



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



In the matter of:)
)
) ISCR Case No. 11-12979
)
Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: *Pro se*

06/10/2013

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the record, I conclude that Applicant failed to mitigate security concerns under Guideline H, Drug Involvement, and Guideline E, Personal Conduct. Applicant's eligibility for a security clearance is denied.

Statement of the Case

Applicant completed and certified a questionnaire for national security positions (SF 86) in July 2009. In February 2011, he completed and certified an electronic questionnaire for investigations processing (e-QIP). On January 30, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, Drug Involvement, and Guideline E, Personal Conduct. 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* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within DOD for SORs issued after September 1, 2006.

Applicant provided an undated and notarized answer to the SOR. In his answer, he provided additional information, and he elected to have a hearing before an

administrative judge at the Defense Office of Hearings and Appeals (DOHA). The case was assigned to me on April 25, 2013. I convened a hearing on May 15, 2013, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called no witnesses and introduced eight exhibits, which were marked Ex. 1 through Ex. 8 and entered in the record without objection. Applicant testified and called no other witnesses. He introduced three exhibits, which were identified and marked as Applicant's Ex. A through Ex. C and entered in the record without objection. At the conclusion of the hearing, I agreed to leave the record open until close of business on May 22, 2013, so that Applicant could provide additional information. Applicant did not provide additional information before the record closed. DOHA received the hearing transcript (Tr.) on May 24, 2013.

Findings of Fact

The SOR contains four allegations of disqualifying conduct under Guideline H, Drug Involvement (SOR ¶¶ 1.a. through 1.d.), and eight allegations of disqualifying conduct under Guideline E, Personal Conduct (SOR ¶¶ 2.a. through 2.h.) In his Answer to the SOR, Applicant admitted all allegations under both guidelines. Applicant's admissions are entered as findings of fact. (SOR; Answer to SOR.)

Applicant, who is 35 years old, has been married for 12 years and is the father of three young children. In 2003, he was awarded a Bachelor of Science degree in Telecommunications. He also earned an associate's degree in computer networking systems. He is employed in computer support by a government contractor. He seeks a security clearance. (Ex.1; Ex. 2; Tr. 35-36, 40-41.)

From November 2002 until February 2007, Applicant was employed as a logistics manager by a private business. On the e-QIP he completed in February 2011, he reported that he left his job in February 2007 by mutual agreement following notice of unsatisfactory performance. Applicant identified the unsatisfactory performance as tardiness. In a September 2011 interview with an authorized investigator, Applicant stated that he left the job for other opportunities after he disagreed with management.¹ An investigative report in the record, dated December 2009, indicates that Applicant stated he was terminated from the position but believed he was eligible for rehire. The SOR alleges at ¶ 2.g. that Applicant falsified material facts in his September 2011 interview with the authorized investigator when he stated he had left his job to seek other employment opportunities and deliberately failed to disclose that he had been fired. (Ex. 2; Ex. 3; Ex. 7.)

From May 2009 until July 2009, Applicant was employed as an electronics restoration technician by a private company. As an employee of the company, Applicant filed an SF 86. Applicant had a disagreement with the owner of the company and received a written notice of reprimand. He told the investigator that he did not receive

¹ In a signed and notarized statement, dated November 10, 2012, Applicant affirmed that the investigator's report accurately reflected the information he provided when he was interviewed. (Ex. 7.)

any other reprimands or terminations, and he stated that he left the company because it was not what he expected. He told the investigator that the company listed him as terminated but that this was later determined to be false when he applied for unemployment benefits. His supervisor reported that he lied when applying for unemployment benefits. On his e-QIP, Applicant stated that while employed with this company, he received a warning for “engaging in non-work related conversation at the workplace.” The SOR alleges at ¶ 2.h. that Applicant falsified material facts when he told the investigator that he left the company because it did not meet his expectations and deliberately failed to disclose that he had been terminated. (Ex. 1; Ex. 2; Ex. 4; Ex. 7.)

