



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



In the matter of:)
)
) ISCR Case No. 07-00062
)
)
Applicant for Security Clearance)

Appearances

For Government: Braden Murphy, Esquire, Department Counsel
For Applicant: *Pro Se*

September 19, 2008

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the government’s security concerns under Guideline J, Criminal Conduct, Guideline H, Drug Involvement, and Guideline E, Personal Conduct. Applicant’s eligibility for a security clearance is denied.

On June 19, 2008, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing the security concerns under Guidelines J, Criminal Conduct, H, Drug Involvement, and E, Personal Conduct. 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 9, 2008, and requested a hearing before an Administrative Judge. The case was assigned to me on August 8, 2008. DOHA issued a notice of hearing on August 19, 2008, and I convened the hearing as

scheduled on September 11, 2008. The government offered Exhibits (GE) 1 through 6, which were admitted without objection. Applicant testified and submitted Exhibits (AE) A through H, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on September 17, 2008.

Findings of Fact

Applicant's admitted the allegations in SOR 1.a, 1.b, 1.c, 1.d, 1.e, and 1.g, and denied all of the remaining allegations. His admissions, denials and explanations are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 48-year-old instrumentation technician for a defense contractor. He has worked for the defense contractor for almost 26 years and held a secret clearance for approximately 25 years. He is a high school graduate and served in the Army for four years before being honorably discharged. He is twice married and has been married to his second wife for 18 years and has two sons, 17 and 16 years old.

Applicant admitted in 1987 he was arrested and charged with misdemeanor assault on his first wife. He was arrested and charged again in October 1988 for misdemeanor assault, again on his first wife. He pled guilty and was convicted of both of the offenses. At his hearing he denies he did anything.¹

Applicant was arrested in January 1990 and charged with felony possession of marijuana with intent to distribute. He was found guilty of misdemeanor possession of marijuana and received a fine. Applicant stated he was sitting in a car with his friends and there was marijuana in the car. The police charged everyone in the car. Applicant admitted he was in the car, but stated the drugs did not belong to him. He admitted he was handcuffed and spent the night in jail. He was represented by an attorney and both the court and his attorney explained to him that he was being charged with a felony and that he could potentially receive up to a year in jail if found guilty of a felony. Applicant did not list this felony arrest on his security clearance application (SCA).²

Applicant was arrested in October 1994 and charged with misdemeanor possession of marijuana and trespassing. He was found guilty of both charges and fined. Applicant admitted he was convicted of these offenses. He also discussed the facts with the investigator when he was interviewed for his background investigation for his security clearance. Applicant stated he was wearing a jacket, he gave it to his girlfriend and then his girlfriend gave it back to him and it had marijuana in the pocket. He had an altercation with the security guards at an apartment complex. He stated the security guards beat him up for no reason. The police were called and Applicant was arrested and they found the marijuana in his pocket. He admitted he went to court and was advised of what he was being charged with and had a lawyer who explained the

¹ Tr. 35-37.

² Tr. 38-43.

charges to him. He was found guilty of possession of marijuana and trespassing. He received a suspended sentence. He failed to list this drug charge on his SCA.³

Applicant was arrested and charged with Driving Under the Influence of Alcohol (DUI) in August 1998. Although Applicant listed his DUI on his security clearance application as occurring in 1996, it was determined that he was only arrested and charged with DUI on one occasion and it was in 1998. He admitted he was pulled over by the police during a workers' strike against his employer. He was letting a passenger out of the car and apparently made an illegal stop on a highway. He took a breathalyzer and recorded a .10%. Applicant believed he was targeted by the police because he was a striker, but does not deny he was drinking, driving and recorded a blood alcohol over the legal limit. He was found guilty of DUI, fined and was required to attend an Alcohol Safety Program once a week for six months.⁴

Applicant admitted he was arrested around September 2000 and charged with felony possession of a controlled substance, crack cocaine. He was represented by an attorney and was found guilty of the offense at trial. He was sentenced to five years of confinement, which was suspended, and placed on one year of supervised probation and subject to random drug testing. This offense occurred after Applicant's DUI conviction. Applicant pled not guilty to the offense and was found guilty at trial.⁵

