



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



In the matter of:)
)
) ISCR Case No. 11-01018
)
Applicant for Security Clearance)

Appearances

For Government: Candace Garcia, Esquire, Department Counsel
For Applicant: *Pro se*

07/11/2012

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, Applicant's eligibility for access to classified information is denied.

Statement of the Case

Applicant signed an Electronic Questionnaire for Investigations Processing (e-QIP) on July 26, 2010. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) on February 9, 2010, detailing security concerns under Guidelines H, drug involvement, and J, criminal conduct. The action was taken 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 For Determining Eligibility for Access to Classified Information* (AG) implemented on September 1, 2006.

Applicant received the SOR on March 7, 2012 and answered it on March 20, 2012. Applicant requested a hearing before an administrative judge. DOHA received the request, and Department Counsel was prepared to proceed on April 19, 2012. I received the case assignment on May 1, 2012. DOHA issued a Notice of Hearing on May 16, 2012, and I convened the hearing as scheduled on June 5, 2012. The Government offered exhibits (GE) marked as GE 1 through GE 5, which were received and admitted into evidence without objection. Applicant and one witness testified. He submitted exhibits (AE) marked as AE A through AE D, which were received and admitted into evidence without objection. I held the record open for one week, for Applicant to submit additional matters. Applicant timely submitted AE E, which was marked and admitted without objection. The record closed on June 12, 2012. DOHA received the hearing transcript (Tr.) on June 13, 2012.

Findings of Fact

In his Answer, Applicant admitted the factual allegations in the SOR. His admissions are incorporated herein as findings of fact. He also provided additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant, who is 52 years old, works as a mechanical engineer for a Department of Defense (DOD) contractor. He began work with his current employer in 1984 and has worked continuously for his employer. He has held a confidential or secret clearance since 1984, and he has never mishandled classified information.¹

Applicant's supervisor for the last three years testified on his behalf. He indicated that Applicant conducts himself in a professional and respectful manner at work. Applicant's performance always exceeds expectations. Based on their work relationship, his supervisor considers Applicant honest, reliable, trustworthy, and dependable. When asked on cross-examination if his opinion would change if he learned that Applicant had an extensive period of drug use, his supervisor stated "it very well may, yes." Applicant's performance evaluations for the last 12 years support his supervisor's statements about his work skills and abilities. His supervisor also stated that in April 2010, Applicant observed a group of seven trespassers on the company's property and reported his observations to security.²

Applicant graduated from college with a Bachelor of Science degree in engineering in 1984. He married his first wife in 1987, and they divorced in 2000. He has two sons, ages 22 and 19, who now reside with him. His oldest son is a special

¹GE 1; GE 2; Tr. 18, 32-34, 58-67.

²AE C; AE D; Tr. 61-65.

needs child, who is autistic and hearing impaired. Applicant married his second wife in 2006 and they divorced in 2010. His girlfriend lives with him and his sons.³

In high school and college, Applicant smoked marijuana and experimented with many different drugs. After college, he abstained from any drug use until after his divorce in 2000. His first girlfriend after his divorce suggested he smoke marijuana to relax him, as he is a nervous and anxious person. He smoked marijuana a few times with her, but quit because the marijuana exacerbated his anxiety and because he did not like its effect on him. Over the next eight years, he took a puff of marijuana about once a year during a motorcycle ride to be part of the group. He last smoked any amount of marijuana in April 2009. He never purchased marijuana.⁴

In 2004, Applicant began dating the woman who would become his second wife. When they first met, she was not involved with drugs. In November 2004, she met old friends at a motorcycle event. These friends provided her with cocaine, which she shared with him. For the next year, Applicant and she used cocaine one to two times a month. Beginning in November 2005, they began to use cocaine on a weekly basis at parties. He regularly contributed money for the purchase of the cocaine. Their cocaine use continued after they married in 2006.⁵ In 2008, during an argument, she threatened to call his office and report his drug use. Her threat frightened him. He moved out of the marital home and stopped his cocaine use. Six months later, Applicant returned to the marital home in an effort to salvage his marriage. Upon his return, he again used cocaine several times over the next few months. After his second wife sustained serious injury in a motorcycle accident, their “rocky” marriage deteriorated. He decided to end the marriage and told his wife in April 2009. They used cocaine one more time after his decision. He explained the use of cocaine in his marriage as “part of their relationship,” even though he knew it was illegal. Applicant has never been arrested or charged with drug offenses.⁶

