



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



In the matter of:)
)
) ISCR Case No. 12-06676
)
)
Applicant for Security Clearance)

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel

For Applicant: *Pro se*

04/10/2013

Decision

MASON, Paul J., Administrative Judge:

On May 29, 2009, Applicant demonstrated poor judgment when he placed himself in the company of his son who was in possession of illegal drugs. Applicant mitigated his drug involvement because he is not a drug user and does not intend to use drugs in the future. He mitigated his criminal conduct because he has no other criminal record for arrests or convictions. However, his failure to provide truthful information about the May 2009 arrest during the security clearance investigation has not been mitigated. Eligibility for access to classified information is denied.

Statement of the Case

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on October 18, 2010. He provided interviews to an investigator from the Office of Personnel Management (OPM) on November 17, 2010, and February 8, 2011. Interview summaries of those interviews appear in his interrogatory responses which he signed and notarized on November 22, 2011. He agreed with the summaries

and indicated they could be admitted into evidence at a hearing to determine his security suitability. (Item 5 at 137)¹

On June 29, 2012, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing security concerns under criminal conduct (Guideline J), drug involvement (Guideline H), and personal conduct (Guideline 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 adjudicative guidelines (AG), implemented by the Department of Defense on September 1, 2006.

Applicant furnished two notarized answers: the first was July 24, 2012; the second was on September 19, 2012. He requested a decision on the record in lieu of a hearing. A copy of the Government's File of Relevant Material (FORM), the Government's evidence in support of the allegations of the SOR, was sent to Applicant on December 17, 2012. He received the FORM on January 18, 2013. In an attachment to the FORM, he was advised he could respond to the information in the FORM by submitting additional information in rebuttal, explanation, mitigation, or extenuation. Applicant's notarized response dated January 28, 2013, was entered into evidence on February 1, 2013, without objection.

Rulings on Procedure

The FORM filed by the Government on December 17, 2012, includes a Motion to Amend the SOR by adding an allegation (SOR 3.c) under the personal conduct guideline. That allegation reads as follows:

c. You falsified material facts on an Electronic Questionnaire for Investigations Processing (e-QIP), executed by you on or about October 18, 2010, in response to Section 22b. "Have you been arrested by any police officer, sheriff, marshal, or any other type of law enforcement officer?" You answered "NO" and deliberately omitted having been arrested on May 29, 2009, as set forth in subparagraph 1.a., above.

Based on the record, specifically the city arrest report (Item 7), indicating Applicant was arrested on May 29, 2009, for three criminal offenses alleged in SOR 1.a, the Motion to Amend the SOR is hereby granted under E3.1.17 of DOD Directive 5220.6.

Findings of Fact

The SOR contains one allegation under the criminal conduct guideline, two allegations under the drug involvement guideline, and three allegations under the personal conduct guideline. Applicant admitted SOR 1.a. He denied SOR 2.a and 2.b.

¹ Page numbers are located at the lower right corner of the page.

He admitted lying about his May 2009 arrest (SOR 3.c), but denied drug use or drug possession in the last 7 years. (SOR 3.a, 3.b)

Applicant is 49 years old. He married in May 1987 and divorced in January 2005. He has a 24-year-old son and a 20-year-old daughter from this marriage. He served in the U.S. Navy from April 1985 until his honorable discharge in December 1992. He held a security clearance while in the service. In March 2005, he was investigated by another government agency (AGA) for a security clearance. He could not recall the level. He has been employed by a defense contractor since November 2004, and has never been cited for complaints or incidents by his supervisors at work. He has never taken drugs and is subject to random drug tests at any time.

Before his current job, Applicant was employed for about a year as a warehouseman with another employer. He was also a corrections officer for approximately 10 months in 2002.

In Applicant's e-QIP, dated October 18, 2010, he denied: SOR 3.a (Section 23a.-illegal drug use in the last 7 years); SOR 3.b (Section 23c.-illegal possession, transfer in the last 7 years); and SOR 3.c (Section 22b.-arrests in the last 7 years).²

During an interview with an OPM investigator on November 17, 2010, Applicant initially confirmed his negative response to question 22b. (criminal arrest(s) in the last 7 years) of his e-QIP dated October 18, 2010. Subsequently during the interview, he was confronted with information about an arrest on May 29, 2009. Applicant stated he was unaware of an arrest. Then, he told the investigator that on May 29, 2009, he traveled to a city to attend a concert with his son and Applicant's brother. They were stopped by police on an unknown street because Applicant's son was drinking a beer in public. During a search of the three, the police found a pipe with marijuana residue in the pocket of Applicant's son. The three were then handcuffed and taken to the police station. After fingerprinting, the three were released. Applicant claimed he was not charged with any offense and never received a summons, unlike his son and his brother. He reiterated his claim that he was unaware this arrest was on his record.

Applicant told the OPM investigator that he never used drugs, never received drug treatment, never associated with drug users, and did not intend to use drugs in the future. In his interrogatory answers dated November 22, 2011, Applicant agreed with the contents of both the November 17, 2010, and the February 8, 2011, interview summaries.

