



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



In the matter of:)	
)	
)	ISCR Case No. 07-05069
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Eric Borgstrom, Esquire, Department Counsel
For Applicant: Pro Se

November 5, 2008

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant's eligibility for access to classified information is denied.

Applicant submitted his Security Clearance Application (SF 86), on August 10, 2006. On June 30, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H, E and J for Applicant. 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on July 21, 2008, and requested a hearing before an administrative judge. DOHA received the request on July 24, 2008.

Department Counsel was prepared to proceed on August 22, 2008, and I received the case assignment on September 4, 2008. DOHA issued a notice of hearing on September 29, 2008, and I convened the hearing as scheduled on October 15, 2008. The government offered eight exhibits (GE) 1 through 8, which were received and marked. Applicant objected to the admission of GE 6. All exhibits were admitted into evidence without objection, except GE 6, which was not admitted into evidence.¹ Applicant testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on October 23, 2008. I held the record open until October 24, 2008, for Applicant to submit additional matters. On October 24, 2008, he submitted additional documents which have been marked as AE A through H and admitted into evidence, without objection. The record closed on October 24, 2008.

Procedural and Evidentiary Rulings

Notice

Applicant received the hearing notice on October 3, 2008. (Tr. 9) I advised Applicant of his right under ¶ E3.1.8 of the Directive to receive the hearing notice 15 days notice before the hearing date. Applicant affirmatively waived his right to 15 days notice. (Tr. 9-10)

Findings of Fact

In his Answer to the SOR, dated June 30, 2008, Applicant admitted all the factual allegations in the SOR.²

Applicant, who is 57 years old, enlisted in the United States Navy in June 1970 and received an honorable discharge in July 1977. He immediately began working for the Navy in a civilian capacity. During his years of civilian service, he completed many training programs and received awards and honors. In 1985, the Navy granted him a security clearance, which he continues to hold. The record contains no evidence he failed to follow security procedures while working. He retired from federal civilian employment in 2005, after 27 years of service.³

In November 2005, he began working as a staff logistics engineer for a Department of Defense contractor. He has worked in Kuwait on behalf of his employer. His employer rated him "far exceeds", the highest rating, in March 2008. His employer

¹GE 6 consists of an unsworn personal interview statement of Applicant, titled as "testimonies". The Directive prohibits the use of this document unless it is received with an authenticating witness. See Directive ¶ E3.1.20. The government did not authenticate this exhibit and Applicant objected to its admission. GE 7 and GE 8 are "testimonies" which the government authenticated. Tr. 31-41.

²Response to SOR, dated July 21, 2008.

³GE 1 (Security clearance application) at 1, 7, 13, 19-20; AE C (Discharge papers); AE D (Awards); AE F (Training certificates); Tr. 45, 52-54, 65, 81.

describes Applicant as an excellent employee with a very good work ethic. He works well with co-workers and customers.⁴

Applicant was married for 15 years and has been divorced for sometime. His former wife died a few years ago. They had two children, a daughter, age 36, and a son, age 31. He also has a granddaughter, age 19, two grandsons, ages 17 and 13, and a great-grandchild. At the time of the hearing, his son, his father, and two grandsons were living with him. He provides some support for these family members. Over the years, he has worked in his community, on a variety of committees or projects. He works with the youth in his neighborhood, trying to provide guidance to them.⁵

In the late 1970s, Applicant started smoking marijuana occasionally with Vietnam veterans. When he married, he stopped his recreational use of marijuana for a period of time. He started smoking marijuana again when he divorced and continued to use it occasionally until 2007. He smokes marijuana to relax and to celebrate events, such as his birthday. He sometimes purchased marijuana, but never sold, manufactured or distributed marijuana. In February 2003, the police arrested him and charged him with the purchase and possession of marijuana. He pled guilty. The court fined him, required him to attend a drug class, and placed him on probation without verdict for 12 months.⁶

In July 2003, while visiting his mother in the south, the police arrested him for driving while under the influence of alcohol (DUI). He spent the night in jail. His family bailed him out of jail the next day. He never appeared in court or pled to the charges against him. After paying his bail, which he characterized as a fine, he never heard anymore from the authorities in this state about his arrest.⁷

On his birthday in October 2003, the police arrested and charged him with possession of cocaine and marijuana. Prior to his arrest, he used cocaine on a few occasions over several years. He has not used cocaine since his arrest. He pled guilty to the charges. The court sentenced him as a first offender and required him to attend a first offender's class, which he did. The record contains no information on this arrest, except for Applicant's testimony and information provided to the investigator.⁸

⁴AE B (2008 performance evaluation); AE D, *supra* note 3; Tr. 76.

