



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



In the matter of:)
)
) ISCR Case No. 09-08407
)
)
Applicant for Security Clearance)

Appearances

For Government: David F. Hayes, Esquire, Department Counsel
For Applicant: *Pro se*

January 31, 2011

Decision

HOGAN, Erin C., Administrative Judge:

On July 27, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline E, Personal 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 on September 1, 2006.

On August 16, 2010, Applicant answered the SOR and requested a hearing before an administrative judge. Department Counsel was ready to proceed on October 1, 2010. The case was assigned to another administrative judge on October 6, 2010. On October 18, 2010, a Notice of Hearing was issued, scheduling the hearing for November 4, 2010. The case was transferred to me on November 4, 2010, because the assigned administrative judge was ill. The case was heard on that date.

During the hearing, the Government offered eight exhibits which were admitted as Government Exhibits (Gov) 1 – 8. Applicant testified and offered no exhibits. The transcript (Tr.) was received on November 15, 2010. Based upon a review of the case

file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

In his answer to the SOR, Applicant admits the allegations in SOR ¶¶1.a, 1.b, and 1.c. He denies the allegations in SOR ¶¶ 1.d, 1.e, and 1.f.

Applicant is a 49-year-old senior telecommunications specialist employed by a Department of Defense contractor applying for a security clearance. He has worked for his current employer since May 2008. He is a high school graduate and has attended college and technical schools. He served on active duty in the Air Force for two and half years between 1981 and 1983. He was involuntarily separated for misconduct - minor disciplinary infractions. He testified that he received a discharge characterization as general under honorable conditions. (The record does not have Applicant's official discharge paperwork. The characterization of discharge cannot be confirmed.) He is separated from his wife. He has two prior marriages and has four children and three step-children. (Tr at 5-6, 24, 88, 100, 103; Gov 1; Gov 7 at 3)

From 1978 to 1980, Applicant used marijuana approximately twice a week. He used marijuana daily from 1980 to 1981. He enlisted in the Air Force in 1981. He admits using marijuana approximately once a week during the weekends while on active duty in the Air Force until he was discharged in 1983. From 1983 to 1987, he used marijuana approximately once or twice a week. Between 1987 and 1988, he used cocaine approximately once a month. From 1987 to 1988, he used the following illegal drugs: Quaaludes approximately once a week; hashish on approximately 20 occasions; speed (amphetamine) on approximately four occasions; PCP on approximately 50 occasions. (Tr. 44; Gov 7 at 4-5; Gov 8 at 2)

In 1988, he stopped using illegal drugs when his oldest son was born. (Tr. 48) During the hearing, Applicant testified the dates of his past drug use were pretty accurate, but he cannot guarantee that the dates are exactly correct. (Tr. 52)

From 2000 to 2005, Applicant took the prescription drugs Tylenol III, Oxycodone, or Vicodin, at various times, each no more than five times a year for different body aches and pains. He testified that he had prescriptions for each of these drugs. He admits that his level of pain did not require such powerful medications. At hearing, Applicant denied that he was a drug addict, but acknowledged that he may have had a potential drug problem. (Tr. 53-54; Gov 5 at 2; Gov 8 at 2)

In approximately November 2004, Applicant purchased \$800 worth of cocaine and used it during that month. At the hearing, Applicant testified that the purchase of cocaine may have happened in 2003. (Tr. 58-59; Gov 5 at 2; Gov 8 at 3)

On August 30, 2005, Applicant completed a security clearance application (SF-86) for a contractor position with another government agency. Question 27 on the

security clearance application asked: "27. Your Use of Illegal Drugs and Drug Activity – Illegal Use of Drugs. Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbituates, methaqualone, tranquilizers, etc.) hallucinogenics (LSD, PCP, etc.), or prescription drugs?" Applicant responded, "No." He did not disclose his purchase and use of \$800 worth of cocaine in November 2004. He also did not disclose his use of the prescription drugs Tylenol II, Oxycodone, and Vicodin between 2000 to 2005. (Gov 3; Gov 5 at 2; Gov 8 at 2)