Applicant completed his SCA in March 2006. He does not remember ever providing any other SCA except his original in 1982. He understood the importance of accurately completing the SCA to both the government and himself. He also understood the importance of a government security clearance and that he was required to tell the truth and provide completely truthful answers. It took Applicant several days to complete the SCA. He filled it out at home and his answers were then transferred electronically by a company official. He reviewed the final document before signing it. At his hearing he said he skipped around reading it, but understood he was swearing to its truthfulness and answered under criminal penalty.⁶

On his SCA Applicant admitted he was convicted of a drug felony and a DUI. He failed to report he had been arrested and charged with felony possession of marijuana. He was later convicted of misdemeanor possession of marijuana. He failed to list he was convicted of a second possession of marijuana. Applicant's explanation for failing

³ Tr. 43-47.

⁴ Tr. 47-55. It appears that the offenses alleged in SOR 1.e and 1.f are the same offense. The only evidence of two offenses was provided by Applicant and it is clear that he confused the dates and there is only one DUI offense.

⁵ Tr. 56-70. It appears that the offenses alleged in 1.g and 1.h are the same offense. The only evidence of two offenses was provided by Applicant and it is clear that he confused the dates and there is only one felony offense for crack cocaine possession.

⁶ Tr. 73-83.

to list his other drug offenses was because he believed he only had to go back seven years.⁷

Applicant testified he has held a secret security clearance for 25 years. He was asked if he ever advised his employer that he had been arrested and convicted of a felony for possessing crack cocaine. He admitted he never told his employer of his conviction. He stated he did tell his employer about his first misdemeanor conviction of possession of marijuana, but did not report the second arrest and conviction of marijuana possession. He stated he did tell his employer about his DUI arrest and conviction. He admitted he did not report his criminal conduct because he was embarrassed.⁸

Applicant's testimony and explanation for why he failed to provide accurate answers in his SCA was not credible. I find he intentionally and deliberately failed to divulge important and complete information about his past criminal conduct. Although I have not considered for disqualifying purposes his omissions and failures to report his criminal conduct to his employer while holding a secret security clearance, I have considered it when evaluating his honesty and veracity as a whole. It is clear that at the time of his offenses, Applicant did not want his employer to know about them because he understood that it could affect his job and security clearance.⁹

Applicant testified that he has never used marijuana or cocaine. He stated he no longer associates with those who use drugs. Applicant testified that he believes he is a hard worker, good family man, football coach and good with the military. He believes his character is "great." He testified that every time something happened with the police "it was always me." He denied he was responsible for the offenses he was convicted of. He stated he appealed every conviction, but did not win any of them.¹⁰

Applicant provided character letters from friends and coworkers. Some of the comments are provided. He is considered a good and trusted friend. He displayed a high degree of integrity, responsibility, and ambition. He is considered a leader with an excellent work ethic. He is dependable and willing to assist others. He does quality work and is a committed team member who willingly takes on responsibility. He is considered a loving and supportive father. Applicant is a long time coach for youth football and is a positive role model. He is considered a good person.¹¹ No information was provided as to whether any of these people knew of Applicant's criminal convictions.

⁷ *Id.*

⁸ Tr. 83-88, 93.

⁹ *Id.*

¹⁰ Tr. 92.

¹¹ AE A, B, C, D, E, F, G, and H.

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

I have considered the disqualifying conditions under Drug Involvement AG ¶ 25 (c) (“illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia”). I conclude the above disqualifying condition applies. Appellant has one felony conviction for possession of crack cocaine and two misdemeanor convictions for possession of marijuana. Although he testified he has never used marijuana or cocaine, he clearly associated with those that did, which created a heightened risk of vulnerability.

I have considered all of the mitigating conditions under Drug Involvement AG ¶ 26 (a) (“the behavior happened so long ago, was so infrequent or happened under circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment”) and (b) (“a demonstrated intent not to abuse any drugs in the future, such as: (a) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs are used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation”). Applicant's was convicted of a felony for drug possession in 2000. He has other drug convictions that reflect a pattern of being associated with drug users. He states he has never used marijuana or cocaine, but clearly he placed himself in situations that created risks. He stated he no longer associates with drug abusers. Although Applicant's credibility was very questionable throughout his hearing, the facts support that he has not had any additional drug offenses since 2000. I find an eight year period supports he has discontinued his relationships with drug users. Therefore, I find (a) and (b) apply.

