



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



In the matter of:)
)
) ISCR Case No. 10-07266
)
Applicant for Security Clearance)

Appearances

For Government: Julie Mendez, Esquire, Department Counsel
For Applicant: Christopher Graham, Esquire

October 28, 2011

Decision

RIVERA, Juan J., Administrative Judge:

Applicant illegally used marijuana sporadically from 1999 until April 2009. He used cocaine six times between May 2004 and April 2009. He used illegal drugs while serving in the National Guard, and after he was granted a security clearance in February 2008. Not enough time has passed to establish that Applicant has made permanent lifestyle changes, that he disassociated from his drug-using friends, and that his use of drugs is unlikely to recur. Clearance is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on April 13, 2010. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request for a security clearance.

¹ Required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; and Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as revised.

On April 5, 2011, DOHA issued Applicant a statement of reasons (SOR) indicating security concerns raised under Guidelines H (Drug Involvement) and E (Personal Conduct) of the adjudicative guidelines (AG).² On May 31, 2011, Applicant responded to the SOR allegations and requested a hearing before an administrative judge. The case was assigned to me on July 25, 2011. DOHA issued a notice of hearing on July 29, 2011. At Applicant's counsel's request, the hearing was scheduled for September 12, 2011. The Government offered exhibits (GE) 1 through 4, which were admitted without objection. Applicant testified, and he presented six exhibits (AE) A through F, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on September 19, 2011.

Findings of Fact

Applicant admitted all the SOR allegations. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, and having observed Applicant's demeanor and considered his testimony, I make the following findings of fact.

Applicant is a 30-year-old senior geographic information systems engineer working with a Government contractor. He graduated from high school in June 1999, and attended college from 1999 until August 2005. While in college, he worked part-time to pay for his own education. He received a bachelor's degree in geology with a concentration in engineering. He has never been married and has no children.

After college, Applicant worked for two different Government contractors until March 2010, when he was hired by his current employer. He enlisted in the U.S. Army Reserve in March 2000, and transferred into his state National Guard in 2001. He achieved the rank of sergeant (E-5), and served in the National Guard until October 2007, primarily as a weekend-drilling Guardsman. He was activated in 2003 and 2007, to augment installations where its troops were deployed. His service was characterized as honorable. Applicant knew that the use of illegal drugs is prohibited by the U.S. Army and the National Guard. Between 2006 and March 2009, Applicant worked with a Government contractor, and was detailed to work at the National Guard Bureau as a civilian employee. In his spare time, Applicant is an avid marathon runner, and raises money for different charities.

Applicant illegally used marijuana from 1999 until 2005, while he was in college. He characterized his marijuana use as sporadic because he only used marijuana socially once or twice a year. He obtained the marijuana from his college roommate. He claimed he smoked marijuana unknowingly in October 2007, when his roommate mixed marijuana with flavored tobacco. Additionally, he used marijuana socially and for experimentation purposes three times from March 2008 until April 2009.

² Adjudication of this case is controlled by the AG, implemented by the DoD on September 1, 2006.

Applicant illegally used cocaine five times between May 2004 and July 2004. At his hearing, he testified that, during college he worked part-time as a restaurant waiter to pay for his college education. He got mixed up with other restaurant staff members that were using cocaine after their shift ended, and he experimented with it. He claimed he resigned his waiter position to stay away from his co-workers' bad influence. (Tr. 22) He also used cocaine in April 2009, while in a bus at a horse race. He stated his use of cocaine was social and for experimentation purposes. He testified he has not used cocaine since April 2009. He also claimed he no longer associates with any of his drug-using friends.

On May 4, 2010, Applicant was interviewed by a Government background investigator. During that interview, Applicant stated that he used cocaine five times between May 2004 and July 2004, but at his college residence with his roommate and his roommate's friends. Applicant claimed his last use of illegal drugs was in April 2009. At the time, he was working with a Government contractor and was assigned to the National Guard Bureau. He decided not to use illegal drugs again, because he was granted access to classified information. (Tr. 26)

In June 2011, Applicant successfully completed an outpatient substance abuse program. All random urine drug screens were negative for alcohol and illegal drugs. (AE A) He learned to identify the triggers for his alcohol and drug use. He also learned to cope with stress, and to remove himself from situations where the use of alcohol or illegal drugs is likely. He submitted a signed statement of intent not to use illegal drugs, with automatic revocation of clearance for any violation. (AE B)

In 2007, Applicant was sponsored by his employer for a security clearance and submitted his first SCA. Section 24 of his 2007 SCA asked Applicant whether in the last seven years he had illegally used any controlled substances, to include marijuana and cocaine. He answered "No," and deliberately failed to disclose his marijuana and cocaine use between May 2004 and July 2004. (GE 2) Applicant was afraid that he would be denied his security clearance or lose his employment if he disclosed his use of illegal drugs. In February 2008, he was granted a security clearance, which he has possessed until the present.

In April 2010, Applicant submitted his second SCA. In his answers to Sections 23a and b, Applicant disclosed that he illegally used marijuana sporadically from 1999 until March 2005, once in 2007, and three times from April 2008 until April 2009. He also disclosed he used cocaine five times from May 2004 until July 2004, and once in April 2009. He acknowledged that his illegal drug use was wrong. He stated he had made it clear to his drug-using friends that he would not use drugs anymore. He claimed he disassociated from his drug-using friends. (GE 1)

Applicant is considered to be a dependable and highly capable employee. His integrity and honesty have never been called into question. His supervisors and coworkers lauded his professionalism, experience, and knowledge. He is considered to be a valuable and trustworthy employee.