On September 26, 2005, Applicant was interviewed in conjunction with his security clearance background investigation by the other government agency. During this interview Applicant testified that he stopped using illegal drugs in 1988. He said that he had been exposed to marijuana in the past five years. He said that around October 2004, he discovered a "dime bag" of marijuana in his son's room. He found another "dime bag" of marijuana in his daughter's room. He initially stated that he flushed the marijuana down the toilet on both occasions. Later in the interview, he stated that he used some of the marijuana that he found in his daughter's room and flushed the remainder down the toilet. (Gov 7 at 5-6)

On January 9, 2006, Applicant was interviewed a second time related to his background investigation. During this interview, Applicant disclosed additional drug use. He indicated he took Percocet once a year from approximately 1990 to 1997. He took it not for the level of pain he was experiencing, but because it was available. He also admitted his use of Tylenol III, Oxycodone, and Vicodin between 2000 and November 2005. He admitted during the interview that the level of pain he was experiencing did not require such powerful medications. He told the investigator that he might be a drug addict. (Tr. 53-54; Gov 8 at 2)

Later in the interview on January 9, 2006, Applicant recanted the admission made during his previous interview on September 26, 2005, that he smoked some of the marijuana found in his daughter's room in October 2004. He admitted that he found the marijuana, but he flushed all of it down the toilet. He provided false information about smoking marijuana in October 2004, because he thought he could avoid having to admit that he purchased and used \$800 worth of cocaine in November 2004. (Gov 8 at 3) When Applicant was hired by the other government agency in 2005, he was unemployed. He needed a job. He testified that the purchase and use of cocaine in November 2004, could have occurred in 2003. He doesn't deny the illegal drug use; he is just not sure about the accuracy of the dates because it was so long ago. (Tr. 57-62)

On February 6, 2006, the other government agency denied Applicant's eligibility for access to classified information and access to the sensitive compartment information (SCI) for drug involvement and personal conduct. The other government agency found the concerns raised could not be mitigated because of his "longstanding and continuous" involvement with drugs and his dishonesty during security processing. His

behavior raised questions about his judgment, honesty, trustworthiness, and reliability. (Gov 5)

On August 7, 2006, Applicant completed a security clearance application for a position with another government agency. He answered, "No," in response to question 24 which asks: "YOUR USE OF ILLEGAL DRUGS AND DRUG ACTIVITY. Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants, (barbituates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?" (Gov 2) He did not disclose his use of cocaine in November 2004 or his misuse of Tylenol III, Oxycodone, Vicodin between 2000 and 2005. (Gov 2 at 5; Gov 8 at 2) He admits that he lied when he answered, "No" in response to question 24 on the August 7, 2006 security clearance application. He passed a urine test and did not think his past drug use would be raised as an issue. (Tr. 63-67)

On April 17, 2009, Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) to apply for a security clearance in conjunction with his current employment. Applicant responded, "No" to Section 23a. which asks:

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 (barbituates, 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. (Gov 1)

Applicant did not list his use of cocaine in November 2004 and his misuse of the prescription drugs Tylenol III, Oxycodone, and Vicodin between August 17, 2002 and 2005, even though these uses occurred within seven years of the date Applicant completed his e-QIP application. (Gov 2 at 5; Gov 8 at 2)

On August 27, 2009, Applicant was interviewed in conjunction with his background investigation. Applicant told the investigator that he used illegal drugs between the ages of 16 and 24, with the exception of when he served in the military. He said he never used illegal drugs while in the military or while serving in any position of trust. Applicant did not tell the investigator conducting his background investigation interview about his November 2004 purchase and use of cocaine. He lied about not using illegal drugs while on active duty in the military. (Gov 4 at 3-4)

