



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



In the matter of:)
)
) ISCR Case No. 13-00452
)
Applicant for Security Clearance)

Appearances

For Government: Braden Murphy, Esq., Department Counsel
For Applicant: Alan Edmunds, Esq.

10/18/2013

Decision

LYNCH, Noreen, A., Administrative Judge:

The Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) alleging security concerns arising under Guideline H (Drug Involvement) and Guideline E (Personal Conduct). The SOR was dated May 15, 2013. 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 in September 2006.

Applicant timely answered the SOR and requested a hearing before an administrative judge. The case was assigned to me on August 19, 2013. DOHA issued a notice of hearing on September 12, 2013, scheduling the hearing for September 26, 2013. Government Exhibits (GX) 1 through 5 were admitted into evidence without objection. Applicant Exhibits (AX) A through Y were admitted into evidence without objection. Applicant testified and presented six witnesses. DOHA received the transcript (Tr.) on October 2, 2013. Based on a review of the pleadings, testimony, and exhibits, eligibility for access to classified information is denied.

Findings of Fact

In his answer to the SOR, Applicant admitted the factual allegations under Guideline H (Drug Involvement) and Guideline E (Personal Conduct) with explanations.

Applicant is a 31-year-old engineer who works for a defense contractor. He obtained his undergraduate degree in May 2004. He is pursuing his master's degree. (AX S) He is married and has two children. (Tr. 65) Applicant has worked for his current employer since April 2005. He has held a security clearance since 2005. (GX 1) He has completed three security clearance applications. He currently holds a Top Secret-SCI clearance.

Applicant admitted using marijuana in college, from 2000 until 2004. He smoked marijuana with friends socially in college. According to Applicant, the frequency was between one time per week and one time per month. (Tr. 74) He never purchased the drug, but was provided the marijuana by friends. He denies any illegal drug use from 2004 until 2010. (Tr. 68)

Applicant also acknowledged that in July 2010 while on a family vacation with close friends and relatives, he was offered marijuana and used it approximately three or four times. At the time, he held a clearance. He admitted that was a "stupid mistake."

Applicant explained that he initially refused the offer of marijuana from a family member, but then made a lapse in judgment and used the marijuana. He has no intention of using illegal drugs in the future and has signed an agreement to that effect. (AX Q)

Applicant states that he stopped using illegal drugs. He understands that it is a significant risk to his career and to his livelihood. He does not want to jeopardize any part of his career or professional life. He loves his career and his contributions to the national security of his country. He would never put himself in a position to compromise his ability to safeguard classified information. (GX 2)

Applicant's employer has a drug policy, but does not test for drugs. They do not have a zero tolerance policy for the use of illegal drugs, but understand the U.S. Government policy. Applicant has never undergone any employment drug tests.

Applicant obtained a security clearance in approximately 2006. At that time, he knew the use of illegal drugs was against policy. However, he used marijuana in 2010.

Applicant completed an SF-86 security clearance application in May 2005. This was his first application. (GX 5) In response to Question 27, he failed to disclose his 2000 until 2004 illegal drug use. He admitted that he deliberately falsified the security clearance application. (Tr. 75) His reasoning was that he wanted to personally discuss the response during an interview with an investigator. He believed that since he had not used the marijuana for a significant period of time (15 months before the

application) that it would be better to discuss the issue in person. However, he did not have an interview. In 2006, he completed another SF-86 for a top secret clearance and again deliberately falsified his response to Question 24. He did not self-report the use before completing the second application. (Tr. 77)

In August 2006, Applicant was interviewed and he made a statement to the investigator that he did not answer questions concerning use of marijuana correctly because he wanted to explain the situation verbally. (Tr. 81) Applicant claimed that this was an isolated incident. He stated that he had not answered the question concerning use of illegal drugs because it might look as though he were dependent on the illegal drugs. (Tr. 81) He stated that he was young and stupid. He also remembers that he stated that he had no intention of using any illegal drugs in the future. (Tr. 81)

Applicant completed another SF-86 in May 2011. (GX 1) He stated that he then disclosed the true and correct information concerning his illegal drug use because he wanted to set the record straight but he also believed it would be better for him if he presented the negative information.

When questioned at the hearing, Applicant admitted that he lied in 2005 about his drug use because he might not get a security clearance without a verbal explanation. (Tr. 75) He also stated that he knew it was wrong and could potentially affect his ability to hold a clearance in the future.

He believes the assurance that he can give now is based on his glowing recommendations from his employer. He does not want to lose his job, and states that he has worked in a security atmosphere since 2005, and still holds his clearance. He has started a family and is building a future. He is deeply embarrassed and remorseful for his actions. (Tr. 69)

Applicant submitted employee performance evaluations from 2005 through 2012. (AX A-I). Each evaluation describes him as a major contributor to the company. He has received numerous awards (AX J).

Applicant provided seven letters of recommendation from various leaders in his company. (AX K-R) He is described as a talented engineer who performs beyond expectations. He is highly creative/inventive and a prized collaborator. Applicant is described as an incredible person who has contributed extensively and significantly to vital U.S. programs. He is an exceptionally dedicated, superbly trusted, and highly respected employee.

