



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



In the matter of:)
)
) ISCR Case No. 09-03066
)
)
Applicant for Security Clearance)

Appearances

For Government: Candace L. Garcia, Esq., Department Counsel
For Applicant: *Pro se*

March 31, 2011

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

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

Statement of the Case

On October 18, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines H, Drug Involvement; E, Personal Conduct; and J, Criminal 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 after September 1, 2006.

Applicant answered the SOR in writing on November 5, 2010, and elected to have the case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on January 6, 2011. A complete copy of the

file of relevant material (FORM) was received by Applicant on January 13, 2011. He was afforded a 30-day opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. As of February 12, 2011, he had not responded. The case was assigned to me on February 23, 2011.

Findings of Fact

In Applicant's response to the SOR, he admitted the conduct alleged in SOR ¶¶ 1.a. through 1.j., and 2.a. through 2.h. For ¶¶ 2.i., 2.j., and 3.a., he failed to indicate whether he admitted or denied the allegations, and therefore these will be treated as denials. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant is a 31-year-old employee of a defense contractor since 2008. Applicant was granted a security clearance in approximately March 2008. Applicant contends that he has been a model employee in his present position, however, he offered no letters of support. He has never been married and has no children. He is currently enrolled in a company sponsored education program and hopes to earn an Associates Degree in Electronics. (Item 4.)

Applicant has an extended history of illegal drug use. He first tried marijuana in approximately 2006, while in high school. He used marijuana with friends approximately once every two weeks. He purchased the marijuana from friends at school. Applicant claims, in his November 23, 2009 signed statement, that he stopped using marijuana in 1999. However, a lab report from a December 2008 drug test indicated the presence of THC, a chemical found in marijuana. Applicant also used cocaine, beginning in approximately 2000, at the reported frequency of "two lines" every year. He indicated in his statement that he stopped using cocaine in 2005. However, lab reports of drug tests administered between June 2008 and February 2009, show Applicant frequently tested positive for the presence of cocaine (including tests in June 2008, July 2008, September 2008, October 2008, November 2008, February 2009, and May 2009). Applicant also reports use of illegally purchased vicodin and percocet without a prescription, from about September 1996 to June 1997, and from 2005 through at least June 2008. Lab reports of Applicant's urine also show Applicant used Morphine in about June 2008 and November 2008. (Item 2; Item 6; Item 7; Item 8; Item 9.)

In June 2008, Applicant sought medical treatment from a M.D. for opiate dependence in a structured treatment program. Applicant enrolled himself in treatment when he felt his use of vicodin and percocet was getting out of control. He is subject to frequent urine toxic screens, counseling, and medication. Despite his claim that he has "not used any illegal drugs since [his] treatment started," his lab reports, as noted above, show that until at least May 2009, Applicant was still engaging in the use of illegal substances. He is currently being prescribed Alazapram and Suboxone to treat his addictions. As of May 2010, Applicant was still receiving treatment for opiate dependence. (Item 2; Item 6; Item 7; Item 8; Item 9.)

Applicant also has an alcohol related conviction. In May 2000, he was charged with Illegal Possession of An Alcoholic Beverage. Applicant was found guilty and fined. However, when Applicant completed his security clearance application, dated February 23, 2008, he omitted this arrest and conviction in Section 23 where he was required to disclose if he had, "ever been charged with or convicted of and offense(s) related to alcohol or drugs?" Applicant answered this question, "No." He claims he simply forgot his 2000 conviction. However, he later acknowledged that he did not feel it was an arrest, but simply a fine. (Item 2; Item 4; Item 10.)

In addition to his falsification in Section 23, Applicant also failed to disclose his drug use in Section 24 of his security clearance application, dated February 25, 2008. He was required to disclose, "since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc), hallucinogenics (LSD, PCP, etc.), or prescription drugs?" He answered this question, "No," despite his use of illegal substances and misuse of prescription drugs as detailed above. (Item 2; Item 4; Item 6.)

In February 2009, an authorized investigator for the Department of Defense interviewed Applicant. As part of the interview he made claims about his drug use to the agent including that his last marijuana use was in 1997, that he did not use drugs from June 1997 to February 2008, and that he did not use any drugs after June 2008. Applicant also completed a signed, sworn statement, signed November 23, 2009. In his written statement, he asserted that he stopped using marijuana in 1999. He also indicated that he stopped using cocaine in 2005. Finally, Applicant claimed he had not used any drugs since beginning treatment with his physician. Applicant admits that each of these statements is false. He intentionally did not disclose his "slippage" because he "was in fear for [his] job." (Item 2; Item 8; Item 9.)

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;
- (b) testing positive for illegal drug use;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

(d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence; and

(g) any illegal drug use after being granted a security clearance.

The Government presented sufficient information to support the factual allegations under Guideline H (SOR 1.a.-1.j.). Applicant began using illegal substances in 1996. He purchased marijuana for a number of years. As recently as May 2009, he has used cocaine. His recent drug use occurred after being granted a security clearance in March 2008. He has been diagnosed with opiate dependence by his treating M.D. 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, including:

(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;

(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;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant's use of marijuana, cocaine, morphine, vicodin and percocet is recent, occurring between 2008 and 2009. Applicant's drug use did not occur under unusual circumstances, as he used over a 13-year period. Moreover, as recently as 2009, the fact that he held a security clearance did not prevent him from engaging in this questionable conduct. Further, he continued his use of illegal and controlled substances for approximately a year after beginning treatment for his opiate dependency. The decision to continue to use illegal and controlled substances cast doubt on Applicant's reliability, trustworthiness, or good judgment. AG ¶ 26(a) does not apply.

