



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



In the matter of:)
)
-----) ISCR Case No. 10-00526
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin Howry, Esquire, Department Counsel
For Applicant: Alan V. Edmunds, Esquire

November 18, 2010

Decision

LYNCH, Noreen A., Administrative Judge:

On May 19, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E (Personal Conduct). DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG).

Applicant timely answered the SOR, admitted all allegations in the SOR with explanation, and requested a hearing. DOHA assigned the case to me on July 28, 2010. DOHA issued a Notice of Hearing on September 10, 2010, and I convened the hearing as scheduled on October 6, 2010. Department Counsel and Applicant's Counsel stipulated to the admission of documents, which were admitted as Government Exhibits (GE) 1-3 and Applicant Exhibits (AE) A-BB. Applicant testified and presented the testimony of three witnesses. DOHA received the transcript (Tr.) on October 13, 2010.

Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

Applicant is a 44-year-old employee of a defense contractor. After graduating from high school in 1984, he entered college and obtained his degree in 1988. He is divorced and has two children. He has been with his current employer since January 1994. (GE 1) Applicant has held a security clearance since approximately 2001. (GE 2)

Applicant completed a security clearance application in March 2001. He falsified his answers to question 27 concerning his use of illegal drugs by not listing his use of marijuana from about 1994 until 2001. During the security clearance process, Applicant did not report to investigators that he had used marijuana. Applicant continued to use marijuana until about 2004. During this entire period, Applicant held a security clearance.

Applicant completed a security clearance application in October 2009. He answered Section 23 concerning illegal drug use in the affirmative. He listed his use of marijuana from approximately 1982 until 2004 (estimated). He noted that it was recreational use off-and-on and of varying frequency. He reports that he only used at home or a friend's house, and that he never used during work or any type of official business. (GE 2)

In a November 2009 interview, Applicant reported to DOHA that he held a security clearance but intentionally failed to disclose the information about his past marijuana use because "it would jeopardize his employment and he did not want to lose his job." (GE 3) He told the investigator that he has never failed a drug test and he has had a successful working career.

At the hearing, Applicant stated that he initially falsified his security clearance application in 2001 because of a lack of judgment. He elaborated that he was in a troublesome marriage. He married in 1991 and separated in 2005. Applicant and his wife have two children. His wife abused alcohol throughout the marriage, and he worried about the safety of the children. (Tr. 45) Applicant divorced in 2006 and has custody of his two children. Applicant sought therapy in 2006 to address his divorce and use of marijuana. (Tr. 68)

Applicant believes his divorce changed him for the better. He is the sole custodian of his children. He loves his work. He is praised for his diligent work and he never considered himself a security risk. (Tr. 69)

Applicant submitted negative voluntary drug test results from October 1, 2010. He also submitted a notarized statement of intent, dated June 12, 2010, to refrain from using illegal drugs in the future, and with the knowledge that any violation with regard to illegal drug use would result in automatic revocation of any security clearance. (AE Z)

Applicant also submitted a hair-follicle test. (AE F) Applicant states that this type of test can show drug usage up to a year prior. (Tr. 48) Applicant is emphatic that he stopped his use of marijuana in 2004. He will never use the illegal substance again. (Tr. 49) Applicant regrets the initial omission.

Applicant explained that he disclosed the information on his 2009 SCA because he made a decision to change his life and he wanted to be truthful. He noted that he had used marijuana at parties since about 1993. At the hearing, Applicant noted that he was now given an opportunity in this 2009 investigation to be “fully truthful.” (Tr. 60)

Applicant’s vice-president, who has held a clearance for 30 years, describes Applicant as a hard-working engineer and a trustworthy person. He has known Applicant for 14 years. He now knows about Applicant’s use of marijuana. Applicant is a family man. (Tr. 23)

A colleague considers Applicant an honest person. She knows that people make mistakes. She would trust Applicant with her children. She noted that his divorce was very difficult and he was in an abusive relationship. (Tr. 31) She recommends Applicant for retention of a security clearance. He is described as a brilliant engineer and an asset to the company. (AE C)

A program manager in the company, who is retired military, describes Applicant as one of the lead engineers. Applicant’s reliability is impeccable. He sees Applicant daily and has known him for approximately seven years. (Tr. 38) He is aware of the government’s concerns but still recommends Applicant. He is totally dedicated to his work. Applicant’s professionalism, knowledge, and experience have all been great assets to our program. (AE D)

Applicant submitted numerous letters of reference and commendations, including program evaluations. (AE J-Y) He submitted a notarized statement of intent not to use an illegal drug in the future. (AE Z) Applicant was consistently described as an outstanding engineer.

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 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,

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, 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 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 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 (EO) 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

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern for 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 following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

- (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; and,
- (b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying:

- (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;
- (c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;
- (d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:
 - (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information:

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and,

(4) evidence of significant misuse of Government or other employer's time or resources.

(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;

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

(g) association with persons involved in criminal activity.

In 2001, Applicant intentionally falsified his security clearance application by his omission of his use of marijuana from approximately 1994-2001 by his own account. He was granted a security clearance and continued to use marijuana until approximately 2004. Applicant admitted using poor judgment, but believed he was a different person at the time. He claims that his abusive marriage had an impact on his ability to be totally forthcoming about his marijuana use.

AG ¶ 17 provides conditions that could mitigate security concerns:

(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.

The intentional omission was in 2001. From 2001-2009, Applicant did not discuss the use of marijuana with his employer. He waited until he completed his reinvestigative security clearance in 2009. He now acknowledges that it was a poor decision and has some regret. He acknowledged that he should have answered truthfully when completing his security clearance application in March 2001.

Although not specifically alleged conduct, Applicant's failure to tell his employer -- about his illegal drug use (including while holding a security clearance) on any security clearance applications until last year is quite troubling. This lack of disclosure undermines his credibility and judgment.

Applicant acknowledged that throughout his career he never disclosed any information about his early drug use to his managers. It was not until 2009 that Applicant chose to disclose the instances of illegal drug use, including use while holding a security clearance.

Applicant's stellar career and his character references weigh in his favor. However, the witnesses and the references could not have known about Applicant's deliberate failure to disclose material information until recently. No one knew until 2009 about any of the above described incidents. I have considered that he has never been arrested, charged, or disciplined in his lengthy career. He has not mitigated personal conduct security concerns.

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 and conclude they are insufficient to overcome the government's case.

Applicant is a well-educated professional with an excellent career record. He held security clearances. He has favorable recommendations and reports. His colleagues respect and trust him. His current civilian employer considers him an outstanding employee. He has never been charged or convicted of a crime. He has changed his habits since his divorce.

Applicant's personal conduct and disregard of rules and regulations is troubling. He admitted that it was a bad decision to choose not to disclose his early illegal drug use (including while holding a security clearance) until 2009.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising under personal 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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

NOREEN A. LYNCH
Administrative Judge