



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



In the matter of:)	
)	
)	ISCR Case No. 10-07432
)	
Applicant for Security Clearance)	

Appearances

For Government: Raashid S. Williams, Esquire, Department Counsel
For Applicant: William F. Savarino, Esquire

December 30, 2011

Decision

METZ, John Grattan, Jr., Administrative Judge:

Based on the record in this case,¹ Applicant's clearance is denied.

On 15 August 2011 the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E, Personal Conduct.² Applicant timely answered, requesting a hearing. DOHA assigned the case to me 4 November 2011, and I convened a hearing 1 December 2011. DOHA received the transcript 9 December 2011.

¹Consisting of the transcript (Tr.), Government's exhibits (GE) 1-4, and Applicant's exhibits (AE) A-D. AE D was timely received post hearing.

²DOHA 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) effective within the DoD on 1 September 2006.

Findings of Fact

Applicant admitted the drug-related SOR allegations, but denied falsifying his August 2005 clearance application and having his special access request denied in December 2008 for drug involvement and personal conduct. He is a 55-year-old process engineer employed by a defense contractor since April 2005. He seeks to retain the clearance he was issued in 2005.

Applicant used marijuana fairly frequently in the 1970s when he was a teenager. He also used LSD about 6 to 12 times in the 1970s. In 1977, he enlisted in the U.S. military. During the recruiting process, his recruiter broadly hinted at the amount of drug use that would pass muster and not hold up his enlistment. Applicant took the hint and disclosed on his enlistment documents only that he had used marijuana experimentally. He did not disclose his LSD use, or the full extent of his marijuana use. He does not recall if he had to complete a drug waiver to enlist in the military.

Applicant was accepted into the military and was the honor recruit during basic training. He was a standout student at his follow-on professional school. However, from March 1977 until about 1980, he used marijuana monthly and used LSD once in about 1978. By 1980, he had stopped using illegal drugs, partly because he was no longer interested in using marijuana and partly because the military had begun random testing for illegal drug use. He held a clearance from 1982 to 1983 while in the military. He did not disclose his military drug use on his clearance application. Applicant finished basic training as an E-3 and left the military as an E-6 in March 1983.

After Applicant left the military in March 1983, he did not use illegal drugs again until about 1996, when he began using marijuana. He used marijuana until 2000 or 2001, when he again stopped. In 2004, he bought marijuana two to three times for a friend of his who suffered from debilitating migraine headaches and had asked him to get marijuana for her. He knew the purchases were illegal, but rationalized his conduct because his friend got so much relief from using the marijuana. At the time of the purchases, Applicant was serving as the national outreach coordinator for a national organization advocating relaxed drug laws for medical marijuana use.

When Applicant applied for his industrial security clearance in August 2005, he failed to disclose his marijuana use from 1998 to 2000/2001 (question 24a) or his marijuana purchases in 2004 (question 24c). He rationalized his answers by telling himself that the marijuana use "didn't count" or "didn't matter" (Tr. 72) and the marijuana purchases were not for his personal use. Neither question has such a qualifier, and while Applicant now acknowledges that his thinking was wrong, he cannot bring himself to acknowledge that he knew at the time that his answers were deliberately false (Tr. 81-85). However, he admitted that he feared the consequences of disclosing the truth (Tr. 72-73). The summary of Applicant's February 2006 interview with a Government investigator does not record any discussion of Applicant's drug history (GE 2, 3).

Applicant obtained his clearance as a result of this background investigation and held it without incident until his company nominated him for special access with another government organization (AGO). In March 2008, Applicant completed a supplemental application on which he again denied any history of drug involvement, which at this point would have required him to disclose only his 2004 drug purchases, the rest of his drug involvement being more than seven years old. During the next few months, Applicant made three trips to AGO and underwent at least two polygraphs. Applicant initially denied that he had any drug involvement, and acknowledges that he did not disclose his drug history until the examiner confronted him with the assessment that Applicant seemed to be hiding something (Tr. 74-75, 111-113)

Once his drug history came to light, AGO acted to deny Applicant's request for special access based on his drug use and personal conduct (GE 4). Applicant did not appeal AGO's decision.

