



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



In the matter of:)	
)	
)	ISCR Case No. 10-04031
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: David Hayes, Esquire, Department Counsel
For Applicant: Alan V. Edmunds, Esquire

March 21, 2011

Decision

LYNCH, Noreen A., Administrative Judge:

On September 20, 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) implemented in 2006.

Applicant timely answered the SOR, admitted all allegations with explanation, and requested a hearing. DOHA assigned the case to me on December 14, 2010. DOHA issued a Notice of Hearing on December 20, 2010, and I convened the hearing as scheduled on January 26, 2011. Department Counsel and Applicant's Counsel stipulated to the admission of documents, which were admitted as Government Exhibits (GE) 1-6 and Applicant Exhibits (AE) A-Z. Applicant testified and presented the testimony of four witnesses. DOHA received the transcript (Tr.) on February 3, 2011.

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

Findings of Fact

Applicant is a 30-year-old employee of a defense contractor. After graduating from high school in 1998, he worked for a contractor. While continuing to work, in 2004, he entered college and obtained his undergraduate degree in 2009. (AE P) He is now working on a master's degree in applied information technology. He is recently married. He has no children. He has been with his current employer since March 2009. (GE 1) Applicant has held a security clearance since approximately 2000. (GE 2)

Applicant completed a security clearance application on April 12, 2000. He falsified his answers to question 27 concerning his use of illegal drugs by not listing his use of marijuana from about 1996 until 2000. In fact, he used marijuana in one instance in Amsterdam in 2000, when he was on a work trip and he purchased and used marijuana with his coworkers.¹ Applicant continued to use marijuana until about 2004 while he held a security clearance. (Tr. 45)

In 2002, Applicant purchased a video game in Walmart. When he returned home, he opened the box and learned that a part of the item was missing. He returned to the store to exchange the item. He did not want to wait in the long exchange line. (Tr. 52) He was irritated that the part was missing from the box, so instead of waiting in line, he retrieved the missing part from another box and left the store. (Tr. 52) He was never charged, arrested, or convicted of any crime, including shoplifting.

During 2003, Applicant worked with a personal trainer. His trainer offered to sell him steroids (without a prescription) to help with his body building. Applicant purchased and used the steroids on 10 to 12 occasions. (GE 4) He admits that he injected one 'cc' every one to two weeks. He stopped using the steroids in 2003. (GE 3)

In 2004 to 2005, Applicant downloaded some songs and a dream weaver software package. He believes the value of the downloaded material was approximately \$1,000. He remembers he needed the software package for a course. He admitted that he borrowed a "burnt" CD from a coworker that contained Microsoft Office. At the time, he noted that he did not think he was doing anything illegal because the songs were a trial version of the music program and he deleted the program after the trial period was over.

In the summer of 2008, Applicant underwent a security processing for a higher level security clearance with another agency. As part of the process, he took a polygraph test. He reported his use of marijuana (approximately 40 times between January 1996 and December 2003; the marijuana usage in 2000 in Amsterdam while on

¹Applicant noted that he was 19 or 20 years old at the time and it was not illegal to use marijuana in Amsterdam.

official business; his steroid use between April and December 2003; his downloading computer software; and the incident in Walmart in 2002 or 2003. He also reported a DUI in 2001. Based on his disclosures, the agency denied him the clearance in September 2008. (GE 4)

Applicant completed a security clearance application in January 2010. He answered Section 24 concerning illegal drug use in the affirmative. He listed his use of marijuana from approximately 1996 until 2004 (estimated). He listed the use of steroids from April 2003 until December 2003. He noted that his security clearance was suspended in December 2009 after the higher level clearance was denied in September 2008. (GE 2)

In a March 2010 personal subject interview, Applicant told an investigator about the 2008 security clearance process and the polygraph exams. He indicated that he was advised that he was denied a top-secret clearance due to the illegal drug use (marijuana); steroid use; illegally downloading/stealing software; shoplifting; and withholding further criminal activity. (GE 3).

In the 2010 personal subject interview Applicant detailed his use of marijuana as a young man from the age of 17 to 24. The majority of the usage was before age 20. He explained that he used marijuana out of curiosity and to socialize with friends. He acknowledged purchasing from friends and acquaintances. He last used marijuana in late 2003 or early 2004. He has not used other illegal drugs and has never been diagnosed with drug dependence or abuse. (GE 5) He does not associate with people who use illegal drugs.

During the same interview, Applicant reiterated the steroid use as described above. He also noted that he had a DUI in 2001. He has no had any other incidents with alcohol. Applicant also explained about the WalMart incident and that he had never been charged with shoplifting. He stated that the 2008 polygraph results characterized that incident as shoplifting. In sum, Applicant explained all the instances that are noted in the SOR and described above in this decision. He signed a sworn statement on March 12, 2010, as to the veracity of the contents.

At the hearing, Applicant stated that he initially falsified his security clearance application in 2000 because of a lack of judgment and his mother's advice. He credibly testified that his mother advised him not to list the marijuana use from his teen years. He now recognizes that he alone is responsible for not disclosing the marijuana use. He has no intention of using any illegal drugs in the future.

As to the other incidents that are noted in the SOR, Applicant admits that he made poor choices when he was younger. He now knows and understands what he did in the various instances was wrong. He accepts full responsibility for his actions. He does not blame anyone. He did not think about his future or the impact of his poor judgment calls on his security clearance.