Sometime before February 18, 2010, the Defense Office of Hearings and Appeals sent Applicant interrogatories for him to answer. Included in the interrogatories

was a summary of the August 27, 2009, interview which was prepared by the investigator who interviewed him. In his response to interrogatories, dated February 18, 2010, Applicant agreed that the investigator's summary of the interview was accurate. Item 5 of the interrogatories stated: "You may also add additional information at this time regarding the matters discussed during your interview. Add additional pages if necessary." Applicant added that he used cocaine with a friend on one occasion in either 2001 or 2002. (Gov 4) (Applicant did not list his 2001/2002 use of cocaine on his security clearance applications dated August 30, 2005, August 7, 2006, and April 17, 2009.)

In his answer to the SOR, Applicant admits that he lied during his background interview on September 26, 2005. Applicant denied the allegations in SOR ¶¶ 1.d, 1.e, and 1.f because he believed that he had to only disclose drug use within the past seven years. He also claims that he did not abuse the prescription drugs, but was disclosing that he may have potential problem with prescription drug abuse. He claims he obtained legal prescriptions for Tylenol III, Oxycodone, and Vicodin. He would take them until he ran out of each prescription. His wife pointed out the potential abuse issue. At the hearing, he stated that he appreciates that the other government agency pointed out a potential problem that he may have had regarding prescription drugs during the 2005/2006 background investigation. (Tr. 53-55; Response to SOR, dated, August 16, 2010.)

During the hearing, Applicant stated that the interviews on September 26, 2005, and January 9, 2006, were in conjunction with a polygraph test. He states that he only failed the drug portion of the polygraph examination. He admits that he lied. (Tr. 19-20) He testified that he answered, "No" in response to question 27 on the security clearance application dated August 30, 2005, and in response to question 24 on the August 7, 2006, security clearance application because he passed a urine test. (Tr. 22, 35-39)

Applicant claims that he was truthful in his response to section 23a on his e-QIP application dated April 17, 2009, because he was only required to disclose drug use within the past 7 years. When advised by Department Counsel that the seven-year period would go back the April 17, 2002, and the 2004 cocaine use should have been listed, Applicant claimed that he had a faulty memory. (Tr. 68-73) He testified that he did not discuss his 2004 cocaine use during his background interview on August 27, 2009, because he thought more than seven years had passed since he used cocaine. He did not think his use of prescription drugs was relevant because they were legal prescriptions. (Tr. 74-75)

When Applicant was questioned about his statement during his August 27, 2009, interview that he never used drugs while in the military, Applicant responded:

Well, like I said, you know, I never did it on duty. I never did it on weekends when I was in the military. I would only do it on leave. And that would be going home ... so I mean trying to reflect back on those days and what I did, you know, did I do some when I was in the military? Yes.

Did I do it on the weekend? Maybe. It's like one of these things I'm trying to remember did I? did I? did I?

And I don't when I did it, how I did it and anything. All I know is that it's most likely yes because I did smoke marijuana back then. And I gave it up for a year. I wouldn't smoke it for a year and then all of a sudden somebody would give me one. I never bought it. (Tr. 77)

Applicant requests that the Government be open-minded and understanding. He claims the case is about dates and his inability to remember. The United States is the greatest country in the world and he would never harm his country. He has been rehabilitated since the denial of his security clearance in 2005. (Tr. 111-113)

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 must be considered when determining 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.

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

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.

There is sufficient evidence to conclude Applicant deliberately omitted information about his past drug use in response to question 27 on his security clearance application dated August 30, 2005. He deliberately omitted information about his past drug use in response to question 24 on a security clearance application dated August 7, 2006. He deliberately omitted information about his past drug use in response to section 23(a) on an e-QIP application, dated April 17, 2009.

Applicant’s deliberate falsifications on three separate security clearance applications raise 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).

