



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



In the matter of:)
)
) ISCR Case No. 11-00391
)
Applicant for Security Clearance)

Appearances

For Government: Gregg Cervi, Esq., Department Counsel
For Applicant: Palmer A. Hoovestal, Esq.

September 14, 2011

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated personal conduct and alcohol consumption security concerns, but he has not mitigated drug involvement security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On April 14, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines H (drug involvement), E (personal conduct), and G (alcohol consumption). The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the Department of Defense on September 1, 2006.

Applicant answered the SOR on May 12, 2011, and requested a hearing before an administrative judge. The case was assigned to me on August 2, 2011. DOHA issued a notice of hearing on August 10, 2011, scheduling the hearing for August 31,

2011, by video teleconference. The hearing was convened as scheduled. The Government offered exhibits (GE) 1 through 3, which were admitted without objection. Applicant testified, called three witnesses, and submitted exhibits (AE) A and B, which were admitted without objection. Applicant's counsel's memorandum is marked hearing exhibit (HE) I. DOHA received the hearing transcript (Tr.) on September 6, 2011.

Findings of Fact

Applicant is a 51-year-old employee of a defense contractor. He has a bachelor's degree. He is married with two adult children.¹

Applicant smoked marijuana a few times a year from 1978 to June 2010. His marijuana use usually occurred at his family's cabin several hours from his home. He usually smoked the marijuana with one or more of his siblings, who would leave the marijuana at the cabin. He stated that his marijuana use was rare. He sometimes went more than a year without smoking marijuana, and he did not purchase the drug.²

Applicant submitted a security clearance application (SCA) in November 1996. He answered "No" to the question that asked if he had used any illegal substances, including marijuana, in the last seven years. Applicant initially denied intentionally falsifying the SCA. In his response to the SOR, he stated that he "answered 'No' because at the time [he] considered [his] marijuana use to be so rare and infrequent that [he] considered it to be non-use and did not even approach the use that seemed to be contemplated by the question." At his hearing, Applicant admitted that his failure to list the marijuana use was intentional. He stated that his response to the SOR was poorly worded.³ I find that Applicant intentionally falsified his SCA.

Applicant received his security clearance sometime after he submitted his SCA. He continued to periodically smoke marijuana while he held his clearance. Applicant left his job in 2001, and went to work for a company that did not require a security clearance.⁴

Applicant tested positive for the active ingredient in marijuana during a random drug screening test administered by his employer in September 2008. Applicant was permitted to retain his job, but he was subjected to additional drug tests. He was required to sign a document certifying that he understood that he would be terminated from his position if he tested positive again.⁵

¹ Tr. at 66; GE 1, 3.

² Tr. at 38-39, 47, 52-57; Applicant's response to SOR; GE 1, 2.

³ Tr. at 36-37, 66-69; Applicant's response to SOR; GE 1, 3.

⁴ Tr. at 42-43; Applicant's response to SOR; GE 1, 2.

⁵ Tr. at 42-47, 60; Applicant's response to SOR; GE 2.

Applicant received a chemical dependency assessment by a licensed addiction counselor (LAC) in November 2008. The LAC concluded that Applicant had abused marijuana, but he did not have an apparent dependence on marijuana. The LAC also noted that Applicant “does have a dependence upon alcohol and I am recommending an intensive outpatient treatment for alcohol dependence.”⁶

Applicant passed multiple drug tests after his 2008 positive test. He liked his job, and he was aware that smoking marijuana could cause him to lose the job. He stated that he did not use marijuana for 18 months. He smoked marijuana during a visit to the cabin in June 2010. He tested positive on a drug test administered shortly thereafter, and he was terminated from his job.⁷

Applicant completed a chemical dependency evaluation by a different LAC in June 2010. The LAC determined that Applicant met the criteria for alcohol abuse and cannabis abuse. He did not meet the criteria for treatment placement as specified by the American Society of Addiction Medicine. The LAC recommended that Applicant “achieve and maintain abstinence from marijuana and other non-prescribed mood-altering substances and limit and monitor [his] alcohol consumption.”⁸

Applicant submitted a Questionnaire for National Security Positions (SF 86) in June 2010. Applicant listed marijuana use from “02/1978 (Estimated) to 06/2010.” He wrote that he “smoked pot occasionally/socially since college.” He stated that he had not used marijuana since his termination from employment in June 2010, and he would never use it again. Applicant noted that the U.S. Government “investigated [his] background and/or granted [him] a security clearance in 1997.” Applicant mistakenly checked “No” in the box asking about use of a controlled substance while holding a security clearance. That answer was not intended to deceive, as the same information was essentially provided under other questions.⁹

Applicant disputes the 2008 assessment that he is alcohol dependent. He accepts that he could be evaluated as an alcohol abuser. He admitted that when he smoked marijuana, he was usually drinking beer. He believes the evaluation was based upon his lifetime drinking habits. He stated that he drank more when he was younger. He stated that he still drinks beer occasionally, but only about three beers a week. He has never been arrested on an alcohol-related charge.¹⁰

Applicant stated that he does not intend to use illegal drugs again. He has not used marijuana since his positive drug test. He has not discontinued association with

⁶ Tr. at 61-63; Applicant’s response to SOR; AE A.

⁷ Tr. at 44-45, 58-59.

⁸ Tr. at 64-65; Applicant’s response to SOR; GE 1; AE B.

⁹ Tr. at 39-40; Applicant’s response to SOR; GE 3.