Policies

The President of the United States has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AG are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable to reach his decision.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See *also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication that the Applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline H, Drug Involvement

AG ¶ 24 articulates the security concern about 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.

Applicant illegally used marijuana sporadically from 1999 until April 2009. He used cocaine approximately six times between May 2004 and April 2009. He used illegal drugs while serving in the National Guard, and after he was granted a security clearance in February 2008.

AG ¶ 25 describes eight conditions related to drug involvement that could raise a security concern and may be disqualifying. Two drug involvement disqualifying conditions raise a security concern and are disqualifying in this particular case:

- (a) any drug abuse;³ and
- (c) illegal drug possession.

AG ¶ 26 provides four potentially applicable drug involvement mitigating conditions:

³ AG ¶ 24(b) defines “drug abuse” as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.”

AG ¶ 24(a) defines “drugs” as substances that alter mood and behavior, including: (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.

(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;

(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; and

(4) a signed statement of intent with automatic revocation of clearance for any violation;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(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.

None of the Guideline H mitigating conditions fully apply. Applicant's use of illegal drugs, although sporadic, spanned a period of approximately 10 years, and his use was not infrequent. He started using drugs while he was in college (age 18), and his use extended until May 2009 (age 28). He illegally used drugs socially, and not under extraordinary circumstances. He knew that his use of drugs was illegal and specifically prohibited by the U.S. Army and the National Guard. Notwithstanding, he illegally used drugs while serving in the National Guard. Moreover, Applicant falsified his 2007 SCA because he was afraid he would be considered not eligible for a security clearance, or his employment with a Government contractor would be terminated. Notwithstanding, he illegally used drugs again between April 2008 and April 2009, while working for a Government contractor, and after he was granted a security clearance in February 2008.

Applicant believes his questionable behavior is mitigated by the passage of time because he last used drugs in April 2009, and his abstinence since demonstrates his intent not to abuse drugs in the future. He also successfully participated in substance abuse counseling and submitted a signed statement of intent not to use illegal drugs with automatic revocation of clearance for any abuse of illegal drugs. I disagree. His actions are not sufficient to mitigate drug involvement concerns. According to Applicant, he was drug abstinent from March 2005 until April 2008. (That is, not counting his allegedly "unknowing" use of marijuana in 2007.) Notwithstanding his age, experience, job responsibilities, and his possession of a security clearance, Applicant chose to illegally use drugs again in 2008-2009.

Considering the evidence as a whole, not enough time has passed to establish that Applicant has made permanent lifestyle changes, that he has disassociated from his drug-using friends, and that his use of drugs is unlikely to recur. His questionable behavior casts doubt on his reliability and judgment. Applicant's favorable evidence is not sufficient to fully mitigate the Guideline H security concerns.

Guideline E, 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.

Applicant deliberately falsified his 2007 SCA when he failed to disclose he used illegal drugs from around 1999 until at least 2005. Notwithstanding, in April 2010, Applicant corrected his falsification before being confronted with the facts.

Applicant illegally used drugs during the period he was serving in his state National Guard unit. He denied using drugs while drilling during the weekends or when activated. He used marijuana and cocaine while working with a Government contractor, and after he was granted a security clearance in February 2008.

Applicant's 2007 SCA falsification, and his use of drugs while in the service and possessing a security clearance, trigger the applicability of the following disqualifying conditions under 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;

(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

(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.

AG ¶ 17 lists seven conditions that could potentially mitigate the personal conduct 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.

After considering the above mitigating conditions, I find that AG ¶¶ 17(a) and (c) apply to his falsification allegation. Applicant's correction of his falsification was not prompt. However, his disclosure was made in good-faith, and before confrontation. The disclosure of his falsification and his past illegal drug use also established that Applicant is taking steps to reduce or eliminate his vulnerability to exploitation, manipulation, or duress.

Notwithstanding, for the same reasons articulated under the Guideline H discussion, incorporated herein, Applicant did not mitigate the security concerns alleged under SOR ¶ 2.b – his illegal use of drugs while serving in the National Guard, and his illegal use of drugs while in possession a security clearance. On balance, Guideline E is decided against Applicant.

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.

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. AG ¶ 2(c).

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant receives credit for correcting his 2007 SCA falsification in his 2010 SCA. He stopped using illegal drugs in April 2009, because he has matured and wants to develop his career. He seems to be on the correct path to accomplish his rehabilitation. He has outstanding endorsements from his character references. He is considered to be a truthful, highly competent, and dependable worker. He successfully participated in substance abuse treatment and promised never to use illegal drugs again. These factors show responsibility, good judgment, and some mitigation.

Notwithstanding, in light of Applicant's age, his nine years of sporadic drug use which included drug use while in the service, working for a Government contractor, and possessing a security clearance, his promise to not use illegal drugs in the future is not sufficient to show his questionable behavior is unlikely to recur. At this time, the record evidence fails to convince me of Applicant's eligibility and suitability for a security clearance.

I conclude that Applicant's favorable evidence is insufficient to fully mitigate the security concerns arising from his drug involvement and personal conduct. Overall, the

record evidence fails to convince me of Applicant's eligibility and suitability for a security clearance.

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.e:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	Against Applicant

Conclusion

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

JUAN J. RIVERA
Administrative Judge