



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



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| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 14-02790 |
| |) | |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: Kevin Barry McDermott, Esquire

March 9, 2016

Decision

CEFOLA, Richard A., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) on February 27, 2013. On January 13, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J, H, G and E for 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 adjudicative guidelines (AG), effective within the Department of Defense after September 1, 2006.

Applicant answered the SOR in writing on March 4, 2015, and requested a hearing before an Administrative Judge. The Defense Office of Hearings and Appeals (DOHA) received the request soon thereafter, and I received the case assignment on June 16, 2015. Initially, a notice of hearing was issued on July 2, 2015, setting this matter for hearing on August 13, 2015. However, Applicant retained Counsel on July 21, 2015. As said Counsel was engaged in another trial “that was expected to last eight weeks,” I granted Applicant’s two requests for a delay until December 2, 2015, in order

for his Counsel to be available. DOHA issued a second amended notice of hearing on September 9, 2015, and I convened the hearing as scheduled on December 2, 2015. The Government offered Exhibits (GXs) 1 through 6. Applicant's Counsel objected to GXs 2 and 3. This motion was overruled, in favor of a full administrative record. (Transcript (TR) at page 14 line 12 to page 16 line 24.) GXs 1 through 6 were admitted into evidence. Applicant testified on his own behalf and submitted Exhibits (AppXs) A through F, which were received without objection. DOHA received the transcript of the hearing on December 11, 2015. I granted Applicant's request to keep the record open until January 4, 2016, to submit additional matters. On January 2, 2016, he submitted Exhibits G through L. On January 3, 2016, Department Counsel objected to AppX J. This motion is overruled, in favor of a full administrative record. AppXs G through L were admitted into evidence. As the undersigned was on leave on January 4th, the record closed on January 5, 2016. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in all the Subparagraphs of the SOR, with explanations, except for 4.a., which he denies, also with explanation.

Applicant is a 35 year-old "Military Analyst." (GX 1 at pages 5 and 14.) He is a former Marine Corps Captain, who served two tours in Iraq as "a Logistics Officer." (TR at page 54 line 18 to page 60 line 8.) He suffers from Post Traumatic Stress Disorder (PTSD) for which he is taking the drug "Wellbutrin." (*Id.*)

Guideline J - Criminal Conduct & Guideline E - Personal Conduct

1.a. and 4.b. In May of 2011, Applicant was arrested for, and subsequently charged with, "Driving Under Influence of Alcohol/Drugs [DUI]." (AppX E at page 1.) In August of 2011, he pled guilty, and was sentenced to serve ten days in jail or a "Work Alternative Program," and was "placed on probation for a period of 5 yrs [years]." (AppX E at page 1.) He is still on probation as a result of this conviction.

In his Answer to Subparagraph 1. of the SOR, Applicant admits "that . . . [his] us of MDMA [ecstasy] and driving while intoxicated was a criminal act." (Answer at page 1.) However, at his hearing he denied ever knowingly using ecstasy.

1.b. and 4.b. After an Article 32 Uniform Code of Military Justice (UCMJ) Investigation, Applicant was also "referred for General Court Martial for violating Art[icle] 122a [of the UCMJ] wrongful use of (MDMA)" (GX 6.) However, in January of 2012, he requested "to resign in lieu of trial by court-martial." (GX 2 at Encl 3 page 1.) This request was granted.

Guideline H - Drug Involvement & Guideline E - Personal Conduct

2.a., 2.b. and 4.b. In his Answer to Subparagraph 2. of the SOR, Applicant admits “that . . . [his] use of MDMA [ecstasy] and driving while intoxicated tarnished the trust and reliability others had in me, including the Marine Corps.” (Answer at page 2.) Applicant had been granted a security clearance in about May of 2004. (GX 1 at page 45.) He therefore used the illegal substance, ecstasy, in 2011 while possessing a security clearance.

Guideline G - Alcohol Consumption & Guideline E - Personal Conduct

3.a., 3.b. and 4.b. In June of 2011, Applicant was diagnosed as suffering from “Alcohol Abuse.” (AppX A.) He admits to alcohol issues prior to his 2011 DUI. (TR at page 62 lines 7~14.) Applicant has not consumed alcohol since October of 2011. (TR at page 27 line 3 to page 37 line 18.)

Guideline E - Personal Conduct

4.a. On Applicant’s February 27, 2013 e-QIP, **Section 23 - Illegal Use of Drugs or Drug Activity** asks **In the last seven (7) years**, have you illegally used any drugs or controlled substances”? (Emphasis in original.) To which he answered “No.” (GX 1 at page 42.) In his Answer to the SOR, Applicant avers that he “misunderstood the question.” (Answer at page 3.) However, at his hearing he places great weight on “never knowingly . . . doing drugs.” (TR at page 44 lines 15~19.) The posited question is simply stated. It does not differentiate between “knowing” and “unknowing.” Furthermore, Applicant knew he was charged with the use of ecstasy in 2011 by the Marine Corps, which lead to his discharge in lieu of court-martial. I find this to be a wilful falsification.