Question 13c on the e-QIP Applicant completed in February 2011 asks the following:

Has any of the following happened to you in the last 7 years? 1. Fired from a job 2. Quit a job after being told you would be fired 3. Left a job by mutual agreement following charges or allegations of misconduct 4. Left a job by mutual agreement following notice of unsatisfactory performance 5. Left a job for other reasons under unfavorable circumstances 6. Laid off from a job by an employer.

In response to Question 13c, Applicant reported that he left his job in February 2007 by mutual agreement following notice of unsatisfactory performance. He reported that in 2009, he had received a “warning for engaging in non-work related conversation at the workplace.” The SOR alleged ¶ 1.f. that Applicant deliberately failed to disclose he had been fired from the two jobs in 2007 and 2009. (Ex. 2.)

Investigation reports in the record confirm that Applicant was terminated from both jobs. At his hearing, Applicant reported that when his employer fired him in 2007, he asked the employer to check a box on the termination form which stated that the company would rehire him. Applicant concluded that the employer got what he wanted (firing Applicant), but Applicant also got what he wanted (a statement that the company would rehire him.) (Ex. 3; Ex. 4; Tr. 61-64.)

Applicant has a history of illegal drug use. He began using marijuana in about 1991 while in high school. He also used marijuana after dropping out of college and living with his brother. His marijuana use during this time was infrequent and intermittent. At his hearing, he stated that he no longer associated with the individuals with whom he used illegal drugs. (Tr. 31-32, 43-46.)

In 2000, Applicant used ecstasy once with a high school friend. This drug use is alleged at SOR ¶ 1.a. (Tr. 46-47.)

In 2003, he used hallucinogenic mushrooms one time when his wife and child were away from home and out of town. Applicant stated that he was not happy with

himself, and he used the drug experimentally. This drug use is alleged at SOR ¶ 1.b. (Tr. 47-49.)

In 2007, at a Father's Day party, Applicant used marijuana once. He explained that he became piqued with his wife when she wanted to leave the party early. He did not leave the party when his wife left. After his wife left, Applicant joined some friends in using marijuana. This drug use is alleged at SOR ¶ 1.c. (Tr. 37-38, 50.)

In 2008 and 2009, in order to earn some extra money, Applicant worked on Friday evenings with some musicians at a recording studio. While working at the studio, Applicant used cocaine an estimated ten to twelve times between 2008 and March 2009. On one occasion, toward the end of his period of cocaine use, Applicant rubbed cocaine residue on his gums. Applicant's cocaine use is alleged at SOR ¶ 1.d. Applicant denied any formal drug counseling. (Ex. 5; Tr. 37-39, 51-52.)

In July 2009, Applicant completed an SF 86 on which the following question, identified as 23.a, appeared:

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 (barbiturates, 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, swallowing, experimenting with or otherwise consuming any controlled substance.

Applicant answered "Yes" and stated that he had used marijuana once in June 2007. He did not disclose his use of hallucinogenic mushrooms in 2003 and his multiple uses of cocaine between 2008 and March 2009. The SOR alleges at ¶ 2.a. that Applicant's failure to disclose that he used other drugs in addition to marijuana was deliberate. (Ex. 1.)

At his hearing, Applicant was asked why he didn't list his other uses of illegal drugs on his July 2009 SF 86. He stated: "I didn't want to admit it to them. I did not want to admit to it. That was an error in judgment on my part and I admit that I have done that." (Tr. 55.)

In an interview with an authorized investigator in January 2010, Applicant was asked about his use of drugs. He reported that he had used marijuana once in the past seven years. He did not disclose his use of ecstasy, hallucinogenic mushrooms, and cocaine between 2000 and 2009. The SOR alleges at ¶ 2.b. that Applicant's failure to disclose the full extent of his illegal drug use was deliberate. (Ex. 4.)