Criminal Conduct

AG¶ 30 expresses the security concern pertaining to criminal conduct: “Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.”

I have considered the disqualifying conditions under Criminal Conduct AG ¶ 31 (a) (“a single serious crime or multiple lesser offenses”) and (“allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted”). I find both disqualifying conditions apply. Appellant was arrested, charged, and convicted of misdemeanors and felonies for assaults, possession of marijuana with intent to distribute, possession of crack cocaine, trespassing, and DUI.

I have also considered all of the mitigating conditions for Criminal Conduct under AG ¶ 32 (a) (“so much time has elapsed since the criminal behavior happened, or it happened under unusual circumstances that is it unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness or good judgment”); (b) (“the person was pressured or coerced into committing the act and those pressures are no longer present in the person’s life”); (c) (“evidence that the person did not commit the offense”); (d) (“there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement”). Appellant was on probation for five years after his felony conviction for possession of crack cocaine. He denied he was responsible for all of the drug offenses and portrayed himself as the victim of circumstances or he was being targeted. He contested the charges against him and was found guilty. He appealed all of his convictions, but did not win on appeal. He failed to tell his employer about some of his more serious offenses, which occurred while he was holding a security clearance. Although it has been three years since he completed his probation, it does not appear he has come to grips with his criminal past. He is not remorseful, but wants to place blame elsewhere. He admitted he was drinking and driving and had a blood alcohol content over the legal limit, but thinks the police were out to get him. Appellant has a long history of violating the law and although it appears he has not been arrested in the past few years, I do not find he has presented sufficient evidence to mitigate the criminal conduct security concerns that were raised.

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. I have specifically considered (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 only divulged his DUI and

his felony conviction for possession of crack cocaine on his SCA. He did not disclose his prior felony arrest for possession of marijuana with intent to distribute or his misdemeanor arrest and conviction of possession of marijuana. Appellant was well aware of his past arrest record. He testified he had pled not guilty to the charges and was found guilty. He did not divulge his felony conviction for possession of crack cocaine to his employer. He did divulge it on his SCA because it was obvious he could no longer hide it. His concealment of his crack cocaine possession goes to his credibility about why he did not divulge his other offenses. I find Applicant was not believable and intentionally and deliberately omitted his past drug offenses.

I have considered all of the mitigating conditions for personal conduct under AG ¶17 and specifically considered (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”); and (e) (“the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.”) Applicant did not make an effort to promptly notify officials that he failed to divulge all of his past drug offenses. I find (a) does not apply. Applicant’s offenses are serious, both the drug offenses and his failure to provide honest, complete and accurate information on his SCA. Because he demonstrated a willingness to hide his criminal drug offenses from his employer, while he held a security clearance, I can not find that his conduct is unlikely to recur. It casts serious doubts on his trustworthiness and good judgment. Applicant has not taken responsibility for his omissions or his past drug and criminal conduct, all of which reflect negatively on his personal conduct and causes security concerns.

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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has a history of criminal arrests, charges, and convictions for assaults, trespassing and drug possessions, both

felony and misdemeanor. He failed to divulge all of his past drug offenses on his SCA. He seems to have moved away from associating with drug abusers, but does not take responsibility for his involvement in violating the law. I have serious concerns about his honesty, reliability, trustworthiness, and good judgment. Overall, the record evidence leaves me without questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant successfully mitigated the security concerns under Guideline H, Drug Involvement, but he failed to mitigate the security concerns arising from Guidelines E, Personal Conduct and J, Criminal 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 J:	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:	For Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	Against Applicant
Paragraph, Guideline H:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a (1):	Against Applicant
Subparagraph 3.a (2):	For Applicant
Subparagraph 3.b (1):	Against Applicant
Subparagraph 3.b (2):	For 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.

Carol G. Ricciardello
Administrative Judge