Applicant believes he has made “stratospheric” progress since his younger days. He is eager to continue his work which he enjoys. He is finishing his master’s degree so that he may continue to grow in his chosen occupation. He realizes the importance of a security clearance. (Tr. 58) He stated that during his years of employment he did not recall having very much security awareness training.

Applicant noted that he has surrounded himself with friends who are ethical and who believe in self-development. He is concerned about his future and the future for his wife and family. (Tr. 64) He listens to motivational tapes and takes his faith seriously.

Applicant submitted five negative voluntary drug test results from February 24, 2009 until November 17, 2010. (AE B-F) 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 A)

Applicant’s facility security officer (FSO), who has held a clearance since 1992, knows about the security concerns alleged in the SOR, and is helping Applicant with the security process. The witness is not aware of any recent behavior that would negate granting Applicant a clearance. (Tr. 16) The FSO states that Applicant has not been involved in any security incidents while working in the company.

A former classmate from college, who has a security clearance, testified that in 2008, he worked very closely with Applicant on a project. (Tr. 22) He describes Applicant as trustworthy, hard-working, and dedicated. He also has socialized with Applicant and recommends him for a security clearance. (AE J)

A former colleague, who has known Applicant since 2005, recommends him for a security clearance. The colleague, a lieutenant in the military, holds a security clearance and has no hesitation in recommending Applicant. (Tr. 33) He is aware of the security concerns raised and believes Applicant is honest and moral. (AE K)

Applicant’s 2006 room mate, who is an engineer with a security clearance, praised Applicant for his superb reliability and willingness to learn. (AE O) He testified at the hearing that he is aware of the allegations in the SOR and never observed Applicant with any illegal drugs. (Tr. 41) He highly recommends Applicant for a security clearance.

Applicant submitted numerous letters of reference and commendations, including his academic awards, winning competition certificates, and letters of recognition. (AE L-Z) Applicant was consistently described as a diligent and responsible friend and colleague. He has focused on his work and his higher education in the past few years. Applicant has shown professionalism and displays excellent customer service. (AE M)

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 2000, Applicant falsified his security clearance application by omitting marijuana use from approximately 1996 to 2000. He was granted a security clearance and continued to use marijuana until approximately 2004. Applicant admitted the other allegations in the SOR that describe his poor judgment when he was a young man. Applicant admitted that he disclosed the other incidents such as steroid use, downloading music, and "shoplifting" in his 2008 polygraph exam while trying to obtain a higher level clearance. AG ¶¶ 16(a), 16(d), 16(e) apply.

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 2000. This is, of course, troubling behavior. He takes responsibility for his actions but relied on advice from his mother. He now knows this was the wrong thing to do. The illegal use of marijuana stopped in late 2003 or 2004. Applicant is credible that he has not used any illegal drug since then. He also was credible in his explanation about the use of steroids without a prescription in 2003. He did not believe he was shoplifting when he took the missing part from another box in the store and did not wait in line to do an official exchange. He was never charged with shoplifting. He also claimed to innocently download music in 2004. He understands that these were clearly poor choices on his part. He disclosed everything in 2008 when he was being assessed for a higher clearance. The clearance was denied based on the behaviors mentioned in this decision. He believes he made such poor decisions based on the fact when he was a young man and not thinking about his future.

Applicant has matured. He worked hard and started his undergraduate studies to enhance his work opportunities. He is now in the process of obtaining a master's

degree. He recently married and is more responsible. Applicant has achieved success in his academic studies and his work. He had four witnesses at the hearing attesting to his character and his development as a person. He submitted numerous letters of recommendation. He signed a statement of intent concerning any future use of illegal drugs. He submitted four negative drug screens. He was candid and forthright at the hearing. He believes he is taking his faith seriously and has a new attitude toward life. Applicant has shown increasing responsibility in the last few years. His career, education and character references weigh in his favor. Each witness knew about the SOR allegations. Each recommended Applicant for a clearance. I have considered the great strides that he has made since he was 19 or 20 years of age. I find that he has 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 sufficient to overcome the government's case.

Applicant completed his first security clearance application when he was 19 or 20 years old. He asked his mother's advice about the question concerning any use of illegal drugs. He was concerned about his use of marijuana. She advised him to not report the use. While this is not an excuse, Applicant was credible in his explanation of the event. As a young person, he made several poor choices. This included the use of marijuana until 2004. It also includes the use of steroids in 2003. He admitted that he used marijuana in Amsterdam while on official business in 2000 with coworkers. He relied on his belief at the time, that it was not illegal in Amsterdam.

Applicant disclosed all of the above incidents when he was undergoing a polygraph in 2008 for a higher security clearance by another agency. He was candid at the hearing that he disclosed everything and does not understand why they believed there may have been more involvement in criminal activity. He explained the denial and all the details during a subsequent interview in March 2010.

Applicant has matured. He recognizes that he made huge errors in judgment with his actions when he was younger. He has worked hard and has an excellent academic record and an excellent work record. He is now 30 years old and has recently married. He is a well-educated professional with an excellent career record. He has favorable recommendations and reports. His colleagues respect and trust him. His current civilian employer considers him an outstanding employee. He has changed his habits since 2004. The passage of time and his maturation have persuaded me that he has mitigated the personal conduct security concerns.

Overall, the record evidence leaves me without questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has 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:	FOR APPLICANT
Subparagraphs 1.a:-1.g:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

NOREEN A. LYNCH
Administrative Judge