



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



| | | |
|----------------------------------|---|------------------------|
| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 12-10889 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

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

02/11/2014

Decision

LYNCH, Noreen, A., Administrative Judge:

The Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) alleging security concerns arising under Guideline H (Drug Involvement) and Guideline E (Personal Conduct). The SOR was dated September 10, 2013. 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 in September 2006.

Applicant timely answered the SOR and requested a hearing before an administrative judge. The case was assigned to me on November 25, 2013. DOHA issued a notice of hearing on December 11, 2013, scheduling the hearing for December 17, 2013. Government Exhibits (GX) 1 through 5 were admitted into evidence without objection. Applicant Exhibits (AX) A through C were admitted into evidence without objection. Applicant testified and presented one witness. I held the record open for any additional information that Applicant might provide. He submitted one document, which was marked as AX D. DOHA received the transcript (Tr.) on December 27, 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 factual allegations under Guideline H (Drug Involvement) and Guideline E (Personal Conduct) with the exception of SOR ¶¶ 2.c, 2.g, and 2.h.

Applicant is a 48-year-old network administrator for a defense contractor.¹ He is single and has no children. He served in the U.S. Army from February 1984 until July 1985 and was given a general discharge under Honorable conditions. (AX A) Applicant completed trade school courses. He has worked for his current employer since March 2012. (AX B) He believes that he had a security clearance while in the military. (Tr.19)

Applicant admitted using marijuana occasionally between 1979 and 2010. He first used marijuana in high school in 1979. His last incident was in 2010, and Applicant emphasized that it was an isolated incident. He was attending a holiday party at a friend's house and "had a couple of puffs." (Tr. 12) According to Applicant, before the incident in 2010, it had been five years since his last use. He admitted that he led a party-boy life style, but he wants to live a professional life and better his employment opportunities. He never purchased the drug, but was provided the marijuana by friends. He denies any illegal drug use from 2005 until 2010. (Tr. 13) He has no intention of using illegal drugs in the future. (AX D) The death of Applicant's mother and the closing of his business in 2009 also influenced his choice to stop the use of marijuana. (Tr. 26)

Applicant's August 2012 Office of Personnel Management (OPM) interview noted that Applicant responded that over the past five years he had smoked marijuana in cigarette form perhaps two times a month. (GX 2) Applicant denies that it is an accurate description of what he said at the interview. However, he did not correct that piece of information. He stated that perhaps it was an oversight on his part.

Personal Conduct

In December 2000, Applicant completed a Declaration for Federal Employment. In response to Question 7, he listed his military discharge as Honorable. He denies that he deliberately falsified the application. (GX 5) His reasoning was that he believed it was the same as an honorable discharge. He noted that it was called an "administrative" discharge and that he was given an "administrative" discharge due to a family hardship. He was emphatic that the two types were not dissimilar. At the hearing, Applicant explained that he was under the impression that a general discharge under honorable conditions is the same as an honorable discharge. He also noted that he could have asked to upgrade to an honorable discharge, but he did not see the point.

¹Applicant was suspended from the employment in February 2013 pending the outcome of the security clearance process. He receives unemployment.

In June 1985, Applicant received a non-judicial punishment for drunk on duty/failure to obey a lawful order or regulation. He was sentenced to correctional custody for 30 days and a forfeiture in pay. (GX 3) He admitted that he went to an enlisted men's club on post, which was restricted to him. He was there on field exercises. He believes he was not drunk, but admitted that he had been drinking beer. (Tr.27)

Applicant told his command that he wanted to go home as his father was quite ill and possibly dying. According to Applicant, a process was started and he was granted an "administrative" discharge. However, when he received the non-judicial punishment, the discharge became a general discharge under honorable conditions. (Tr. 31, AX C)

In October 1985, Applicant was charged and arrested for unlawful possession-controlled dangerous substance (CDS). Applicant's vehicle was searched and a canister with marijuana residue was found. Due to an illegal search, Applicant was found not guilty of the crime. (GX 4)

In June 1989, Applicant was charged with concealing a deadly weapon. He was convicted of the offense and sentenced to two months confinement, suspended, and one year probation. Applicant was delivering pizza on a military base. A random search of his vehicle was conducted and a wooden nightstick was found by the front seat of the car. Applicant denies carrying any firearm. He admits that he had the nightstick as he would use it for self defense in case he was robbed. He pled not guilty to the charge but was found guilty.(GX 4)

Applicant was stopped the same evening in June 1989 and charged with driving under the influence. He left a bar with a friend who had been drinking with him. Applicant did not come to a full stop at a yield sign and was pulled over by the police. Applicant completed probation successfully. He attended alcohol abuse classes on his own volition. This incident is his only alcohol-related charge. Applicant stated that he no longer drinks alcohol. (GX 2)

Applicant denies the 1990 battery charge. At first he could not recollect any incident. He stated that he has never been found guilty of battery. At the hearing, Applicant explained that he had a verbal altercation with a woman about a situation involving his mother. The woman's boyfriend bumped chests with Applicant. Applicant pushed him back and the fellow fell. At that point, they both swung at each other. The police were called. Applicant recalls that he was charged, but at court, the charge was dismissed because the complainant did not appear. (Tr. 46)

