



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



In the matter of:)	
)	
[NAME REDACTED])	ISCR Case No. 10-06619
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Caroline H. Jeffreys, Esquire, Department Counsel
For Applicant: Greg D. McCormack, Esquire

December 12, 2011

Decision

MALONE, Matthew E., Administrative Judge:

Applicant was involved with illegal drugs between 1975 and 2007. Between 2006 and 2008, he also misused prescription pain medication at least three times. His illegal drug involvement also occurred while he held a security clearance first obtained in 1979. Applicant deliberately failed to disclose the full scope of his illegal drug involvement in security clearance applications submitted in 2008 and 2009. Applicant failed to mitigate the security concerns raised by his drug involvement and personal conduct. His request for a security clearance is denied.

Statement of the Case

On August 3, 2009, Applicant submitted an Electronic Questionnaire for Investigations Processing (eQIP) to obtain a security clearance required for his job with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA)

issued to Applicant interrogatories¹ to clarify or augment information obtained by investigators. After reviewing the results of the background investigation and Applicant's responses to the interrogatories, DOHA adjudicators were unable to make a preliminary affirmative finding² that it is clearly consistent with the national interest to grant Applicant's request for access to classified information. On March 1, 2011, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which, if proven, raise security concerns addressed in the adjudicative guideline (AG)³ for drug involvement (Guideline H) and personal conduct (Guideline E).

Applicant timely answered the SOR and requested a decision without a hearing. However, on July 19, 2011, after retaining legal counsel, Applicant requested a hearing. On July 28, 2011, Department Counsel submitted to Applicant an Amendment to the Statement of Reasons (Amendment). The case was assigned to me on August 10, 2011. Applicant replied to the Amendment on August 16, 2011. The Amendment and Applicant's response to it were provided to me on August 25, 2011.

Pursuant to a Notice of Hearing issued on August 15, 2011, I convened a hearing in this matter on September 20, 2011. DOHA received a transcript (Tr.) of the hearing on September 28, 2011. The parties appeared as scheduled. The Government presented four exhibits, which were admitted without objection as Government's Exhibits (Gx.) 1 - 4. Applicant testified and presented four exhibits, identified as Applicant's Exhibits (Ax.) A - D, all of which were admitted.⁴ I left the record open to receive additional relevant information from the Applicant, whose timely post-hearing submission was admitted without objection as Ax. E.

Findings of Fact

Through the amended SOR, the Government alleged under Guideline H that Applicant "illegally used Percocet without a prescription on two occasions and with a prescription, but not for the prescribed purpose, on one occasion from about 2006 to at least March 2008." (SOR 1.a); that he used marijuana with varying frequency between 1975 and 2007 (SOR 1.b); that he used cocaine once in 2000 (SOR 1.c); and that his use of illegal drugs and his illegal use of prescription medication occurred while he held "Department of Defense security clearances granted in 1979, 1984, 1989, 1992, 1995, and 2003" (SOR 1.d). Applicant admitted all of the SOR allegations. His admissions to SOR 1.b and 1.c also contained explanations provided in his response to the original SOR.

¹ Authorized by DoD Directive 5220.6 (Directive), Section E3.1.2.2.

² Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

³ The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006). Pending official revision of the Directive, they take precedence over the guidelines listed in Enclosure 2 to the Directive.

⁴ Ax. C and D were admitted over Department Counsel's objections. (Tr. 29 - 32)

Through the amended SOR, the Government also cross-alleged, as disqualifying personal conduct under Guideline E, the SOR 1.d allegation of drug use while holding a security clearance (SOR 2.a). The Government also alleged that during a 2008 background investigation conducted by a different agency, Applicant deliberately withheld his use of cocaine in 2000. (SOR 2.b) Finally, the Government alleged that Applicant's negative answer to eQIP question 23.b (***Illegal Use of Drugs or Drug Activity***. *Have you EVER illegally used a controlled substance while possessing a security clearance; while employed as a law enforcement officer, prosecutor, or courtroom official; or while in a position directly and immediately affecting public safety?*) constituted a knowing and willful false statement to the Government, because Applicant had used cocaine in 2000 while holding a security clearance (SOR 2.c). Applicant admitted all of the Guideline E allegations.

