



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



In the matter of:)
)
) ISCR Case No. 11-08704
)
Applicant for Security Clearance)

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: Christopher Graham, Esq.

07/19/2013

Decision

RIVERA, Juan J., Administrative Judge:

Applicant’s long-term use of illegal drugs, lack of credibility, and his falsifications cast serious doubt on his current reliability, trustworthiness, judgment, and ability to follow the law. Clearance denied.

Statement of the Case

Applicant submitted his most recent security clearance application (SCA) on December 13, 2010. On February 27, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) listing security concerns under Guideline H (drug involvement) and Guideline E (personal conduct).¹ Applicant answered the SOR on April 23, 2013, and requested a hearing before an administrative judge.

¹ DOD acted under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

The case was assigned to me on April 24, 2013. The Defense Office of Hearings and Appeals (DOHA) issued the notice of hearing on May 24, 2013, scheduling a hearing for June 26, 2013. At the hearing, the Government offered exhibits (GE) 1 through 3. Applicant testified and submitted exhibits (AE) A through H. AE H was received post-hearing. All documents were received without objection. DOHA received the hearing transcript (Tr.) on July 8, 2013.

Findings of Fact

Applicant admitted in part and denied in part, the factual allegations under SOR ¶¶ 1.a, 1.b, 2.b, and 2.c. He denied the allegations under SOR ¶¶ 1.c and 2.a. After a thorough review of all the evidence, including his testimony and demeanor while testifying, I make the following findings of fact:

Applicant is a 35-year-old consultant working for a government contractor. He attended college from 1999 to May 2001, and completed a bachelor's degree in history. He also completed a work-related certification in November 2006. He married his wife in May 2005, and they have a five-year-old daughter and a two-year-old son.

Applicant has been working for his current employer since December 2003. He submitted his first SCA in 2005. At the time he submitted his SCA, Applicant was aware of his company's no tolerance policy for the use of illegal drugs. He also was aware that he was required to be truthful and candid in his answers to the SCA questions. In response to the illegal drug activity questions of that SCA, Applicant disclosed he had illegally used marijuana and cocaine on an experimental basis. However, he deliberately failed to disclose the full extent and nature of his illegal drug use.

In April 2006, DOD granted Applicant access to classified information at the top secret level. Later that year, Applicant requested access to work on special projects with another government agency (agency). During the ensuing security investigation, he underwent two counterintelligence polygraph-assisted interviews. Applicant stated that in his December 2006 interview, he "realized the gravity of his situation and came clean with his prior drug use." (GE 2) Applicant disclosed he illegally used drugs from 1992 until 2007, including heroin, LSD, Ecstasy, crack cocaine, methadone, cocaine, and marijuana.

Between 2007 and December 2008, Applicant underwent three or four additional lifestyle polygraph-assisted interviews. During these interviews, he confirmed his prior statements about his illegal drug use and stated that his last illegal drug use was in 2007. As a result of these interviews, Applicant's access at the agency was revoked in August 2009. The September 2009 revocation letter stated that "during the security clearance processing, in a piecemeal manner, you reported use of drugs for non-medical purposes from 1996-2007. . . . During your December 2008 polygraph test, you stated your last illegal drug use was in 2007." (GE 3)

Applicant submitted his pending SCA in December 2010. Section 23 (Illegal Use of Drugs or Drug Activity) asked him to disclose whether in the last seven years he had illegally used any controlled substances, including cocaine, crack cocaine, marijuana, narcotics (heroin), stimulants (Ecstasy), depressants (methaqualone), hallucinogenics (LSD), steroids, or prescription drugs. Applicant answered "Yes," and indicated that he had used the following illegal drugs: (GE 1)

Heroin – April 2005 – April 2005, "at my bachelor's party I ingested (snorted) a small amount of heroin."

Methadone - January 2005 – January 2005, "I took a sip of the liquid."

Cocaine - December 2004 – December 2004, "I ingested (snorted) a small amount."

Marijuana - October 2004 – October 2004, "I inhaled one time and returned to the party."

Applicant was interviewed concerning his illegal drug use by a government investigator in January and February 2011. During the interviews, Applicant told the investigator that he started using illegal drugs in 1992, between the ages of 13 and 14. While in high school, he smoked marijuana every other weekend. He stopped using marijuana in 1994, and did not use marijuana again until October 2004, when he smoked marijuana with his father at a bar. He estimated he used marijuana between 25 and 40 times total.

