



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-05477
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Rita C. O'Brien, Esquire, Department Counsel
For Applicant: Pro Se

March 27, 2008

Decision

LYNCH, Noreen, Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on May 7, 2007. On September 21, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H and E 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 acknowledged receipt of the SOR on October 3, 2007, and elected to have his decision on the record in lieu of a hearing. Department Counsel submitted the Government's written case on December 13, 2007. Applicant received a complete file of relevant material (FORM) on December 21, 2007, and was provided the opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's

case.¹ Applicant did not submit additional information. The case was assigned to me on March 13, 2008. Based upon a review of the case file, eligibility for access to classified information is denied.

Findings of Fact

In his Answer to the SOR, received October 15, 2007, Applicant admitted all the factual allegations in the SOR.² He did not provide additional information to support his request for eligibility for a security clearance.

Applicant is a 59-year-old employee of a defense contractor. He has worked for his current employer since October 1967.³ He is a widower and has three children.

Applicant admitted in his 2007 security clearance application to a charge of buying drugs in 1988. In fact, he was charged with attempt to possess cocaine (felony) in 1991. He was found guilty and he was put on probation. There are no other details in his SF 86 about his history of drug abuse.⁴

Applicant used crack cocaine from at least April 2004 until January 2005. He reports that the use was approximately 15 to 20 times. However, he does not recall the exact number of times nor the exact dates.⁵ During this time period, Applicant held a security clearance.

In January 2005, Applicant was working and had to provide a urine sample for a random drug test.⁶ Applicant was informed by his employer that his urine sample tested positive for cocaine. Applicant was placed on unpaid leave until he completed a drug rehabilitation class. He attended classes for 6-8 weeks. The Applicant attended three or four times a week according to his recollection. He returned to work in March or April 2005. He reports attending Narcotics Anonymous after that for three or four months. He did not continue.⁷ Applicant did not provide any documentary evidence to support his attendance at drug treatment.

Applicant purchased cocaine from a man on the streets. He paid cash for the cocaine but does not recall how much he actually bought. He reported using the drug on

¹Department Counsel submitted six items in support of her contentions.

²Item 3 (Answer, signed October 15, 2007).

³Item 4 (Security Clearance Application, dated May 7, 2007).

⁴*Id.*

⁵Item 4 at 25.

⁶Items 3, 5, and 6.

⁷Item 6 (Response to Interrogatories, dated August 7, 2007).

weekends. If he had extra money, he would purchase and use more cocaine. He enjoyed the way cocaine made him feel. He also thought it would help with the sense of loss after his wife died. Before failing the drug test, he had no problems at work. He denies selling drugs to anyone. He does not believe he was addicted to cocaine. He did not seek any counseling outside of the mandatory work program.⁸

Applicant regrets using crack cocaine and wasting his money.⁹ He also stated in his interview with the Department of Defense investigators in October 2006 that he does not intend to use any illegal drugs for the rest of his life.¹⁰

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.

⁸ *Id.*

⁹ Item 6

¹⁰ *Id.*

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

The security concern relating to the guideline 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 several conditions that could raise security concerns. Under AG & 25(a), Any drug abuse^o is potentially disqualifying. Applicant admitted using cocaine in 2004-2005. Similarly, AG ¶ 25(b), “testing positive for illegal drug use” is a disqualifying condition. Applicant tested positive for cocaine during a random test at work in January 2005. The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

Under AG ¶ 25(c) “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia” is also potentially disqualifying. In 2004-2005, Applicant purchased cocaine and possessed. He admitted that he did so on many occasions. He also had an earlier charge for attempt to possess cocaine in 1991. He was a mature adult at that time. Not only that, Applicant was working and held a security clearance when he was using cocaine. Thus, AG ¶ 25(g), “any illegal drug use after being granted a security clearance” is an applicable disqualifying condition in this case.

The guideline also includes examples of conditions that could mitigate security concerns arising from drug involvement. Under AG ¶ 26 (a), the disqualifying conditions

may be mitigated where the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment. Applicant's illegal use occurred numerous times and as recent as 2005. I do not find that this mitigating condition applies.

Under AG ¶ 26 (b), it may be mitigating where Aa 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. As noted above, Applicant provided no additional information in response to the FORM. He provided no documentary evidence concerning his rehabilitation program and treatment. Also, he has not had a sufficient period of abstinence for mitigation. In addition, his comments do not convince me of his future intentions not to use illegal drugs in light of his use of drugs while holding a security clearance.

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

(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 community standing.

Applicant's use of an illegal drug shows not only poor judgment, but a disregard of the law. In addition, using an illegal drug while holding a security clearance demonstrates a disregard for the trust that the Government placed in him when it granted him a security clearance. This could make him vulnerable when he has access to classified information. I have doubts about his reliability and judgment. I find his personal conduct creates a vulnerability and raises a security concern under the above disqualifying condition. After reviewing the mitigating conditions, I do not find that any apply.

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) 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has been employed for many years with his current employer and has held a security clearance. He has no documented problems at work prior to the drug test in 2005. However, he did not alert his employer about his drug problems. If he had not been tested, he may still be using an illegal drug. He used cocaine in 1991 and then resorted to it in 2004. Granted, he lost his wife, but that is no excuse for resort to an illegal drug. He bought cocaine many times. Applicant reports that he completed the mandatory drug program, but he has produced no documentation to support this claim. He did not provide any record of his treatment or prognosis. Nevertheless, I accept his statement about completing treatment and attending Narcotics Anonymous for 3-4 months as truthful and accurate. His drug use is recent. He was a mature adult at the time that he used cocaine. Applicant does not convince me that his poor judgment is not likely to recur. His poor judgment to revert to drugs in his 50's is troubling. Applicant has not met his burden of proof in this case.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility, judgment, and suitability for a security clearance. For all the reasons discussed above, I conclude Applicant has not mitigated the security concerns arising from his drug involvement and 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
Subparagraphs 1.a-1.d:	Against Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Noreen A. Lynch
Administrative Judge