There is sufficient evidence to conclude Applicant deliberately falsified material facts during a September 26, 2005 interview by an investigator conducting his security clearance background investigation when he claimed that he had used marijuana that he found in his daughter’s room in October 2004. Applicant admits that he fabricated this story in hopes that he would not have to disclose his purchase and use of \$800 worth of cocaine in November 2004. He admits to the fabrication and to the cocaine use, even though at the hearing he disclosed the cocaine use may have happened in 2003.

There is sufficient evidence to conclude that Applicant falsified material facts during an August 27, 2009, interview with an investigator conducting his background investigation when he states that he had not used illegal drugs while on active duty in the military. Applicant admits that he used marijuana approximately once a week on the weekends when he served on active duty. Applicant had the opportunity to review the summary of the August 27, 2009 interview and stated the interview was accurate. During the hearing, Applicant had no explanation for why he stated that he never used illegal drugs while in the military during his background investigation interview on August 27, 2009.

Applicant's deliberate falsifications during two background investigation interviews on September 26, 2005, and August 27, 2009 raised AG ¶ 16(b) (deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative).

I find for Applicant with respect to the SOR ¶ 1.f. The Government alleged Applicant falsified material facts in his interrogatory response, dated February 18, 2009, because he did not disclose his purchase of cocaine in October 2004. The interrogatory states: "You may also add additional information at this time regarding the matters discussed during your interview." This statement is open-ended and too broad to conclude that Applicant deliberately falsified his February 18, 2009, interrogatory response. For this reason, I find Applicant did not deliberately falsify his February 18, 2009 interrogatory response.

Applicant's deliberate falsifications of his security clearance applications dated August 30, 2005, August 7, 2006, and April 17, 2009; and his deliberate falsifications during security clearance background interviews conducted on September 26, 2005, and August 27, 2009 raise personal conduct disqualifying condition AG ¶ 16(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 . . .). Applicant's past drug use makes him vulnerable to exploitation, manipulation, or duress. His past falsifications about his past drug use indicate that he has something to hide.

Several personal conduct mitigating conditions potentially apply:

AG ¶ 17(a) (the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts):

AG ¶ 17(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); and

AG ¶ 17(e) (the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress).

None of the mitigating conditions apply. AG ¶ 17(a) does not apply because Applicant did not make prompt good-faith efforts to correct his falsifications before being confronted with the facts. He continued to lie about his past drug use during three subsequent security clearance investigations.

AG ¶ 17(c) does not apply because questions about Applicant's reliability, trustworthiness, and good judgment remain. Deliberately providing false information to the government is a serious offense. Applicant lied about his illegal drug use after he submitted security clearance applications on three separate occasions. He deliberately concocted a story about using marijuana found in his daughter's room in October 2004, hoping that he could avoid admitting his purchase and use of cocaine in 2004. He deliberately omitted his illegal drug use when he submitted a security clearance application on August 7, 2006, because he did not think that his past illegal drug use would be discovered after he passed a urine test. He deliberately lied during his most recent security clearance background investigation when he answered, "No" in response to section 23(a) about his illegal use of drugs within the past 7 years. He failed to list his cocaine use in 2004 and the abuse of prescription drugs between 2002 and 2005. He also deliberately lied to the security clearance investigator conducting his background investigation interview on August 27, 2009, when he stated that he never used illegal drugs while on active duty in the military. Applicant has lied so often throughout these security clearance investigations that anything he states about his past illegal drug use lacks credibility. Questions about Applicant's judgment, trustworthiness, and reliability remain.

AG ¶ 17(e) does not apply because Applicant's deliberate falsifications about his illegal drug use indicates that he has something to hide and is vulnerable to exploitation, manipulation, or duress.

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 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 did not provide information about his duty performance or character. Applicant's pattern of repeated deliberate falsifications about his illegal drug use raises credibility issues. He did not present sufficient evidence to mitigate personal conduct security concerns. Questions about Applicant's judgment, reliability, and trustworthiness remain.

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 – 1.e:	Against Applicant
Subparagraph 1.f	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 interests to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

ERIN C. HOGAN
Administrative Judge