



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 06-22451
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel

For Applicant: *Pro se*

December 19, 2008

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Security Clearance Application (eQIP), on December 2, 2005 (Government Exhibit 1). On March 28, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline E concerning the 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 President Bush on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant submitted an Answer to the SOR on April 17, 2008, and requested a hearing before an Administrative Judge. I received the case assignment on July 9, 2008. DOHA issued a notice of hearing on July 9, 2008, and I convened the hearing as scheduled on July 23, 2008. The Government offered Government Exhibits 1 through 6, which were received without objection. Applicant testified on his own behalf and

submitted Applicant's Exhibits A and B, without objection. DOHA received the transcript of the hearing on July 30, 2008. The record closed on August 8, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

The Applicant is 46 and married. He is employed by a defense contractor and seeks to obtain a security clearance in connection with his employment.

Guideline E - Personal Conduct

The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has made false statements during the clearance screening process. The Applicant denied the allegations in the SOR.

The Applicant was a member of the United States Armed Forces for eight years, until 1992. In 1992 he was tried by a General Court-Martial for various drug offenses. The specifications included one count of Use of Methamphetamine, one count of the Use of Hashish, and two counts of the Use of Marijuana, all under Article 112a of the Uniform Code of Military Justice. The Applicant plead guilty to all four charges, and received a sentence that included prison time and a Bad Conduct Discharge. The Applicant's wife was also implicated in his misconduct. (Government Exhibits 5 and 6; Applicant's Exhibit B.)

With regards to his court-martial, the Applicant has consistently maintained that he did not use methamphetamine and hashish as alleged. Rather, he states that he received poor legal advice, and that in the military being in the presence of illegal substances is the same as using it. He furthermore states that a military investigation report, which has other service members implicating him in the use of methamphetamine and hashish, is not correct. He testified, "I still stand by what I said. No, I did not use it and have not used it. However, I am guilty by association. So, you know, that makes me guilty. I have no problems with being guilty by that association, but I am not guilty by use." (Transcript at 39-40.)

In 1999, the Applicant and his wife were charged with Possession of Marijuana and/or Disturbing the Peace. According to the Applicant's account, he and his wife were walking on a beach when they spotted a bag which had marijuana inside it. His wife picked up the bag and they continued to walk. A policeman approached, asked them if they picked up anything, they admitted having the bag, and they were cited. At court, the Applicant plead guilty to Disturbing the Peace, and was sentenced to a fine and one year's probation. The actual citation was not entered into evidence, nor is there any other evidence stating what offense the Applicant was charged with. (Government Exhibit 3; Transcript at 32-36.)

The Applicant signed an eQIP (Government Exhibit 1) on December 2, 2005. He testified that he failed to proof read this copy of the questionnaire before signing it. He further stated that the failure is solely his responsibility, and not his company's. (Transcript at 30-32, 35-38.)

That questionnaire asks the following as question 19, "Have you ever received other than an honorable discharge from the military?" The Applicant answered, "Yes," and admitted he had received a Bad Conduct Discharge in 1993 (actually 1992). He did not set forth the charges for which he was court-martialed.

1.a. The questionnaire asks the following as question 23.d., "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?" The Applicant answered, "Yes," and related a 2002 Driving Under the Influence arrest. He did not discuss his 1992 Court-Martial or the 1999 citation. This answer was, therefore, incomplete.

The Applicant testified at great length, and under cross-examination, about how he completed the questionnaire concerning this question. He stated that he had prepared a hand written record for his company and that in that record he had completely set forth the Court-Martial and the 1999 citation. (Transcript at 30-31, 35-36.) In addition, because he had previously admitted the Court-Martial on the same questionnaire, there is some question of intent, which will be discussed below.

1.b. Question 24.b. of the questionnaire asks, "Have you ever illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official; while possessing a security clearance; or while in a position directly and immediately affecting the public safety?" (Emphasis in original.) The Applicant answered, "Yes," and stated that he had used marijuana a couple of times from 1989 to 1990.

The Government alleges that the Applicant actually used marijuana until 1993 while holding a security clearance and, therefore, his statement was false. The support for this is an unsworn declaration of an interview of the Applicant taken on June 21, 2006. That declaration states, "Subject [the Applicant] has not used marijuana in the last ten years however, he admitted to using marijuana on seven or eight occasions prior to 1993." (Government Exhibit 3 at 8.)

The Applicant testified concerning this point, "I thought that showing my Court Martial would have been entered - - so, there was no reason for me to say it there. It was specifically under Air Force. And I did check it that yes, I did use it while I had a Security Clearance before." (Transcript at 38.)

