



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



In the matter of:)
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-----) ISCR Case No. 14-01048
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)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: Alan Edmunds, Esquire

April 6, 2015

Decision

Synopsis

Applicant was arrested for marijuana possession in 1998, and pled guilty to a lesser charge. Applicant knowingly and willingly furnished false and misleading information in response to questions on security clearance applications completed by him in 2002, 2008, and 2013, and from a Government investigator, regarding whether he had been subject to any arrests or charges involving alcohol or drugs. Mitigation has not been shown. Clearance is denied.

MOGUL, Martin H., Administrative Judge:

On August 26, 2014, the Department of Defense (DoD) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J 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) (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

On October 13, 2014, Applicant replied to the SOR (RSOR) in writing, and he requested a hearing before an Administrative Judge. The case was assigned to this Administrative Judge on December 8, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on December 10, 2014, and the hearing was convened as scheduled on January 21, 2015. The Government offered Exhibits 1 through 8, which were received without objection. Applicant testified on his own behalf and submitted Exhibits A through N, which were also admitted without objection. Two additional witnesses also testified on Applicant's behalf. DOHA received the transcript of the hearing (Tr) on January 29, 2015. Based upon a review of the pleadings, exhibits, and all the testimony, eligibility for access to classified information is denied.

Findings of Fact

After a complete and thorough review of the evidence in the record discussed above, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is 51 years old. He was born in Lebanon and became a United States citizen in 1975 or 1976. He has been divorced since 2011, and he has one son. Applicant has been employed by his present employer, a defense contractor, for 29 years, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 (Guideline J - Criminal Conduct)

1.a. The SOR alleges that Applicant has engaged in criminal conduct, which creates doubt about a person's judgement, reliability, and trustworthiness. The specific allegation is that in approximately December 1998, Applicant was arrested for Unlawful Possession of Less than 8.5 grams of marijuana. In March 1999, Applicant pled guilty to the charge of Disturbing the Peace, and was sentenced to community service, to pay a fine of \$250, and to pay a state penalty fund assessment of \$425.

At the hearing, Applicant admitted this allegation. He testified that in December 1998, he was taking two women, whom he had met in a chat room online, to a party. On the way there, one of the women took out marijuana and both women smoked it. He stated that it was offered to him, but he told them that he did not use marijuana. While at the party, he was not enjoying himself, but the women did not yet want to leave the party. He told the women that he would be waiting in his vehicle, and when they came back out he would take them home. Applicant fell asleep in the vehicle, and he was not aware that he was parked in a parking lot of the Sheriff's department. A Sheriff's Deputy approached him while he was in his vehicle, and when Applicant rolled down his window, the Deputy smelled marijuana. He was asked if a small container in the vehicle had marijuana in it, and when he answered affirmatively, he was issued a citation for possession of marijuana. His attorney informed him that this was considered an arrest. (Tr at 49-51, 59-62.) As reviewed above, Applicant pled guilty to the charge of Disturbing the Peace, and was sentenced to community service, to pay a fine of \$250, and to pay a state penalty fund assessment of \$425.

1.b. The SOR alleges on December 31, 2013, Applicant accepted a plea negotiation for charges related to a restraining order and was found guilty of Disturbing the Peace. Applicant was fined and agreed to an extension of a restraining order which was extended through December 31, 2017.

At the hearing, Applicant testified that the restraining order involved him and his ex-wife. He stated that the first restraining order began a week after he filed for divorce from his wife, and from the middle of 2011 until 2104, there were a series of restraining orders that involved both civil and criminal courts. Applicant testified that an initial determination was made by a judge that there was domestic violence because of his yelling at his wife. At the advice of his attorney, Applicant accepted a plea arrangement wherein he accepted a guilty plea for domestic violence that extended the restraining order for three years. Applicant claimed that he never violated the restraining order but his wife continually alleged that he did. (Tr at 51-56.) As reviewed above, the restraining order is in effect December 31, 2017.

Paragraph 2 (Guideline E- Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he engaged in conduct that exhibited questionable judgement, unreliability, unwillingness to comply with rules and regulations, and untrustworthiness.

2.a. The SOR alleges that the conduct listed above as 1.a. and 1.b. can be considered adversely under Guideline E.

2.b. Applicant executed a Security Clearance Application (SCA) on January 23, 2013. The SOR alleges that Applicant falsified material facts in response to the question under "Section 22 - Police Record (EVER), "Have you EVER been charged with an offense involving alcohol or drugs?" of the 2013 SCA by falsely indicating that he had never been involved with a charge involving alcohol or drugs, when in fact he failed to disclose the information listed on the SOR as 1.a., above. (Emphasis in original)

At the hearing, Applicant admitted that he never identified his arrest for marijuana on any of his SCAs, which are listed as 2.b, 2.c., and 2.d, on the SOR. He explained that he "was really ashamed" about the incident. He admitted he was afraid that if he revealed his involvement with the marijuana incident, as has been discussed in 1.a., above, he would lose his job. At the hearing, he conceded that his actions in not being truthful on his SCAs were wrong. (Tr at 56-58.)

