as a dedicated husband and father who puts his family first (Tr. 15). He also submitted evidence that he was an excellent student in undergraduate and graduate school (AE E). He did not believe he was ever addicted to any of the above referenced illegal drugs. He emphasized that the drugs were always used in a social setting and never alone (Tr. 43).

Applicant distanced himself from the fraternity brothers and friends with whom he used the illegal drugs after graduating from college. Now, he may see some of them at weddings. He signed a statement in October 2009, promising that he would not abuse any illegal or legal drugs in the future (AE A).

At the hearing, Applicant emphasized that ignorance and fear were the basis of his intentional omissions in 2002. However, he claimed that it was not his intent to mislead the United States government. He is terribly sorry and relies on the excuse that he was a naive college student who feared losing a great employment opportunity. He also believed he took bad advice from his parents. He acknowledged that his falsification of the security clearance application is inexcusable.

At the hearing, Applicant testified that it was not until 2008, when completing his SF 86, that a “light bulb went off” (Tr. 108). He maintained that now he has fully come forward and disclosed everything.

Applicant’s performance appraisals (AE D) show he was rated as “exceeds requirements” on all evaluations from 2006 until 2009. He is noted as having strong technical abilities and leadership traits.

Applicant presented 12 letters of reference. His friends and co-workers described him as dependable. His engineering manager notes that Applicant is dedicated to his work and to his family (AE C). He also described him as a highly motivated, dependable engineer who takes responsibility for his mistakes. He further noted that Applicant is respected by his peers and by management for his technical expertise and work ethic.

Another senior engineer considered Applicant to be trustworthy. He gives the highest recommendation to Applicant. He has worked with Applicant for many years and believes that Applicant demonstrates integrity.

Applicant's co-workers described him as responsible, consistent, honest, and moral. Applicant's knowledge and performance is excellent.

Applicant's mentor describes him as an expert design engineer. He is calm, resourceful, honest and hardworking. He has earned the trust and respect of his colleagues. Applicant is a valuable team player who is bright and dedicated.

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 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 he purchased and used marijuana, in varying amounts and frequency, from about 1998 until February 2007. He purchased cocaine on various occasions. He also admitted using cocaine, mushrooms, LSD, Ecstasy, Percocet and Ritalin in 2000 and 2001. These disqualifying conditions apply in this case.

Under AG ¶ 25(g) “any illegal drug use after being granted a security clearance” is a disqualifying condition. Applicant has held a security clearance since 2003. He used marijuana in 2005 and in 2007. His use of marijuana while holding a security clearance was not an isolated event but twice in two years. This use occurred after he was a husband and father, and after he had been working for his employer for a number of years. This mitigating condition applies.

The guideline also includes 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.[@] There are no bright line rules for determining when conduct is recent. The determination must be based on a careful evaluation of the totality of the record. If the evidence shows a significant period has passed without evidence of misconduct, then the administrative judge

considers whether that period demonstrates changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.

Applicant's history of illegal drug use (marijuana) spans from 1999 until 2007. He stopped using the other illegal drugs in 2001. He was yet again influenced by someone to use an illegal substance in 2005 and 2007. This shows poor judgment and lack of trustworthiness given the fact that he had a security clearance during that time.

Applicant's last illegal drug use was in 2007, when he was attending a concert with friends. At the time, he was a married man and a father. He was a mature professional, holding a security clearance, working for a defense contractor. None of the above mitigating conditions apply.

Under AG ¶ 26(b), it may be mitigating where there is 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." Applicant signed a statement of intent in October 2009. The mitigating condition applies in part, but does not mitigate the drug involvement concerns.

Under all the circumstances, security concerns cannot be alleviated without the passage of more time and because doubts about his current reliability, trustworthiness, or good judgment are not sufficiently resolved. Despite his good intentions, Applicant was easily influenced at the 2007 concert with friends. He understands the adverse effects from drug use. However, he has not shown a sufficient track record of refraining from marijuana use to authorize his access to classified information.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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. Under AG ¶ 16(a), a disqualifying condition exists when there is "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 eligibility or trustworthiness, or award fiduciary responsibilities." Under AG ¶ 16(b) a disqualifying condition exists when "deliberately providing false or

misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.”

Applicant admitted that he deliberately falsified his 2002 security clearance application because he wanted to gain a position and feared that he would not be as desirable a candidate if he was truthful about his drug use. Applicant failed to disclose illegal drug use while holding a security clearance for many years. He realized in 2003 that he made a huge mistake by not reporting the prior use of illegal drugs. He did not do anything about this until completing a 2008 security clearance application. His behavior and personal conduct are disqualifying as they raise questions about his judgment, reliability, truthfulness, and willingness to comply with the law.

I considered the mitigating conditions under AG ¶ 17. Under AG ¶ 17(a), “the person made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts” is a possible mitigating condition. Applicant is given credit for revealing in 2008 his prior illegal drug use in college and in 2005 and 2007. However, he knew as early as 2002 or 2003 that he omitted relevant information out of fear of losing his employment. He waited until 2008 to rectify the problem. This mitigating condition applies in part.

Under 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” is not applicable. Although the intentional omission occurred in 2002, Applicant’s last use of marijuana was in 2007. He also believed that his employer did not have a need to know about his prior drug use in college because it occurred before his employment and does not affect his present performance. He has offered inconsistent reasons and explanations as to why his personal conduct should be mitigated. I have serious doubts about his good judgment and reliability. This mitigating condition does 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 and conclude that they are not sufficient to overcome the Government's case. Applicant is a well-educated professional. He has served in a professional capacity holding a security clearance since 2003 with no problems. He is a married man and the father of a child. He has an excellent employment record. He is a bright young man. There is no proof that Applicant used illegal drugs at work. He was credible in his statement that he intends to avoid use of marijuana in the future. He is recommended for a security clearance by his managers.

When Applicant completed his 2002 security clearance application, he deliberately omitted information concerning his illegal drug use because he feared he would not be able to keep his employment. He made no attempt to correct his falsifications prior to 2008. He used marijuana while holding a security clearance in 2005 and 2007. He does not understand what is required of him to be eligible for a security clearance.

Applicant receives some credit for disclosing his history of illegal drug use while in college on his 2008 security clearance application. He also listed the two incidents of marijuana use in 2005 and 2007. He has motivation to refrain from using illegal drugs. If he continues to abstain from illegal drug use, and avoids any other conduct that raises a security concern, a security clearance might be eventually approved for him.

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 and personal conduct.

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:-1h:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-c:	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