



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



In the matter of:)	
)	
)	ISCR Case No. 12-04565
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

07/09/2013

Decision

LYNCH, Noreen A., Administrative Judge:

On March 25, 2013, the Department of Defense (DOD) issued a Statement of Reasons (SOR) listing security concerns arising under Guideline E (Personal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), implemented in September 2006.

Applicant timely answered the SOR and requested a hearing before an administrative judge. The case was assigned to me on May 10, 2013. A notice of hearing was issued on May 24, 2013, scheduling the hearing for June 21, 2013. Government Exhibits (GX) 1-4 were admitted into evidence without objection. Applicant testified, presented one witness, and submitted Applicant Exhibits (AX) A-B, which were admitted without objection. The transcript was received on June 28, 2013. Based on a review of the pleadings, testimony, and exhibits, eligibility for access to classified information is denied.

Findings of Fact

In his answer to the SOR, Applicant admitted the SOR allegations in ¶¶ 1.a through 1.d. At the hearing, the Government amended the SOR by adding an allegation 1.e to include, Applicant's failure to disclose his use of marijuana in response to Question 27 of a 2003 security clearance application. Applicant admitted that he used marijuana for a period of approximately six months before completing the 2003 security clearance application. Applicant denied that he falsified his 2003 application. (Tr. 25)

Applicant is 32 years old. He graduated from high school in June 1999. He married his current wife in 2012. He has two biological children and one stepchild. Applicant served on active duty in the U.S. Army from July 2003 until July 2006. Applicant served in the National Guard from July 2006 until July 2007. Applicant completed a security clearance application in 2003. He believes he had two interim security clearances after 2003. Applicant has been employed with his current employer since March 2010. (GX 1)

Applicant admitted that he used cocaine after a friend introduced the drug to him, from July 2007 until at least April 2008. During that time he also purchased cocaine. He used the illegal drug about two or three times a week. Applicant was candid that his frequent use of cocaine affected his daily life. He acknowledged that "things started to go downhill." He could not pay his bills due to the cost of cocaine. He stated he was not responsible and he lost his apartment because he did not pay his bills.

Applicant began employment with a company in the summer of 2007. Applicant was required to take a preemployment drug test. He was informed of the company's no-drug policy. He was also aware that he was making bad decisions. He bought cocaine from coworkers. (Tr. 14) He never reported the use of cocaine to his employer. (Tr. 27)

In July 2009, Applicant reenlisted in the military by joining the National Guard. He knew he had a security clearance, completed his training and in December 2009, he returned home. He left the national guard due to a disciplinary action. He knew he had to make a change in his life. Applicant stopped using cocaine in April 2008. (Tr. 27) He did not seek any professional help. He noted that he stopped using cocaine just like he stopped smoking cigarettes cold turkey.

Applicant claimed that he did not know that he had a "full fledged" security clearance. He also explained that he believed the interim clearances had expired in 2006. Applicant was not credible in his denial of having a security clearance. When questioned, he admitted that he had never received notice that his clearance had been denied or revoked. (Tr. 22) When Applicant completed his January 19, 2012, security clearance application, he noted that he had a security clearance in 2006 and that it had never been denied or revoked.

Applicant testified that he has changed his ways. He provides for his family and children. He is financially stable. He stated that he does not use cocaine. He has

changed his friends and acknowledges his bad decisions. He enjoys his current employment and has been granted promotions. He would like a second chance.

During the hearing, Applicant disclosed that he had a pending criminal charge from May 2013. He stated that he was arrested for breaking and entering. (Tr. 32) He has alerted his security officer of the charge. Applicant has a court date in August 2013. Applicant provided his current security officer a statement concerning the matter. (Tr. 32)¹

Applicant submitted a letter of recommendation from a former Army platoon leader who worked with him in 2004. He described Applicant as a quiet, disciplined trainer and leader who is a team player. He describes Applicant's judgment and actions as above reproach. He operated above his pay-grade and outperformed his peers. Applicant possesses unlimited potential for advancement. He is an intelligent and mature individual. (AX A)

Applicant presented a letter of favorable recommendation from a former manager. The manager described Applicant as a consummate professional who performs his job duties with the utmost of integrity. He is an outstanding performer and supports his customers and team members. He works with little or no supervision. (AX B)

Applicant's team leader testified that Applicant's work ethic is above reproach. He never shies away from responsibility. He has had access to secret information and has never compromised the information. After a year, Applicant was promoted to a senior technician position, and is currently a system administrator. He is considered a model employee. (Tr. 46)

Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." An 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

¹Counsel requested to amend the SOR to include Guideline J, based on Applicant's disclosure. I denied the Amendment.

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.

The U.S. Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .”² The burden of proof is something less than a preponderance of evidence.³ The ultimate burden of persuasion is on the applicant.⁴

A person seeking access to classified information enters into a fiduciary relationship with the Government based on 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 classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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.”⁵ “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁶ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.⁷ The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant’s character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

² See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

³ *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

⁴ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁵ See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

⁶ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁷ *Id.*

Analysis

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying:

(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;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources.

(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 personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group;

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment; and

(g) association with persons involved in criminal activity.

For AG ¶ 16(a) to apply, Applicant's omission must be deliberate. The Government established that Applicant omitted material facts from his 2003 security clearance application, when he failed to disclose using marijuana during the six months before completing the 2003 security clearance application. This information is material to the evaluation of Applicant's trustworthiness and honesty. When the allegation of falsification is controverted, the Government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred.

Applicant denies giving any fraudulent information concerning his use of marijuana on his 2003 security clearance application. He said he did not think about it. He also stated that he could not answer that question. He did not seem credible in his answer. ¶ 16(a) applies.

Applicant admitted the use of cocaine, as often as weekly, from about July 2007 at least April 2008. He also admitted purchasing cocaine during that period. Applicant had a security clearance during that time. Additionally, Applicant admitted that he used cocaine while working for his employer in 2007 directly in violation of company policy. He did not report that use to his employer. ¶ 16(c) applies. After considering the mitigating factors, Applicant has not mitigated the personal conduct security concerns under Guideline E.

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 an 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) the 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. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case as well as the whole-person factors. Applicant is 32 years old. He served in the military on active duty. He is married and has children. He has worked for his current employer since 2010. Applicant admitted his use of cocaine from 2007 until 2008. After having seen the effect it had on his life, he quite using cocaine. He has not used the drug since 2008. He stopped associating with his older friends.

Applicant's guarded answers about holding a security clearance are self-serving. He was intentionally vague about the dates that he held interim clearances, but acknowledged that he was never given notice of any denial or revocation of a security clearance. Applicant admitted that he violated the company's policy in 2007 by using illegal drugs. He purchased the drugs from coworkers. Applicant acknowledged a pending criminal charge against him. The charge is recent. Applicant has not persuaded me through his demeanor or testimony that he is using good judgment or is trustworthy and reliable or suitable for holding a security clearance. For all these reasons, Applicant has not mitigated the security concerns under personal conduct (Guideline E). Clearance is denied.

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:

AGAINST APPLICANT

Subparagraphs 1.a-1.e:

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 a security clearance. Clearance is denied.

NOREEN A. LYNCH.
Administrative Judge