



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



In the matter of:)
)
) ISCR Case No. 09-04284
)
)
Applicant for Security Clearance)

Appearances

For Government: Eric Borgstrom, Esquire, Department Counsel
For Applicant: *Pro Se*

June 9, 2010

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline H, Drug Involvement, and Guideline E, Personal Conduct. Applicant’s eligibility for a security clearance is denied.

On December 14, 2009, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing the security concerns under Guidelines H and E. 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 answered the SOR in writing on December 14, 2009, and again on January 11, 2010. He requested a hearing before an administrative judge. The case was assigned to me on April 5, 2010. DOHA issued a Notice of Hearing on April 9,

2010. I convened the hearing as scheduled on May 26, 2010. The Government offered Exhibits (GE) 1 through 6. Applicant did not object and they were admitted. Applicant testified and did not offer any exhibits. DOHA received the hearing transcript (Tr.) on June 3, 2010.

Procedural Matters

Department Counsel moved to amend the SOR, deleting in ¶¶ 2.a and 2.b, the date “February 23, 2009,” and substituting the date, “August 14, 2008.” Applicant did not object and was afforded an opportunity to delay the case 15 days so he would have proper notice. He elected to waive the 15-day notice requirement and proceed with the hearing as scheduled. Department Counsel’s motion was granted.¹

Findings of Fact

Applicant admitted all of the allegations in the SOR except ¶¶ 2.a and 2.b. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 56 years old. He graduated from high school in 1973. He has worked for the same federal contractor since 1977. He married in 1990. Applicant was unclear whether he held a security clearance while working for his employer. Evidence shows that he was granted an interim Secret clearance in December 2007, and was granted a Secret clearance on August 15, 2008. He was aware that he received a special access badge that permitted him to enter certain areas that he was previously unable to access. He did not know what level of access he was permitted. He stated he was unaware that he had a Secret security clearance that was granted in 2008. He believed his level of access was Confidential. He was aware that by being given a red badge his level of access was higher than it had been.²

After the terrorist attacks of September 11, 2001, Applicant was very scared. He was told by company officials to be vigilant in observing if any packages received by the company were suspicious. Because he was scared, Applicant used marijuana after September 11, 2001, until around October 13, 2001. He estimated he used marijuana about twice a week for approximately three weeks. He was aware his use violated his employer’s drug policy. He purchased the marijuana from friends he knew on the street. He would pay about \$20. Sometimes he smoked it with his cousins, sometimes by himself. He had to hide it from his wife because she would get angry if she found him using marijuana. He never sold marijuana. He was given a drug test in October 2001, and his results confirmed he used marijuana. Applicant admitted his use. He was

¹ Tr. 11-17.

² Tr. 30.

suspended from work for six to seven weeks. He attended a drug rehabilitation program. He stated he did not use marijuana again for five or six years.³

Applicant's daughter became very ill and he and his wife had to care for their grandchildren. He had difficulty handling the stress of taking care of his grandchildren with his wife. Due to this pressure and the added financial burden because he could not obtain public assistance for them, he began using marijuana again. He began smoking marijuana in October or November 2007 on the weekends, when he was watching football. He stopped using it in approximately December 2007, and resumed using it again around April 2008, during baseball season. He would use it with his cousins who would come to his house on the weekends. Sometimes he would use marijuana by himself. He used marijuana on and off throughout 2008. He knew it was against company policy and he was concerned about being tested again, so he placed a cup of his urine that did not have marijuana in it, in the office refrigerator. When he was contacted on October 2008 to submit a sample, he took the clean sample and heated it in the microwave. When it was tested, it was not the correct temperature and the sample would not be accepted. He was required to provide another sample. This sample was not altered and marijuana was found in his urine. He was purchasing marijuana from the street drug dealers. Applicant admitted he used marijuana one more time on October 27, 2010, after he took his employer's drug test. He stated the reason he used it again was because he felt guilty and had to tell his wife.⁴

Applicant attended a substance abuse program for treatment from November 7, 2008 to March 5, 2009. He was suspended from his employment while he attended the program. He was diagnosed with cannabis abuse.⁵ He does not intend to use marijuana in the future. Applicant was to be terminated by his employer, but signed a "last chance agreement" holding his termination in abeyance if he agreed to the conditions of the letter, which among other things included that he attend an alcohol/drug program and cooperate with random drug tests.⁶

Applicant completed a Questionnaire for Investigative Processing (E-QIP) form on August 14, 2008. He did not disclose his drug use during the previous seven years. He also did not disclose his drug use while holding a Confidential security clearance. Applicant explained the reason he did not disclose his drug use was because he was confused about the dates. I did not find Applicant believable in that he was so confused that he did not know he was required to disclose his most recent illegal drug use on his E-QIP. Applicant did not know he had been granted an interim Secret security clearance, but admitted that he knew he had a Confidential security clearance. He was also aware he was granted a special access red badge. I find Applicant was aware he

³ Tr.22-25, 36-37.