At his hearing, Applicant was asked why he did not tell the investigator about his use of ecstasy, hallucinogenic mushrooms, and cocaine in his January 2010 interview. He replied that he “did not want to diverge from what I’d already stated on the [SF 86]. Being that I made an error in judgment before, I decided that I had to stick to it at that point.” (Tr. 55-56.)

In February 2011, Applicant completed and certified an e-QIP, on which the following question, identified as 23 a, appeared:

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 (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), steroids, inhalants (toluene, amyl nitrate, etc.) or prescription drugs (including painkillers)?

Applicant responded “Yes” to the question and admitted using marijuana one time on June 17, 2007. He did not reveal his use of other drugs in addition to marijuana. The SOR alleges at ¶ 2.c. that Applicant’s failure to list his other drug use was deliberate. (Ex. 2.)

At his hearing, Applicant acknowledged that his answer to question 23 on his February 2011 e-QIP was not truthful. He stated: “I just wanted to keep this same answer throughout, so unfortunately, I did compound falsifications, which I’m admitting to now.” (Tr. 57.)

In September 2011, Applicant was interviewed by an authorized investigator. When the investigator asked Applicant to explain his “Yes” answer to Question 23 a, Applicant reported that he had used marijuana once in June 2007. He did not reveal that he had used marijuana, ecstasy, hallucinogenic mushrooms, and cocaine from 2008 to 2009. The SOR alleges at ¶ 2.d. that Applicant’s failure to reveal this additional information about his drug use was deliberate. (Ex.7.)

At his hearing, Applicant admitted that his statements about his drug use in the September 2011 interview were not truthful. Again, his plan was to keep his story consistent with the falsification on the SF 86 he completed in July 2009. (Tr. 58-59.)

Also in September 2011, as a part of his interview with the authorized investigator, Applicant completed a signed sworn statement about his drug use. In that statement, Applicant stated he used marijuana one time in June 2007. The SOR alleges at ¶ 2.e. that Applicant failed to disclose the full extent of his illegal drug use and did not reveal that he had used marijuana, ecstasy, hallucinogenic mushrooms, and cocaine between 2008 and 2009. (Ex. 6.)

At his hearing, Applicant again stated that he concealed information about his drug use in order to keep his statements consistent with his earlier untruthful statements. Applicant asserted that the Government should trust him with classified and sensitive information because his serial falsehoods only dealt with one incident. (Tr. 59-60.)

Applicant provided letters of character reference from a supervisor and two coworkers. The letters praised Applicant's work ethic and his dedication to his job. His supervisor also noted that he trusted Applicant and found him to be reliable. He noted that Applicant protected the confidentiality of those in his management team who shared information with him. (Ex. A; Ex. B; Ex. C.)

Burden of Proof

The Government has the initial burden of proving controverted facts alleged in the SOR. The responsibility then shifts to the applicant to refute, extenuate, or mitigate the Government's case. Because no one has a right to a security clearance, the applicant then bears the burden of persuasion. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of protecting national security.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant an applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, the administrative judge applies these guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all

available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H, Drug Involvement

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual’s reliability and trustworthiness because it may impair judgment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations. AG ¶ 24(a) defines drugs as “mood and behavior altering substances.” The definition of drugs includes “(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.” 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.”

Through Applicant's admissions, the record establishes that he used ecstasy once in 2000; hallucinogenic mushrooms once in 2003; marijuana once in June 2007; and cocaine ten to twelve times between 2008 and March 2009.

Applicant's drug involvement casts doubt on his reliability, trustworthiness, and good judgment. It also raises security concerns about his ability or willingness to comply with laws, rules, and regulations. I conclude that Applicant's illegal drug use raises security concerns under AG ¶ 25(a), which reads: "any drug abuse [as defined at AG ¶ 24(b)]."