After he knowingly failed to tell the truth and did not reveal the marijuana arrest on the first SCA, he believed it would look even worse to reveal his marijuana arrest on later SCAs, so he continued to knowingly furnish incomplete and untruthful information on two subsequent SCAs. Applicant also admitted that he failed to identify his drug arrest during at least one, or possibly two, occasions when he was interviewed by a Government investigator, after he completed his SCAs. In 2013, after a Government investigator confronted Applicant with information about his drug arrest, of which the

investigator had become aware from an interview with Applicant's ex-wife, Applicant did finally admit to the drug arrest. (Tr at 62-69.)

2.b. Applicant executed an SCA on January 21, 2008. The SOR alleges that Applicant falsified material facts in response to the question under "Section 23 - Your Police Record," of the 2008 SCA by falsely writing that he had never been charged with or convicted of any offense related to alcohol or drugs, when in fact he failed to disclose the information listed on the SOR as 1.a., above.

2.c. Applicant executed an SCA on May 15, 2002. The SOR alleges that Applicant falsified material facts in response to the questions under "Section 24 - Your Police Record - Alcohol/Drug Offenses," of the 2002 SCA by falsely averring that he had never been charged with or convicted of any offense related to alcohol or drugs, when in fact he failed to disclose the information listed on the SOR as 1.a., above.

Mitigation

As stated above, two additional witnesses testified on behalf of Appellant. Both witnesses have known Applicant from his professional career, and both believe that Applicant is a trustworthy individual. (Tr at 24-44.)

Applicant submitted a number of documents into evidence in mitigation. They have all been reviewed very carefully, and some of them will be briefly reviewed here: The first exhibit consists of seven extremely positive and laudatory character letters submitted on Applicant's behalf. (Exhibit A.) The next document is an additional character letter from Applicant's therapist. She discussed Applicant's failure to list his drug arrests on his SCAs, and wrote that he has accepted responsibility for his decisions and actions that led to his arrest, and he conceded to her that he was not honest on his SCAs because of his fear that he might lose his job. (Exhibit B.) Applicant also submitted his Performance Evaluations from 1998 to 2013. His overall rating for 2013 was a rating of 3 out of 5 (Achieves Expectations). (Exhibit D.) Exhibits G and N consist of four and three negative drug tests results of Applicant, respectively. Finally, Applicant submitted a statement of intent not to use illegal drugs in the future. (Exhibit M.)

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 ¶ 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 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 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

Paragraph 1 (Guideline J - Criminal Conduct)

The Government has established that Applicant was arrested for marijuana possession in 1998. Applicant also plead guilty to Disturbing the Peace in 2013, which resulted in an extension of a restraining order through December 31, 2017. Among the disqualifying conditions, I find that ¶ 31(a), “a single serious crime or multiple lesser offenses,” applies in this case. ¶ 31(c), “allegations or admissions of criminal conduct, regardless of whether the person was formally charged,” is also applicable to this case. Finally, because Applicant is still subject to the temporary restraining order until the end of 2017, ¶ 31(d), “individual is currently on parole or probation,” can also be interpreted to be applicable in this case.

While Applicant’s remorse appears sincere, and I do find that the evidence indicates that Applicant has not used illegal substances, because of the recency of the

conduct involved in 1.b., above, and because Applicant is still subject to the temporary restraining order until the end of 2017, I do not find that any of the mitigating conditions under ¶ 32 are applicable. I find Paragraph 1 Guideline J, Criminal Conduct, against Applicant.

Paragraph 2 (Guideline E - Personal Conduct)

With respect to Personal Conduct, the Government relies heavily on the honesty and integrity of individuals seeking access to our nation's secrets. If such an individual intentionally falsifies material facts or fails to furnish relevant information to the Government, it is extremely difficult to conclude that he nevertheless possesses the judgment, and honesty necessary for an individual given a clearance.

In this case the evidence clearly establishes that Appellant knowingly furnished untruthful information to the Government on three separate security clearance questionnaires, in 2003, 2008, and as recently as 2013. In reviewing the disqualifying conditions under Personal Conduct ¶16, I conclude that ¶ 16(a) applies because of Applicant's "deliberate omission, . . . of relevant facts from any . . . personnel security questionnaire . . ., or similar form used to determine employment qualifications, award benefits or status."

Applicant also admitted that he had not been honest with a Government investigator on at least one and possibly two occasions regarding his drug arrest, until a Government investigator confronted him with the facts of the arrest. Therefore, I conclude that ¶ 16(b) also applies because of Applicant's "deliberately providing false or misleading facts to an employer, investigator, . . . or other official government representative."

I do not find that any mitigating condition is applicable under ¶17. Applicant's conduct, considered as a whole, exhibits questionable judgement, lack of candor, dishonesty and unwillingness to comply with rules and regulations. I, therefore, resolve Paragraph 2 Guideline E, Personal Conduct, 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. 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. Based on all of the reasons cited above as to why the disqualifying conditions are applicable and why the mitigating conditions do not apply under both guidelines alleged, I find that the record evidence leaves me with significant questions and doubts as to Applicant's eligibility and suitability for a security clearance under the whole-person concept. For all these reasons, I conclude Applicant has not mitigated the security concerns under the whole-person concept.

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:	AGAINST APPLICANT
Subparagraph 1.a.-1.b.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a.-2.d:	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.

Martin H. Mogul
Administrative Judge