Applicant's current (Tr. 16) and former (Tr. 28) supervisors consider him honest and trustworthy, and recommend him for his clearance. They consider the misconduct noted in the SOR inconsistent with what they know of Applicant. Applicant advised them of the misconduct after he received the SOR.

Policies

The adjudicative guidelines (AG) list factors to be used to evaluate an applicant's suitability for access to classified information. Administrative judges must assess both disqualifying and mitigating conditions under each issue fairly raised by the facts and situation presented. Each decision must also reflect a fair, impartial, and commonsense consideration of the factors listed in AG ¶ 2(a). The presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific guidelines should be followed where a case can be measured against them, as they represent policy guidance governing the grant or denial of a clearance. Considering the SOR allegations and the evidence as a whole, the relevant adjudicative guideline is Guideline E (Personal Conduct).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to Applicant to refute, extenuate, or mitigate the Government's case. As no one has a right to a clearance, the applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the requisite judgement, reliability, and trustworthiness of those who must protect national interests as their 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.³

Analysis

The Government established a case for disqualification under Guideline E, and Applicant did not completely mitigate the security concerns. Applicant’s use of marijuana and LSD and his marijuana purchases are mitigated largely by the passage of time the same as they would be mitigated if they had been alleged as drug involvement. Beyond that, however, the drug involvement has no lingering security significance under Guideline E because it comes into play here only if the conduct is not fully cognizable under another guideline. Applicant’s drug involvement is fully cognizable under Guideline H, Drug Involvement. The Government implicitly acknowledged this by not alleging the conduct under Guideline H.

Nevertheless, Applicant failed to mitigate the security concerns raised by his multiple misrepresentations and falsifications on Government documents and to Government investigators. Applicant falsified his enlistment documents in 1977. Although not alleged in the SOR, he falsified a clearance application in approximately 1982. He did so to first obtain, and then retain, his military employment. He deliberately failed to disclose his drug history on his August 2005 clearance application. Although not alleged in the SOR, he also failed to mention his drug history during a February 2006 subject interview with a Government investigator, deliberately failed to disclose his drug history on a March 2008 application for supplemental access, and deliberately failed to disclose his drug history during subsequent polygraph examinations until he was confronted by the examiner with indications that Applicant seemed to be having trouble with some of the questions.⁴ Applicant’s falsifications and omissions were made to first obtain, and then retain, the clearances necessary for his employment with a Government contractor. The falsifications and omissions alleged were enough to shift the burden of persuasion to Applicant to refute or mitigate the Government’s information.⁵

None of the Guideline E mitigating conditions apply. The concealed information was relevant to a clearance decision. Applicant did not disclose this adverse information until his polygraph examination, and then only when the examiner told Applicant that

³See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁴¶ 16(a) deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, . . . [or] determine security clearance eligibility or trustworthiness. . . ; (b) deliberately providing false or misleading information regarding relevant facts to an . . . investigator . . . ;

⁵The falsifications and omissions that were not alleged in the SOR may not be considered on the merits of the Guideline E allegations, but may be considered as relevant to the Applicant’s credibility, his whole person analysis, and to establish absence of mistake on the falsifications that were alleged.

Applicant was having trouble with some of the questions.⁶ Applicant argues that because the full extent of his drug history is now known to the Government, he has no reason to falsify that drug history in the future. Applicant urges too narrow a view of the evidence. Applicant has demonstrated that he is willing to falsify, omit, or misrepresent adverse information in his background in order to obtain or retain employment and clearances. Applicant's 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. Applicant's conduct suggests he is willing to put his personal needs ahead of legitimate Government interests. Finally, Applicant is unable to squarely admit that he deliberately falsified his drug history during his military career and his later clearance processes, a factor that seriously undercuts any claims to rehabilitation. I resolve Guideline E against Applicant.

Formal Findings

Paragraph 1. Guideline E:	AGAINST APPLICANT
Subparagraphs a-b:	For Applicant
Subparagraph c:	Against Applicant
Subparagraphs d-e:	For Applicant
Subparagraphs f-h:	Against Applicant

Conclusion

Under the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance denied.

JOHN GRATTAN METZ, JR
Administrative Judge

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