



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 09-04040
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Caroline H. Jeffreys, Esquire, Department Counsel
For Applicant: Alan V. Edmunds, Esquire

July 20, 2010

Decision

LYNCH, Noreen, Administrative Judge:

On December 23, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline E (Personal Conduct) and Guideline H (Drug Involvement) 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 adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR, answered the allegations, and through Counsel, requested a hearing before an administrative judge. I received the case assignment on March 30, 2010. DOHA issued a notice of hearing on May 13, 2010, and I convened the hearing as scheduled on June 22, 2010. 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 the testimony of one witness. At the hearing, he introduced eight Exhibits (AE) A-H, which were admitted into

the record without objection. At Applicant's request, I kept the record open for additional documents. Applicant through Counsel submitted nine additional exhibits, which were marked as AE I through O. DOHA received the transcript on June 29, 2010. 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, 1.c, 1.d, and 1.e. He also admitted the allegations in ¶¶ 2.a and 2.b. He denied the allegation in ¶ 1.b of the SOR with explanation.

Applicant is a 41-year-old employee of a defense contractor. He graduated from high school in 1987, and earned an undergraduate degree in 1995 (GE 1). He attended Master's level classes in 2005. (AE C) He is married and has one infant son. Applicant has been with his current employer since December 2008 (GE 1). He held a security clearance in 1998 or 1999 for a short period (Tr. 45).

From approximately 1992 until 1995 and 2001 until summer 2008, Applicant used marijuana. He purchased and used marijuana in social settings about 12 to 24 times when he was a senior in high school in 1986 or 1987. (Tr. 48) He recalled that he also used marijuana a few times in college. (Tr. 95)

Applicant also experimented with Ecstasy in 2000 until about 2006. When he first used Ecstasy, he was at night clubs or at home. He believed the last times were at his home with friends. (GE 3) He stopped because "he grew out of it."

Applicant completed a security clearance application on May 1, 2003 (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. (Tr. 65) He knew this was a false answer and claims that it was a mistake of character and judgment (Tr. 66).

In 2005, Applicant was denied a security clearance based on the 2003 investigation. (GE 4) At the time, he was employed by a defense contractor. During the background investigation, he was given a polygraph test. (Tr. 68) Applicant testified credibly that he did not like the way the polygraph was being conducted. He explained that he left in the middle of the test. At that point, he decided he did not want to work in a "classified field" any longer. He decided to work in an area that was non-classified. (Tr. 68) Applicant also went into business on his own.

Applicant completed a security clearance application on December 12, 2008. (GE 1) He answered "No" to question 26(a) concerning his investigation record. He also answered "No" to question 26(b) concerning a previous suspension or revocation of a security clearance. He was not aware at the time if he was denied a clearance in 2005. (Tr. 68)

In March 2009, 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. However, the dates of use for Ecstasy were from 2000 to 2001. (GE 3) Also, he told the investigator that his use of marijuana was also 2000 until 2001. (GE 3) He explained during the interview that he has not had any drug related treatment or counseling and did not have any drug related incidents or arrests. He noted that his use of illegal drugs did not affect his job or finances.

In Applicant's response to interrogatories, dated September 14, 2009, he appended a list of the dates and circumstances of his last use of marijuana or any illegal drug. He noted that he used marijuana a "couple times" a year from 2001 until 2008. He noted that a puff or two was typical during the last decade. (GE 3) As to his use of Ecstasy, Applicant explained that he used "on a couple times a month on weekends from 2000 until 2001, and maybe four times after 2001." He believed his last use of Ecstasy was sometime in 2006 (one pill).

When questioned about his response to section 24 concerning illegal drug use on his 2008 security clearance application, he explained that he made a mistake. (Tr. 36) He went on to say that the answer should have been "Yes". He explained, "I said something that wasn't true and I shouldn't have done that." (Tr. 37)

At the hearing, Applicant stated that he was not aware that he was "denied" a clearance because he just left the testing site (polygraph) and never followed up. So he did not know a "ruling" was made. Thus, he answered "No" to the question concerning the denial of a previous security clearance. (Tr. 39)

Applicant claimed at the hearing that during the 2009 OPM interview, he realized that he had made a mistake and did not tell the truth previously in his answers, and he thought he was now being more cautious with his answers. (Tr. 41)

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. 43). He was candid by noting that he still associates with some of the same people with whom he used illegal drugs. (Tr. 43)

Applicant changed his answers several times during the hearing when questioned about his motivation for not disclosing any illegal drug use on any security clearance applications. He said it was a mistake on several occasions and then later said it was a "memory lapse." (Tr. 72)

Applicant submitted negative voluntary drug test results from April 22, 2010 and May 18, 2010. (AE A) He also submitted a notarized statement of intent, dated May 13, 2010, to refrain from using illegal drugs in the future, and with the knowledge that any violation with regard to illegal drug use would result in automatic revocation of any security clearance. (AE B)