⁴ Tr. 25-28, 38-46.

⁵ GE 3.

⁶ Tr. 29-30.

held a security clearance, albeit a Confidential, when he completed his E-QIP. I find he intentionally failed to disclose his past drug use on his E-QIP.⁷

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 considered 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, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and 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 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

⁷ Tr. 28-29, 32-35, 46-57, 64-76.

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. Drugs are defined as mood and behavior altering substances, and include: (1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances; Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.”

I have considered the disqualifying conditions under drug involvement AG ¶ 25 and conclude the following have been raised:

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

Applicant used marijuana in 2001 for several weeks, and again in 2007 and 2008 with varying frequency. He purchased the marijuana and therefore also possessed it. He tested positive for marijuana use in 2001 and again in 2008. Applicant was not aware he had been granted a Secret security clearance, but there is sufficient evidence to conclude Applicant was aware he had a Confidential security clearance and had been granted a special access badge, when he used marijuana. I find all of the above disqualifying conditions apply.

I have considered all of the mitigating conditions under drug involvement AG ¶ 26. The following three are potentially applicable:

- (a) the behavior happened so long ago, was so infrequent or happened under circumstances that it is unlikely to recur or does not cast doubt on the individual's 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 are used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation; 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 used marijuana for several weeks in 2001. He failed a drug test given by his employer and attended a drug rehabilitation program. He was reinstated by his employer. He again used marijuana in 2007 and 2008 with varying frequency. This time, in anticipation of a drug test, he tampered with his urine sample. He was required to provide another sample and failed the test. Applicant's repeated actions cast doubt on his trustworthiness and good judgment. I find AG ¶ 26(a) does not apply. Applicant does not intend to use marijuana in the future. He signed a last-chance agreement with his employer acknowledging that he may be terminated if he does not comply with it. Applicant was aware of his employer's drug policy. He violated it in 2001 and was given another chance to return to work and redeem himself. Instead, he began using marijuana again. He was deceptive in tampering with his sample and attempting to thwart the company's drug detection program. Although Applicant professes he will not use marijuana in the future, his past actions raise serious doubts about his reliability, trustworthiness, and good judgment. He abstained for six years and then resumed use. Despite attending a drug rehabilitation program in 2001, knowing his employer gave random drug tests and the consequences if he used marijuana again, he took the risk. Not enough time has passed to find Applicant will not use marijuana again. I find there is insufficient evidence to conclude AG ¶ 26(b) applies. Applicant relapsed after attending a drug program in 2001. He completed another drug program in 2009. He did not provide sufficient evidence to conclude AG ¶ 26(d) applies.

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.

I considered the disqualifying conditions under personal conduct AG ¶ 16 that could raise a security concern and conclude the following have been raised:

(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.

Applicant deliberately failed to disclose on his E-QIP his past marijuana use. I find the above disqualifying condition applies. There is sufficient evidence to conclude that Applicant knew he had a Confidential security clearance when he was using marijuana. He stated he did not know he had been granted a Secret security clearance. I find Applicant intentionally falsified his E-QIP when responding to the question whether he used marijuana while holding a security clearance.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following mitigating conditions under AG ¶ 17:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts, and

(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.

Applicant was aware of his past drug use and his responsibility to disclose it when he completed his E-QIP. He did not promptly correct his falsification. He knew he had a Confidential security clearance and a special access badge when he answered questions on his E-QIP. His falsifications are not minor. His actions cast doubt on his reliability, trustworthiness and good judgment. I find the above mitigating conditions 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 the 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. Applicant is a mature person who began using marijuana because he was under stress. He was given a second chance by his employer, went to a drug program, and continued to work. Six years later he resumed his marijuana use because he was again under stress. He tampered with his urine sample and falsified his E-QIP about his drug use. The record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the Drug Involvement and Personal Conduct 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
Subparagraphs 1.a-1.d:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-2.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 interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge