



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)	
)	
-----)	ISCR Case No. 06-26515
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Jennifer Goldstein, Esquire, Department Counsel
For Applicant: David P. Price, Esquire

January 23, 2009

Decision

MOGUL, Martin H., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on February 23, 2006. On July 21, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J, 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 responded to the SOR (RSOR) in writing on August 7, 2008, and requested a hearing before an Administrative Judge. I received the case assignment on October 6, 2008. DOHA issued a Notice of Hearing on October 9, 2008, and I convened the hearing on November 6, 2008, in San Diego, California. The Government offered Exhibits 1 through 7, which were received without objection. Applicant testified on his own behalf and three other witnesses testified on behalf of Applicant. He submitted Exhibits A through E, which were admitted without objection. DOHA received the transcript of the hearing (Tr) on November 14, 2008. Based upon a review of the case

file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

At the beginning of the hearing, allegation 3.d. of the SOR was amended due to a typographical error. The first five words initially read, "I do know know why." It should read and has been amended to read, "I do not know why." The amendment was made without objection.

Findings of Fact

In his RSOR Applicant admitted SOR allegations 1.a., through 1.d., and 2.a. through 2.d., and he denied 3.a. through 3.d. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 51 years old. He served in the U.S. Air Force for four years, and he received an Honorable Discharge in 1981.

Applicant works for a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 (Guideline J - Criminal Conduct)

The Government alleges that Applicant has engaged in the following criminal acts:

1.a. On December 5, 1985, Applicant was arrested and charged with Hit and Run-Personal Injury, a felony. He was found guilty, and he was sentenced to three years confinement, which was suspended. He also was sentenced to three years probation, and he was fined a total of \$502. Applicant served 36 days in confinement.

Applicant testified that he was involved in an accident, but he exchanged information with the driver of the other car before he left the scene. Several days later, he was arrested for leaving the scene of an accident where there were injuries. He was in jail for 36 days, before he accepted a guilty plea. He contended that there was some confusion as to whether the crime was a felony or a misdemeanor, but he claimed that he was informed that it was actually a misdemeanor, although he was originally told it was a felony.

1.b. On September 7, 1997, Applicant was arrested and charged with being Under the Influence of a Controlled Substance. He pled guilty to the charge and was sentenced to pay a fine of \$100.

Applicant testified that this incident occurred when the police happened to be at his home, because he was filing a report, as he believed he had property that had been burglarized from his home, and the police arrested him for being under the influence of an illegal substance. He testified that he had consumed a bottle of soda that belonged to his girlfriend, and unbeknownst to him, it contained methamphetamine. He claimed that he pled guilty, even though he had not known that he had ingested an illegal substance.

1.c. On December 14, 2002, Applicant was arrested and charged with being Under the Influence of a Controlled Substance. Applicant plead no contest to this charge. He was sentenced to five years probation, fined \$435, and sentenced to serve 20 days of public service work. He also was required to attend and complete a drug treatment program. On April 10, 2003, his plea was set aside and the case was dismissed, after he completed the drug rehabilitation program.

Applicant testified that this incident did occur as he was offered crystal methedrine by an individual whom he knew, and because he was feeling under a lot of pressure, he used the methedrine (Tr at 132). As a result of this arrest he underwent treatment at a Veterans Administration (VA) hospital. The records from his treatment at the VA (Exhibit 6) and the statements attributed to him will be discussed below.

1.d. On March 28, 2004, Applicant was arrested and charged with Count (1) DUI Alcohol/Drugs with a Bodily Injury and Count (2) Under the Influence of a Controlled Substance.

Applicant testified that on that occasion he was pulled over by a law enforcement officer for having a brake light that was not working. The officer said he was under the influence. His car was towed, and he was given a blood test. Applicant claimed that when he appeared at the arraignment the case was dismissed.

Paragraph 2 (Guideline H - Drug Involvement)

The SOR lists four allegations regarding illegal drug involvement under Adjudicative Guideline H. All of the allegations will be discussed in the same order as they were listed in the SOR:

2.a. Applicant used marijuana from approximately 1970 through 1975 on three or four occasions.

2.b. Applicant used cocaine on one occasion during the time period of 1975 to 1977.

2.c. Applicant used methamphetamine. His testimony was that he only knowingly used it on one occasion in 2002, when it was offered to him, as discussed in 1.c., above.

The records from his treatment at the VA, prepared in 2003, directly contradict this assertion that he only used methamphetamine one time.

On page 112 of Exhibit 6 there is a diagnoses of Amphetamine Dependence. There is a notation under Medical "meth scars on arms & legs 'from picking. '" Under Personal Narrative it states:

Veteran states he's coming to ADTP at this time because his wife does not like him to use crystal meth. Veteran states he started using Methamphetamine in 1982 to help keep him awake or for his various jobs. He's had one 2 yr. period of not using since then & that was in 1997, stating he couldn't afford it then. States he would typically stay away from it for 3-4 mos at a time. Withing (*sic*) the last yr., he reports smoking 1/4 Gm. of Meth about once daily or day & ½. Last smoked 12/14/02.

Under Comments on page 124 It states, "[Veteran] states he's here because he's been using crystal Meth x 21 yrs., recently smoking it, states it's 'faster.'"

Applicant is quoted on page 131 as stating, "I'm a functioning addict. I can quit, but I just can't stay quit . . . My problems will begin [again] with Meth in about 6 months."

Finally, on page 132 he states, "It's easy to quit, hard to stay quit. The problem is that I like it too much."

There are other examples of very specific statements attributed to Applicant about his Methamphetamine usage. During his testimony, he contended that the technicians at the VA were simply making up false allegations or else making errors. He claimed that they applied so much pressure on him that he just agreed with whatever they told him, even if he knew it was not true.

Because of the specificity in the VA records and the numerous quotes attributed to Applicant about his long and frequent methamphetamine usage, the lack of any perceived reason for the VA to furnish incorrect and untruthful information, and other examples of Applicant's less than complete candor, as will be discussed below, I find that the VA's version of Applicant's drug usage history, that he used methamphetamine regularly over many years, is far more credible than Applicant's testimony that he only knowingly used Methamphetamine on one occasion.

2.d. On February 21, 2003, Applicant was diagnosed as being Amphetamine dependent by a health provide with the Department for Veterans Affairs. This was stated in Exhibit 6.

Paragraph 3 (Guideline E - Personal Conduct)

The SOR lists four allegations regarding Personal Conduct concerns under Adjudicative Guideline E. All of the allegations will be discussed in the same order as they were listed in the SOR:

3.a. Applicant executed a SCA on February 23, 2006 (Exhibit 1). Question #24 a. of the SCA asked if, in the previous seven years, Applicant had illegally used any controlled substance? Applicant answered "Yes" to this question, and he disclosed that he used "methadrine" on one occasion on December 2002.

Based on the VA records, Applicant was long time user of methamphetamine, and he should have listed his many years of methamphetamine usage, as discussed above in paragraph 2.c.

3.b. Applicant responded to DOHA interrogatories on February 1, 2007 (Exhibit 2) and March 27, 2007 (Exhibit 3). He disclosed that he used methamphetamine on one occasion in 2003 . Again, he should have listed all of his methamphetamine usage, as discussed above.

3.c. Question #23 a. of the February 23, 2006 SCA asked if Applicant had ever been charged with or convicted of any felony offense? He answered "No" to this question. He should have revealed his 1985 arrest and conviction for Hit and Run-Personal Injury, a felony , as discussed in 1.a., above.

Applicant testified that he did not believe that he had to disclose this arrest because it occurred more than 10 years before his completion of the SCA (Tr at 122). However, the question did not limit the answer to 10 years, but asked whether he had ever been charged with a felony offense. Clearly he should have included this 1985 offense. He also claimed that he was not sure if it was resolved as a felony. However, he was informed initially that he was being arrested and charged with a felony, so there was no legitimate reason for not listing this offense in response to question #23 a.

3.d. Question #23 d. of the February 23, 2006 SCA asked if Applicant had ever been charged with or convicted of any offense(s) related to alcohol or drugs? He answered "Yes" to this question, but he failed to reveal his 1997 arrest and conviction for being Under the Influence of a Controlled Substance and his 2004 arrest for DUI Alcohol/Drugs with Bodily Injury, as discussed in 1.b. and 1.d., above.

Applicant testified that he was informed by the judge that his 1997 drug conviction was "no worse than a traffic ticket" so he did not believe that he had to disclose this conviction (Tr at 130). The question requested information as to being charged or convicted of any offense related to drugs, and he should have included this 1997 drug conviction. He also should have informed the Government about his 2004 arrest DUI Alcohol/Drugs with Bodily Injury.