Applicant disclosed he used heroin five times. Between 2000 and 2002 he used heroin four times. He used heroin again in April 2005, on his way to his bachelor's party. Applicant used cocaine approximately five times between 1999 and 2004. The last time he used cocaine was in December 2004, when a co-worker came to visit him at his home. Applicant used LSD five times between 1995 and 1997. Applicant smoked crack cocaine three to four times between 2000 and 2002. Additionally, Applicant illegally used methadone three times between 2000 and January 2005.

Applicant's statements to the investigator in 2011 were consistent with the statements he made to the agency during the 2006-2008 polygraph-assisted interviews, with two exceptions. In 2011, Applicant told the investigator his last illegal drug use occurred in April 2005. He denied that his last illegal drug use occurred in 2007, as memorialized in his September 2009 revocation letter. He attributed the discrepancy on the date he ended his use of drugs to a mistake by the agency or the interviewer. He did not appeal the agency's 2009 revocation and did not seek to correct the alleged mistake. At his hearing, Applicant again confirmed his prior illegal drug use disclosures, and claimed his last illegal drug use occurred in 2005. The second exception is that Applicant failed to tell the investigator he also used Ecstasy and Oxycontin.

During the January and February 2011 interviews, and at his hearing, Applicant described his illegal drug use as infrequent and experimental. He stated he has never been diagnosed as drug dependent or as a drug abuser. Nor has he received any substance abuse treatment or counseling. Applicant stated he used illegal drugs socially with a diverse number of friends. He denied he ever purchased or sold any illegal drugs. He always obtained them from friends. His wife is aware of his past illegal drug use and she does not condone such behavior.

Applicant testified he does not intend to use any illegal drugs in the future. He claimed he changed his lifestyle after his May 2005 marriage. He wants to be a good husband and role model for his children. Applicant believes he has matured and that he is now a different person. He averred he no longer associates with his illegal drug-using friends, that he is now dedicated to his work and taking care of his family. He submitted a statement of intent with automatic revocation of clearance for any use of illegal drugs. (AE A)

When asked why he failed to disclose in his 2005 SCA the whole extent of his illegal drug use, Applicant stated that he was embarrassed and afraid to bring up his drug use because of the taboo nature of the particular drugs he used. (GE 2) Applicant repeatedly claimed his last use of illegal drugs was in 2005. He specifically testified that he remembered quite well his last illegal drug use because he snorted heroin with a friend on their way to his bachelor's party in May 2005. (Tr. 25) When asked why he told the investigators in January and February 2011 and at his hearing that his last use was in April 2005, Applicant attributed the discrepancy to an innocent mistake. During the interviews, Applicant prepared a table indicating the illegal drugs he used and the periods he used them. In that table he indicated his last use of drugs was in April 2005.

Applicant is considered to be an asset to his employer because of his character, dependability, and trustworthiness. He is a hard working team member that goes above and beyond what is asked of him to support his mission. His references believe that he has demonstrated he can be relied upon and trusted to handle classified information. In their opinion, he is an outstanding employee. He is considered to be conscientious of security rules and regulations, and always abides by them. His supervisors, co-workers, and friends recommend his eligibility for a security clearance. Applicant's excellent performance is also demonstrated through his five performance awards and his annual assessments.

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 for 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.

Between 1992 and 2007, Applicant illegally used drugs including marijuana, LSD, Ecstasy, cocaine, crack cocaine, heroin, Oxycontin, and methadone. He used drugs after receiving access to classified information at the top secret level in 2006.

AG ¶ 25 describes eight conditions related to drug involvement that could raise a security concern and may be disqualifying. The following drug involvement disqualifying conditions raise a security concern and are disqualifying in this case:

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

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

Considering the evidence as a whole, I find that none of the Guideline H mitigating conditions fully apply. Applicant's most recent illegal drug use occurred in 2007. As such, his illegal drug use could be considered temporally remote. However, as discussed under the personal conduct guideline, incorporated herein, Applicant has a history of making false statements and continues to minimize his illegal drug use. Such behavior brings to the forefront the Guideline H concerns about Applicant's reliability and trustworthiness, and raises questions about his ability or willingness to comply with laws, rules, and regulations.

Applicant's lack of credibility adversely impacts the validity of his testimony concerning his change of lifestyle, disassociation from drug-using friends, successful rehabilitation, and his ability and willingness to abstain from illegal drugs. On balance,

Applicant's testimony and evidence are insufficient to mitigate the drug involvement 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.

