



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



In the matter of:)	
)	
)	ISCR Case No. 11-00566
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O’Connell, Esquire, Department Counsel
For Applicant: *Pro se*

11/23/2012

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the pleadings, exhibits, and testimony in this case, I conclude that Applicant failed to rebut or mitigate the Government’s security concerns under Guideline E, Personal Conduct. Applicant’s eligibility for a security clearance is denied.

Statement of Case

Applicant completed and certified the following security clearance applications: a Personnel Security Questionnaire, dated March 10, 1996; an Electronic Questionnaire for Investigations Processing (e-QIP), dated January 12, 2007; and an e-QIP, dated June 15, 2010. On May 31, 2012, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, Personal Conduct. DOHA acted under Executive Order 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) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant's notarized answer to the SOR was dated July 12, 2012. He elected to have a hearing before an administrative judge. The case was assigned to me on September 13, 2012. I convened a hearing on October 26, 2012, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called no witnesses and introduced five exhibits, which were marked Ex. 1 through 5 and entered in the record without objection. Applicant testified and introduced one exhibit, which was marked as Applicant's Ex. A and entered in the record without objection. DOHA received the hearing transcript (Tr.) on November 5, 2012.

Findings of Fact

The SOR contains four allegations of disqualifying conduct under Guideline E, Personal Conduct (SOR ¶¶ 1.a., 1.b., 1.c., and 1d.). In his Answer to the SOR, Applicant admitted all four Guideline E allegations. Applicant's admissions are entered as findings of fact. (SOR; Answer to SOR.)

Applicant is 42 years old, married, and the father of a 15-year-old son and a nine-year-old daughter. In 1993, he earned a Bachelor of Science degree in Physics and Astronomy. Applicant has worked for his current employer for six years, and he is employed as a production test manager. (Ex.1; Tr. 24-27, 50.)

Applicant enlisted in the United States military in 1996, when he was 26 years old. He was first awarded a security clearance in 1996. He was honorably discharged for medical reasons in 2000. (Ex. 1; Tr. 24.)

When Applicant was a college student and 19 years old, he began using marijuana. He told an authorized investigator that he used marijuana about once a month from 1992 until 1993.¹ (Ex. 3; Tr. 30, 50-51.)

Soon after enlisting in the military in 1996, Applicant completed a personnel security questionnaire. Section 22 on the questionnaire is entitled "Drug/Alcohol Use and Mental Health. Item "a" under Section 22 asks: "Have you ever tried or used or possessed any narcotic (*to include heroin or cocaine*), depressant (*to include quaaludes*), stimulant, hallucinogen (*to include LSD or PCP*), or cannabis (*to include marijuana or hashish*), or any mind-altering substance (*to include glue or paint*), even one time or on an experimental basis, except as prescribed by a licensed physician?" Applicant answered "No" to Section 22, Item "a." At his hearing, he acknowledged that his failure to list his drug use on the personnel security questionnaire was deliberate. This conduct is alleged at SOR ¶ 1.a. (Ex. 5; Tr. 32-33.)

¹ At his hearing, Applicant denied he used marijuana once a month while a college student, and he did not recollect telling the investigator that he did so. He stated that he used marijuana in college "a handful of times." (Tr. 30-31.)

Applicant was subsequently awarded a security clearance. Between 1996 and 2000, he used marijuana on at least five occasions while holding a security clearance. This conduct is alleged at SOR ¶ 1.b. (Ex. 3; Tr. 33-34.)

Applicant was discharged from the military in 2000, and he no longer had a security clearance. In August 2006, Applicant purchased Ecstasy and cocaine. He and his wife experimented with the drugs on two separate occasions in August 2006. (Ex. 1; Ex. 3; Tr. 36-41.)

In January 2007, Applicant completed an e-QIP. Section 24 on the e-QIP is entitled "Your Use of Illegal Drugs and Drug Activity." Item "a" under Section 24 reads: "Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.) amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?" Applicant responded "No" to Section 24, Item "a." At his hearing, Applicant said he had no good reason for failing to list his 2006 drug use on his 2007 e-QIP. This conduct is alleged at SOR ¶ 1.c. (Ex. 1; Ex. 3; Tr. 36-39.)

Applicant was again awarded a security clearance. Then in October and December of 2009, Applicant attended two parties with his wife and again used the illegal drug marijuana while holding a security clearance. This conduct is alleged at SOR ¶ 1.d. (Ex. 1; Tr.39-43.)