In January 2011, Applicant admits that he left his job of approximately eight months because of conditions that were not favorable to him. He stated that he was threatened by another employee. A manager initiated an incident report. Applicant was given a reprimand. Applicant refused to sign the reprimand and never returned to work. (Tr. 48) He noted that it was not a career-oriented job but just a job to pay his bills. (Answer to SOR)

In December 2011, Applicant was terminated from his employment. He told his manager that he could not report to work the next day. Applicant explained that he had to meet a friend who would give him money to pay his water bill. (Tr. 50) It was imperative that he meet the friend because Applicant's water had been shut off and he did not have the money to pay the bill. When the friend did not meet him that day, Applicant stated that he received a telephone call from his manager and was ordered to come in to work by a certain time or he would be fired. Applicant advised the manager that he could not be there by that time. Applicant noted that he had been working at the job for a few weeks and had not received his first pay check. Again, he stated that it was not a career-choice job, but one to pay his bills.

Applicant provided a letter of recommendation from a colleague, who describes him as a model employee in the company. (AX B) He recommends him for a security clearance. He testified that he has known Applicant since 2000, and is aware of the SOR allegations. He recalls that Applicant was always passionate about his work in information technology (IT).

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 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.

The 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. . . ." The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant.

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.” “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.” Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information. 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.

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.

(a) 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;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying:

(a) any drug abuse (see above definition);

(b) testing positive for illegal drug use;

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

(d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;

(e) evaluation of drug abuse or drug dependence by a licensed clinical social worker who, is a staff member of a recognized drug treatment program;

(f) failure to successfully complete a drug treatment program prescribed by a duly qualified medical professional;

(g) any illegal drug use after being granted a security clearance; and,

(h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

Applicant admitted his use of marijuana, an illegal drug, between 1979 and 2010. He also admitted that he last used marijuana in 2010. AG ¶¶ 25(a) and 25(c), apply.

AG ¶ 26 provides conditions that could mitigate security concerns:

(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;

(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 were used;

(3) an appropriate period of abstinence; and,

(4) a signed statement of intent with automatic revocation of clearance for any violation;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant's last use of any illegal substance was in June 2010. He stated that he has not used any illegal drugs since that time. Applicant also submitted a signed letter of intent not to use illegal drugs in the future. He stated that he has no intention of using any illegal drugs. He has a long history of marijuana use. A large part of his use was stopped in 2005, but he again used it in 2010. Granted, he has not used any illegal drug since 2010, but given his pattern, the drug use does not reflect good judgment, reliability, and trustworthiness to sufficiently mitigate the security concerns under this guideline. None of the mitigating factors fully apply.

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.

Applicant described his discharge on a government form as "honorable" rather than "general under honorable conditions". He believed that they were basically the same. He produced his record of service form (DD214) and did not hide the circumstances in the case. The Government did not prove that he intentionally falsified the official document.

Applicant has a pattern of incidents involving criminal drug charges beginning in 1985. Although the last incident was in 2010, Applicant has a pattern of unreliable behavior. The incidents with his loss of employment do not persuade me that has good judgment. His misconduct and failure to follow rules troubles me. This spans a period of time since 1985. AG ¶¶ 16(c), and 16(d)(3) apply. His conduct shows a pattern of untrustworthiness.

AG ¶ 17 provides conditions that could mitigate security concerns:

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

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

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

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant's behaviors were not minor. He has not presented any other information to persuade me that he has mitigated personal conduct concerns regarding his conduct. I have doubts about his judgment, trustworthiness, and reliability. After considering the mitigating conditions outlined in AG ¶ 17, I conclude Applicant has not mitigated the security concern under personal conduct or drug use.

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 a 48-year-old professional who has a pattern of illegal drug use that spans a period from 1979 until 2010. Granted, the use was sporadic after 2005. However, this is a long history of use. Applicant had criminal charges from 1985 until 1990. He has not had any criminal charges since then, but again, this shows a pattern of inappropriate conduct. He had two incidents that resulted in termination from employment in 2011. He shows poor judgment.

Applicant did not falsify or intentionally mislead the Government in 2000 by listing his discharge as honorable. He explained the reasoning at the hearing. While Applicant has no new criminal charges and an abstinence of three years with any illegal activity, the lengthy pattern of misconduct gives me doubts about his ability to handle classified information. I have doubts about his judgment. Any doubts must be resolved in favor of the Government. Applicant has not met his burden in this case. He has not mitigated the security concerns under drug use and personal conduct. 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 H: | AGAINST APPLICANT |
| Subparagraph 1.a: | Against Applicant |
| Paragraph 2, Guideline E: | AGAINST APPLICANT |
| Subparagraphs 2a.-2g.: | Against Applicant |
| Subparagraph 2.h: | For Applicant |
| Subparagraphs 1.i-j: | 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