



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



In the matter of:)
)
) ISCR Case No. 10-05748
)
Applicant for Security Clearance)

Appearances

For Government: Braden Murphy, Esq., Department Counsel
For Applicant: *Pro se*

August 22, 2011

Decision

HEINY, Claude R., Administrative Judge:

In 1998, after leaving active duty and before obtaining his current job, Applicant used illegal drugs sporadically. He did so while a member of the U.S. Air Force Reserve. In 2003, when he completed a security clearance questionnaire, he falsified his answers related to illegal drug use. Due to the frequency of his use, the passage of time, and the likelihood the conduct will not recur, Applicant has mitigated the security concerns under personal conduct. Clearance is granted.

Statement of the Case

Applicant contests the Department of Defense's (DoD) intent to deny his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a Statement of

¹ 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) effective within the DoD on September 1, 2006.

Reasons (SOR) on February 8, 2011, detailing security concerns under Guideline E, Personal Conduct.

On February 17, 2011, Applicant answered the SOR and requested a hearing. On May 5, 2011, I was assigned the case. On June 15, 2011, DOHA issued a Notice of Hearing for the hearing held on June 30, 2011. At the hearing, the Government offered exhibits (Ex.) 1 through 5, which were admitted into evidence without objection. Applicant testified and submitted Exhibits A through T, which were admitted into evidence without objection. He called two additional witnesses. On July 12, 2011, DOHA received the hearing transcript (Tr.).

Findings of Fact

In Applicant's Answer to the SOR, he admitted all of the factual allegations in the SOR, and his admissions are incorporated herein. After a thorough review of the evidence on record, I make the following findings of fact.

Applicant is a 39-year-old heating and air conditioning technician who has worked for a defense contractor since July 2003. He is also a technical sergeant (E-6) in the United States Air Force Reserve, currently with 20 years of service. He was on active duty from February 1991 until 1998. (Tr. 62) In 2009, he was activated and served for six months in Iraq in support of Operation Iraqi Freedom, for which he received an Air Force Commendation Medal. (Tr. 58, Ex. L) For the last eight years, he has been performing his reserve duty approximately 900 miles from his home. During this time, he has spent in excess of \$25,000 going to and from his reserve unit for training. (Tr. 58) He seeks to obtain a clearance. In 2004, an earlier clearance request was denied by another government agency due to his marijuana and cocaine use in 2002/2003.

Applicant's most recent Enlisted Performance Report (EPR), AF Form 910, dated January 2011, rates his overall performance as a "5" "Truly Among the Best." (Ex. H) His service in Operation Iraqi Freedom was from March 2009 to September 2009, for which he receiving the Iraqi campaign medal as well as the previously listed AF Commendation Medal. (Ex. J, L) For his outstanding achievement in July 2002, he received an AF Achievement Medal, first oak leaf cluster. (Ex. I)

Applicant's commanders, coworkers, supervisors, and friends state: Applicant sets high standards, has a strong work ethic, displays great service, has great rapport with his coworkers, shows great leadership, and is extremely dependable, competent, dedicated, loyal, honest, and trusted. (Ex. C, D, E, F, G, O, P, Q) His EPR from January 2002 through December 2010 lists his overall performance assessment at "Above Average (4)," "Immediate Promotion (6)", or "Truly Among the Best (5)." (Ex. R, S, T, SOR Answer²)

² AF Reserve enlisted personnel receive EPRs every two years.

