



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



In the matter of:)
)
) ISCR Case No. 14-00387
)
Applicant for Security Clearance)

Appearances

For Government: Christopher Morin, Esq., Department Counsel
For Applicant: Jason Harris, Esq., and Ellen Shulz, Esq.

07/08/2014

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant mitigated the Government’s security concerns under Guideline J, criminal conduct. Applicant’s eligibility for a security clearance is granted.

Statement of the Case

On March 18, 2014, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J, criminal conduct. 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 DOD on September 1, 2006.

Applicant answered the SOR on April 4, 2014, amended his answer on May 22, 2014, and requested a hearing before an administrative judge. The case was assigned to me on April 28, 2014. After coordinating with both parties, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on April 30, 2014. I convened

the hearing as scheduled on June 16, 2014. It was conducted by video teleconference. The Government offered exhibits (GE) 1 through 5, and they were admitted into evidence without objection. Applicant and one witness testified. He offered Applicant's Exhibits (AE) A through J that were admitted into evidence without objection. Four documents were marked as Hearing Exhibits (HE) I through IV. They were copies of emails, the amended answer, and a motion in limine.¹ DOHA received the hearing transcript (Tr.) on June 25, 2014.

Findings of Fact

Applicant admitted the allegation in the SOR. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 29 years old. He enlisted in the Marine Corps shortly after graduating high school in 2003. He served in the Marine Corps almost ten years and was honorably discharged. He is married and has three children, ages 10, 8, and 21 months. He has held a security clearance for approximately ten years.²

While serving in the Marine Corps, Applicant worked as a military police officer. He was awarded four Navy-Marine Corps Achievement Medals, a Combat Action Ribbon, and three Good Conduct Medals. He had four combat tours during his almost ten-year enlistment. He was deployed to Iraq from January 2005 to August 2005, February 2006 to October 2006, and February 2008 to October 2008. He also served a combat tour in Afghanistan from June 2009 to December 2009. He twice was struck by improvised explosive devices (IED) and was with Marines who lost their lives from them. During one of his combat tours, he suffered a traumatic brain injury. He was recently advised that a recommendation was being submitted for him to receive a Purple Heart Medal. Applicant stated that at the time he asked his gunnery sergeant not to recommend him for a Purple Heart because he had been with Marines who lost their lives or were seriously injured and did not want to compare himself to them.³

Applicant was receiving physical therapy for injuries that were non-combat related, and he was told by his physical therapist that it would be beneficial to his condition to build muscle to alleviate some of his problems. He was told to take protein supplements to help build muscle. Applicant lifted weights in the gym and started working out with "B." They discussed what supplements they were taking and were comparing them. Applicant conducted an Internet search and found a substance called "Winnie-V." He did not believe at that time it was an illegal substance. Later "B" provided Applicant with "Winnie-V" pills and he purchased some. In August 2011, he used "Winnie V" for approximately five to seven days before stopping. This was his only use. He used them in the hope it would accelerate his training and help him build muscle

¹ The motion in limine was a moot issue.

² Tr. 32-35.

³ Tr. 35-36, 77-81.

faster. Shortly thereafter, Applicant became aware of a substance called “oxielite” that was removed from the military base’s nutrition store due to suspected banned ingredients. Applicant credibly testified that when he heard of its removal he realized that taking supplements while being unaware of their exact ingredients was dangerous.⁴

Applicant conducted his own research to see if there were any Marine Corps administrative notices identifying what substances were banned. He had difficulty finding guidance on the subject. He asked a master sergeant, who was a regular gym user, if he was aware of a list of banned substances disseminated by the Marine Corps. The master sergeant was unaware of a list. He was told by a Marine officer that there was no official banned substance list because it was always changing. He also asked people in the Marine Criminal Investigative Division (CID) if they were aware of a banned substance list and was told no. Through his Internet search he discovered “Winnie V” was illegal. This information was discovered after he used it. Applicant learned that “Winnie V” is the street name for Stanazolol and Winstrol-V. He also later found a Marine Corps administrative notice that banned certain substances, but “Winnie V” was not on the list. There was a substance that he thought could possibly be the same as “Winnie V.” He posted the list in the briefing area where he worked.⁵

Eight months after using “Winnie-V,” Applicant was interviewed by the CID and the Naval Criminal Investigation Service. He was asked about use of illegal drugs such as cocaine and the illegal use of pain pills. Applicant volunteered that he had used “Winnie-V.” Applicant credibly testified that when he used “Winnie V” he was unaware it was illegal. However, he readily admitted that he did use it. He trusted the person he purchased the substance from, but realizes he should not have purchased it. He stated it was after he took it and did research that he learned it was illegal.⁶