¹⁰ Tr. at 48-50, 63-66; Applicant’s response to SOR; GE 2.

his siblings, and he still goes to the family cabin. He stated that one of his siblings no longer smokes marijuana. His other sibling may still smoke marijuana, but Applicant told the sibling not to do it around him and not to bring it to the cabin. Applicant is willing to sign a statement of intent not to use illegal drugs, with automatic revocation of his clearance for any violation.¹¹

Three witnesses testified on Applicant's behalf, and attested to Applicant's excellent job performance, responsibility, reliability, trustworthiness, patriotism, competence, professionalism, and judgment. The witnesses recommended Applicant for a security clearance.¹²

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 are to be used 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, administrative judges apply the guidelines 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 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.

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 the 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

¹¹ Tr. at 39, 41, 45-48, 57-58; Applicant's response to SOR; GE 2.

¹² Tr. at.15-35.

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 EO 10865 provides that adverse 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 H, Drug Involvement

The security concern for drug involvement is set out in AG ¶ 24:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

- (a) any drug abuse;¹³
- (b) testing positive for illegal drug use;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (g) any illegal drug use after being granted a security clearance.

Applicant possessed and smoked marijuana a few times a year from 1978 to June 2010. He used marijuana while he held a security clearance from about 1997 to 2001. He tested positive for marijuana use in 2008 and 2010. All of the above disqualifying conditions are applicable.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially applicable:

- (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

¹³ Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

on the individual's current reliability, trustworthiness, or good judgment;
and

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

Applicant smoked marijuana periodically for much of his adult life. He smoked marijuana a few times a year, but he also went a year or more without using the drug. He did not list his marijuana use on his SCA in 1996, and he was granted a security clearance. He continued to smoke marijuana after he received his security clearance. He tested positive for marijuana in September 2008. He was permitted to retain his job, but he was required to sign a document certifying that he understood that he would be terminated from his position if he tested positive again. He again smoked marijuana in June 2010. He tested positive, and he was terminated.

Applicant stated that he does not intend to use illegal drugs again, and he is willing to sign a statement of intent not to use illegal drugs, with automatic revocation of his clearance for any violation. There is no bright-line rule for when conduct is recent. Applicant has not used illegal drugs since June 2010, about 15 months ago. He appears sincere in his desire to remain drug-free. However, he previously signed a document acknowledging that he would be terminated if he tested positive again, and he later smoked marijuana with full knowledge that it could cost him a job that he liked. Applicant may not use marijuana again; however, I am unable to conclude that illegal drug use is completely in his past. Applicant's drug use continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 26(a) has limited applicability. He does not receive full mitigation under AG ¶ 26(b) for the same rationale. In sum, I conclude that security concerns remain despite the presence of some mitigation.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15:

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 describes conditions that could raise a security concern and may be disqualifying. The following is potentially applicable:

(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 intentionally falsified his SCA in 1996 when he failed to list his marijuana use. AG ¶ 16(a) is applicable as it relates to that application. He did not deliberately falsify his SF 86 in 2010. AG ¶ 16(a) is not applicable to that application. SOR ¶ 2.b is concluded for Applicant.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant provided intentionally false information on his SCA in 1996. There is no evidence that the falsification was caused or significantly contributed to by improper or inadequate advice of authorized personnel, or that he made a prompt, good-faith effort to correct the falsification before being confronted with the facts. AG ¶¶ 17(a) and 17(b) are not applicable.

Applicant left the job requiring a security clearance in 2001. When he was rehired and required to reapply for a security clearance in 2010, he fully listed his marijuana use. I find that Applicant has taken positive steps to reduce or eliminate his vulnerability to exploitation, manipulation, or duress. I further find that such behavior is unlikely to recur, and it no longer casts doubt on Applicant's current reliability, trustworthiness, and good judgment. AG ¶¶ 17(c), 17(d), and 17(e) are applicable.

Guideline G, Alcohol Consumption

The security concern for alcohol consumption is set out in AG ¶ 21:

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

The guideline notes several conditions that could raise security concerns under AG ¶ 22. The following are potentially applicable in this case:

(e) evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

Applicant was given chemical dependency evaluations by licensed addiction counselors following his positive drug tests in 2008 and 2010. In 2008, he was found to be alcohol dependent. In 2010, the LAC determined that Applicant met the criteria for alcohol abuse. AG ¶ 22(e) is applicable.

Conditions that could mitigate alcohol consumption security concerns are provided under AG ¶ 23. The following are potentially applicable:

(a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

(b) the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser).

Applicant accepts his evaluation as an alcohol abuser. He believes the evaluation was based upon his lifetime drinking habits. He has reduced his drinking to about three beers a week. He has never been arrested on an alcohol-related charge. I give the most recent evaluation the most weight. I find that Applicant has established a pattern of responsible alcohol use. Applicant's alcohol consumption does not cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶¶ 23(a) and 23(b) are applicable.

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. I have incorporated my comments under Guidelines H, E, and G in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

I considered Applicant's favorable character evidence. I found him to be a credible witness and tend to believe that he will probably not use marijuana again. However, Applicant lied about his drug use in 1996, and then used drugs while holding a security clearance. He flunked a drug test in 2008. He was permitted to keep a job that he liked, knowing he would lose the job if he tested positive again. Despite many good reasons to finally put marijuana in his past, Applicant once again smoked marijuana. At this time, 15 months of abstinence is not enough to mitigate Applicant's incidents of extremely poor judgment and disregard for the law.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated personal conduct and alcohol consumption security concerns, but he has not mitigated drug involvement security concerns.

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.d:	Against Applicant

Paragraph 2, Guideline E: FOR APPLICANT

Subparagraphs 2.a-2.b: For Applicant

Paragraph 3, Guideline G: FOR APPLICANT

Subparagraphs 3.a-3.b: For Applicant

Conclusion

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

Edward W. Loughran
Administrative Judge