



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



In the matter of:)
)
) ISCR Case No. 11-02215
)
)
Applicant for Security Clearance)

Appearances

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

February 9, 2012

Decision

HOGAN, Erin C., Administrative Judge:

Applicant submitted an application for a security clearance (e-QIP) on August 31, 2010. On August 15, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline H, Drug Involvement, and Guideline E, Personal 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 (AG) implemented within the Department of Defense on September 1, 2006.

On September 14, 2011, Applicant answered the SOR and requested his case be decided on the written record. Department Counsel prepared a File of Relevant Material (FORM) on October 16, 2011. The FORM was forwarded to Applicant on October 20, 2011. Applicant received the FORM on November 1, 2011. He had 30 days to submit a response to the FORM. He did not submit a response. On January 17, 2012, the FORM was forwarded to the Hearing Office and was assigned to me on January 18, 2012. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

Findings of Fact

In his answer to the SOR, Applicant admits the allegations in SOR ¶¶ 1.b, 1.c, 1.e, 1.f, 2.c, and 2.e. He denies the allegations in SOR ¶¶ 1.a, 1.d, 2.a, 2.b, and 2.d. (Item 4)

Applicant is a 34-year-old employee of a Department of Defense contractor who has been employed with the contractor since September 2003. He was previously granted a Top Secret DoD security clearance on October 26, 2004. He has a bachelor of science degree in electrical engineering. He is single and has an eight-year-old daughter. (Item 5; Item 6; Item 7)

Guideline H – Drug Involvement

Applicant admits marijuana use with varying frequency between 1994 and 2005. He last used marijuana in February 2009 while on the way to a hockey game with friends. He admits that he has purchased marijuana in the past and grew marijuana plants in the summer 2002. He also admits to using hashish on one occasion in 2003. From late November 2005 to October 2006, Applicant used cocaine on several occasions. In late November 2005 to early December 2005, he attended a friend's wedding at a location outside of the United States. He used cocaine on six of the seven days during his visit. He used cocaine on another occasion in December 2005 while at friend's party. His last use of cocaine was on October 21, 2006, while at another party. His last use of illegal drugs was his marijuana use in February 2009. (Item 4; Item 8 at 2 – 4)

On January 21, 2006, Applicant attended a party. He had four to five beers and a couple shots of hard liquor. When he left the party, he drove a few blocks down the street. He discovered he was in no condition to drive so he parked his car and went to sleep. Around 11 pm, a police officer approached his car and woke him up. Applicant was arrested and charged with Disorderly Conduct: Drugs With Alcohol. He spent the night in jail. Applicant states that he was taken to jail for his own safety and no further charges were pursued. The record does not indicate the outcome of Applicant's arrest. (Item 8 at 3; Item 9 at 10-11)

Guideline E – Personal Conduct

On October 17, 2003, Applicant completed a personnel security questionnaire, Standard Form (SF) 86. Applicant answered "yes" in response to question 27 which reads:

Your Use of Illegal Drugs and Drug Activity – Illegal Use of Drugs

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 (barbituates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?

He listed that he used marijuana on a social basis between January 1, 1999, and June 1, 2000. He did not list his marijuana use between 1996 and 1999 and between June 2000 and October 2003. (Item 7 at 9)

On March 24, 2004, Applicant provided a signed statement to his employer indicating that he would not use illegal drugs. He acknowledged in the statement that any future use of any narcotic substance, including marijuana, could result in removal of special security access. After his background investigation, Applicant was granted a Top Secret DoD security clearance on October 26, 2004. As mentioned above, Applicant used marijuana and cocaine after March 2004 on numerous occasions until October 2006. He last used marijuana in February 2009. (Item 8 at 3-4; Item 9)

In December 2008, Applicant received a reprimand from his employer for charging overtime without receiving advance written approval to work overtime. In an affidavit dated November 23, 2010, Applicant indicated that prior to the written reprimand, he had always received verbal approval for overtime from his supervisor. He was not aware of the policy to obtain advance written approval for overtime. Once he became aware of the policy (i.e. after he received the reprimand), he has followed the overtime policy. This is the first and only time he was ever reprimanded by his employer. Applicant states that his job performance record is good and he always complied with rules and regulations. He claims the reprimand is an isolated event and does not establish a pattern of failure to follow rules. I find for Applicant with respect to SOR ¶ 1.d because he was unaware of the overtime policy and has followed it after becoming aware of the policy. (Item 8 at 1)

On April 24, 2009, Applicant completed another SF 86. He answered, "yes" in response to question 23a which asks:

In the last 7 years, have you illegally used any controlled substance, for example, cocaine, crack cocaine, THC (marijuana, hashish, etc.), narcotics (opium, morphine, codeine, heroin, etc.), stimulants (amphetamines, speed, crystal methamphetamine, Ecstasy, ketamine, etc.), depressants (barbituates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), steroids, inhalants (toluene, amyl nitrate, etc.) or prescription drugs (including painkillers)? Use of a controlled substance includes injecting, snorting, inhaling, swallowing, experimenting with or otherwise consuming any controlled substance.