Applicant's FSO testified that he has known Applicant almost four years and is aware of the SOR allegations. He describes Applicant as a diligent worker who has had one security violation. (Tr. 23) Applicant self-reported the violation. The witness acknowledged that it did concern him that Applicant used marijuana while holding a security clearance.

Applicant's supervisor testified that he has known him for about ten years. He describes Applicant as exceptional. He is aware of the SOR allegations. He has no hesitation about Applicant's abilities.

The hiring manager testified that Applicant's work is of the highest quality. He is consistently one of the top performers. He is aware of the marijuana use and the allegations of false answers on an SF-86. He is not concerned about Applicant having a security clearance. He considers Applicant a highly valuable member of the team. (Tr. 44)

A special security manager testified in Applicant's behalf. He is aware of the SOR allegations and understands the breach of trust. However, given the whole person, he believes that people make mistakes.

The vice-president of Applicant's company traveled from another state to testify on behalf of Applicant. He describes Applicant as a significant engineer for the company. He supports Applicant in his request for a continued security clearance. He is aware of the SOR allegations. He has confidence in Applicant based on his past responsibilities. (Tr. 59) He explained that the company does have a drug policy but does not test employees. (Tr. 62)

Applicant submitted a negative drug test screen from June 25, 2013. It was not random, but it was a hair follicle test. (Tr. 89) Applicant states that he has been around members of his family in the past few years who use marijuana but the family members are aware that Applicant does not use illegal drugs.

Policies

When evaluating an applicant's suitability for a security clearance, an 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. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." An 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

The Government must present evidence to establish controverted facts alleged in the SOR. An 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 burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based on 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 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 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.” “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.” Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information. The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant’s character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

Analysis

Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to 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.

(a) 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;

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

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying:

- (a) any drug abuse (see above definition);
- (b) testing positive for illegal drug use;
- (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;
- (e) evaluation of drug abuse or drug dependence by a licensed clinical social worker who, is a staff member of a recognized drug treatment program;
- (f) failure to successfully complete a drug treatment program prescribed by a duly qualified medical professional;
- (g) any illegal drug use after being granted a security clearance; and,
- (h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

Applicant admitted his use of marijuana, an illegal drug, from 2000 until 2004. He also admitted that he used marijuana in 2010 while holding a security clearance. He used these illegal drugs after obtaining a security clearance in 2005. AG¶¶ 25(a), 25(c), and 25(g) apply.

AG ¶ 26 provides conditions that could mitigate security concerns:

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

Applicant's last use of any illegal substance was in June 2010. He stated that he has not used any illegal drugs since that time. He stated that he has no intention of using any illegal drugs. Granted, a large part of his use was while in college. However, he continued the use after applying for and obtaining a security clearance. In 2006, he promised not to use any illegal drugs, but he did in 2010. His recent drug use does not reflect good judgment, reliability, and trustworthiness. Despite a signed letter of intent, he has not mitigated the security concerns under this guideline. None of the mitigating factors apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying:

(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;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources.

(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;

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment; and

(g) association with persons involved in criminal activity.

As discussed above, Applicant intentionally falsified his 2005 and 2006 security clearance applications. During an investigative interview in 2006, he discussed his marijuana use. In 2011, he answered the questions concerning illegal drug use completely. He has shown a pattern of dishonesty. AG ¶¶ 16(a), 16(b), and 16(d)(3) apply. His conduct shows a pattern of untrustworthiness.

AG ¶ 17 provides conditions that could mitigate 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.

Applicant admitted that he intentionally falsified his first security clearance application in 2005 and again in 2006. The reason he gave for not disclosing initially on his early applications was fear that someone would believe he was dependent on illegal drugs. He did not make good-faith efforts to correct his omission until an interview in 2006. His falsifications did not result from inappropriate advice. The offense is not minor but goes to his integrity. He was holding a security clearance and had the Government's trust. He has not presented any other information to persuade me that he has mitigated personal conduct concerns regarding the falsification. I have doubts about his judgment, trustworthiness, and reliability. After considering the mitigating conditions outlined in AG ¶ 17, I conclude Applicant has not mitigated the security concern under personal conduct or drug use.

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 an applicant's conduct and all the 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. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the whole-person factors. Applicant is a 31-year-old professional who is educated and holds a position that requires a security clearance. He is well-respected by his employer. He is described as an invaluable asset to the company. He admitted that he used marijuana even after his grant of a security clearance. He admitted that he intentionally falsified responses in both his 2005 and 2006 security clearance applications. He waited until an interview in 2006 to reveal his drug use. His regret is that he may lose his job and his career. He has acknowledged his poor judgment.

His two falsifications, when considered with his 2010 illegal drug use, while holding a security clearance, outweigh any other behavior and are not mitigated. I have doubts about his judgment. Any doubts must be resolved in favor of the Government. Applicant has not met his burden in this case. He has not mitigated the security concerns under drug use and personal conduct. Clearance is denied.

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
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2a-2c:	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 a security clearance. Clearance is denied.

NOREEN A. LYNCH.
Administrative Judge