



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



In the matter of:)
)
) ISCR Case No. 11-05873
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: *Pro se*

08/02/2012

Decision

RIVERA, Juan J., Administrative Judge:

Applicant illegally used drugs from 1995 until December 2010. He used drugs after he was employed by a government contractor in September 2008. Moreover, he deliberately falsified his security clearance application (SCA) when he failed to disclose a felony charge (convicted of a misdemeanor) and a 2000 conviction for Driving Under the Influence of Alcohol (DUI). Clearance is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on January 20, 2011, On April 27, 2012, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline H (Drug Involvement) and Guideline E (Personal Conduct) of the adjudicative guidelines (AG).¹ Applicant answered the SOR on May 9, 2012, and he elected to have his case decided on the written record in lieu of a hearing. A copy of the file of relevant material (FORM) was provided to him by transmittal letter dated May 21, 2012. Applicant

¹ Adjudication of this case is controlled by the AGs, implemented by the DOD on September 1, 2006.

received the FORM on May 30, 2012. He was allowed 30 days to submit any objections to the FORM and to provide material in extenuation and mitigation. He did not respond to the FORM, and he provided no additional information. The case was assigned to me on July 19, 2012.

Findings of Fact

Applicant admitted the two factual SOR allegations under Guideline H. He denied the two Guideline E allegations. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, including his answers to the SOR and his statement to a government investigator, I make the following additional findings of fact.

Applicant is a 30-year-old employee of a defense contractor. He attended a community college for approximately one semester in 2007, and he did not receive a degree. Applicant has never been married, and he has no children. He worked in the insurance industry from 2000 until August 2008. He has been working for his current employer, a government contractor, since September 2008.

Applicant submitted his first SCA on January 20, 2011. SCA Section 22 (Police Record) asked Applicant the following questions:

For this item, report information regardless of whether the record in your case has been sealed, expunged, or otherwise stricken from the court record, or the charge was dismissed. . .

For questions a and b, respond for the timeframe of the last 7 years (if an SSBI go back ten years).

- a. Have you been issued a summons, citation, or ticket to appear in court in a criminal proceeding against you; are you on trial or awaiting a trial on criminal charges; or are you currently awaiting sentencing for a criminal offense?
- b. Have you been arrested by any police officer, sheriff, marshal, or any other type of law enforcement officer?
- c. Have you EVER been charged with any felony offense?
- d. Have you EVER been charged with a firearms or explosives offense?
- e. Have you EVER been charged with any offense(s) related to alcohol or drugs?

Applicant answered "No" to the above five questions.

SCA Section 23 (Illegal Use of Drugs or Drug Activity) asked Applicant (in its pertinent part), whether in the last seven years (a) he had illegally used any controlled substance, and whether (c) he had been involved in the illegal possession, purchase, manufacture, trafficking, transfer, shipping, receiving, handling, or sale of any controlled substance, including prescription drugs. Applicant answered "Yes" to the above questions and disclosed that he smoked marijuana once or twice per year from December 1995 until around December 2010, and that he snorted cocaine once or twice per year from about 2001 until 2010.

Applicant's background investigation disclosed that in around 2001, he was charged with a felony offense - "Produce, Distribute, Finance – Child Pornography." In February 2011, Applicant was interviewed by a government investigator about his use of illegal drugs and the undisclosed felony charge. Applicant told the investigator that his failure to disclose the felony charge was an honest mistake. He claimed he believed that he only had to disclose criminal offenses within the preceding seven years.

Concerning the felony charge, Applicant explained that he and his then girlfriend made a videotape of themselves engaging in consensual sexual intercourse. After they broke up, Applicant showed the videotape to some friends. His ex-girlfriend found out about it and she filed a complaint against him, alleging that she was 17 years old when the videotape was made. Applicant was arrested and charged with Produce, Distribute, Finance - Child Pornography. He pled guilty to the lesser offense of Contributing to the Delinquency of a Minor and was sentenced to 12 months in jail, six months suspended. Applicant appealed the conviction in December 2002, and established that his ex-girlfriend was 18 years old at the time the video was made. In April 2003, Applicant pled to a charge of Disorderly Conduct, and received no punishment.

During his February 2011 interview, Applicant clarified his cocaine and marijuana use. He told the investigator that from 2001 until 2002, he snorted cocaine once per month, and from 2002 until 2010, he snorted cocaine one to two times per year. Applicant also stated that from 1995 until 2000, he smoked marijuana approximately five to six times per year. From 2001 until 2010, he smoked marijuana one to two times per year. Applicant also disclosed that in 2000, he was convicted of DUI.

As of February 2011, Applicant's last use of cocaine was in September 2010, and his last use of cocaine was in December 2010. Applicant has not participated in any substance abuse counseling or treatment. Applicant told the investigator that he had not made any attempt to stop or reduce his illegal drug use because it had not created any problems for him. He normally used illegal drugs with some of his close friends. Applicant stated that he had no intention to use illegal drugs in the future because he is looking out for his future and he is trying to live a healthy life.

