



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



In the matter of:)
)
) ISCR Case No. 11-14069
)
Applicant for Security Clearance)

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: , Personal Representative

02/20/2014

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated personal conduct and drug involvement security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On August 13, 2013, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E (personal conduct) and H (drug involvement). The action was taken under Executive Order (EO) 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) implemented by the DOD on September 1, 2006.

Applicant submitted a notarized response to the SOR on November 1, 2013, and requested a hearing before an administrative judge. The case was assigned to me on January 10, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on January 17, 2014, scheduling the hearing for February 6, 2014. The

hearing was convened as scheduled. Government Exhibits (GE) 1 through 4 were admitted in evidence without objection. Applicant testified, called a witness, and submitted Applicant's Exhibits (AE) A through F, which were admitted without objection. DOHA received the hearing transcript (Tr.) on February 18, 2014.

Findings of Fact

Applicant is a 50-year-old independent contractor. His application for a security clearance is sponsored by a defense contractor. He has a bachelor's degree. He married in 2003 and divorced in 2006. He does not have any children.¹

Applicant smoked marijuana from 1984 through May 2008. Except for short periods when he attempted to stop, he used marijuana almost every day. He used cocaine and LSD in the late 1980s. He purchased cocaine, LSD, and marijuana for his use. He stopped using cocaine and LSD because he did not like their effects, but he continued to smoke marijuana. In about 2001, Applicant took a drug test for employment and tested positive for marijuana use. Applicant admits that he was addicted to marijuana. He drove while under the influence of marijuana. He did not smoke marijuana at work, but he worked while under the effects of marijuana.²

Applicant attempted unsuccessfully on several occasions to stop smoking marijuana. He sought outpatient treatment in 2002. As part of the process, he was tested for illegal drugs, and he tested positive for marijuana use. He did not complete the recommended aftercare treatment, and he returned to smoking marijuana.³

From about 2005 to 2008, Applicant smoked marijuana while he held positions involving access to sensitive information. It does not appear that he has ever held a security clearance or had access to classified information.⁴

In 2008, Applicant realized that his marijuana use was out of control and he needed help. He entered a 28-day inpatient drug and alcohol rehabilitation facility in early June 2008. While in the facility, he was diagnosed by a medical doctor as marijuana dependent. He completed the program and the prescribed aftercare. He has been attending Alcoholics Anonymous (AA) or Narcotics Anonymous (NA) regularly

¹ Tr. at 17, 23, 61-62; Applicant's response to SOR; GE 1.

² Tr. at 24, 36, 40-41, 52-56; Applicant's response to SOR; GE 1, 4.

³ Tr. at 41-43, 58-59; GE 4.

⁴ Tr. at 36-40; Applicant's response to SOR; GE 1, 4. Security clearance is defined under DOD Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended (Regulation), as "[a] determination that a person is eligible under the standards of this Regulation for access to classified information." Classified information is defined in the Regulation as "[o]fficial information or material that requires protection in the interests of national security and that is classified for such purpose by appropriate classifying authority in accordance with the provisions of Executive Order 12356."

since his discharge. He has a sponsor, and he is a sponsor. He helps conduct NA meetings in two state prisons and a federal prison.⁵

Applicant has not used marijuana or any other illegal drug since May 2008. As a recovering addict, he does not drink alcohol or use any legal drugs that have mind-altering effects. He avoids any situation in which illegal drugs may be used.⁶

Applicant submitted a number of questionnaires between 2005 and 2009, including a Questionnaire for Public Trust Positions (SF 85P) in October 2005 and a Questionnaire for Non-Sensitive Positions (SF 85) in August 2007. He intentionally falsified all the questionnaires by stating that he had not used illegal drugs within the periods stated in the questionnaires. Two of the questionnaires were submitted after Applicant stopped using marijuana. Applicant explained that his sobriety is a gradual and ongoing process, and it took some time before he was able to completely admit his drug use. He fully admitted his marijuana use when he submitted a Questionnaire for National Security Positions (SF 86) in July 2011.⁷

Applicant submitted a letter from his state Department of Corrections expressing gratitude for his volunteering to conduct NA meetings. On his Department of Corrections volunteer performance evaluation, he was rated “Very Good or Excellent for such categories as Attendance, Attitude toward Work, Relationship with Coworkers and Staff, Relationship with Inmates, Reliability, Promptness, Preparedness, Professionalism, and Communication Skills.” A witness and several letters attested to Applicant’s trustworthiness, responsibility and honesty.⁸

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be 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, administrative judges apply the 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

⁵ Tr. at 15-22, 24-36, 43-46, 56-57; Applicant’s response to SOR; GE 1, 4; AE A-E.

⁶ Tr. at 46-48, 60-61; Applicant’s response to SOR; GE 1, 4.

⁷ Tr. at 48, 57-58; Applicant’s response to SOR; GE 1-3.

⁸ Tr. at 15-22, 64-65; AE B, C, E, F.