The Applicant's answers are not inherently contradictory, or at odds with the facts. While the Applicant was actually discharged from the military in 1993, he had been in confinement or preparing for a court-martial since 1991. He therefore did not have a security clearance during that time.

1.c. The Applicant made another unsworn declaration to a Department of Defense investigator on June 7, 2007. The investigator reported:

Subject answered the question of why he did not disclose his use of hashish and methamphetamine (possible cocaine) in the SI [subject interview] dated 6/21/06. Subject does not recall the answers in the 6/21/06 paperwork but he would not disclose this because he has not used methamphetamine, cocaine or hashish. Subject had been in the presence of others who were using, but the [Applicant] has not used those drugs and the only drug he has used is marijuana. The military code of justice considers being in the presence of and failing to report, the same as use of the drug. (Government Exhibit 3 at 5.)

The Government alleges that this statement is false. This is based on the Applicant's conviction after a guilty plea of the use of methamphetamine, his own statement to military investigators, and the statements of other service members that he did use the drugs. Contradicting this is the Applicant's consistent, and adamant, statements that he did not use methamphetamine. He freely admits his use of marijuana. (See Applicant's Answer; Transcript at 27-30, 39-40.)

Mitigation

The Applicant submitted documentary evidence showing that he is a highly respected employee. His supervisor states, "[The Applicant] has performed admirably since he began employment . . . and continues to do so." (Applicant's Exhibit A.)

Policies

Security clearance decisions are not made in a vacuum. 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. In addition, the Administrative Judge may also rely on his own common sense, as well as his knowledge of the law, human nature, and the ways of the world, in making a reasoned 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. Security clearance decisions include, by necessity, consideration of the possible risk that 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.

Finally, as emphasized by President Eisenhower in Section 7 of Executive Order 10865, “Any determination under this order . . . shall be a determination 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 E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 16(a), the “deliberate omission, concealment, or falsification of relevant facts from

any personnel security questionnaire,” is potentially disqualifying. Similarly under AG ¶ 16(b), “deliberately providing false or misleading information concerning relevant facts to an . . . investigator” may also raise security concerns. Based on the facts of this case, I find that these Disqualifying Conditions do not apply for the following reasons.

The Applicant put the Government on notice in Government Exhibit 1 that he had been Court-Martialed and received a Bad Conduct Discharge as a result of that Court-Martial. In addition, he put the Government on notice that he had been involved with illegal drugs during his time in the Air Force. He plead guilty to using methamphetamine, but has consistently denied its use since that time.

I have considered the Applicant’s explanations for why his questionnaire does not contain information on the 1999 marijuana incident and find them to be plausible. In particular, without documentary evidence, I cannot find to a reasonable degree of certainty that the Applicant was charged with Possession of Marijuana as opposed to Disturbing the Peace.

Finally, the Applicant has consistently stated that he did not use methamphetamine, but that the military puts use in the same category as being present where the drug is used. The Applicant’s understanding may, or may not, be legally correct. What is important, however, is that he believes it to be the case. Once again, I cannot find with a reasonable degree of certainty that he lied to a Department of Defense investigator in 2007.

The Applicant attempted to put the Government on notice about his years old drug history. In doing so, some of his answers were incomplete, and others were wrong. Certainly, he could have done a better job proof reading his questionnaire. However, looked at in a manner most favorable to the Government, all of these acts, or failures to act, merely show that the Applicant is human and can make mistakes, not that he intended to falsify statements to the Government. Since I find that the Applicant did not intentionally falsify his questionnaire or statement to a Department of Defense investigator, none of the Mitigating Conditions are applicable. Paragraph 1 is found for the 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. The Applicant is a hard-working, respected, professional person who has overcome his earlier drug use. In viewing all the facts of this case, I find that the Applicant has mitigated any security significance of his prior conduct. As set forth at length above, I find that the Applicant did not intend to deceive the Government (AG ¶2(a)(1) and (2)). In addition, I find that there is little to no potential for pressure, coercion, exploitation, or duress (AG ¶2(a)(8)), and that the likelihood of recurrence is close to nil (AG ¶2(a)(9)).

Overall, the record evidence leaves me without questions and/or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude the Applicant has mitigated the security concerns arising from his alleged personal conduct.

On balance, it is concluded that the Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

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 E:	FOR THE APPLICANT
Subparagraph 1.a:	For the Applicant
Subparagraph 1.b:	For the Applicant
Subparagraph 1.c.:	For the Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

WILFORD H. ROSS
Administrative Judge