Applicant stated that he no longer associates with some of the individuals with whom he used illegal drugs in the past. He stated that he does not intend to use drugs in the future. He has attended a "handful" of Narcotics Anonymous meetings. He stated that he has thought about attending Al-Anon meetings and may do so in the future. For about one and one-half years, he has been in counseling with a licensed social worker to understand his past behavior with drugs. The licensed social worker is not a specialist in drug treatment. (Tr. 44-48.)

Applicant's counselor provided a written evaluation for the record and concluded that Applicant was not a drug abuser or drug dependent. He stated that he did not recommend treatment for Applicant. The counselor also stated:

I evaluated [Applicant] for possible substance abuse problems on 2/24/11. [Applicant] was self referred after his employer discovered he had used cannabis. The evaluation revealed no maladaptive pattern of use of cannabis leading to any psycho-social impairment or distress. There is no evidence of recurrent use despite negative consequences (e.g. ability to fulfill obligations at work or home, hazardous behavior, legal problems, social or interpersonal problems). Also, there is no evidence of repeated use resulting in the development of tolerance. [Applicant] denies the use of any other illicit substance, and there is no evidence to the contrary. (Ex. 2.)

Applicant provided a letter of character reference from his manager at work. The manager stated that Applicant was a valued professional and conscientious worker. He also praised Applicant's trustworthiness and good judgment. (Ex. A.)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President 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." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant an applicant's 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.

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are 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, the administrative judge applies these 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 applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining 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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 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

Guideline E, Personal Conduct

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

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 used marijuana as a college student during 1992 and 1993. In 1996, he answered “No” when asked on a personnel security questionnaire if he had ever used cannabis or marijuana. He was subsequently issued a security clearance by his military superiors, who had no knowledge of his former drug use. Between 1996 and 2000, while in military service, Applicant used marijuana while possessing a security clearance.

In October and December of 2006, Applicant purchased and used Ecstasy and cocaine with his wife. In January 2007, he executed an e-QIP and, responded “No” to a question asking if he had used an illegal drug in the last 7 years, thereby failing to acknowledge his use of Ecstasy and cocaine in October and December of 2006. Again, Applicant was awarded a security clearance. In 2009, while holding a security clearance, Applicant again used marijuana on two separate occasions. Applicant’s personal conduct raises security concerns under AG ¶¶ 16(a) and 16(e)(1).

AG ¶ 16(a) reads: “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.” AG ¶ 16(e)(1) reads: “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. . . .”

Several Guideline E mitigating conditions might apply to Applicant’s personal conduct. If “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts,” then AG ¶ 17(a) might apply. AG ¶ 17(d) might apply in mitigation if “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 occur.” AG ¶ 17(e) might apply if “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.”

In 1996 and in 2007, Applicant executed security clearance applications. On both applications, he answered “No” when asked about illegal drug use, even when he knew he had used illegal drugs. He made no effort to correct the falsifications on his security clearance applications, even though he knew his answers denying drug use were false. Lacking knowledge of Applicant’s illegal drug use, his military and civilian superiors awarded him security clearances. Then, while holding these security clearances, Applicant twice again used illegal drugs. He concealed his illegal drug use, thereby demonstrating poor judgment and unreliability. The fact that this behavior occurred when Applicant was a mature adult continues to cast doubt on his reliability, trustworthiness, and good judgment.

At his hearing, Applicant stated he had been consulting a licensed social worker for a year and one-half in an attempt to alleviate the factors that caused his drug use. In a report, the counselor offered an evaluation of Applicant’s drug use and concluded that he was not a drug abuser or drug dependent. Applicant’s reliance on the licensed social worker’s evaluation is misplaced. At issue in this case is not Applicant’s repeated drug use but, instead, his repeated dishonesty about his drug use. After observing Applicant carefully at his hearing, listening to his testimony, and assessing his credibility, I conclude that his unreliable and untrustworthy behavior has not been mitigated and is likely to recur. Accordingly, I conclude that AG ¶¶ 17(a), 17(d), and 17(e) do not apply in mitigation in this case.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of an 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. Applicant is a mature adult whose military and civilian contractor experience has provided him with knowledge of the security clearance process and its policies. He knows, or should know, of the importance of telling the truth on a security clearance application. Applicant deliberately falsified material facts on two security clearance applications in response to a question about his use of illegal drugs. After being awarded these security clearances, he then used illegal drugs. Applicant's personal conduct raises serious concerns about his judgment, reliability, and trustworthiness.

The record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate 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, Guideline E:	AGAINST APPLICANT
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Subparagraphs 1.a.-1.d.:	Against Applicant
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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.

Joan Caton Anthony
Administrative Judge