Two Guideline H mitigating conditions might apply to the facts of Applicant's case. If Applicant's drug use happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on his current reliability, trustworthiness, or good judgment, then AG ¶ 26(a) might be applicable in mitigation. If Applicant demonstrated an intent not to abuse any drugs in the future by (1) disassociation from drug-using associates and contacts, (2) changing or avoiding the environment where drugs were used, (3) abstaining from drug use for an appropriate period, or (4) signing a statement of intent with the automatic revocation of her security clearance for any violation, then AG ¶ 26(b) might be applicable.

Applicant's last use of marijuana was in 2007, approximately six years ago. His last use of ecstasy was in 2000, 13 years ago, and his last use of hallucinogenic mushrooms occurred in 2003, ten years ago.

However, while Applicant's use of cocaine occurred between four and five years ago, his use of the drug during that period was frequent. He testified that he no longer associated from those with whom he had used drugs in the past. He did not provide a signed statement of his intent not to abuse drugs in the future, with automatic revocation of his security clearance for any violation.

Applicant's illegal drug use occurred periodically over nine years, suggesting a lifestyle choice that went beyond curiosity and experimentation. While his use of ecstasy, hallucinogenic mushrooms, and marijuana was infrequent and occurred at least six years ago, his use of cocaine occurred when he was a mature adult of 32 years. His cocaine use was more recent and frequent, and it continues to cast doubt on his reliability and good judgment. I conclude that AG ¶ 26(a) and AG ¶ 26(b) apply in mitigation to the Applicant's use of ecstasy, hallucinogenic mushrooms, and marijuana. However, I conclude that those same mitigating factors do not fully apply to Applicant's use of cocaine in 2008 and 2009.

Personal Conduct

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

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions

about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Applicant's personal conduct raises security concerns under AG ¶¶ 16(a) and 16(b). AG ¶ 16(a) reads: "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities." AG ¶ 16(b) reads: "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative."

Applicant admitted deliberately falsifying his answers to Sections 23 on two separate security clearance applications that he executed in 2009 and 2011. Moreover, he provided false and misleading information in two interviews with authorized investigators and in a signed, sworn statement he executed in September 2011. Applicant's deceptions continued for over two years. At his hearing, Applicant admitted to serial falsifications in order to sustain the initial falsification he perpetrated in July 2009.

Applicant also was not candid in responding to questions about his employment record. He was fired from two jobs, one in 2007 and one in 2009, but in he did not reveal this information forthrightly when responding to Question 13c on his e-QIP. When he was interviewed by an authorized investigator, he stated that he left his employer in 2009 because the job did not meet his expectations. He told the investigator he left his employment in 2007 for other employment after a disagreement with management.

Applicant's multiple deceptions about his drug use raise serious concerns about his trustworthiness, reliability, and judgment. His lack of candor in responding to questions about his employment record raises additional concerns about his veracity and reliability. I conclude that none of the Guideline E mitigating conditions fully applies to the facts of Applicant's case.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to

which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances in this case. When he executed two separate security clearance applications as a government contractor, Applicant was a mature adult. On those applications, Applicant was not candid about his illegal drug use and his employment record, nor was he candid when he was interviewed by investigators about his drug use and employment record. Applicant's protracted and long-standing lack of candor impacts his credibility and raises serious security concerns about his reliability, trustworthiness, and judgment.

Applicant's illegal drug use in 2000, 2003, and 2007 was infrequent, and it does not appear that it will recur. However, he used cocaine ten to twelve times in 2008 until early 2009. His use of cocaine was frequent and intense. Insufficient time has passed to conclude that Applicant will not return to such drug use if an occasion presents itself. Applicant failed to meet his burden of persuasion in mitigating the Government's allegations under the drug involvement and personal conduct adjudicative guidelines. Overall, the evidence in this case leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance.

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.:	For Applicant
Subparagraph 1.d.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a.- 2.h.:	Against 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.

Joan Caton Anthony
Administrative Judge