Policies

When evaluating an applicant’s suitability for a security clearance, the 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, 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 commonsense decision. According to AG Paragraph 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.

The protection of the national security is the paramount consideration. Paragraph 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 Paragraph E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive Paragraph 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. Decisions include, by necessity, consideration of the possible risk 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.

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.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline J - Criminal Conduct

Paragraph 30 of the adjudicative guidelines sets out the security concern relating 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 adjudicative guidelines set out certain conditions that could raise security concerns. Paragraph 31(a) provides that an “*a single serious crime or multiple lesser offenses,*” may raise security concerns. The Applicant has a 2011 conviction for DUI, and also used ecstasy, in conjunction with the alcohol that was used as the basis for the conviction. However, this is countered by Subparagraph 32(a) as “*so much time has elapsed since the criminal behavior happened . . . that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment.*” This

one-time act of Criminal Conduct occurred more than four years ago. Criminal Conduct is found for Applicant.

Guideline H - Drug Involvement

The security concern relating to the guideline for Drug Involvement is set out in Paragraph 24:

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.

The guideline also notes several conditions that could raise security concerns. Under Subparagraph 25(a), "*any drug abuse*" may be disqualifying. In addition, "*any illegal drug use after being granted a security clearance*" under Subparagraph 25(g) may be disqualifying. Here, Applicant used ecstasy in 2011, after having been granted a security clearance in 2004.

However, I find a countervailing mitigating condition that is applicable here. Subparagraph 26(a) notes that where Applicant's "*behavior happened so long ago, was so infrequent . . . that it is unlikely to recur . . .*," may be mitigating. Again, Applicant's one time usage occurred more than four years ago. Drug Involvement is found for Applicant.

Guideline G -Alcohol Consumption

Paragraph 21 of the adjudicative guidelines sets out the security concern relating to Alcohol Consumption:

Excessive alcohol consumption often leads to the exercise of questionable judgment or failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

The adjudicative guidelines set out certain conditions that could raise security concerns. Subparagraph 22(a) is applicable and provides that "*alcohol-related incidents away from work, such as driving while under the influence . . .*" may be disqualifying. Applicant has a 2011 DUI. Subparagraph 22(d) is applicable and provides that a "*diagnosis by a duly qualified medical professional . . . of alcohol abuse . . .*" may be disqualifying. Applicant was diagnosed as suffering from alcohol abuse soon after his arrest.

However, I find that countervailing mitigation conditions 23(a) and 23(b) are applicable here. Under 23(a), "*so much time has passed . . . that it [the behavior] is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment.*" Under 23(b), "*the individual acknowledges his . . . alcohol abuse . . ., and has established . . . responsible use (if an alcohol abuser).*"

Applicant's alcohol abuse, and related DUI, was more than four years ago; and although not required to do so, he has abstained from the consumption of alcohol since October of 2011, more than four years ago. Alcohol Consumption is found for Applicant.

Guideline E - Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in Paragraph 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.

The guideline notes several conditions that could raise security concerns. Under Subparagraph 16(a), "*deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . or similar form . . .*" Here, Applicant falsified his answer to Sections 23 on his February 2013 e-QIP. He used ecstasy prior to executing this document. I can find no countervailing Mitigating Condition that is applicable here. Personal Conduct is found against 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. Under AG Subparagraph 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.

The Administrative Judge should also consider the nine adjudicative process factors listed at AG Subparagraph 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.

I considered all of the evidence, including the potentially disqualifying and mitigating conditions surrounding this case. The Applicant has the unqualified support of those who knew Applicant in the Marine Corps (AppX E.) However, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. He was clearly less than candid with the Government as to his

past drug abuse. For this reason, I conclude Applicant has not mitigated the security concerns arising from his Personal Conduct.

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:

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|---------------------------|-------------------|
| Paragraph 1, Guideline J: | FOR APPLICANT |
| Subparagraph 1.a: | For Applicant |
| Subparagraph 1.b: | For Applicant |
| Paragraph 2, Guideline H: | FOR APPLICANT |
| Subparagraph 2.a: | For Applicant |
| Subparagraph 2.b: | For Applicant |
| Paragraph 2, Guideline G: | FOR APPLICANT |
| Subparagraph 3.a: | For Applicant |
| Subparagraph 3.b: | For Applicant |
| Paragraph 2, Guideline E: | AGAINST APPLICANT |
| Subparagraph 3.a: | Against Applicant |
| Subparagraph 3.b: | For 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 eligibility for a security clearance. Eligibility for access to classified information is denied.

Richard A. Cefola
Administrative Judge