Applicant's former AF Reserve supervisor of seven years has known the Applicant for 15 years. (Tr. 32) In 2009, they were deployed to Iraq together. (Tr. 33) He stated Applicant is a model airman, who can be counted on to do anything asked of him. He has never had reason to question Applicant's judgment. (Tr. 34) His former supervisor stated, if he were ever called upon to chose a team to perform a task at any location in the world, Applicant would be one of his first choices for that team. (Tr. 42) A former supervisor at Applicant's civilian job stated Applicant was trustworthy and someone who could be counted on to get the job accomplished. (Tr. 52)

Applicant acknowledged he made mistakes and his actions were wrong. (Tr. 60) From high school until 1998, he never used any illegal drugs. (Tr. 67) From 1998 to October 2003, Applicant used illegal drugs. In July 2002, he used marijuana one time with his now ex-wife. (Ex. 2, Tr. 73) He used cocaine three times in the fall of 1998, after having left active duty. He used it again in July 2003 and also in October 2003. (Ex. 2, Tr. 71) His use occurred while he held a secret clearance in the AF Reserve.

Applicant acknowledges he made some bad mistakes when he left active duty and returned to the small town where he grew up. (Tr. 55) In the summer of 1998, Applicant separated from the Air Force after eight years with an honorable discharge. (Tr. 56) When he left active duty, he believed his clearance was pulled. (Tr. 65) Upon returning to civilian life, he moved back to his home state to begin working and had casual encounters with school friends. After a couple of encounters where he used drugs, he quickly realized this was not his "environment and broke away from those people." (Ex. 2) In 2003, he knew he had to get away from that environment and moved to another state, where he now lives. (Tr. 56)

During the summer of 2003, Applicant's marriage of five years had ended in divorce, he tried cocaine once. He had married the year before he left active duty. (Tr. 82) During the same year, his father³ was diagnosed with cancer. In October 2003, feeling bad for himself and his father, he again used cocaine. His last cocaine use was before being hired at this current job. (Tr. 83) His cousin gave him three Percocet tablets and told him they were good for severe headaches. (Tr. 75) Between June 2003 and the spring of 2004, he used the three tablets to get rid of hangovers.

In 2004, Applicant was working for his current employer and held a top secret clearance. A construction project required a higher clearance, which required a polygraph examination. Through the polygraph, his one use of marijuana and his five uses of cocaine, including his two uses in 2003, were discovered. Additionally, the polygraph revealed he had used Percocet two or three times between June 2003 and May 2004 to help him with headaches. He got the Percocet from his cousin. (Ex. 3) He has not used any illegal drugs since May 2004, when he used a Percocet tablet. (Ex. 3) In December 2009, his clearance was suspended. (Ex. 5)

³ In August 2005, his father died from the cancer. (Tr. 88)

In August 2003, Applicant completed a security clearance application, Standard Form (SF 86). He answered “no” to question 27, which asked if he had used any illegal drug, including marijuana and cocaine, in the last seven years. He also answered “no” to question 28, which asked if he had ever used illegal drugs while possessing a security clearance. Applicant does not deny he deliberately gave false information. (Tr. 76)

In October 2009, when Applicant completed his Electronic Questionnaires for Investigations Processing (e-QIP), he stated in response to section 25, Investigations and Clearance Record, that another government agency “has denied my clearance with them due to the use of the Marijuana and cocaine back in 2002/2003.” (Ex. 1) In response to section 24, Illegal Use of Drugs or Drug Activity, he listed his marijuana, cocaine, and Percocet use.

Applicant is the parent of a bright, ten-year-old daughter, who in the fifth grade is doing tenth grade work. (Tr. 20, 59, Ex. A, Ex. B)

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 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(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 interests of 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 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 of 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

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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 provides three conditions that could raise a security concern and may be disqualifying in regard to falsification of Applicant’s security clearance application:

(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

(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.

Applicant admits he used marijuana once in July 2002 and cocaine five times between the fall of 1998 and October 2003. He also admits used Percocet three times between June 2003 and May 2004. He admits he deliberately gave false answers on his August 2003 security clearance application when asked about his illegal drug usage. The disqualifying conditions in ¶ 16(a), 16(b), and 16(d) apply.

Applicant marijuana and cocaine use occurred after leaving active duty with the Air Force and before Applicant obtained his current job. He last used one of the three Percocet tablets his cousin gave him in May 2004, which was after being hired at this current job. His most recent illegal drug use occurred more than seven years ago. His deliberate falsification of his SF 86 occurred approximately eight years ago in August 2003.

