



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 06-23323
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Paul M. DeLaney, Department Counsel
For Applicant: *Pro Se*

September 18, 2008

Decision

TESTAN, Joseph, Administrative Judge:

On March 24, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to applicant detailing the security concerns under Guidelines J, H and E. 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 April 8, 2008, and requested an Administrative Determination by an Administrative Judge (AJ). Department Counsel issued a File of Relevant Material (FORM) on May 9, 2008. Applicant filed a response to the FORM on June 23, 2008. The case was assigned to me on July 2, 2008. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

Findings of Fact

Applicant is a 32 year old employee of a defense contractor.

In 1997, applicant was cited for a noise violation. He was found guilty and fined \$60.00. In his response to the SOR, applicant stated he was the social chair of a fraternity, and "part of the duties of the acting social chair were to accept the charges for any noise violation at a fraternity held function and [he] did so without question."

In 1998, applicant was arrested and charged with Assault and Battery. He was convicted of the charge, fined, placed on probation, and ordered to pay his victim's medical expenses. In his response to the SOR, applicant stated this incident was the result of him going to the aid of one of his fraternity brothers when he saw him "on the ground on his back being beaten up by three unnamed men."

In November 1998, applicant received non-judicial punishment under Article 15 of the UCMJ for assault on a superior officer. As a result, he was reduced in rank. In his response to the SOR, applicant stated this charge was the result of him accidentally splashing hot coffee on the chest and face of his superior.

In November 1998, applicant was arrested and charged with Breaking and Entering with the Intent to Commit Assault and Battery. The Court placed him in a diversion program and ordered him to serve 100 hours of community service. After applicant completed the community service, the charge was dismissed. In his response to the SOR, applicant admitted that he participated in a brawl with 16-20 fraternity brothers and their associates, but believes he was "singled out" because he looked like one of the other brawlers.

In October 1999, applicant was charged with Assault and Battery on his former girlfriend. He was found not guilty of the charge.

In November 2000, applicant was arrested and charged with Shooting or Throwing Missiles at Occupied Vehicles, a felony. He pleaded guilty to the misdemeanor charge of Property Damage and was fined \$500.00. In his response to the SOR, applicant stated this incident started with him throwing an empty soda can out of his car and ended with him colliding with a van. According to the driver of the van, the soda can hit the van, causing him to lose control and collide with applicant's vehicle. Applicant has a different theory. He believes that the driver of the van became enraged after being hit by the soda can and then sped up and rammed applicant's vehicle.

In November 2002, applicant was arrested for Driving While Intoxicated. He was found guilty of the charge.

Applicant used illegal steroids in 1997 and 1998, cocaine once in either 2001 or 2002 and twice in 2004, and marijuana approximately ten times in 1999 and at least seven times between 2003-2006.

Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) on September 27, 2006. In response to Question 24, applicant indicated his

illegal drug use had consisted of using marijuana ten times in 1999. This response was false because, as noted above, he had used marijuana between 2003 and 2006.¹ Applicant denies that he tried to mislead the DoD with his answer. In Exhibit 5, he stated his omission was due to an “unintentional oversight.” In his response to the SOR, he appeared to be stating that his mistake was due to him simply copying the information he provided on his 2000 e-QIP onto his 2006 e-QIP without updating it. He stated the following:

In my effort to fill out the appropriate form in a timely manner I had pulled my previous file from my first application, SF86, for Security Clearance. This form did not have the new data on it as it was filled out in 2000. Once I realized my omission and mistake I immediately contacted my security officer at the time who instructed me to simply make the statements during my personal interview with my OPM Security Officer. I did so, initiating the dialogue proactively making all forthright statements about my previous drug use during that face to face interview.

When the information on applicant’s 2000 e-QIP is compared to the information on his 2006 e-QIP, this explanation is not credible. In response to a question about drug use on his 2000 e-QIP, applicant stated he used marijuana 10 times from 1/1999 to 3/1999. When he responded to the drug use question on his 2006 e-QIP, he stated he used marijuana 10 times from 2/1999 to 5/1999. In addition, he provided an explanation about his marijuana use with his 2006 answer, something he did not do with his 2000 answer. The difference in dates and the added explanation belie applicant’s explanation that he simply copied the information from one e-QIP onto the other e-QIP. He clearly read the question and provided fresh information. Based on the foregoing, I find that applicant intentionally provided the false information. I further find his uncorroborated statements (1) that he talked with his security officer about his “omission and mistake” and was told to “simply make the statements during [his] personal interview with [the] OPM Security Officer” and (2) implying that he voluntarily disclosed his 2001-2003 marijuana use to the OPM investigator before being questioned about it, to be incredible.