Applicant's admissions are incorporated in my findings of fact. Having reviewed the response to the SOR, the transcript, and exhibits, I make the following additional findings of fact.

Applicant is 55 years old and employed by a defense contractor in a position that requires a security clearance. Applicant has worked for his current employer since 1981. He has worked on several different contracts and has held security clearances as high as Top Secret with Special Compartmented Information (SCI) access since 1979. Between 1995 and 2006, he also held a security clearance or a position of trust granted by a foreign government while working on a contract in support of that country's national law enforcement agency. It does not appear that his U.S. security clearance has lapsed at anytime since at least 1992. (Gx. 1; Gx. 4; Ax. A; Tr. 79 - 81)

Applicant and his wife have been married since April 1983. They have a 21-year-old son and a 24-year-old daughter. (Gx. 1)

Applicant started using marijuana in about 1975. His use for the next several years was frequent, at times daily. In the late 1970s, he also began growing marijuana, some of which he sold in small amounts and some of which he used. Applicant's marijuana use abated and sometimes ceased when he moved to a new job or a new residence. But his drug use would resume once he was comfortable with his new associates and neighbors. (Tr. 85 - 86) Applicant last used marijuana in 2007. His most recent uses of marijuana included use between 20 and 40 times while on vacation with friends. (Gx. 1; Gx. 2; Tr. 83) Applicant has known at all times that using marijuana was illegal and that it was prohibited by DoD policy. (Tr. 71)

Applicant used cocaine twice. The first time was before he was married. He used cocaine again in 2000 while on vacation with friends. (Gx. 2; Tr. 59 - 60) He has also misused Percocet, a prescription painkiller, on at least three occasions between 2003 and 2008. The first time, he used what was left over from his own prescription. The second time, he took Percocet from a prescription his son had been given. The third time, he used Percocet prescribed for his wife. Applicant used the painkiller only to relax and for the "buzz" it gave him. His wife and son did not know about his use of their prescription medications, and Applicant did not have a medical reason to use Percocet

on any of the three occasions. Applicant has a current prescription for Percocet that he has not filled. (Answer to SOR Amendment; Gx. 1; Gx. 2; Tr. 48 - 49, 84)

On November 8, 2008, Applicant submitted a security clearance application (SF-86) to obtain a Top Secret clearance with SCI access for contract work at another government agency. For that access, he was required to take a full lifestyle polygraph examination. When confronted with having to take that examination, Applicant admitted he had deliberately falsified his SF-86. Specifically, Applicant had disclosed in his SF-86 only that he used marijuana five times in March 2005. He did not disclose that he actually used marijuana 20 to 40 times in March 2005, or that he used marijuana until 2007. Applicant also deliberately omitted from his 2008 SF-86 his misuse of Percocet and his use of cocaine. Applicant explained that he tried to minimize the extent of his drug use because he did not want to give the impression that he was a drug abuser. Applicant did not appeal the denial of his application, choosing instead to wait one year and submit a new application. Concurrent with the adjudication of his application for a DoD security clearance, his re-application to the other agency is still pending. In the 2009 eQIP he submitted for his DoD clearance, Applicant did not list his use of cocaine in 2000. Again, he was afraid it would make him look bad. (Answer to SOR; Gx. 2; Gx. 3; Tr. 39, 45 - 46, 68 - 70)

Applicant stated, through a notarized statement and in his hearing testimony, that he does not intend to again use illegal drugs or to abuse prescription drugs. He averred that he has severed ties with the friends and associates with whom he used drugs in the past. However, in 2008, he was offered, but declined, marijuana by other friends whom he still sees at Christmas. Applicant has never been tested in the workplace for drugs. In response to the SOR and on the recommendation of his attorney, Applicant obtained his own urinalysis tests and was evaluated by a licensed clinical social worker and substance abuse counselor. All of his drug tests in the past year have been negative and the clinical evaluation found no reason to classify Applicant as either drug dependent or a substance abuser. (Answer to SOR; Ax. B; Ax. C; Ax. E; Tr. 51, 71 - 72).

