



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



In the matter of:)
)
) ISCR Case No. 09-04258
)
 SSN:)
)
)
 Applicant for Security Clearance)

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: *Pro se*

October 13, 2010

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated Drug Involvement and Personal Conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On May 7, 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) and E (Personal 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).

Applicant answered the SOR on May 27, 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 July 11, 2010. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file

objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received a copy of the FORM on July 19, 2010. As of October 6, 2010, he had not responded. The case was assigned to me on October 7, 2010.

Findings of Fact

Applicant is a 26-year-old employee of a defense contractor. He is applying for a security clearance for the first time. His Questionnaire for National Security Positions (SF 86), submitted in April 2009, listed that he worked for his current employer since January 2008, he attended community college, he has never been married, and he has a child that is now two years old.¹

Applicant started smoking marijuana in about 1997 and continued through early 2009. He estimated smoking marijuana a couple times a week during that period. He purchased marijuana for his use, but never grew or sold the drug. He also used cocaine, methamphetamine, psilocybin mushrooms, LSD, and ecstasy at various times during the same period. He used each of these drugs about once or twice, because he did not want to risk becoming dependent on them.²

Applicant was arrested in a state forest in about June 2006. He was charged with possession/use of marijuana, possession of drug paraphernalia, violation of a fire ban, and criminal littering/polluting. Applicant obtained a deferred prosecution in which he was required to perform community service and complete group educational counselling sessions. Applicant completed the conditions of his diversion program.³

Applicant listed his 2006 arrest under the pertinent police record question on his SF 86. Section 23a of the SF 86 asked:

In the last 7 years, have you illegally used any controlled substance, for example, cocaine, crack cocaine, THC (*marijuana, hashish, etc.*), narcotics (*opium, morphine, codeine, heroin, etc.*), stimulants (*amphetamines, speed, crystal methamphetamine, Ecstasy, ketamine, etc.*), depressants (*barbiturates, methaqualone, tranquilizers, etc.*), hallucinogenics (*LSD, PCP, etc.*), steroids, inhalants, (*toluene, amyl nitrate, etc.*) or prescription drugs (*including painkillers*)? Use of a controlled substance includes injecting, snorting, inhaling, swallowing, experimenting with or otherwise consuming any controlled substance.

Applicant answered "Yes," and stated that between "05/2003 (Estimated)" and "06/2006 (Estimated)," he used marijuana. He added that it was "Recreational. I was arrested in [J]une 2006 and offered a first time offender diversion plan in order to avoid being charged. I was order[ed] to attend group coun[se]ling from January 2007 through April

¹ Item 5.

² Items 4-6.

³ Items 4-8.

2007.” He did not list his marijuana use after June 2006, and he did not list his use of other controlled substances. In his response to the SOR, Applicant admitted to SOR ¶ 2.b, which alleged that he intentionally falsified the SF 86 by omitting his use of other drugs and by listing the end date of his marijuana use as June 2006. He did not respond to the FORM in which Department Counsel specifically commented that Applicant intentionally falsified the SF 86.⁴ After considering all the evidence, I find that Applicant intentionally falsified his SF 86 by failing to divulge the full extent of his drug use.

Applicant was interviewed by an investigator from the Office of Personnel Management (OPM) in April 2009. He fully discussed his 2006 arrest and his illegal drug use. He stated he stopped smoking marijuana in early 2009, because he no longer saw using illegal drugs as a reasonable risk and he knew that his employer would not tolerate drug use. He stated that he did not intend to use illegal drugs of any kind in the future.⁵

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.

⁴ FORM, Items 4, 5.

⁵ Item 6.

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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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

The security concern 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. Two are potentially applicable in this case:

- (a) any drug abuse;⁶ and
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant’s drug possession and use are sufficient to raise AG ¶¶ 25(a) and (c) as disqualifying conditions.

Two Drug Involvement Mitigating Conditions under AG ¶ 26 are potentially applicable:

- (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; and

⁶ Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

(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.

Applicant started smoking marijuana at a young age and used it regularly for years. He experimented with other illegal drugs but only used each drug once or twice, because he did not want to become dependent upon them. He stopped using illegal drugs in early 2009. There is no bright-line rule as to whether conduct is recent. Applicant has not used illegal drugs in more than a year. However, his drug use was extensive, occurred over a long period, and continued after his arrest and participation in group educational counselling sessions. I am unable to make a determination that illegal drug use is completely in his past. His drug use continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 26(a) is not applicable. Applicant stated he does not intend to abuse drugs in the future. He does not receive full mitigation under AG ¶ 26(b) for the same rationale discussed above.

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 is 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; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant intentionally falsified his SF 86 in 2009. AG ¶ 16(e) is applicable. His illegal drug use created a vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is also applicable.

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;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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 the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors 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 revealed his full drug use when he was questioned by an OPM investigator in April 2009. That is insufficient to establish a mitigating condition for the falsification of his SF 86. His honest answers to the OPM investigator and his abstinence from illegal drug use constitute positive steps to reduce or eliminate his vulnerability to exploitation, manipulation, and duress. AG ¶ 17(e) is applicable to the security concerns raised by Applicant's illegal drug use.

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 and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment. Applicant is 26 years old. He used illegal drugs for many years and provided false information on his SF 86. Applicant deserves credit for abstaining from illegal drug use since early 2009 and for being truthful in his background interview. However, concerns remain about his judgment, reliability, and trustworthiness.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated Drug Involvement and Personal Conduct security concerns.

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

Edward W. Loughran
Administrative Judge