Mitigation

Three witnesses testified on his behalf. Two of them had previously worked with Applicant, and one was the wife of one of the other witnesses. They also spoke in extremely positive terms about Applicant.

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 J - Criminal Conduct

The Government has established by substantial evidence that Applicant engaged in criminal conduct, as he was arrested for, and convicted of criminal offenses including: Hit and Run-Personal Injury, a felony, and more than one count of being Under the Influence of a Controlled Substance. Also, while it was not alleged, Applicant’s failure to furnish truthful information to the Government on his SCA and interrogatories and his continued use of methamphetamine also is criminal conduct.

In reviewing the Disqualifying Conditions (DC) under Guideline J, DC 31. (a), a single serious crime or multiple lesser offenses, applies in this case. Under Mitigation Conditions (MC), I can not find that any MC applies to this Applicant, as there is no evidence of successful rehabilitation, because there is a significant pattern of criminal conduct, and Applicant has not been truthful about all of his criminal conduct or shown sufficient remorse. Applicant has not mitigated this allegation. Paragraph 1 is found against Applicant.

Guideline H - Drug Involvement

With respect to Guideline H, the Government has established its case. Applicant's improper and illegal drug abuse, especially the possession and use of methamphetamine over many years, is of concern, especially in light of his desire to have access to the nation's secrets. Applicant's overall conduct pertaining to his illegal substance abuse clearly falls within Drug Involvement Disqualifying Condition (DC) 25. (a) (any drug abuse), (c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution), and (e) evaluation of drug abuse or dependence by licensed social worker, in this case a diagnoses of Amphetamine Dependence.

Based on the Applicant’s long and extensive use of methamphetamine and his failure to be truthful about his usage, I do not find that any MC applies to this guideline.

In this case, the Government has met its initial burden of proving by substantial evidence that Applicant has used illegal drugs for many years under Guideline H. Applicant, on the other hand, has failed to introduce any persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's case against him. Accordingly, Paragraph 2 Guideline H of the SOR is concluded against Applicant.

Guideline E - Personal Conduct

With respect to Guideline E, the evidence establishes that Applicant furnished incorrect, untruthful information to the Government in both a SCA, that he executed on February 23, 2006 (Exhibit 1), and in interrogatories that he responded to on February 1, 2007 (Exhibit 2) and March 27, 2007 (Exhibit 3).

The Government relies heavily on the honesty and integrity of individuals seeking access to our nation's secrets. When such an individual intentionally falsifies material facts or fails to furnish relevant information to a Government investigator, it is extremely difficult to conclude that he nevertheless possesses the judgment, and honesty necessary for an individual given a clearance. In this case, I conclude that Applicant knowingly and willingly failed to give complete, honest answers regarding his drug usage and his criminal conduct to the Government.

In reviewing the DCs under Guideline E, I conclude that DC 16. (a) applies because of Applicant's deliberate omission, concealment, and falsification of relevant facts from a personnel security questionnaire and interrogatories, which were used to determine security clearance eligibility. I can not find that any MC applies in this paragraph.

Applicant's conduct, considered as a whole, exhibits questionable judgement, unreliability, and a lack of candor. I resolve Paragraph 3, Guideline E, against Applicant.

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

I have considered the potentially disqualifying and mitigating conditions under Guidelines J, H and E, in light of all the facts and circumstances surrounding this case, and based on all of the reasons cited above, including Applicant's criminal conduct, drug usage, and lack of honesty, I find that the record evidence leaves me with considerable questions and doubts as to Applicant's eligibility and suitability for a security clearance under the whole person concept. For all these reasons, I conclude Applicant has failed to mitigate the 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 J: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant
Subparagraph 1.b: Against Applicant
Subparagraph 1.c: Against Applicant
Subparagraph 1.d: Against Applicant

Paragraph 2, Guideline H:AGAINST APPLICANT

Subparagraph 2.a: Against Applicant
Subparagraph 2.b: Against Applicant
Subparagraph 2.c: Against Applicant
Subparagraph 2.d: Against Applicant

Paragraph 3, Guideline E:AGAINST APPLICANT

Subparagraph 3.a: Against Applicant
Subparagraph 3.b: Against Applicant
Subparagraph 3.c: Against Applicant
Subparagraph 3.d: 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.

Martin H. Mogul
Administrative Judge