Applicant fully acknowledged his illegal drug use between 2001 and 2009. He never reported to work under the influence of marijuana or cocaine, and he never used drugs at work. His drug use did not impact his work performance. He always kept his drug use separate from his work. No one at work was aware of his drug use. Applicant verified that he received yearly security training, which included a direction not to use illegal drugs. He is aware of a company drug policy, but did not know the specifics of the policy. His supervisor explained the company’s drug policy as two-fold: 1) an initial drug screening process for new employees, and 2) random drug testing. Applicant stated that he passed a random drug test in 2003, which was the last time he was subjected to a

³GE 1; GE 2; Tr. 18-20, 29, 44.

⁴GE 1; GE 3; Tr. 23, 29-33.

⁵Applicant admitted at the hearing that he knew this conduct was wrong and that he should not be using cocaine or marijuana as he held a security clearance. He also knew that he could lose his job. Tr. 33-34.

⁶GE 1; GE 3; GE 5; Tr. 24-26, 36, 43-44.

random drug test. His supervisor had no knowledge that Applicant had been subjected to a random drug test.⁷

On May 31, 2009, Applicant attended a party, where he consumed alcohol with friends. On his way home from the party, the police stopped him and charged him with driving under the influence (DUI), DUI with breathalyzer, and failure to produce evidence of financial responsibility. On September 21, 2009, Applicant entered into a plea agreement with the prosecutor. He plead guilty to DUI and failure to provide evidence of financial responsibility. The DUI with breathalyzer charged was dismissed. Based on this plea agreement, the court sentenced Applicant to 10 days in jail, with nine days suspended; fined him \$\$1,500; placed him on 12 months of unsupervised probation; ordered him to attend alcohol classes and obtain an alcohol evaluation; and directed that an ignition interlock be placed on his car as part of his probation. Applicant complied with all the terms of his probation. As a result of his DUI conviction, the Motor Vehicle Department assessed him 8 points on his driving record, which will remain on his driving record for seven years. To keep his driver's license, he cannot commit any traffic violations for two years and no DUI offenses for five years. He is in compliance with these terms.⁸

Applicant obtained the required alcohol evaluation in July 2009. Based on the pattern of alcohol use provided by Applicant,⁹ the alcohol counselor evaluated Applicant as a Level II potential problem drinker, who required 16 hours of DUI education. Applicant, who does not dispute this assessment, attended the Level II DUI education classes and eight sessions of Alcoholics Anonymous (AA). As a result of these classes, Applicant realized that his drinking habits were not normal and that he needed to get control of himself.¹⁰

When he decided to quit his drug use and end his second marriage, Applicant decided he needed to make changes in his life to ensure a drug-free lifestyle. He changed his surroundings, ended his friendship with the motorcycle club, and ceased contacts with his second wife. Following the alcohol education and AA classes, Applicant limited his alcohol consumption to one beer after work and three beers on the weekend. He does not drink and drive. He lives with his girlfriend, whom he describes as a positive force in his life. She helped him recognize that he created the more recent problems in his life and that his second marriage damaged his relationship with his

⁷GE 5; Tr. 22, 27, 33-36, 38-39, 65-68.

⁸GE 1; GE 3 - GE 5; Tr. 20-21, 47-52.

⁹Applicant told the counselor that he began drinking alcohol at age 17 and that he drank alcohol on the weekends at the rate of 1-2 drinks "per episode". His BAC at the time of his arrest was .14%. GE 3.

¹⁰GE 3; Tr. 48-53.

sons. Applicant continues to work on improving his relationship with them. Finally, Applicant signed a letter of intent not to use drugs in the future.¹¹

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 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, these guidelines are applied 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, an applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." An applicant has the ultimate burden of persuasion for 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 an 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.

¹¹GE 5; AE B; AE E; Tr. 21-22, 48-56.

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 H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to 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.

(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.

AG ¶ 25 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

(a) any drug abuse (see above definition);

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

(d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence; and

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

Applicant used marijuana intermittently between 2001 and 2009. He used cocaine regularly between 2004 and 2009. To smoke marijuana and to use cocaine, he

had to possess these drugs and associated paraphernalia. Although there is no evidence that he manufactured or sold marijuana or cocaine, he routinely provided money towards the purchase of cocaine. During the time he used cocaine and marijuana, he possessed a DOD security clearance. The Government has established a security concern under AG ¶¶ 25(a), 25(c), and 25(g).