Applicant enjoys an excellent reputation in the workplace and the community for his generosity, expertise, professionalism, and reliability. Multiple personal and professional references laud him for his good character and trustworthiness. Applicant is known to always be willing to help others, is an avid motorcyclist and outdoorsman, and is dedicated to the missions he supports through his defense contractor work. (Ax. D)

Policies

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁵ for an applicant to either receive or continue to have access to classified information. Each decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and

⁵ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

material information,⁶ and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the “whole-person” concept, those factors are:

- (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.

The presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under AG ¶ 24 (Drug Involvement).

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the government’s case. Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion.⁷ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of one who will protect the national interests as his or her own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government.⁸

Analysis

Personal Conduct

The Government presented sufficient information to show that Applicant deliberately omitted information about his drug use from his last two security questionnaires. In a 2008 SF-86, he tried to minimize the full scope of his marijuana use and he omitted his abuse of Percocet and his use of cocaine. It was only through

⁶ Directive. 6.3.

⁷ See *Egan*, 484 U.S. at 528, 531.

⁸ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

confrontation connected to a full lifestyle polygraph examination at another agency that he disclosed all of his drug use. However, even after being denied a security clearance, in part, for failing to disclose relevant information about his drug use, Applicant falsified his 2009 eQIP by omitting his cocaine use because he did not want the Government to think he was a drug abuser. Finally, the Government established that Applicant knowingly and repeatedly used illegal drugs and abused prescription drugs while holding a security clearance. The security concern about Applicant's judgment, reliability and trustworthiness is expressed at AG ¶ 15 as follows:

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.

More specifically, information about Applicant's adverse personal conduct supports application of the disqualifying condition at AG ¶ 16(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 knew his drug use while holding a security clearance was an ongoing violation of rules pertaining to persons with access to classified information. He did not willingly and fully disclose that information when asked to do so on at least two security clearance applications. It is also reasonable to assume that, until he was subjected to a recent polygraph examination, he had never disclosed his illegal drug involvement when applying for earlier clearances.

Available information does not support the pertinent mitigating conditions under this guideline. The mitigating condition at AG ¶ 17(a) (*the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts*) does not apply because it was only when confronted through the polygraph process that Applicant fully disclosed his drug use. Even then, he still withheld his 2000 cocaine use from a subsequent clearance application.

The mitigating condition at AG ¶ 17(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*) does not apply because Applicant has not claimed that he was improperly advised about what to list in response to the questions in both applications.

The mitigating conditions at AG ¶ 17(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), AG 17(e) (*the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress*), and AG ¶ 17(f) (*association with persons involved in criminal activities 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*) are not factually pertinent to the issue of Applicant's deliberate falsifications. As to their applicability to his underlying conduct, namely, his drug use, for the reasons stated under Drug Involvement, below, the record does not support their application.

Finally, the mitigating condition at AG ¶ 17(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*) does not apply. Making false statements to any agency of the United States concerning a matter within its jurisdiction is a violation of federal criminal law. More important, it is a fundamental breach of a basic tenet of the Government's personnel security programs. This Applicant has held a security clearance since 1979. He knew or should have known of his obligation to be truthful at all times in his answers to reasonable Government inquiries into his background. Available information presents the probability that Applicant has not, in the more than 30 years he has held a security clearance, disclosed any relevant adverse information when required to do so. Thus, his conduct in this regard cannot be considered infrequent or minor. Based on all of the foregoing, I conclude that Applicant did not mitigate the security concerns raised by the Government's information about his personal conduct.

