



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



In the matter of:)	
)	
)	ISCR Case No. 09-04598
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Caroline H. Jeffreys, Esq., Department Counsel
For Applicant: *Pro se*

September 28, 2010

Decision

LOUGHRAN, Edward W., Administrative Judge:

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

Statement of the Case

On May 19, 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 June 7, 2010, and requested a hearing before an administrative judge. The case was assigned to me on July 12, 2010. DOHA issued a notice of hearing on July 28, 2010, and the hearing was convened as scheduled on August 19, 2010. The Government offered Exhibits (GE) 1 through 5, which were

received without objection. Applicant testified and submitted Exhibits (AE) A and B, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on August 30, 2010.

Findings of Fact

Applicant is a 35-year-old engineer employed by a defense contractor. He has worked for his current employer since 2001. He is seeking a security clearance for the first time. He has a bachelor's degree, which was awarded in 1997. He is married and has a child that is not yet two years old.¹

Applicant started smoking marijuana while he was in college. He continued to smoke marijuana after he graduated college. In 2000 to 2001, he also used cocaine about seven times, heroin about three times, ecstasy (MDMA) about three times, psilocybin mushrooms about twice, and LSD once. He has purchased marijuana and ecstasy; the other drugs were provided by friends or acquaintances.²

Applicant submitted a security clearance application (SF 86) in 2003. He listed his illegal drug use. He was interviewed by an investigator from the Defense Security Service (DSS) in July 2004, and provided a signed statement. He discussed his illegal drug use and admitted that he continued to smoke marijuana after he submitted his SF 86.³ He wrote about his future intentions:

At this time, I am not sure that I will terminate my use of marijuana. I don't believe that the drug has any negative effect on me. I do not use it on what I would consider an abusive basis. Purchase of the drug has never had any financial impact on me. I smoke the drug as a recreational activity and have never been psychological[ly] or physically addicted to the drug. If it is critical that I quit smoking marijuana in order to be eligible for a security clearance, I will make a definitive decision at that time. I have informed my supervisor and my employment security department about my illegal drug use. I am not trying to hide my drug usage, but I feel as though there is no harm in my continued use of marijuana. My use of other drugs as well as marijuana is not an issue that I can be blackmailed or manipulated. Other than marijuana, I have no intention of using any other type of drug.⁴

Applicant testified the DSS agent told him that because of Applicant's drug use, if he did not need a security clearance for his job, it would be a good idea to withdraw his application for a clearance. The agent told him that it was better to stop the process

¹ Tr. at 38, 52; GE 1.

² Tr. at 22, 24, 38-40; Applicant's response to SOR; GE 1-5.

³ Tr. at 18, 41; GE 1, 5.

⁴ GE 5.

than to be denied a clearance. Applicant's employer withdrew its request for a security clearance for Applicant in September 2004. Applicant continued to smoke marijuana. He also used psilocybin mushrooms in a foreign country in 2004 and in the United States in 2007. He testified that he did not understand all that was required of someone holding a security clearance.⁵

Applicant submitted a Questionnaire for National Security Positions (SF 86) in May 2009. He listed his use of psilocybin mushrooms and marijuana under the question that asked about illegal drug use during the last seven years. He wrote that his marijuana use was from 2002 to the "[p]resent," and that it was:

Infrequent use on vacations or holidays for recreational and relaxation purposes. If I had to guess, maybe three times a year over the last 7 years. So I'd have to guess 20 times total?⁶

Applicant was interviewed by an investigator from the Office of Personnel Management (OPM) in May 2009. He described his illegal drug use. He stated the last time he used any illegal drug was when he smoked marijuana during Thanksgiving 2008. He stated that he had not smoked marijuana during the previous several months because he felt sleep deprived because of his infant child, and he did not want to complicate issues with drug use. He stated that he did not believe that marijuana should be a controlled substance. The interview was summarized in a report of investigation (ROI). DOHA sent the ROI to Applicant in an interrogatory and asked him to verify the accuracy of the ROI, make any changes, and submit additional information. In October 2009, he responded and wrote:

And, with an 8-month old child, I can say that my personal recreational time and activities, or lack thereof, will keep me from even wanting to use drugs for the foreseeable future. I would be happy to sign something to this effect, and abstain while possessing a clearance, if it alleviates concerns that may exist.⁷

DOHA submitted additional interrogatories to Applicant, which he answered in February 2010. He wrote that he was not currently using illegal drugs, and that he was "also a new parent, with no inclination to do anything that might affect being a good father, such as being under the influence of drugs or breaking laws."⁸

Applicant's last marijuana use was during Thanksgiving 2008. His wife was pregnant at the time. The marijuana was available before dinner. Applicant's wife

⁵ Tr. at 18-19, 24-31, 42-46, 52; Applicant's response to SOR; GE 2.