Applicant has never been diagnosed with drug dependency or as a drug abuser; thus, AG ¶¶ 25(d) and 25(e) are not applicable. AG ¶ 25(h) is not established because Applicant has ceased his drug use and has no intent to use drugs in the future.

The drug involvement guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 26(a) through 20(d), and 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 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; and,

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

Applicant's use of marijuana was infrequent; however, he used cocaine extensively for more than four years. His decision to use illegal drugs, particularly cocaine, showed bad judgment. In 2009, he decided to stop all his drug use and has done so. He changed his friends, divorced his second wife with whom he used cocaine regularly, and changed his environment and activities. While he did not obtain counseling for drug use, the counseling he received following his May 2009 DUI significantly changed his viewpoint about the use of alcohol and validated his decision not to use drugs. He recognizes his poor judgment in using illegal drugs and accepts responsibility for his conduct. Applicant ceased his drug use in 2009 and willingly signed a statement of intent with revocation of his clearance should he use any illegal drugs in the future, and he made lifestyle changes supportive of continued abstinence. While I am persuaded that Applicant is not likely to abuse marijuana or cocaine in the future, and favorable findings are returned as to SOR allegations 1.a. and 1.b, that does not end the inquiry in this case.

Although Applicant intends not to use drugs in the future, he breached a special trust when he used marijuana and cocaine, illegal drugs, while he held a security clearance. He used these drugs multiple times between 2001 and 2009, knowing when he did so that he was violating his security clearance requirements, and that the use was illegal. Each year, he attended security training and was informed of the prohibition against illegal drug use. Despite this knowledge, he continued his excessive use of cocaine. He did not want his co-workers to know of his illegal drug use because he feared it would impact his job. I find that his breach of the trust given him outweighs the other mitigating factors regarding his drug involvement and entitlement to a security clearance. Applicant has failed to fully mitigate the security concern under Guideline H.

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct, “Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.”

AG ¶ 31 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

The police arrested and charged Applicant with a DUI in May 2009 and he pled guilty to this charge in September 2009. Applicant engaged in criminal conduct when he routinely used marijuana and cocaine for eight years, even though he was never arrested for his drug use. The Government has established a security concern under AG ¶¶ 31(a) and 31(c).

AG ¶ 32 provides conditions that could mitigate security concerns. I have considered all the mitigating conditions, and especially the following:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and
- (d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Applicant has been arrested one time for DUI. This arrest occurred three years ago. Applicant met all the requirements of his probation and continues to adhere to the rules of the road so as not to lose his driver's license. He is acutely aware of the impact that another DUI arrest would have on him and has taken steps to assure that he will not again be arrested for DUI. He limits the level of his alcohol consumption and does not drive after drinking. Applicant decided over three years ago that his illegal drug use was the wrong path. He decided to change his life, and he did. He has a new girlfriend, new friends, and an excellent employment record. He has rehabilitated his past criminal conduct, and there is little likelihood that he will be involved in criminal conduct in the future. Applicant has mitigated the security concerns about his criminal conduct.

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 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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant spoke honestly and truthfully about his drug use between 2001 and 2009. He made no excuses for his conduct and accepted responsibility for his bad judgment in deciding to use illegal drugs. He is given credit for recognizing the negative impact his cocaine use and second marriage had on his life and for taking the necessary steps to change his life for the better. He never allowed his drug use to interfere with his work, but it interfered with his relationship with his sons. In the 28 years he has held a security

clearance, he has never mishandled sensitive or classified information, a factor in his favor.

The many positive factors in Applicant's favor are outweighed by his extremely poor judgment in using illegal drugs, particularly his regular use of cocaine. He knows cocaine and marijuana are illegal drugs and he acknowledges that he had been told, at least once a year at his security training, not to use illegal drugs. His breach of the trust given to him by the Government raises serious questions about his trustworthiness and integrity. Moreover, he used marijuana occasionally at motorcycle events so that he would be accepted by the group. Questions about his vulnerability to pressure or coercion are raised by this admission and are not mitigated.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his criminal conduct under Guideline J, but he did not mitigate his drug involvement under Guideline H.

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
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.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.

MARY E. HENRY
Administrative Judge