



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



In the matter of:)
)
) ISCR Case No. 09-06798
)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro Se*

August 31, 2010

Decision

DAM, Shari, Administrative Judge:

Based upon a review of the record evidence as whole, Applicant's eligibility for a security clearance is denied.

On April 8, 2009, Applicant submitted a Questionnaire for National Security Positions (SF 86). On March 10, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under the guidelines for Personal Conduct, Drug Involvement, and Criminal Conduct. 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.

On April 10, 2010, Applicant answered the SOR in writing and elected to have the case decided on the written record in lieu of a hearing. On May 25, 2010,

Department Counsel prepared a File of Relevant Material (FORM), containing 14 exhibits (GX), and mailed Applicant a complete copy two days later. Applicant received the FORM on June 2, 2010, and had 30 days from its receipt to file objections and submit additional information. Applicant did not file a response. On July 28, 2010, DOHA assigned the case to me.

Procedural Issue

The Government's Motion to Strike allegation 2.i is granted. (FORM at 6.)

Findings of Fact

In his Answer, Applicant admitted all factual allegations contained in the SOR. Those admissions are incorporated into the findings herein.

Applicant is 57 years old. He has been married 25 years and has two children, ages 25 and 21. He has participated in community organizations and events for many years. He has worked for a federal contractor from 1983 until 1989, and from 1999 to the present. He is a senior engineering specialist. (GX 11 at 10.)

Applicant has a long history of purchasing and using marijuana illegally. In 1977, he was found guilty of possessing marijuana, fined \$100, and placed on unsupervised probation for one year. He admitted that he used it from 1975 to May 2008 with varying frequency. He used it while holding Secret and Top Secret security clearances with the Department of Defense since 1984. He used it after he was granted access to sensitive compartment information (SCI) by another Government agency in October 2006. (GX 3.)

Applicant admitted that: (1) he failed to disclose the extent of his marijuana use in a Personnel Security Questionnaire (SF 398), which he executed on May 22, 1992; (2) he failed to disclose that he had used marijuana with the seven years prior to completing a Security Clearance Application (SF 86) on February 1, 2000; (3) he failed to disclose using marijuana after being granted a security clearance; (4) and he failed to disclose his marijuana use from 1992 to 2002 in a sworn statement that he completed on June 4, 2002. (GX 3.)

On September 15, 2008, another Government agency revoked Applicant's access to classified information based on his falsification of information, which he had included in his July 2006 and January 2008 security clearance applications. (GX 3, 11 at 5.) In its revocation letter, the agency stated:

Adverse reporting received in June 2008 advised that you admitted you had been using marijuana from 1995 until 2006. You revealed you stopped using marijuana in 2006 and most of 2007; however, you started using again in the fall of 2007.

During your August background investigation, you acknowledged you purchased marijuana over the past 25 years. You said you purchased an ounce of marijuana a year for \$300. You acknowledged that you had not been forthcoming regarding your marijuana use because you feared repercussions your admission would entail with your work.

You signed a drug statement in November 2006 stating that you had been informed that “unlawful use of any narcotic substances, marijuana, or dangerous drugs, is a basis for Ineligibility for Special Security Access.” (GX 11 at 5.)

Applicant acknowledged that he made a made “a really big mistake; one that may not be balanced by the good things I’ve done. I smoked marijuana occasionally and lied about it repeatedly and intentionally. I am sorry for having done so.” (GX 11 at 10.)

Applicant signed security clearance applications in May 1992, February 2000, July 2002, and January 2008, and a sworn statement in June 2002, under the certification that he understood that a knowing and willful false statement on any of the forms can be punished by fine or imprisonment or both, including a citation to “section 1001 of title 18, United States Code.”¹ That statute reads in relevant part:

§ 1001. Statements or entries generally.

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591 [18 USCS §§ 2241 et seq., 2250, 2251 et seq., 2421 et seq., or 1591], then

¹GX 13.

the term of imprisonment imposed under this section shall be not more than 8 years.

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 (AG) list potentially disqualifying conditions and mitigating conditions, which are useful 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 AG ¶ 2(a). 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 "Any 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.

Directive ¶ E3.1.14 requires the Government to 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 the applicant or proven by Department Counsel and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." 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."