Policies

The President has “the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position that will give that person access to such information.” (*Department of the Navy v. Egan*, 484 U.S. 518,527 (1988).) In Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch. The President authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” (Exec. Ord. 10865, Section 2.)

¹The SOR alleges applicant falsified material facts on a 2000 e-QIP when he failed to disclose his cocaine use. However, as Department Counsel concedes in the FORM, there is no evidence that applicant used cocaine prior to 2001. This allegation is therefore found for applicant.

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline.

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. (Directive, Paragraph E3.1.14.) Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. (Directive, Paragraph E3. 1.15.) An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” (ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).) “Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.” (Directive, Paragraph E2.2.2.)

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. (Exec. Ord. 10865, Section 7.) It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

Analysis

Guideline J, Criminal Conduct

The security concern for criminal conduct is set forth in Paragraph 30 of the AG, and is as follows:

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.

Paragraph 31 describes conditions that could raise a security concern and may be disqualifying: Under Paragraph 31.a., “a single serious crime or multiple lesser offenses” may be disqualifying. And, under Paragraph 31.c., an “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted,” may be disqualifying. Applicant’s multiple convictions and his intentional misrepresentation of material facts on the 2006 e-QIP (a felony under 18 U.S.C. 1001) raise these two disqualifying conditions.

Paragraph 32 of the AG sets forth conditions that could mitigate security concerns. I have considered each of them and conclude none apply.

Guideline H: Drug Involvement

The security concern for drug involvement is set forth in Paragraph 24 of the AG, and is as follows:

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.

Paragraph 25 describes conditions that could raise a security concern and may be disqualifying. Under Paragraph 25.a., "any drug abuse" may be disqualifying. This disqualifying condition is applicable.

Paragraph 26 of the AG sets forth conditions that could mitigate security concerns. Under Paragraph 26.a., it may be mitigating if "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." Under Paragraph 26.b., it may be mitigating if there is "a demonstrated intent not to abuse any drugs in the future," such as "disassociation from drug-using associates and contacts," and "an appropriate period of abstinence." Applicant used last used an illegal drug, marijuana, in 2006. According to applicant, he had stopped using marijuana in 1999, only to resume his use of it in 2003, long after he graduated from college, and after he had applied for a security clearance. The evidence does not support a finding that he is unlikely to use it again. I conclude that neither of these mitigating conditions is applicable.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set forth in Paragraph 15 of the AG, and is as follows:

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.

Paragraph 16 describes conditions that could raise a security concern and may be disqualifying. Under Paragraph 16.a., the "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," may be disqualifying. This disqualifying condition is applicable because applicant intentionally provided false material information on the e-QIP.

Paragraph 17 sets forth conditions that could mitigate security concerns. I considered each of them and conclude none apply.

“Whole Person” Analysis

Under the whole person concept, the AJ must evaluate an applicant’s security eligibility by considering the totality of the applicant’s conduct and all the circumstances. An AJ should consider the nine adjudicative process factors listed at AG Paragraph 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 Paragraph 2c, the ultimate determination of whether to grant 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 is a mature man with a history of numerous arrests and convictions, illegal drug use, and dishonesty. Although he appears to have started to straighten out his life, the various statements and explanations he provided for most his criminal conduct, statements and explanations that consistently and incredibly downplay his culpability and attempt to make him look like an innocent victim of circumstances, together with his relatively recent intentional falsification of material facts about his drug use on the e-QIP, and his relatively recent illegal drug use, indicate that he still has some work to do before he can be deemed sufficiently reliable and trustworthy to hold a security clearance. Applicant failed to mitigate the security concerns arising from Guidelines J, H and E.

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

Paragraph 2, Guideline H: AGAINST APPLICANT

Paragraph 3, Guideline E: 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.

JOSEPH TESTAN
Administrative Judge