Drug Involvement

The Government presented sufficient information to show that Applicant used marijuana extensively from about 1975 until 2007. At times, Applicant also grew and sold for his own profit modest amounts of marijuana. The Government's information also established that Applicant twice used cocaine, most recently in 2000, and that on three occasions between 2003 and 2008, he misused a prescription painkiller for non-medicinal purposes. Finally, the Government's information showed that Applicant's use of illegal drugs and his misuse of prescription medications after 1979 occurred while he held a security clearance. These facts raise a security concern addressed in AG ¶ 24 as follows:

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.

(a) Drugs are defined as mood and behavior altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g.,

marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

More specifically, available information requires application of the disqualifying conditions listed at AG ¶ 25(a) (*any drug abuse...*); AG ¶ 25(c) (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*); and AG ¶ 25(g) (*any illegal drug use after being granted a security clearance*).

Applicant presented information that supports consideration of the mitigating condition at AG ¶ 26(b) (*a demonstrated intent not to abuse any drugs in the future, such as: (1) dissociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; and (4) a signed statement of intent with automatic revocation of clearance for any violation*). Available information supports a finding that Applicant has broken off contacts with the persons with whom he used drugs, that he avoids situations where he might encounter drugs, and that he has committed in writing to abstaining from future drug use. However, the record shows that Applicant, who is now 55 years old, started using marijuana at age 19 and continued to use it for most of the past 35 years. He also did so knowing that such conduct was illegal and prohibited by DoD policy regarding access to classified information. There were also times when he stopped using drugs for periods when he was transitioning from one job or residence locale to another until he was comfortable that he could resume his use. In light of all of the available information, Applicant's abstinence from drug use over the past four years is not sufficient to support application of AG ¶ 26(b).

Of the remaining mitigating conditions under this guideline, AG ¶ 26(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*) does not apply. Again, the passage of four years, in this case, is insufficient to show that Applicant's drug use will no longer occur. His drug use was not infrequent, and it reflects adversely on his judgment because it occurred despite Applicant's understanding of his responsibilities as a holder of access to classified information and his knowledge of the criminality of his drug use.

The mitigating condition at AG ¶ 26(c) (*abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended*) does not apply because there is no indication that Applicant's abuse of even his own painkiller prescription was tied to an ongoing medical condition. Finally, Applicant did not complete a drug rehabilitation program and the clinical evaluation he received does not constitute a positive prognosis as there was no diagnosis of substance abuse or dependence in the first place. Although it is positive information about Applicant's current sobriety, his clinical evaluation alone does not support application of the mitigating condition at AG ¶ 26(d) (*satisfactory completion of a*

prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional).

Applicant has not used illegal drugs since 2007 and he has not abused prescription medications since 2008. However, the value of his current abstinence is undermined by his extensive history of drug use. It also is possible that his abstinence is currently motivated by a pending clearance application with another agency and by his response to the current DoD clearance adjudication. Also, because he has been willing to lie about his drug use, there are ongoing concerns about his judgment and reliability, which further undermine his stated intent to abstain from illegal drug use. On balance, Applicant has not mitigated the security concerns about his drug involvement.

Whole-Person Concept

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guidelines E and H. I have also reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is 55 years old. He has been employed by the same company for 30 years and has been married to the same person for 28 years. Together, he and his wife have raised two children and appear to have had a stable, productive life together. Applicant has established a strong professional and personal reputation through his work and community activities. All of this information supports a presumption that he is a mature, responsible adult. However, his behavior for the past 30 years also reflects serious defects in his judgment and trustworthiness. The positive information about the Applicant's work and community accomplishments and reputation are not enough to overcome the willful and protracted nature of his misconduct. A fair and commonsense assessment of all available information bearing on Applicant's past and current circumstances shows that doubts remain about his ability to protect the Government's interests as his own. Because protection of the national interest is paramount in these determinations, such doubts must be resolved for the Government.

Formal Findings

Formal findings 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.d:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a - 2.c:	Against Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the national interest to continue Applicant's access to classified information. Request for security clearance is denied.

MATTHEW E. MALONE
Administrative Judge