Applicant indicated that he will not use illegal substances in the future, that he no longer socializes with known drug users, and that he voluntarily entered treatment for his drug issues. However, Applicant's past statements to the Department of Defense are fraught with half truths and omitted facts. Applicant's failure to disclose his recent drug use on his security clearance application, in his February 2008 interview, and in his November 2009 statement, undermines the credibility of any such promise. AG ¶ 26(b) does not apply.

Applicant failed to present evidence that his misuse of prescription drugs occurred after any type of illness or that vicodin and percocet had ever been prescribed to him legally. AG ¶ 26(c) does not apply.

Applicant is still under the care of his treating physician. No prognosis for recovery was given. Further, Applicant's use of illegal drugs during the first year of treatment indicates that the abuse recurred, despite his treatment. AG ¶ 26(d) does not apply.

Applicant has not used any illegal substances since May 2009. There is no bright line defining an appropriate period of reform and rehabilitation. In some cases, almost two 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 drugs 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;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative; 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 deliberately falsified information relating to: his drug use and alcohol conviction in his February 2008 security clearance application; the extent of his drug use in February 2009 interview with an authorized agent of the Department of Defense; and the extent of his drug use in his November 2009 statement. He was required to list his drug use dating back to 2001, and thus, should have disclosed his use of cocaine from 2005 through 2008, marijuana use in 2008, his use of morphine in 2008, and his misuse of the prescription drugs percocet and vicodin from 2005 through 2008. He admits the falsification of his drug use in his answer to the statement of reasons and explained that he was "too fearful for his job" to answer the questions truthfully. Moreover, his illegal use of cocaine, morphine, Percocet, vicodin, and marijuana, occurred after he was granted a security clearance. With respect to his falsification on Section 23 regarding his alcohol arrest, his falsification appears to be deliberate despite his explanation that he forgot about the arrest because he later indicated that he did not consider it an arrest but instead a fine. His falsifications raise concerns under AG ¶¶ 16(a) and 16(b).

Further, his conviction for Illegal Possession of Alcoholic Beverages in May 2000 and his illegal drug use from 1996 through 2009 is personal conduct that creates a vulnerability to exploitation, manipulation, or duress. His drug use and conviction, if known, may affect the Applicant's personal, professional, or community standing, given the fact that he lied about them to protect his employment. AG ¶ 16(e) also applies.

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;

(d) the individual has acknowledged the behavior and obtained counseling to change behavior or taken other positive steps to alleviate the stressors, circumstances, or facts that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

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

Applicant's falsification and questionable personal conduct is unmitigated. Falsification of information provided to the Government cannot be considered minor. His decisions to falsify pertinent information to the Department of Defense in order to protect his job are troubling because the Department of Defense relies on individuals to self-report security incidents. He has neither sought to correct his falsification in a timely manner, nor been fully frank with the Government about his drug use. His falsification is recent, occurring in 2009, and has not been mitigated by time or other demonstrations of good judgment. While he has obtained counseling for his drug problem, he does not attribute his falsification to his use of drugs. Further, his counseling has not yet proven to be effective. Applicant's conduct reflects negatively on his trustworthiness and good judgment. He has not shown sufficient steps to reduce or eliminate vulnerability to exploitation. AG ¶¶ 17(a), 17(c), 17(d) and 17(e) do not apply.

Guideline J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

(a) a single serious crime or multiple lesser offenses; and

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant has a criminal history from 1996 through his most recent use of an illegal substance in 2009. While he only has one conviction over this 13-year time span, he has continuously engaged in the illegal use of drugs, and falsification to the Government about his drug use. The above disqualifying conditions have been established.

Two Criminal Conduct mitigating conditions under AG ¶ 32 are potentially applicable:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Applicant's most recent criminal activity, the falsification of his statement in November 2009, occurred less than two years ago, after a 13-year period of criminal activity. Not enough time has passed since his last illegal drug use to predict whether Applicant's drug use is likely to recur in the future. Further, while Applicant is attempting to rehabilitate himself through drug treatment, not enough time has passed to determine if Applicant has successfully been rehabilitated. He presented no evidence of a good employment record or other evidence of rehabilitation. AG ¶¶ 32(a) and 32(d) 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, E, and J in my whole-person analysis.

Weighing in Applicant's favor are several positive factors: he is working towards an associates degree, and he is currently undergoing treatment for his opiate dependence. However, other facts raise security concerns. Applicant used illegal substances at varying frequencies for 13 years. His use continued, even though he had

been granted a security clearance in 2008, and he was undergoing counseling for his drug dependency. Then he chose to hide his drug use from the Government. 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
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
Subparagraph 1.g.:	Against Applicant
Subparagraph 1.h.:	Against Applicant
Subparagraph 1.i.:	Against Applicant
Subparagraph 1.j.:	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
Subparagraph 2.f.:	Against Applicant
Subparagraph 2.g.:	Against Applicant
Subparagraph 2.h.:	Against Applicant
Subparagraph 2.i.:	Against Applicant
Subparagraph 2.j.:	Against Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraph 3.a.:	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