In the remarks section of the SF 86, dated April 24, 2009, Applicant indicated that he used marijuana on a social basis between January 1997 and June 2003 and used cocaine in February 2005 on a one-time experimental basis. He did not list his marijuana use between June 2003 and 2005 and his last use of marijuana in February 2009. He also did not list his use of cocaine between late November 2005 to October 2006. (Item 6 at 16)

On January 19, 2010 and January 20, 2010, Applicant underwent polygraph examinations as part of a background investigation with another government agency. During a post-polygraph interview, Applicant admitted to using marijuana on a regular

basis from July 1994 through February 2009. He admitted that he used cocaine eight times between December 2005 and October 2006. When asked why he did not accurately list his illegal drug use on his security clearance questionnaires, Applicant said he did not disclose his marijuana use in 2003 out of fear that he would not receive a clearance and would be ineligible for his job. In 2009, he was afraid if he reported all of his drug use, he would lose his job. When asked why he listed only a one-time use of cocaine on his 2009 security clearance questionnaire, he rationalized that all of the uses at the wedding (at least daily over a period of six days) were really only one use because it was no longer a part of his life. (Item 9 at 2)

On June 21, 2010, another government agency revoked Applicant's program access because of his falsification on his security clearance questionnaires pertaining to illegal drug use; his use of illegal drugs while holding a security clearance; and his use of illegal drugs after providing a statement to his employer acknowledging that future use of any narcotic substance, including marijuana, could result in the removal of Special Security Access. (Item 9) SOR ¶ 2.d alleges the fact that Applicant was disapproved for access to classified information by another government agency because of his drug involvement and personal conduct. While the allegation consists of a relevant fact related to Applicant's falsifications and illegal drug use while holding a security clearance, it does not raise a separate security concern. For this reason, I find for Applicant with respect to SOR ¶ 2.d.

On August 23, 2010, Applicant submitted his most recent security clearance application. He disclosed all of his illegal drug use on this application. (Item 5) On November 23, 2010, Applicant was interviewed by an investigator conducting his security clearance background investigation. He provided a signed sworn affidavit. He admitted to his arrest in January 2006 (although he recalled the arrest was in February 2006) for Disorderly Conduct/Drug with Alcohol. He estimated that between January 2004 and 2005, he used marijuana about less than once a week at parties with friends, at other social events, and occasionally when he was alone. He did not use marijuana between 2005 to February 2009. He used marijuana one last time on February 17, 2009. He also admitted to cocaine use between November 2005 and January 2006 while at a wedding. He used cocaine on six of the seven days when he was at the location where the wedding was held. He used cocaine in December 2005 while at party with friends. His last use of cocaine was on October 21, 2006, at another party with his friends. (Item 8)

In the November 23, 2010 affidavit, Applicant stated that he has not used illegal drugs for several years. He is not addicted to marijuana or cocaine. He has never received treatment for drug use and no one has ever suggested to him that he needs treatment. His drug or alcohol use has not had a negative impact on his job performance, his financial stability, his judgment, and reliability. He has never failed a drug test. He admits that he used illegal drugs during the period that he had a security clearance and he acknowledges that he was warned of the consequences in writing. (Item 8 at 4)

Regarding SOR ¶ 1f, I find for Applicant. This allegation relates to Applicant's arrest for Disorderly Conduct: Drug With Alcohol in January 2006. While this is an

alcohol-related arrest, there is nothing in the record suggesting Applicant also ingested illegal drugs on the night of the arrest. It is not a proper allegation under the Drug Involvement Guideline. If it was properly alleged under Guideline G, Alcohol Consumption, it would have been mitigated because of the passage of time.

SOR ¶ 2b alleges two subparts of Section 23. Subpart 23a. asks about illegal drug use within the last seven years. Subpart 23b. asks:

Have you EVER illegally used a controlled substance while possessing a security clearance; while employed as a law enforcement officer, prosecutor, or courtroom official; or while in a position directly and immediately affecting public safety?

Applicant answered, “yes” to this question. Because he answered affirmatively, I find for Applicant with respect to his answer to SOR ¶ 2.b pertaining to Section 23.b on his security clearance questionnaire. He did not deliberately falsify his response to this question. His deliberate falsification of the extent of his illegal drug use relates to the allegation pertaining to Section 23.a on his security clearance questionnaire. Regardless, SOR ¶ 2.b should have been two separate allegations in the SOR. Combining alleged falsifications involving separate questions on the personnel security questionnaire into one SOR allegation results in a convoluted and confusing SOR allegation. It is not a good practice.

Applicant states that he has made good faith attempts to set the record straight and correct the information which appeared to be misleading or omitted. He said that he does not intend to use illegal drugs in the future. He claims he no longer associates with people who use illegal drugs. They all live far away from him. He acknowledges his wrongdoings and wishes to make amends. (Item 8 at 4)

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 over arching 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 that 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 H, Drug Involvement

The security concern relating to the guideline 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.

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;

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

The guideline notes several disqualifying conditions that could raise security concerns. I find the following drug involvement disqualifying conditions apply to Applicant's case.

