



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



In the matter of:)	
)	
-----)	ISCR Case No. 14-00285
)	
Applicant for Security Clearance)	

Appearances

For Government: Pamela Benson, Esquire, Department Counsel
For Applicant: *Pro se*

March 20, 2015

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP), on August 16, 2013. (Item 5.) On May 12, 2014, the Department of Defense issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H (Drug Involvement), J (Criminal Conduct), and E (Personal Conduct) concerning Applicant. (Item 1.) 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 on September 1, 2006.

Applicant answered the SOR in writing on May 29, and July 15, 2014, and requested a decision without a hearing by an administrative judge from the Defense Office of Hearings and Appeals (DOHA). (Item 4.) Department Counsel submitted the Government's File of Relevant Material (FORM) to Applicant on December 8, 2014. The FORM contained eight items. Applicant acknowledged receipt of the FORM on January 13, 2015. He was given 30 days from receipt of the FORM to submit any additional documentation. Applicant submitted additional information, an unsigned statement. Department Counsel had no objection to my considering the statement, and it is

admitted into evidence as Applicant Exhibit A. The case was assigned to me on February 10, 2015. Based upon a review of the pleadings and exhibits, eligibility for access to classified information is denied.

Findings of Fact

Applicant is 34, divorced, and has one child. He is employed by a defense contractor and seeks to obtain a security clearance in connection with his employment.

Paragraph 1 (Guideline J, Criminal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he engaged in criminal activity that casts doubt on his judgment, reliability and trustworthiness. Applicant admitted both allegations under this paragraph, concerning his receiving non-judicial punishment for wrongful use of marijuana in June 2008 and November 2009 while serving in the Army.

Paragraph 2 (Guideline H, Drug Involvement)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he used marijuana while a member of the United States Army. Applicant admitted the single allegation under this paragraph that refers to the two incidents described above.

Applicant admits that he used marijuana on at least two occasions, June 2008 and November 2009. He also admits, and the records show, that on those two occasions he received positive urinalysis test results. Furthermore, on each of these occasions he subsequently received non-judicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ). The military reports concerning each occasion reflect that Applicant admitted to the use of marijuana on each occasion. (Items 7, and 8.)

Paragraph 3 (Guideline E, Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he made false statements to the Department of Defense during the clearance screening process. Applicant's answers to these two allegations are viewed as denials.

Applicant filled out an e-QIP on August 16, 2013. (Item 5.) Section 15 of Item 5 asks Applicant if, in the last seven years, he had been subject to court martial, or other disciplinary procedure under UCMJ, such as Article 15. Applicant stated, "Yes," and provided details of an Article 15 he received in March 2008 for the offense of Insubordination to a Commissioned Officer. He did not admit the two other Article 15s he received for use of marijuana in June 2008 and November 2009. This was a false answer to a material question concerning Applicant's military history.

Applicant basically argued in his Answer that there were procedural defects in the Article 15s that made him believe they were not on his record and, therefore, he did not have to report them. He stated:

I [deny], the claim that I sought to conceal information contained in subparagraph 1.a.-1.b. I remain steadfast in my position that what I knew of the process for both of [the] incidents was mishandled by the respective CO. Because I was under the impression that nothing would be handled on an official level, and since I had seen other soldiers trouble get barred in the sand in Iraq, I was certain that the whole incident was not going to follow me. Clearly it was a mistake. (Item 4 at 6.)

Section 23 of Item 5 asks Applicant if, in the last seven years, he had been involved in the illegal use of drugs or controlled substances. Applicant answered this question, "No." This was a false answer to a material question concerning Applicant's drug background.

Applicant states in his Answer, "I'm not sure how to [respond] to this subparagraph, in part, I can't deny the fact that I had to have use[d] a controlled substance, otherwise I would not have failed the UA [urinalysis]. But its not with my nature to mislead or conceal the truth."