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 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.

Analysis

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.

The Government alleged in SOR ¶ 1 that Applicant deliberately failed to disclose his long history of marijuana use in security clearance applications and a sworn statement. It further alleged that he used marijuana while holding a security clearance.

Applicant admitted those allegations, raising three disqualifications under AG ¶ 16.

(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;

(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; and

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment.

Applicant admitted that he intentionally failed to disclose the scope of his illegal drug purchase and use on security clearance applications and in a sworn statement because he was afraid to lose his employment. That evidence raised potential

disqualifications under AG ¶¶ 16(a) and (b). It raised a potential for exploitation because such information, if known in his community, could affect his reputation, as noted under AG ¶ 16(e)(1). He used marijuana while holding security clearances and in violation of his employer's policies. That evidence further triggered the application of AG ¶ 16(f). These acts shift the burden to him to establish mitigation.

AG ¶ 17 includes six personal conduct mitigating conditions that could mitigate security concerns arising under this guideline:

(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;

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

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant did not provide evidence to support the application AG ¶¶ 17(a) or (b). His history of intentionally withholding information about his illegal drug use began in May 1992 and continued into January 2008. His trustworthiness and judgment are in question. Hence, AG ¶ 17(c) does not apply. Although he acknowledged his deception in 2008, there is no evidence that he has received counseling or taken other steps to address the psychological factors underlying the repeated falsifications and to mitigate

the possibility of a recurrence. AG ¶ 17(d) does not apply. There is insufficient evidence to support the application of AG ¶¶ 17 (e), or (g). AG ¶ 17(f) is not relevant.

Guideline H, Drug Involvement

The security concern pertaining to 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. (a) 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; (b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

This guideline notes several conditions that could raise security concerns. Based on Applicant's admissions that he regularly used and purchased marijuana for most of his adult life up to May 2008, the Government raised a disqualifying condition under AG ¶ 25(a), "any drug abuse (see above definition)."

AG ¶ 26 includes examples of conditions that could mitigate the security concern arising from illegal drug use:

(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; and,

(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.

None of the above conditions mitigate the security concerns raised under this guideline. Given Applicant's 33-year history of the purchasing and using marijuana, his behavior casts doubt on his current trustworthiness and good judgment. AG ¶ 25(a) does not apply. There is no evidence to warrant the application of AG ¶¶25(b) or (c). Applicant has not participated in any substance abuse treatment, which is necessary to trigger the application of AG ¶ 25(d).

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct:

Criminal activity creates doubt about a person'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:

(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.

As alleged in SOR ¶ 3.a, each of the falsifications and omissions of material facts set forth in SOR ¶¶ 1.a through 1.e were deliberate and willful, thereby constituting violations of 18 U.S.C. § 1001.

AG ¶ 32 provides conditions that could mitigate criminal conduct security concerns:

(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;

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense; 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.

For the same reasons that Applicant failed to establish the parallel mitigating conditions under Guideline E (Personal Conduct), he failed to meet his burden with respect to these mitigating conditions. The multiple falsifications began in May 1992 and continued to January 2008. Although he noted in a December 2009 letter many personal accomplishments, a good work history with his employer, and expressed great remorse over his dishonest behavior, those facts are insufficient evidence of successful rehabilitation and do not outweigh his 33 years of illegal marijuana use and, beginning in May 1992, continued falsifications regarding it.

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.

According to 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 57-year-old married man and father of two young adult children, who has illegally used and purchased marijuana during his adult life and while holding security clearances. Although his candid admissions and remorse over his conduct is noteworthy, his long-term marijuana use raises serious concerns about his reliability, judgment, and ability to comply with rules and regulations. An equal security concern is Applicant's intentional failure to divulge his drug history on four security applications and in a sworn statement. The Government imposes a special trust in one who holds a security clearance and relies on a person to be honest and truthful regardless of the consequences. Applicant failed to honor that trust.

Overall, the record evidence leaves me with substantial questions as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant did not mitigate the security concerns arising from his personal conduct, drug involvement and criminal 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 to 1.f:	Against Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraphs 2.a to 2.h:	Against Applicant
Subparagraph 2.i:	Stricken
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.

SHARI DAM
Administrative Judge