⁶ GE 1.

⁷ GE 4.

⁸ GE 3.

believed that he had missed out on a lot because of the pending arrival of their baby. She told him that it was fine with her if he smoked the marijuana.⁹

Some of the people that Applicant used illegal drugs with have stopped using drugs. He no longer socializes with people that still use drugs. Applicant testified that he did not intend to use illegal drugs again. He regretted the poor decisions he made when he used illegal drugs. He submitted a signed statement of intent not to use illegal drugs while holding a security clearance, with automatic revocation of his clearance for any violation.¹⁰

Applicant submitted a letter from his supervisor. He wrote about Applicant's solid job performance resulting in a recent promotion. He believes Applicant is patriotic, trustworthy, and honest. Applicant has shared with him the security concerns. He feels that Applicant has demonstrated a "changed lifestyle that accommodates both family and the clearance process," and that Applicant "can be counted on to maintain that lifestyle."¹¹

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. 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.

⁹ Tr. at 31-33, 48; GE 2.

¹⁰ Tr. at 21-22, 25-26, 31-38; Applicant's response to SOR; AE B.

¹¹ AE A.

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 an 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;¹² and
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant’s possession and use of marijuana, psilocybin mushrooms, ecstasy, cocaine, heroin, and LSD raise AG ¶¶ 25(a) and 25(c) as disqualifying conditions.

Two Drug Involvement mitigating conditions under AG ¶ 26 are potentially applicable:

¹² Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

(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

(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 using marijuana in college. He used psilocybin mushrooms, ecstasy, cocaine, heroin, and LSD in 2000 to 2001. He stopped using ecstasy, cocaine, heroin, and LSD in 2001. He submitted a security clearance application in 2003. He provided a written statement to the DSS in 2004, in which he stated that he was not sure that he would end his marijuana use. His request for a clearance was withdrawn. He continued to use marijuana and psilocybin mushrooms. He has not used any illegal drugs since the last time he smoked marijuana during Thanksgiving 2008. There is no bright-line rule as to whether conduct is recent. Applicant has not used illegal drugs in almost two years. However, he continued to use illegal drugs after submitting a security clearance application and being interviewed by the DSS. Applicant's drug use continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 26(a) is partially applicable.

Applicant no longer socializes with people that still use drugs. He testified that he did not intend to use illegal drugs again. He submitted a signed statement of intent not to use illegal drugs while holding a security clearance, with automatic revocation of his clearance for any violation. I am satisfied that he will never use ecstasy, cocaine, heroin, and LSD again. Despite his assertions, doubts remain as to whether he will use marijuana and psilocybin mushrooms again. AG ¶ 26(b) is partially applicable.

In sum, I conclude that security concerns remain despite the presence of some mitigation.

Guideline E, Personal Conduct

The security concern 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 condition is potentially applicable:

(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 used marijuana and psilocybin mushrooms after he submitted his security clearance application in 2003. That conduct created a vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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 has not used illegal drugs since November 2008. He has been honest about his drug use with his employer and the DoD. He has taken positive steps to reduce his vulnerability to exploitation, manipulation, and duress. AG ¶ 17(e) is applicable. Personal Conduct security concerns have been mitigated.

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.

I considered Applicant's favorable character evidence. Applicant continued to use illegal drugs after he submitted a security clearance application in 2003 and was interviewed by the DSS in 2004. He has not used illegal drugs since November 2008. He has been honest about his drug use with his employer and the DoD, and he appears to be sincere when he states that he will not use illegal drugs again. However, his extensive illegal drug use continues to raise doubts about his current judgment, reliability, and trustworthiness. He has not yet established a sufficient period of abstinence to convince me that he will not return to illegal drug use.

Overall, 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 mitigated Personal Conduct security concerns, but he has not mitigated Drug Involvement 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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	For Applicant
Paragraph 2, Guideline E:	For APPLICANT
Subparagraph 2.a:	For 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