AG ¶25(a) (any drug abuse);

AG ¶25(c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia);

AG ¶25(g) (any illegal drug use after being granted a security clearance);
and

AG ¶25(h) (expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use).

Applicant used marijuana on numerous occasions between 1996 and February 2009. He used cocaine on six occasions while attending a friend's wedding in November 2005 to December 2005. He used cocaine on another occasion in December 2005 and again at a party in October 2006. AG ¶25(a) applies. AG ¶25(c) also applies because Applicant possessed the drugs on occasion. He also purchased marijuana for his personal use. When he was younger, he cultivated marijuana plants for his own use.

AG ¶25(g) applies because Applicant used illegal drugs after being granted a security clearance on October 26, 2004.

AG ¶25(h) applies because Applicant signed a statement in March 2004 expressly stating the he will not use illegal drugs which he provided to his employer. He continued to use illegal drugs despite the statement. Through his actions, he failed to clearly and convincingly commit to discontinue drug use.

The Government's substantial evidence and Applicant's own admissions raise security concerns under Guideline H, Drug Involvement. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. September 22, 2005))

Guideline H also includes examples of conditions that could mitigate security concerns arising from drug involvement. The following mitigating conditions potentially apply to the Applicant's case:

AG ¶ 26(a) (the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment);

AG ¶ 26(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); and

AG ¶26(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 mitigating conditions apply. AG ¶ 26(a) does not apply because Applicant has a long history of illegal drug use. While he claims not to have used illegal drugs since February 2009, and states that he will not abuse illegal drugs in the future, his assertions are given less credit because he previously signed a written statement in March 2004, expressing his intent to not use illegal drugs, yet he continued to use illegal drugs after making the statement and after being granted a security clearance. Based on his past history, Applicant's reliability, trustworthiness, and judgment remain questionable.

AG ¶ 26(b) does not apply for the reasons mentioned in the above paragraph. In addition, while Applicant claims he no longer associates with any of his drug-using friends, in part, because they all live far away from him, a lot of his past illegal drug use occurred when he visited his friends. Applicant appears to succumb to peer pressure when he is around friends who use illegal drugs. Although Applicant claims to have abstained from illegal drugs for two years, this is not a sufficient period of abstinence based on his long history of illegal drug use. He did not present a signed statement of intent acknowledging that his clearance will be automatically revoked for any violation. Even if he had done so, it would be given little weight because he provided a similar statement in 2004, but continued to use illegal drugs.

No evidence was presented that would raise AG ¶ 26(d). Applicant has not met his burden to mitigate the security concerns raised under Guideline H, Drug Involvement.

Personal Conduct

The security concern relating to the guideline 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.

The following disqualifying conditions apply to Applicant's case:

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);

AG ¶ 16(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); and

AG ¶ 16(f) (violation of a written or recorded commitment made by the individual to the employer as a condition of employment).

Applicant deliberately falsified his response to question 27 on his security clearance questionnaire, dated October 17, 2003, and his response to question 23a on his security clearance questionnaire, dated April 24, 2009, by minimizing his illegal drug use. The full extent of his illegal drug use was disclosed during post-polygraph interviews by another government agency on January 19-20, 2010. AG ¶ 16(a) applies to Applicant's case.

AG ¶ 16(e) applies because his illegal drug use and his intentional omissions on his security clearance questionnaires make him vulnerable to exploitation, manipulation and duress.

AG ¶ 16(f) applies because Applicant continued to use illegal drugs after providing a statement in 2003 that he would refrain from doing so as a condition of special security access.

The following Personal Conduct Mitigating Conditions potentially apply to this case:

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

AG ¶ 17(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); and

AG ¶ 17(e) (the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress).

AG ¶ 17(a) does not apply because Applicant deliberately minimized his illegal drug use on two different security clearance applications. He did not attempt to correct his deliberate falsifications in a prompt manner.

AG ¶ 17(c) does not apply because Applicant's deliberate falsifications and his continued illegal drug use after being granted a security clearance are serious offenses. His decision to continue to use illegal drugs was of his own volition. It did not happen under circumstances that are unlikely to occur. Applicant's past actions continue to raise questions about his reliability, trustworthiness, and good judgment.

AG ¶ 17(e) does not apply because Applicant's past conduct still makes him vulnerable to exploitation, manipulation or duress.

Personal conduct concerns are not mitigated.

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 considered Applicant's work as a contractor for the Department of Defense since 2003. I considered Applicant's history of illegal drug use, his use of illegal drugs while holding a security clearance, and after providing a signed statement to his employer indicating he will abstain from illegal drug use. I considered his deliberate minimization of his illegal drug use on two different security clearance applications. Applicant's actions raise serious concerns about his judgment, trustworthiness, and reliability. Applicant has not met his burden to overcome those 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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	
#23a:	Against Applicant
#23b:	For Applicant
Subparagraph 2.c:	Against Applicant
Subparagraph 2.d:	For Applicant
Subparagraph 2.e:	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.

ERIN C. HOGAN
Administrative Judge