Applicant was sent a set of interrogatories by DOHA on March 10, 2014. He submitted signed, but undated and un-notarized, responses to the interrogatories. In these responses, which he affirmed are true, he stated that he had not used marijuana within the last seven years, and that he had not tested positive on any drug screening test. (Item 6.) These were false answers.

Applicant provided no evidence concerning the quality of his professional performance, the level of responsibility his duties entail, or his track record with respect to handling sensitive information and observation of security procedures. He submitted no character references or other evidence tending to establish good judgment, trustworthiness, or reliability. I was unable to evaluate his credibility, demeanor, or character in person since he elected to have his case decided without a hearing.

Policies

Security clearance decisions are not made in a vacuum. 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 to be used as appropriate 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 AG ¶ 2 describing the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 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. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that, "Any 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 ¶ 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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. Security clearance decisions include, by necessity, consideration of the possible risk that 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.

Finally, as emphasized in Section 7 of Executive Order 10865, "Any determination under this order adverse to an applicant shall be a determination 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

Paragraph 1 (Guideline J, Criminal Conduct)

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

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 following disqualifying condition under AG ¶ 31 applies to this case:

(a) a single serious crime or multiple lesser offenses.

The following mitigating conditions under AG ¶ 32 have also been considered:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; 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 involvement.

It has been six years since Applicant received his second, and last, Article 15. Normally such a span of time would militate towards a finding for Applicant on this allegation. However, as further described below, Applicant has actively deceived the Government within the last two years. Accordingly, under the particular circumstances of this case, I cannot find that mitigating conditions AG ¶¶ 32(a) and (d) were established. Paragraph 1 is found against Applicant.

Paragraph 2 (Guideline H - Drug Involvement)

The security concern relating to the guideline for Drug Involvement is set out in AG ¶ 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. 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; Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

I have considered the disqualifying conditions under AG ¶ 25 and especially considered the following:

- (a) any drug abuse; and
- (b) testing positive for illegal drug use.

I have studied all of the mitigating conditions under AG ¶ 26 and especially considered the following:

- (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 were used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation.

As stated, Applicant admitted using marijuana in 2008 and 2009. However, in both a Government questionnaire he filled out in 2013, and DOHA interrogatories he filled out in 2014, Applicant denied any drug use within the last seven years, which is false. Nowhere in the evidence is there a statement from Applicant as to the full extent of his drug use, when it started, or when it stopped. Accordingly, Applicant offered no evidence that would support mitigation under AG ¶¶ 26 (a), or (b). Paragraph 2 is found against Applicant.

Paragraph 3 (Guideline E - Personal Conduct)

The security concern relating to Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty or unwillingness to comply with rules or 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.

I have examined the disqualifying conditions under AG ¶ 16 and especially considered the following:

(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.

The following mitigating condition under AG ¶ 17 may apply to the facts of this case:

(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.

Applicant's falsifications of his e-QIP occurred about a year and a half ago. His argument that his "No" answer to Section 15 was due to procedural issues with how the Article 15s were presented to him is lessened by his failure to admit any drug use on the questionnaire, and on DOHA interrogatories. Applicant is not a reliable narrator of his own history. The dearth of mitigating information of any type precludes a finding that he is a credible person. Paragraph 3 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 relevant circumstances. 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. The administrative judge must 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.

I considered the potentially disqualifying and mitigating conditions in light of all the relevant facts and circumstances surrounding this case. The discussion under Guidelines J, H and E, above, applies here as well. Applicant has a history of criminal conduct, drug abuse and falsification of a government questionnaire. He failed to

provide sufficient mitigating information to overcome the adverse inference arising from his conduct.

Under AG ¶ 2(a)(3), his conduct is recent and continuing. I cannot find that there have been permanent behavioral changes under AG ¶ 2(a)(6). Accordingly, I also cannot find that there is little to no potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)); or that there is no likelihood of continuation or recurrence (AG ¶ 2(a)(9)).

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his criminal conduct, drug involvement and personal conduct. Accordingly, the evidence supports denying his request for a security clearance.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

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

WILFORD H. ROSS
Administrative Judge