Policies

Eligibility for access to classified information may be granted “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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Guideline H, Drug Involvement

AG ¶ 24 articulates the security concern about 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.

Applicant illegally possessed and used marijuana from 1995 (age 13) until September 2010 (age 28). He illegally possessed and used cocaine from 2001 until December 2010. He illegally used drugs while working for a government contractor.

AG ¶ 25 provides two drug involvement disqualifying conditions that raise a security concern and are disqualifying in this particular case:

- (a) any drug abuse;² and
- (c) illegal drug possession.

AG ¶ 26 provides four potentially applicable drug involvement mitigating conditions:

- (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;
- (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;
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and
- (d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements,

² AG ¶ 24(b) defines "drug abuse" as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction."

AG ¶ 24(a) defines "drugs" as substances that alter mood and behavior, including: (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.

without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

None of the Guideline H mitigating conditions apply. Applicant was a frequent user of illegal substances -- marijuana and cocaine – for a period of approximately 15 years. He started using marijuana in 1995 (age 13), and his use extended until September 2010, when he was 28 years old. His use of cocaine spans from 2001 until December 2010. He illegally used drugs socially with his friends, and not under extraordinary circumstances.

Applicant claimed he last used marijuana and cocaine in the fall of 2010. He told the investigator in February 2011 that he was abstinent, and he promised not to abuse drugs in the future. Applicant presented no current documentary evidence about any counseling or aftercare treatment program. He presented no evidence of a recent diagnosis or prognosis concerning his illegal drug use. In light of Applicant's age, experience, the period he used drugs, and his recent history of illegal drug use, his promise not to use drugs without corroboration (e.g., clear evidence of lifestyle changes, statements from those who know him about his disassociation from his drug-using friends, or a competent medical diagnosis and prognosis) is not sufficient to show his use of drugs is unlikely to recur.

I do not find that his questionable behavior is mitigated by the passage of time because of the lengthy period during which he used illegal drugs, the frequency of his use, his age at his most recent use, and his illegal use of drugs while working for a government contractor. Considering the record evidence as a whole, Applicant's recent illegal drug use still casts doubt on his reliability, judgment, and willingness and ability to comply with the law. His favorable evidence is not sufficient to mitigate the Guideline H security concerns.

Guideline E, Personal Conduct

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

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 Government alleged Applicant falsified his 2011 SCA because he failed to disclose that in about 2001 he was charged with Producing Child Pornography, a felony; and because he failed to disclose his 2000 DUI conviction. Applicant claimed that his failure to disclose both offenses was an innocent mistake and not made with the intent to mislead the Government. He averred that he believed the questions only asked to disclose those offenses that occurred during the preceding seven years.

SCA Section 22 (Police Record) is written in clear, plain language. The questions specifically state that the seven-year timeframe only applies to questions (a) and (b). Moreover, questions (c) [Have you EVER been charged with any felony offense?] and (e) [Have you EVER been charged with any offense(s) related to alcohol or drugs?] emphasize the word EVER in capital letters. It is difficult to believe that the Applicant was confused by the questions.

I note that the investigator's statement indicate Applicant voluntarily disclosed additional information related to the above offenses, and that Applicant disclosed his illegal drug history in his 2011 SCA. Notwithstanding, considering the record as a whole, the scant record evidence is not sufficient for me to conclude that Applicant made an honest mistake.

Applicant's omissions trigger the applicability of the following disqualifying conditions under 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; and

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

AG ¶ 17 lists seven conditions that could potentially mitigate the personal conduct security concerns:

(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;

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

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

After considering the above mitigating conditions, I find that none of them apply to the facts of this case. Applicant failed to correct his omission until after he was confronted during his interview. The record evidence is insufficient to show he was misled by the questions. He was candid and forthcoming during his interview. As such, he receives credit for taking steps to reduce or eliminate his vulnerability to exploitation or duress. Notwithstanding, his falsification is a recent, serious offense and it casts doubt on his current reliability, trustworthiness, and judgment.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c). Applicant claimed he stopped using illegal drugs in the fall of 2010, because he wants to continue with his career and he is concerned about his health. Apparently, he has done well working for his employer.

Considering Applicant's age, his 15 years of illegal drug use, the recency of his last drug use, and his falsification of his SCA, his promise to not use illegal drugs in the future without corroboration is not sufficient to show his questionable behavior is unlikely to recur. At this time, the record evidence fails to convince me of Applicant's eligibility and suitability for a security clearance, and of his ability to comply with the law.

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 and 1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a and 2.b:	Against Applicant

Conclusion

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

JUAN J. RIVERA
Administrative Judge