⁵AE H (paper written by Applicant on philosophy of life); Tr. 44-53.

⁶GE 2 (Interrogatories with attachments) at 5-6; GE 3 (Interrogatories with attachments) at 5); GE 5 (Court record) at 5; Tr. 55-62.

⁷GE 4 (United States Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, date of request August 25, 2006) at 4; GE 2, *supra* note 6, at 4; GE 3, *supra* note 5-6; Tr. 68-70.

⁸GE 2, *supra* note 6, at 4; GE 3, *supra* note 6, at 7-8; Tr. 63-65, 67.

When he completed his SF-86 on August 10, 2006, Applicant answered “yes” to Question 23d, indicating that he had been arrested in October 2001 for possession of marijuana and to Question 24a, listing two occasions in 2001 for his marijuana use. He did not list his other two arrests or acknowledge his extensive and more recent use of marijuana. Applicant used the wrong date for the arrest he listed. At the hearing, he did not provide a reason for his failure to provide more details about his past drug use or his failure to list his arrest in February 2003. He did not believe his DUI arrest in July 2003 was relevant, so he did not list it.⁹

In March 2006, Applicant met with an investigator to discuss issues raised by his answers in his SF-86. During this interview, he told the investigator he had been arrested in February 2003 for purchasing and possessing marijuana, in July 2003 for DUI, and in October 2003 for drug and alcohol use. He provided the investigator with detailed information about the facts surrounding these arrests and about his use of marijuana and cocaine. Based on this information provided by Applicant during the interview, the investigator prepared a report. She did not request nor did she have his criminal arrest record when she interviewed him. His criminal arrest record was requested more than five months after this interview.¹⁰

Applicant also provided information regarding his arrests in his interview in August 2007. In this interview, he provided limited information about his use of marijuana, stating that he used it in the 1970s and twice later, in October 2001 and for the last time in later 2003 or early 2004. He also acknowledged using cocaine on two occasions, October 2003 and March 2004 for the last time. Although he attended a court mandated drug class after his February 2003 arrest and a court mandated first offenders class after his October 2003 arrest, he is not dependent on drugs and has not received drug counseling or treatment. The interviewer concluded her report by noting that Applicant was not able to remember the particulars of all the incidents.¹¹

At the hearing, Applicant acknowledged his drug use. He started with marijuana in the 1970s, stopped during his marriage, and resumed smoking marijuana after his divorce. He also admitted that he used cocaine maybe two or three times a year with a girlfriend. He no longer dates this women, and has not used cocaine since 2004. He last used marijuana in 2007 to celebrate his birthday. He testified that although he knew marijuana and cocaine were illegal, he did not realize he could did not use drugs while holding a clearance or that he could be fired if he tested positive for drugs.¹²

⁹GE 1, *supra* note 6, at 16-18; Tr. 70-71, 87.

¹⁰GE 4, *supra* note 7, at 3; GE 8 (Testimonies of personal subject interview on March 16, 2006) at 3-5; Tr. 34.

¹¹GE 2, *supra* note 6, at 5-7.

¹²Tr. 55-59, 64-65, 71-79, 82, 93-98.

Policies

When evaluating an Applicant's suitability for a security clearance, the 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 useful 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and common sense 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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

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);

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

(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 used marijuana in the 1970s and for many years since his divorce. For a number of years he also used cocaine occasionally. He possessed both drugs and sometimes purchased marijuana. He knows both drugs are illegal. Even with this knowledge, he still used both while holding a security clearance. He last used cocaine in 2004 and marijuana in October 2007. He has not clearly and convincingly established a commitment not to use marijuana again. He enjoys the effects of marijuana, which is the reason for his continued use of it on occasion. The above disqualifying conditions

are established.¹³ I have considered the mitigating conditions and conclude that none apply. Guideline H, drug involvement is found against Applicant.¹⁴

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. 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(a) 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.