In his first answer to the SOR (July 24, 2012), Applicant admitted he was arrested, but denied he was charged with any offense. He confirmed most of the information he provided in the November 2010 interview regarding the arrests, but

² The October 2010 e-QIP also shows that Applicant incorrectly answered Section 22e (has the applicant ever been charged with any offense related to alcohol or drugs). This omission cannot be considered in the Government's case-in-chief, but is relevant to Applicant's overall credibility under the whole person-concept..

added that before he was arrested, he took the drug pipe from his son to try to prevent his son from being arrested. Applicant stated, "Officers told us nothing would show up on our records which is the main reason I answered no to prior arrests on the security clearance application."

In his September 19, 2012 answer to the SOR, Applicant indicated, "I do admit lying about my arrest on 29 May 2009 in fear of losing my job. I was never charged or read any rights which are why I denied being arrested on my security clearance [application]"

In his response to the FORM dated January 28, 2013, Applicant, though acknowledging he was arrested, disputed the arrest report which indicated he was observed smoking marijuana from a metal pipe. He admitted he was charged but never convicted of any offense. He acknowledged the poor judgment he exercised in associating with his son who uses illegal drugs.

The city arrest report reflects that Applicant was arrested and charged with criminal possession of a controlled substance, criminal possession of marijuana in public, and unlawful possession of marijuana. (Item 7) The information in the exhibit identifying Applicant's date of birth, social security number, and a residential address, is independently confirmed in Applicant's e-QIP (Item 4).

The Federal Bureau of Investigation (FBI) criminal record indicates Applicant was arrested for three misdemeanors (identified above) on May 29, 2009. (Item 6) The identifying information in this exhibit regarding Applicant's date of birth and social security number is the same as Item 7 and Item 4.

Considering the record as a whole, specifically Applicant's interview summary and his subsequent statements, he supplied different positions about whether he was arrested on May 29, 2009. In his October 2010 e-QIP, he denied being arrested. When the arrest was first discussed in his November 2010 interview, he falsely confirmed his negative response in his October 2010 e-QIP. Even when he was confronted with the May 2009 arrest later in the interview, he claimed he was unaware he had an arrest record. He did not finally admit he had been arrested until July 2012, in his first answer to the SOR. The different positions undermine Applicant's credibility.

Character Evidence

Applicant is proud he has been able to finance his children's education while paying child support. Aside from his statements about his job performance, he furnished no character endorsements from his supervisors about his job performance. He provided no evidence about his reputation from anyone in the community where he lives.

Policies

The evaluation of an applicant's suitability for a security clearance should include a careful consideration of AG. Each guideline lists potentially disqualifying conditions and mitigating conditions, which are to be applied to the extent they are deemed necessary in evaluating an applicant's eligibility for access to classified information. The conditions must be evaluated in the context of general factors that comprise the whole-person concept.

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 for obtaining a favorable security decision.

Analysis

Criminal Conduct

AG ¶ 30 of the criminal conduct guideline sets forth the security concern related 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.

The two pertinent disqualifying conditions under AG ¶ 31 are:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

On May 29, 2009, Applicant was arrested and charged with three offenses: (1) criminal possession of a controlled substance; (2) criminal possession of marijuana in public; and (3) unlawful possession of marijuana. Although the three offenses are not classified as serious criminal behavior, their designation at the misdemeanor level raises security concerns about Applicant's reliability and trustworthiness and good judgment. The security significance of these charges is not excused by the fact that Applicant was neither prosecuted nor convicted. AG ¶¶ 31(a) and 31(c) apply.

There are three pertinent mitigating conditions under AG ¶ 32 that may apply:

- (a) so much time has passed since the criminal behavior happened, or it happened under such circumstances that it is unlikely to recur and does

not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(c) evidence that the person did not commit the offense; and

(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 development.

The criminal conduct occurred more than three years ago. The crime arose under circumstances that are unlikely to recur. Applicant unsuccessfully tried to take the drug pipe from his son so that Applicant would be arrested rather than his son. The arresting officer formed a different opinion and arrested Applicant, his son, and his brother. Judging by the totality of the evidence, because Applicant has no other criminal record of arrests or convictions, I am confident the criminal conduct will not recur. Applicant does not receive full credit under AG ¶ 32(a) because of the poor judgment he demonstrated in deliberately concealing relevant information about his arrest from his October 2010 e-QIP and November 2010 interview.

Applicant is entitled to some mitigation under AG ¶ 32(c). Although the city report and federal record show an arrest for three drug possession charges, I accept Applicant's explanation of trying to take the blame for his son's drug involvement.

Applicant gains some mitigation from AG ¶ 32(d). More than three years have passed since Applicant's criminal behavior. Based on the isolated nature of the conduct, along with Applicant's remorse and some evidence of a good employment record, AG ¶ 32(d) is partially applicable.

Drug Involvement

Paragraph 24 of the AG sets forth the security concern associated with 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.

