



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



In the matter of:)	
)	
)	ISCR Case No. 10-00291
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Melvin A. Howry, Esq., Department Counsel
For Applicant: *Pro se*

March 28, 2011

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant has not mitigated the Personal Conduct security concerns related to his falsification surrounding his drug use and his use of marijuana while possessing a security clearance. Eligibility for access to classified information is denied.

Statement of the Case

On July 27, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline 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) effective for cases after September 1, 2006.

Applicant answered the SOR on August 19, 2010, and requested a decision without a hearing. On November 8, 2010, Department Counsel requested a hearing before an administrative judge in the instant matter pursuant to Directive ¶ E3.1.7. The case was assigned to me on November 9, 2010. DOHA issued a notice of hearing on

November 9, 2010, and the hearing was convened as scheduled on December 15, 2010. The Government offered Exhibits (GEs) 1 through 6, which were admitted without objection. The Applicant offered Exhibits (AEs) A through E, which were admitted without objection, and testified on his own behalf. The record was left open until January 3, 2011, for the Applicant to submit additional documentation, however, nothing further was submitted. DOHA received the transcript of the hearing (Tr.) on December 28, 2010.

Findings of Fact

Applicant admitted SOR allegations 1.a. through 1.e. He denies allegation 1.f. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 44-year-old employee of a defense contractor since 2003. He also worked for another government contractor from 1986 through 2002. He is married and has two children. Since his marriage in 2003, he has become a Born-Again Christian. (GE 1; GE 2; Tr. 5, 31-33, 56-58.)

The details surrounding Applicant's drug use are inconsistent and confusing. Applicant admits he first used illegal substances in approximately 1986 or 1987. In the late 1980s, he used marijuana "off and on" every two months and tried cocaine on one occasion in approximately 1989. In his early testimony, he indicated that his marijuana use continued recreationally through approximately 1999 or possibly even 2000. However, he later changed his testimony to indicate he ceased his recreational use of marijuana in 1989. Applicant was employed with a government contractor from 1986-2002 and received a security clearance in 2000. He claimed that he did not use marijuana while possessing a security clearance. When he was laid-off from his position with that contractor in 2002, he resumed using marijuana for five to seven days. His most recent marijuana use was in approximately August 2004, at a party, (although he later testified the party was in 2003). He admitted he used marijuana in August 2004, after the grant of his clearance in July 2004, in his answer (SOR ¶ 1.b). At hearing, he denied this allegation. He testified that his last use was in 2003 at a party. He indicated that he was so intoxicated at the party that he did not recall using marijuana. In 2004 or 2005, after learning from a friend that he had used marijuana at the party, he self reported the incident to his facility security officer (FSO). In 2005, his access to Sensitive Compartmentalized Information (SCI) was revoked by another government agency due to his use of illegal drugs and related personal conduct (SOR ¶ 1.c). (Answer; GE 1; GE 2; GE 3; GE 4; GE 5; AE C; Tr. 32-64.)

The SOR alleges (SOR ¶ 1.a.), and the Applicant admits that on his March 9, 2004, security clearance application, he intentionally falsified question 27, which asked "Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substances, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.) hallucinogenics (LSD, PCP, etc), or prescription drugs?" Applicant answered this question, "No," because he thought it

would interfere with his employment. In truth, Applicant admits he used marijuana in the seven years prior to the application and should have answered this question, "Yes." In his own words he "lied on Form 86." (Answer; GE 1; GE 5; AE C; Tr. 36-39.)

Applicant also admitted that he falsified his May 30, 2007, security clearance application (SOR ¶¶ 1.d and 1.e.). Section 24.a. of the application asked: "Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substances, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.) hallucinogenics (LSD, PCP, etc), or prescription drugs?" This time, Applicant answered, "Yes," but indicated in April 1999 he used marijuana one time. Further, Section 24.c. of the application asked "Have you ever illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official; while possessing a security clearance; or while in a position directly and immediately affecting the public safety?" and Applicant answered, "No." He failed to disclose that he had used marijuana in 2004, after his security clearance was granted by another government agency. At hearing, Applicant admitted he intentionally omitted his more recent marijuana use because he did not want it to affect his security clearance. However, he was unwilling to admit that he used marijuana in 2004, despite his past admissions. (Answer; GE 2; GE 5; AE C; Tr. 41.)