Applicant declined nonjudicial punishment, and he was charged with wrongful use and possession of Stanazolol, also known as Winstrol-V, a Schedule III controlled substance. Applicant pled not guilty at a Special Court-Martial tried by members. He was convicted in November 2012, and sentenced to no punishment. Applicant was permitted to complete his enlistment and continued to serve in trusted positions of responsibility until his discharge. Due to his conviction he was not permitted to reenlist, which he wanted to do. At that time, he did not have his security clearance suspended or revoked. He continued to have access to classified materials and sensitive information. He was discharged from the Marine Corps in February 2013. He began working for his present employer in June 2013.⁷

⁴ Tr. 36-39, 50-60.

⁵ Tr. 36-39, 50-71.

⁶ Tr. 37-38, 50-60, 76.

⁷ Tr. 41-47, 74-76; GE 3, 4, 5.

Applicant was a dedicated loyal Marine, and he is remorseful and embarrassed about his conduct and that he has a court-martial conviction. Since he used “Winnie V” in August 2011, Applicant has taken at least four drug tests with negative results. He took a drug test before beginning work with his employer in June 2013, which was negative. He is subject to random drug testing by his employer. While serving in the Marine Corps and subsequent to his discharge, Applicant has never had a positive drug test. He has no other criminal or disciplinary issues on his record.⁸

Applicant’s supervisor testified on his behalf. He was aware of Applicant’s court-martial conviction. He has known Applicant for six months and has been his supervisor since approximately November 2013. He has observed Applicant daily and believes he is an outstanding worker who performs well above the norm. He complies with the policies of the company and has been recognized by one of the customers, a colonel, for his outstanding performance.⁹ He is considered one of their most reliable employees and believes Applicant is remorseful for his past conduct. Because of Applicant’s experience in the Marine Corps he works in an area that continues to support Marines. Other supervisors also support Applicant.¹⁰

Applicant provided numerous character letters. He is described in them as trusted, valuable, having an impeccable work record, reliable, outstanding, a person with high standards and of the highest integrity. He is hardworking, knowledgeable, devoted, honest, and professional. He is a person of sound judgment who is loyal, motivated, and respectful. As a Marine in combat, he placed himself in dangerous positions so others would not have to. He would lead from the front and protect others from danger. He embodied the Marine Corps values of honor, courage, and commitment.¹¹

Applicant counsels Marines about the dangers of using supplements and to err on the side of caution. He stated he was once a proud Marine and suffered the consequences.¹²

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

⁸ Tr. 17-28, 42-47, 72.

⁹ AE J.

¹⁰ Tr. 17-28.

¹¹ AE A-G, I.

¹² Tr. 40, 42.

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 overarching 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.

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 not drawn 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, 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 and has the ultimate burden of persuasion to obtain 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 safeguard 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." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline J, Criminal Conduct

AG ¶ 30 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.

I have considered the disqualifying conditions under criminal conduct AG ¶ 31 and the following potentially apply:

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

Applicant was convicted at a Special Court-Martial in November 2012 for wrongful use and possession of a Schedule III controlled substance. I find both of the above disqualifying conditions apply.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and the following potentially apply:

- (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 almost three years since Applicant experimented with "Winnie V." He admitted that his actions were wrong, and he should not have taken the substance. His behavior happened under unique circumstances and is unlikely to recur. His past behavior does not cast doubt on his reliability, trustworthiness, and good judgment. By all accounts, Applicant appeared to be a model Marine. He is remorseful that his conduct cost him his Marine career, but he continues to be energized in his civilian job to help Marines. Applicant is a husband and father of three young children. He used the banned substance when he was going through physical therapy. He used it for a relatively short period of time and understands the potential dangers of his actions. Applicant outstanding work record and devotion reinforces his successful rehabilitation. I find both of the above mitigating conditions apply.

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 relevant 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is 29 years old. He served in the Marine Corps for almost ten years before his honorable discharge. He had four combat tours in Iraq and Afghanistan. He suffered a traumatic brain injury. While going through physical therapy for a non-combat related injury he was encouraged to build muscle to enhance his rehabilitation. He made the mistake of attempting to expedite the process and used a banned substance. He is remorseful for his conduct and suffered the loss of his military career. He has embraced his new civilian job that helps Marines in the field. It is highly unlikely Applicant will be involved in future criminal activity. Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under the criminal 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

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is granted.

Carol G. Ricciardello
Administrative Judge