AG ¶ 25 identifies two pertinent disqualifying conditions that could raise security concerns:

(a) any drug abuse; and

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia.

On May 29, 2009, Applicant was arrested for three drug possession offenses. While he denies he used marijuana before the arrest, he admitted taking the drug pipe used to smoke the drug. AG ¶¶ 25(a) and 25(c) apply.

The two pertinent mitigating conditions under AG ¶ 26 of the drug involvement guideline are:

(a) 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; and

(b) a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts, (2) changing or avoiding the environment where drugs are used, (3) an appropriate period of abstinence, and (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant's drug involvement transpired more than three years ago. There is no additional evidence of marijuana use. AG ¶ 26(a) is applicable in part for the same reasons that were discussed under AG ¶ 32(a) of the criminal conduct guideline. Applicant does not use drugs and has never had drug treatment. Though his son was the reason he was arrested for possession of drugs, Applicant no longer associates with persons who use drugs. While the record does not contain a signed statement of intent with automatic revocation, Applicant has convinced me he will not engage in future drug use. AG ¶ 26(b) applies.

Personal Conduct

The security concern for personal conduct is set forth in AG ¶ 15:

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.

AG ¶ 16 contains two disqualifying conditions that may be applicable:

(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; and

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

The omission of relevant facts from a security clearance form can occur for a number of unintentional reasons. Those reasons, which include haste, oversight, or negligence, are not present here. I conclude that Applicant deliberately omitted his May 2009 arrest from his October 2010 e-QIP. (SOR 3.c) He did not provide a full account of his arrest until July 2012, when he furnished his first answer to the SOR. AG ¶¶16(a) and 16(b) apply.

Based on my ultimate finding for Applicant under the drug involvement guideline, SOR 3.a and 3.b (drug use and possession allegations) are resolved in his favor because I conclude he is not involved with drugs.

There are three mitigating conditions under AG ¶ 17 that are potentially applicable to the circumstances in this case. Those conditions are:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment or falsification, before being confronted with the facts);

(c) the offense was 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

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate stressors, circumstances, or factors that caused untrustworthy, unreliable or other inappropriate behavior, and such behavior is unlikely to recur).

None of the mitigating conditions apply. Applicant deliberately omitted his May 2009 arrest from his October 2010 e-QIP. During the initial portion of his November 2010 interview, he falsely told the OPM investigator that he had no criminal record. After being confronted with information regarding the May 2009 arrest, he supplied details of the incident while still claiming that he was unaware the arrest was on his record. AG ¶ 17(a) does not apply.

AG ¶¶ 17(c) and 17(d) do not apply because of Applicant's failure to be entirely forthright about the May 2009 arrest when first given the opportunity to disclose the information in his e-QIP and his November 2010 interview. The fact that Applicant finally disclosed the truth about his arrest in July 2012 does not excuse his earlier omissions in October and November 2010. The pattern of omissions continues to raise questions about Applicant's trustworthiness and judgment.

Whole-Person Concept

I have examined the evidence under the disqualifying and mitigating conditions of the criminal conduct, drug involvement, and personal conduct guidelines. I have also weighed the circumstances within the context of nine variables known as the whole-person concept. In evaluating the relevance of an individual's conduct, the administrative judge should consider the following factors:

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 the participation was 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 a commonsense judgment based on careful consideration of the guidelines and the whole-person concept.

Applicant is 49 years old and divorced. He has two adult-age children. He received an honorable discharge in December 1992 after serving more than seven years in the U.S. Navy. Applicant is proud he has been able to finance his children's education while paying child support.

On the other side of the ledger is Applicant's deliberate omission of his arrest from his October 2010 e-QIP. Instead of telling the truth about his arrest in November 2010, Applicant continued to conceal his arrest by falsely affirming his negative e-QIP response. After being confronted with information about his arrest, Applicant provided details of the arrest, but still claimed he was unaware the arrest was on his record.

In his first answer (July 2012) to the SOR, Applicant admitted he was arrested but denied he was charged with an offense. In his second answer (September 2012), Applicant admitted the arrest but again denied he was charged. Only after he was confronted with the city arrest report and the FBI records did Applicant finally provide a full account of the May 2009 offense. His repeated omissions of relevant information between October 2010 and January 28, 2013, have not been mitigated. The fact that Applicant was trying to protect his employment does not excuse or mitigate his deliberate falsifications during the security investigation. After weighing and balancing the disqualifying conditions with mitigating conditions, and considering all the evidence under the whole-person concept, I conclude that Applicant has not mitigated the security concerns arising under the personal conduct guideline.

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): | FOR APPLICANT |
| Subparagraph 1.a: | For Applicant |
| Paragraph 2 (Guideline H): | FOR APPLICANT |
| Subparagraphs 2.a-2.b: | For Applicant |
| Paragraph 3 (Guideline E): | AGAINST APPLICANT |
| Subparagraphs 3.a-3.b: | For Applicant |
| Subparagraph 3.c: | Against Applicant |

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Paul J. Mason
Administrative Judge