Applicant disclosed in his 2005 SCA that he illegally used marijuana and cocaine a few times for experimentation purposes. He was granted access to classified information at the top secret level in 2006.

After numerous polygraph-assisted interviews during 2006-2008, Applicant disclosed that he illegally used drugs from 1996 to 2007. His illegal drug use included marijuana, LSD, Ecstasy, cocaine, crack cocaine, heroin, Oxycontin, and methadone.

Applicant disclosed in his December 2010 SCA that: (1) he illegally used marijuana in October 2004 - "I inhaled one time and returned to the party;" (2) he used heroin in April 2005 - "at my bachelor's party I ingested (snorted) a small amount of heroin;" (3) he used methadone in January 2005 - "I took a sip of the liquid;" and he used cocaine in December 2004 - "I ingested (snorted) a small amount."

During his 2011 interviews, Applicant told a government investigator that he started using illegal drugs in 1992. While in high school, he smoked marijuana every other weekend. He stopped using marijuana in 1994, and did not use marijuana again until October 2004, when he smoked marijuana with his father at a bar. He estimated he used marijuana between 25 and 40 times total.

Applicant disclosed he used heroin five times between 2000 and April 2005. He used cocaine approximately five to six times between 1999 and December 2004. He used LSD five times between 1995 and 1997. He smoked crack cocaine three to four times between 2000 and 2002. He illegally used methadone three times between 2000 and January 2005. He used Oxycontin five times between 2000 and 2002. Applicant told the investigator that his last use of illegal drugs was in 2005.

At his hearing, Applicant acknowledged as true his statements to the agency during 2006-2008, and to the DOD investigators in 2011, except that he denied telling the agency he last used illegal drugs in 2007. He claimed he last used drugs in 2005.

Considering the evidence as a whole, including Applicant's demeanor while testifying, I find that he consistently failed to disclose relevant information and minimized his drug-related behavior until confronted. Even though he disclosed his illegal drug-related behavior to the agency during the 2006-2008 interviews, he failed to fully disclose the nature and extent of his drug use in his 2010 SCA. He minimized his drug use and failed to fully disclose it until his interviews in 2011. Even then, he failed to disclose to the investigator in 2011 that he had used Ecstasy and Oxycontin. Furthermore, he attempted to mislead the government to conceal that he used illegal drugs while possessing a security clearance.

I find that Applicant's last use of illegal drugs was in 2007. He used illegal drugs while possessing a top secret level security clearance between 2006 and 2007. His contention that the agency made a mistake in their revocation letter is not consistent with the evidence as a whole. Applicant's testimony to the contrary is not credible.

Applicant's behavior triggers 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;
- (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative; and
- (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.

AG ¶ 17 provides seven conditions that could 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.

None of the Guideline E mitigating conditions apply. The evidence shows Applicant has consistently omitted or minimized his illegal drug-related behavior. He minimized his drug-related behavior in his 2005 SCA. He then "in a piecemeal manner" disclosed his illegal drug use between 1996 and 2007. Applicant minimized his drug-related behavior in his 2010 SCA, to then expand on it after he was confronted with his 2006-2008 statements during his 2011 interviews. On balance, Applicant's testimony and evidence are insufficient to mitigate the personal conduct security concerns.

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 is a 35-year-old consultant working for a government contractor since 2003. He is married and has two children. He is considered to be an honest, hardworking, and productive employee. His references and outstanding performance appraisals indicate he is a valuable employee, and a dedicated father and husband. I considered his change his lifestyle testimony and his claims that he no longer uses illegal drugs, and that he disassociated from his illegal drug-using friends.

Notwithstanding, Applicant's use of illegal drugs, knowing it was contrary to his employer's policy, and after he submitted his 2005 SCA, continues to raise serious

questions about his judgment. Applicant falsified his 2005 SCA by underreporting his illegal drug use. He continued to misrepresent his drug use through several interviews with another agency until he finally disclosed the full extent of his drug use during several polygraph-assisted interviews. He similarly misrepresented his illegal drug abuse history on his 2010 SCA. His falsifications were calculated to help him obtain and retain the clearance he needed to keep his job. Applicant's long-term illegal use of drugs, lack of credibility, and his falsifications cast serious doubt on his current reliability, trustworthiness, judgment, and on his ability to follow 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 - 1.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a - 2.c:	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