Applicants are expected to give full and frank answers during the clearance process. Applicant acknowledges that his failure to disclose his illegal drug on his clearance application was a deliberate falsification. His failure to disclose this information demonstrates a lack of candor required of cleared personnel. The Government has an interest in examining all relevant and material adverse information about an applicant before making a clearance decision. The Government relies on applicants to truthfully disclose that adverse information in a timely fashion, not when they perceive disclosure to be prudent or convenient. Further, an applicant's willingness to report adverse information about himself provides some indication of his willingness to report inadvertent security violations or other security concerns in the future, something the Government relies on to perform damage assessments and limit the compromise of classified information.

AG ¶ 17 provides three conditions that could be mitigating regarding Applicant's use of illegal drugs and the falsification of his security clearance application:

(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; 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 mitigating conditions outlined in AG ¶ 17(c) apply. It is not that the conduct was minor, for illegal drug usage and falsification of a security clearance application are both serious, but that so much time has passed. The last use of the three Percocet tablets occurred in May 2004, more than seven years ago. The falsification occurred almost a year before that. The conduct is not recent. Additionally, the behavior was infrequent. He used marijuana once since high school, cocaine five times between leaving active duty in 1998 and starting his current job in 2003, and used three Percocet tablets. This is infrequent drug usage. The falsification was to two questions on a single security questionnaire. This was serious, but is also infrequent behavior.

The mitigating conditions outlined in AG ¶ 17(d) apply. Applicant acknowledges his conduct was wrong. He has not obtained counseling to change his behavior, but his actions since the conduct shows it is unlikely to recur. For the past nine years, Applicant has spent more than \$25,000 for transportation to and from his reserve unit. Additionally, former supervisors attested to his good character.

The mitigating conditions outlined in AG ¶ 17(g) apply. Applicant no longer associates with those persons with whom he used illegal drugs. He smoked marijuana one time with his wife, from whom he is now divorced. He realized when he was using the illegal drugs that he needed to get out of that environment and moved to another state. His contact with those individuals has ceased. His last uses of cocaine occurred following his divorce and after learning of his father's diagnosis of lung cancer. These circumstances will not recur. As set forth in AG ¶ 17(b), those stressors, circumstances, or factors are no longer part of his life.

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. There are three major concerns. First, Applicant used illegal drugs. Second, he used those illegal drugs while holding a security clearance. Third, he lied about his drug usage on his security questionnaire. This is serious conduct, which Applicant admits. His drug usage was infrequent and ended more than seven years ago. When he left active duty, he believed his clearance was pulled. He used the illegal drugs sporadically before obtaining his current job. Since obtaining his current job in 2003, his only misuse of drugs was the use of the three Percocet tablets ended in May 2004. Applicant should have told the truth about his illegal drug usage when he completed his security questionnaire. He acknowledges that and acknowledges that his conduct was wrong. He revealed his drug usage on his latest security questionnaire.

I considered Applicant's 20 years of service in the Air Force, his service in Iraq, the recommendations of those he has served with, his favorable military evaluations, and character evidence. I had ample opportunity to evaluate the demeanor of Applicant, observe his manner and deportment, appraise the way in which he responded to questions, assess his candor or evasiveness, read his statements, and listen to his testimony. I find the conduct is unlikely to recur.

The issue is not simply whether Applicant used illegal drugs and lied on his questionnaire – he did and has acknowledge doing so – it is whether his personal conduct occurring more than seven years ago raises concerns about his fitness to hold a security clearance. (See AG ¶ 2(a)(1).) Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant has mitigated the security concerns arising from his 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, Personal Conduct: FOR APPLICANT

Subparagraphs 1.a – 1.d: For Applicant

Conclusion

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

CLAUDE R. HEINY II
Administrative Judge