On June 9, 2010, Applicant was evaluated by a licensed psychologist. The clinical interview was comprised of a lengthy questionnaire and a three inventory screening. The licensed psychologist opined in part that Applicant's "judgment appears uneven with occasional lapses in forethought and breakdown in impulse controls." However, she noted that his Substance Abuse Subtle Screening Inventory (SASSI) indicated a low probability of a substance dependence disorder. She noted a Personality Disorder (Histrionic/Sadistic/Narcissistic features). She noted in conclusion that he tends to see others at fault, overlooking his part in difficulties. She also explained that he appears to enjoy work and is motivated to improve himself. (AE D)

At the hearing, Applicant emphasized that he was just trying to be as forthright as possible about any illegal drug use. (Tr. 76). 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 confused. He acknowledged that his falsification of his security clearance application is inexcusable.

Applicant's former neighbor testified at the hearing that he has known Applicant for almost seven years. (Tr. 23) He never saw Applicant abuse any drugs or alcohol. He attested to Applicant's good character and honesty. He also noted that Applicant is a "frank" person who will give his opinion.

Applicant's direct manager since January 2009, describes Applicant as a team lead for engineers in the company who faced a tough and challenging job. He is one of the top performers. (AE E) He summarized that Applicant's quality of work is exceptional and he is rated as such in his performance review.

Applicant presented 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 E). 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. (AE F)

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 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 1992- 1995 and from 2001 until 2008. He also admitted using Ecstasy, with varying frequency from 2001 until at least the summer of 2006. 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 held a security clearance for a short period of time in 1998. He used marijuana again in later years when he was applying for another clearance and had worked for a contract employer.

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 the 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/ecstasy) spans from 1992 until 2008, with a reported break. He had a security clearance for a short period and then applied again in 2003. He was a mature man and fully understood the adverse legal consequences of using illegal drugs. This shows poor judgment and lack of trustworthiness given the fact that he was trying to obtain a security clearance during the time he was using illegal drugs.

Applicant’s last illegal drug use was in 2006 or 2008. At the time, he was a married man and a father. He was a mature professional, applying for a security clearance, working for a defense contractor. Considering the record as a whole, I find that his questionable behavior did not happen under such circumstance that it is unlikely to recur. He has not disassociated from his drug-using friends and that continues to cast doubt on Applicant’s current reliability, trustworthiness, and judgment. He has never had drug counseling. None of the above mitigating conditions apply.

Under AG ¶ 26(b), it may be mitigating where there is 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; and (4) a signed statement of intent with automatic revocation of clearance for any violation.” Applicant signed a statement of intent not to use illegal drugs in May 2010. He noted that he still occasionally sees a person with whom he had used illegal drugs in the past. The mitigating condition applies in part, but does not fully mitigate the drug involvement concerns.

Under all the circumstances, security concerns cannot be alleviated without the passage of more time without any use of illegal drugs because doubts about Applicant's current reliability, trustworthiness, or good judgment are not sufficiently resolved. Despite his "good intentions" to be overly cautious and fully report his drug use in 2009 on his interrogatories, he was then vague and somewhat inconsistent with his answers at the hearing and during his OPM 2009 investigation. He understands the adverse effects from drug use. However, he has not shown a sufficient track record of refraining from illegal drug 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 2003 and 2008 security clearance application in his answers to the SOR. Applicant failed to disclose illegal drug use on the security clearance applications. He did not disclose the truth about his drug use until completing a 2009 DOHA interrogatory. He then retracted his admissions about the extent of his drug use at the hearing. 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 2009 his prior illegal drug use. However, he knew as early as 2003 that he omitted relevant information. He waited until 2009 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. The intentional omissions occurred in 2003 and 2008, and are too recent and serious to be mitigated Applicant presented vague and somewhat inconsistent answers to questions at the hearing. I have serious doubts about his good judgment and reliability. No mitigating conditions fully 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, intelligent professional. He is a married man and the father of a child. He has an excellent employment record. There is no proof that Applicant used illegal drugs at work. He was credible in his statement that he intends to avoid use of illegal drugs in the future. He was evaluated and there is a low probability of future substance dependence or drug abuse. He is recommended for a security clearance by his manager.

When Applicant completed his 2003 and 2008 security clearance applications, he deliberately omitted information concerning his illegal drug use. He made no attempt to correct his falsifications prior to 2009. He used marijuana around the time he applied for a security clearance in 2003 and 2008. He admitted that as late as 2008, he was using marijuana. His retraction at the hearing, as to an earlier date was not credible.

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 E:	AGAINST APPLICANT
Subparagraphs 1.a-b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraphs 1.d-e:	Against Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraphs 2.a-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.

Noreen A. Lynch
Administrative Judge