¹³AG ¶ 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.

¹⁴The SOR does not allege that Applicant is a current drug user and the evidence of record does not establish that he is a current user of marijuana. See 50 U.S.C. ¶ 435c(b).

The government established that Applicant omitted material facts from his SF-86 when he answered “yes” to Questions 23d and 24a, but failed to provide complete information about his arrests and drug use. This information is material to the evaluation of Applicant’s trustworthiness to hold a security clearance and to his honesty. He denies, however, that he deliberately falsified his answer to these questions. When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant’s intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant’s intent or state of mind at the time the omission occurred.¹⁵ For DC ¶ 16 (a) to apply, the government must establish that Applicant’s omission, concealment or falsification in his answers to these questions was deliberate.

Applicant admits that he did not consider his DUI arrest relevant and thus, did not provide the information about this arrest. He could not provide any reason for not listing all his arrests, which he knew had occurred. He intentionally failed to provide full and accurate answers to Question 23d and 24a. The above disqualifying conditions apply in this case.

I have reviewed the mitigating conditions under AG ¶ 17. Although he failed to provide full and complete information in his SF-86 about his arrests and drug use, Applicant voluntarily provided information about his three arrests and extensive drug use to the investigator during his March 16, 2006 interview without being confronted with evidence of his arrests or drug use. The investigator acknowledged that she did not request his criminal records prior to this interview and that the information in her report came from Applicant. Thus, AG ¶ (a) “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts” applies. Applicant has mitigated the government’s security concerns as to SOR allegations 2.a, 2.a(1) and 2.b.

Concerning his inconsistent statements regarding his drug use, Applicant has consistently stated that he last used cocaine in 2004. He has also provided consistent information about when he actually used marijuana. He has not provided accurate and consistent information about the number of times and frequency of his cocaine and marijuana use. When he initially met with the investigator in March 2006, he provided information about his long use of marijuana and cocaine which coincides with his hearing testimony. The interviewer noted his lack of memory about many details on the issues discussed. In his later interview, he provided less information about his drug use. Given that the government already had better information about his drug use from the prior interview, his statements in his 2007 interview are not a deliberate intent to hide information from the government, but the result of poor recall and miscommunication. SOR allegation 2.c is found in favor of Applicant.

¹⁵ See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

Guideline J, Criminal Conduct

In light of my findings under Guideline E, Guideline J is found against Applicant. Being honest later is not a defense to an 18 U.S.C. ¶ 1001 violation.

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 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 common sense judgment based upon careful consideration of the guidelines and the whole person concept.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant worked for the Navy and the federal government for more than 27 years without any disciplinary actions taken against him. He was a reliable employee and continued with his excellent work ethic in his private sector job. His current employer praises his work. He has worked in his community for many years to help the youth. He takes of his father and grandchildren. He is responsible towards his family, his finances and his community. His efforts to provide guidance to the youth of his community is commendable.

When he used the illegal drugs marijuana and cocaine while holding a security clearance, Applicant breached a special trust . He used these drugs not once, but multiple times between 1985, when he was granted his security clearance, and 2004. Each time he used marijuana or cocaine, he knew he was breaking the law. I do not find his statement that he did not know he could not use illegal drugs while holding a security clearance credible. Common sense would tell him that illegal drug use would not be acceptable behavior while holding a security clearance. Applicant's decision to use marijuana and cocaine showed poor judgment and sets a poor example for the youth he is trying to help. His decision shows a disregard for the rules and laws of society and for holding a security clearance. Furthermore, given his long history of recreational marijuana use, I am not convinced he will not use it in the future. Applicant

has not mitigated the government's concerns about his security worthiness and trustworthiness.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his drug involvement and criminal conduct. He has mitigated the security concerns about his personal conduct.

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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.a (1)	For Applicant
Subparagraph 2.b:	For Applicant
Subparagraph 2.c:	For Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraph 3.a:	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.

MARY E. HENRY
Administrative Judge