In October 2009, Applicant was interviewed by an authorized investigator for the Department of Defense. During that interview, Applicant indicated his only drug use was in 2003 at a party. Applicant asserted both in his answer and in his testimony that he believed the investigator's questions about his drug use were focused solely on the party and did not concern other occasions he used drugs. He did not disclose to the investigator that he used marijuana between 1986 and 2004 or that he used cocaine in approximately 1989 (SOR ¶ 1.f.). (Answer; GE 3; AE A; AE B; AE C; Tr. 32-33, 45-46.)

Further, in interrogatories propounded to the Applicant by the Department of Defense, Applicant indicated that his last use of marijuana was in 2003. However, the letter that advised Applicant his program access had been revoked indicated that Applicant admitted his last use of marijuana was in August 2004. Thus, Applicant was not fully forthcoming with the information regarding his marijuana use in his answers to the interrogatories (SOR allegation 1.g.). (GE 4; GE 5; Tr. 43-46.)

Applicant presented his two most recent performance evaluations. They demonstrate that Applicant is outstanding, exceeds, or meets performance requirements in all of the criteria used to assess his work performance. (AE D; AE E.)

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.

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 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 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 disqualifying conditions are 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;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative; and

(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.

Applicant admits to the falsification of his 2004 and 2007 security clearance applications. The Government also presented sufficient information to establish that Applicant falsified information regarding his marijuana use in his 2009 interview with an authorized investigator of the DoD and in his 2010 answers to interrogatories. It is clear from Applicant's admissions that he did in fact use marijuana, with varying frequency from 1986 through 2004. His choice to engage in the illegal use of marijuana in August 2004, after he had been granted a security clearance in July 2004, is personal conduct that could affect Applicant's professional or community standing and displays questionable judgment. His explanation that he stopped using marijuana in 2003 is self serving, and inconsistent with his admissions and the letter from the other government agency that revoked his SCI clearance. The Government has established sufficient concern under AG ¶ 16(a), 16(b) and 16(e) to disqualify Applicant from possessing a clearance.

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;

(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;

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

Applicant's falsification is unmitigated. Falsification of information provided to the Government cannot be considered minor. Although in 2005, Applicant self reported his marijuana use in 2004, the record contains no evidence that he sought to correct the falsification promptly or that he sought to correct his many other falsifications. Further, even after his disclosure, he continued to provide false information to the government regarding the full extent of his past drug use. Instead of coming forward with the investigator in October 2009, he chose to blatantly deny any other drug use. Further, he falsified information in his interrogatories in 2010 with respect to the date of his last use of marijuana. His conduct reflects negatively on his trustworthiness and good judgment. Moreover, his decision to use marijuana, a substance that is illegal, while possessing a security clearance, indicates that Applicant lacks the judgment to possess a clearance. He has not shown sufficient steps to reduce or eliminate vulnerability to exploitation. AG ¶¶ 17(a), 17(c), and 17(e) 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 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 Guideline E in my whole-person analysis.

Applicant has performed successfully at work, receiving good ratings. He is now a Born-Again Christian and did self-report one instance of marijuana use to his FSO. However, Applicant used marijuana continuously between 1986 and 1999. He used

marijuana in 2002, after being laid off by his employer. He chose to use it again in 2004, after becoming so intoxicated that he does not even recall he used marijuana, even though he had been granted a security clearance in 2004 and he was aware that drug use was a security concern. Then he chose to hide the full extent of his drug use from the Government for several years. His conduct indicates a lack of judgment and trustworthiness, and raises doubts as to whether he understands what is required of those who hold security clearances.

Overall, the record evidence fails to satisfy the doubts raised about Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from the cited adjudicative 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 E:	AGAINST APPLICANT
Subparagraph 1.a.:	Against Applicant
Subparagraph 1.b.:	Against Applicant
Subparagraph 1.c.:	Against Applicant
Subparagraph 1.d.:	Against Applicant
Subparagraph 1.e.:	Against Applicant
Subparagraph 1.f.:	Against Applicant
Subparagraph 1.g.:	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.

Jennifer I. Goldstein
Administrative Judge