



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



In the matter of:)
)
) ISCR Case No. 10-03669
)
Applicant for Security Clearance)

Appearances

For Government: John Bayard Glendon, Esq., Department Counsel
For Applicant: *Pro se*

April 6, 2011

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline H, Drug Involvement and Guideline E, Personal Conduct. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On September 7, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, Drug Involvement and Guideline E, Personal Conduct. DOHA acted 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) implemented by the Department of Defense on September 1, 2006.

Applicant answered the SOR on September 21, 2010, and requested a hearing before an administrative judge. The case was assigned to me on November 2, 2010. DOHA issued a notice of hearing on November 16, 2010, and the hearing was convened as scheduled on December 1, 2010. The Government offered exhibits (GE) 1 and 2, which were admitted into evidence without objection. Department Counsel's exhibit index is marked as Hearing Exhibit (HE) I. Applicant testified, called three witnesses, and offered exhibits (AE) A through E that were admitted into evidence. DOHA received the hearing transcript (Tr.) on December 10, 2010.

Findings of Fact

In Applicant's answer to the SOR, he admitted all the drug allegations under Guideline H, but denied the falsification allegation under Guideline E. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 25 years old. He is single, never been married, and has no children. He has an associate's degree in information technology. Since November 2009, he has worked for a defense contractor. He has no military service and has not previously held a security clearance.¹

Applicant's admitted conduct raised in the SOR includes: using methamphetamine from 2004 through October 2009, using cocaine from 2005 through August 2009, using marijuana three times from 2003 through April 2007, using ketamine² twice from 2004 to 2005, using, purchasing, and selling ecstasy 10 times from 2004 to 2005 (See SOR ¶¶ 1.a – 1.g). In his November 23, 2009, security clearance application, he admitted past marijuana use, but failed to list any other past drug use (See SOR ¶ 2.a).

Applicant first began using marijuana when he was about 17 years old. He used marijuana three times between 2003 and 2007, twice with friends and once with his brother. He was given the marijuana each time. He felt the effects of being high on marijuana by laughing and feeling relaxed. Between 2004 and 2005, he used ketamine, also known as "K", on two occasions. The first time he used it was with some friends at a hotel room. He used it by putting the powdered substance on a table in lines and snorting it up his nose. The second use was at a friend's house. This time the ketamine had to be converted from liquid form into powder. This was done by baking it in an oven. He then snorted the powder up his nose.³

¹ Tr. at 5, 48-49, 55; GE 1.

² Ketamine is a schedule III controlled substance under the Controlled Substance Act (21 U.S.C. 811 *et seq.*).

³ Tr. at 50-51; GE 2.

Applicant began using methamphetamine during the summer of 2004. He used it over 40 times, with the last use in October 2009. He initially snorted it with friends, and then later began smoking it. He also began using ecstasy during the summer of 2004. He used this drug by ingesting pills on about 10 occasions through 2005. On at least one occasion, he bought ecstasy pills for \$13 each and sold them to his friends for the same price. He did not profit from the transactions.⁴

Applicant's cocaine use began in the summer of 2005. He used cocaine at a friend's house by snorting four or five lines of the powdered cocaine. He used cocaine in the same manner about twice a month until the summer of 2006. He also used cocaine about five times in 2007, one time in 2008, and one time in August 2009, which was his last use of cocaine.⁵

Applicant did not list his methamphetamine, ketamine, ecstasy, or cocaine use in section 23 of his security clearance application. During a subsequent interview with an investigator, he admitted to intentionally withholding this drug information. He told the investigator that he was ashamed of using those drugs and was concerned whether such admissions would affect his chances of getting a security clearance. He testified that he told the investigator about his more extensive drug use before he was asked about it. However, there was no notation in the investigative report about his unsolicited new drug admissions.⁶

Applicant's co-workers and sister testified that he is reliable and trustworthy. He presented a statement from a former manager that described him as "reliable, trustworthy, and loyal." He presented his quality assurance evaluations from work. He also presented a drug test result from a sample taken on November 2, 2010, showing a negative result. Applicant testified that he does not intend to use any drugs in the future, or while holding a security clearance and presented a signed written statement to that effect.⁷

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 used in evaluating an applicant's eligibility for access to classified information.

⁴ Tr. at 51, 56; GE 2.

⁵ Tr. at 54; GE 2.

⁶ Tr. at 56-58, 74-75; GE 2.

⁷ Tr. at 29-47; AE A, B, D, E

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, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and 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 that an 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 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 H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to Drug Involvement:

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.

I have considered all of the evidence in this case and the disqualifying conditions under Drug Involvement AG ¶ 25 and especially considered the following:

(a) any drug abuse; and

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

Appellant used methamphetamine, ecstasy, cocaine, ketamine, and marijuana on a number of occasions. He also bought and sold ecstasy. I find both the above disqualifying conditions apply.

I have considered all of the evidence in this case and the mitigating conditions under Drug Involvement AG ¶ 26 and especially considered the following:

(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's use of drugs was frequent and recent (last use October 2009). The period of abstinence is insufficient to demonstrate Applicant's intent not to use in the future. Additionally, even though he signed a letter of intent not to use drugs in the future, not enough time has passed to know whether Applicant's stated intent are just words rather than demonstrated actions. AG ¶ 26(a) does not apply, and AG ¶ 26(b) partially applies.

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying condition is 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.

Applicant admitted falsifying his security clearance application by intentionally failing to list all of his drug use. AG ¶16(a) applies.

The guideline also includes examples of conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and especially considered the following:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

(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.

I am not persuaded by Applicant's testimony that he made a prompt, good-faith disclosure to the investigator before being confronted with his prior false answers. There is no indication from the documentary evidence that such an unsolicited disclosure took place. Additionally, supplying intentionally false information during the security clearance process is not a minor offense and it casts doubt on his overall reliability, trustworthiness, and good judgment. AG ¶¶ 17(a) and (c) 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 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. I considered the witnesses' character testimony about Applicant's loyalty, trustworthiness and reliability. I considered his work-related quality assurance evaluations and the statement from his former manager. I also considered Applicant's statement of intent not to use drugs in the future and his November 2, 2010 negative drug test. However, I also weighed that he used cocaine, methamphetamine, ketamine, ecstasy, and marijuana on numerous occasions, and as recently as October 2009. I further considered that he lied about the full extent of his drug use on his security clearance application. Applicant failed to provide sufficient evidence to mitigate the security concerns.

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 failed to mitigate the security concerns arising under Guideline H, Drug Involvement, and Guideline E, 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 H:	AGAINST APPLICANT
Subparagraphs 1.a-1.g:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.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.

Robert E. Coacher
Administrative Judge