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.”

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 the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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 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.

The guideline notes conditions that could raise security concerns under AG ¶ 25. The disqualifying conditions potentially applicable in this case include:

- (a) any drug abuse;⁹

⁹ Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

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

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

(g) any illegal drug use after being granted a security clearance.

Applicant possessed and used cocaine, LSD, and marijuana. He tested positive for marijuana use in 2001. He was diagnosed by a medical doctor as marijuana dependent. AG ¶¶ 25(a), 25(c), and 25(d) are applicable.

SOR ¶ 1(c) alleges that between 1984 and May 2008, Applicant “operated a motor vehicle while under the influence of marijuana on multiple occasions.” That information is an aggravating factor for SOR ¶ 1(a), which alleges that Applicant used marijuana from 1984 through May 2008, but it does not establish a disqualifying condition or conduct that is separate from SOR ¶ 1(a). When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant’s favor. See ISCR Case No. 03-04704 (App. Bd. Sep. 21, 2005) at 3 (same debt alleged twice). SOR ¶ 1(c) is concluded for Applicant.

SOR ¶ 1(d) alleges that Applicant “used marijuana on multiple occasions while possessing a security clearance, while possessing access to sensitive information, and/or while employed by a U.S. contractor.” Applicant had access to sensitive information, but there is no evidence that he held a security clearance while he was smoking marijuana. The part of the allegation alleging “while possessing a security clearance” has not been established by the evidence. AG ¶ 25 is not an exhaustive and exclusive list of disqualifying conditions; rather, the word “include” in the preamble signals that the matters listed are illustrative in nature and do not provide a basis to conclude that factors or categories not explicitly described do not raise security concerns. See ISCR Case No. 07-00558 (App. Bd. Apr. 7, 2008). Nonetheless, AG ¶ 25(g) only specifies a security clearance. It does not address access to sensitive information. AG ¶ 25(g) is not applicable. The part of the allegation that Applicant used marijuana on multiple occasions “while possessing access to sensitive information, and/or while employed by a U.S. contractor,” is an aggravating factor for SOR ¶ 1(a), but it does not establish a disqualifying condition or conduct that is separate from SOR ¶ 1(a). As a duplicative allegation, SOR ¶ 1.d is concluded for Applicant.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially applicable:

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

- (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; 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.

Applicant has not used cocaine or LSD since the 1980s. That conduct is mitigated. He smoked marijuana regularly from 1984 through May 2008. It has been more than five years since he used any illegal drugs. He successfully completed a 28-day inpatient drug and alcohol rehabilitation program. He regularly attends NA meetings, and he volunteers to conduct meetings in state and federal prisons. He has a sponsor, and he is a sponsor. He avoids any situation in which illegal drugs may be used. He clearly, unequivocally, and credibly committed to remaining drug-free.

However, Applicant chose to violate the law on hundreds, if not thousands, of occasions by using illegal drugs until he was in his mid-40s. He lied about his drug use on at least four questionnaires, and he smoked marijuana while having access to sensitive information. Applicant was credible, and I believe that illegal drug use is unlikely to recur. However, I also find that his drug use continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 26(a) is partially applicable, and AG ¶ 26(b) is applicable. AG ¶ 26(d) is partially applicable because Applicant did not submit a favorable prognosis by a duly qualified medical professional. Notwithstanding, I conclude that security concerns remain despite the presence of some mitigation.

Guideline E, Personal Conduct

The security concern 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(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.

Applicant intentionally provided false information about his marijuana use on at least four questionnaires. AG ¶ 16(a) is applicable.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

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

(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; and

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

Applicant did not correct his false questionnaires after he went through rehabilitation and stopped smoking marijuana. Instead, he continued to lie on two questionnaires submitted after he became sober. He receives credit in mitigation for revealing his drug problems in his 2011 SF 86. However, the mitigating conditions, individually or collectively, are insufficient to mitigate multiple false questionnaires. With unresolved doubts about Applicant's current reliability, trustworthiness, and judgment, I conclude that personal conduct security concerns remain despite the presence of some mitigation.

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 have incorporated my comments under Guidelines E and H in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant smoked marijuana regularly from 1984 through May 2008. He admits that he was addicted to marijuana. He lied about his illegal drug use on at least four questionnaires, including two questionnaires that were submitted after he became sober. Applicant has not used any illegal drugs in almost six years, and he finally revealed his drug problems in his 2011 SF 86. However, his three-plus decades of poor judgment, dishonesty, and disregard for the law are not mitigated.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant has not mitigated personal conduct and drug involvement security 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
Subparagraphs 1.a-1.b:	Against Applicant
Subparagraphs 1.c-1.d:	For Applicant
Subparagraphs 1.e-1.f:	Against Applicant
Subparagraphs 1.g-1.h:	For Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraphs 2.a-2.c:	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.

Edward W. Loughran
Administrative Judge