



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 14-02636
)
)
Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esq., Department Counsel
For Applicant: *Pro se*

04/23/2015

Decision

WHITE, David M., Administrative Judge:

Applicant regularly abused marijuana for 30 years, until he failed a urinalysis test in 2009 while on probation for an alcohol-related conviction. He falsified a 2002 security clearance application concerning his drug abuse, and failed to file required Federal income tax returns. Resulting security concerns were not mitigated. Based on a review of the pleadings and exhibits, eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on March 15, 2013.¹ On August 14, 2014, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline H (Drug Involvement), Guideline E (Personal Conduct), and Guideline

¹Item 2.

F (Financial Considerations).² 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 that came into effect in the Department of Defense on September 1, 2006.

Applicant submitted a written response to the SOR on September 8, 2014, and requested that his case be decided by an administrative judge on the written record without a hearing.³ Department Counsel submitted the Government's written case on February 17, 2015. A complete copy of the File of Relevant Material (FORM)⁴ was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM.

Applicant signed the document acknowledging receipt of his copy of the FORM on March 10, 2015. He submitted an additional statement in response to the FORM, which I marked Applicant's Exhibit (AE) A and admitted into the record. He made no objection to consideration of any contents of the FORM, and did not request additional time to respond. I received the case assignment on April 9, 2015.

Findings of Fact

Applicant is 53 years old. He has been a member of the United States Merchant Marine since 1985 and seeks to renew his security clearance in connection with that service. He was divorced in the early 1980s and his second wife passed away in 2013. He has one adult child. He is a high school graduate, and has successfully completed numerous courses of vocational education and training to obtain and maintain his professional certifications.⁵

In his response to the SOR, Applicant admitted the truth of all of the facts alleged under each guideline. Applicant's admissions are incorporated into the following findings of fact.

²Item 1.

³Item 1.

⁴Department Counsel submitted four Items in support of the SOR allegations. Item 3 is inadmissible. It will not be considered or cited as evidence in this case. It is the summary of an unsworn interview of Applicant conducted by an interviewer from the Office of Personnel Management on May 14, 2013. Applicant did not adopt it as his own statement, or otherwise certify it to be accurate. Under Directive ¶ E3.1.20, this Report of Investigation summary is inadmissible in the absence of an authenticating witness. See Executive Order 10865 § 5. In light of Applicant's admissions, Item 3 is also cumulative.

⁵Item 2; AE A.

Applicant used marijuana, with varying frequency and, at times, as often as three times per week from 1978 to August 2009. He purchased marijuana on numerous occasions during that period. In August 2009, he failed a random urinalysis by testing positive for marijuana. He was most recently granted a DoD security clearance in 2003, and admittedly used marijuana after being granted that security clearance. He said, without documentary corroboration, that his last drink or use of a mind-altering substance (except caffeine or nicotine) was on October 23, 2009. He said that he joined Alcoholics Anonymous (AA) on that date, continues to participate in that program, and has no intention to abuse drugs or alcohol in the future. He also said that he successfully completed a one-year U.S. Coast Guard "Cure" program in October or November 2010, without providing further details or documentation concerning his diagnosis, the nature and course of any treatment involved, or his prognosis.⁶

Applicant signed and certified the truth of his previous security clearance application on November 5, 2002. In response to the question on that application that asked whether he had illegally used any controlled substance during the last seven years, he answered, "No." He admitted that he did so in order to falsify material facts on the application concerning his regular marijuana use throughout that seven-year period, as described above.⁷

On April 2, 2009, Applicant was arrested and charged with the 3rd Degree felony of Carrying a Concealed Weapon; and the 2nd Degree misdemeanors of Driving Under the Influence (DUI) of Alcohol or Drugs, and Reckless Driving. On June 3, 2009, he was convicted of the DUI offense and sentenced to serve two days in jail and one year on probation, fined \$1,116.00, and had his driver's license suspended for six months. The concealed weapon and reckless driving charges were dismissed.⁸

In August 2009, while on probation for the June 2009 DUI conviction, Applicant was administered a random urinalysis test. As noted above, he failed this urinalysis by testing positive for marijuana. He subsequently admitted his guilt of using marijuana during that period of probation.⁹

Applicant admitted that he failed to file his Federal income tax returns for tax years 2010, 2011, and 2012, as required. He explained that his wife had handled their family financial matters for the preceding 23 years while he averaged eight to ten months per year out at sea. He said that when she passed away in 2013 he, "was overwhelmed with the task of what she had been doing."¹⁰ In September 2014 he said

⁶Item 1; Item 2; AE A.

⁷Item 1.

⁸Item 1; Item 2; Item 4.

⁹Item 1; Item 2.

¹⁰Item 1.

that he was just getting a grip on his financial situation and assuming the responsibility of paying his bills and taxes. In his March 2015 response to the FORM he said, “I am correcting my financial situation as I write this letter.”¹¹ He provided no documentation to demonstrate progress in resolving his delinquent tax returns.

The record lacks mitigating evidence addressing the quality of Applicant’s professional performance or his track record with respect to handling sensitive information and observation of security procedures. No character witnesses provided statements describing his judgment, trustworthiness, integrity, 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

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 (DCs) and mitigating conditions (MCs), which are to be used 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 overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 the 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, “[t]he 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.” Section 7 of Executive Order 10865 provides: “[a]ny 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.”

¹¹Item 1; AE A.

A person applying for access to classified information seeks to enter 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.

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. The DCs raised by the evidence in this case are:

(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; and

(g) any illegal drug use after being granted a security clearance.

Applicant admittedly purchased and abused marijuana, on a regular and frequent basis, for more than 30 years. He held a security clearance during a substantial portion of that time, including when tested positive for illegal marijuana use while on probation for his 2009 DUI conviction. These facts raise significant security concerns under AG ¶¶ 25(a), (b), (c), and (g), therefore shifting the burden to Applicant to establish, and prove, mitigation of those concerns.

AG ¶ 26 provides conditions that could mitigate drug-related 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;

(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 admitted regular recreational use of marijuana since age 16 ended in August 2009 after he failed a urinalysis test. Some mitigation, under AG ¶¶ 26(a) and (b), was established due to his recent abstinence. However, the length and frequency of his drug abuse, his admitted purchase of drugs in connection therewith, and his regular drug abuse after being granted a security clearance, combine to preclude a finding that recurrence is unlikely and cast continuing doubt on his reliability, trustworthiness, and good judgment.

Applicant's recreational abuse of marijuana did not involve drugs that had been prescribed for him, so AG ¶ 26(c) has no application to this decision. Applicant did not document participation in a recognized drug treatment program, and offered no information on the frequency of his AA participation given his extensive time at sea. No prognosis by a medical professional was provided, so AG ¶ 26(d) does not 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. 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.

AG ¶ 16 describes conditions that raise security concerns and may be disqualifying with relation to the allegations in this case:

(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;

(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; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant deliberately denied and concealed his regular illegal drug abuse during the preceding seven-year period when he signed and certified his November 2002 security clearance application. That conduct made him vulnerable to exploitation, manipulation, and duress because its revelation would have adversely affected his professional and community standing. He was also arrested for, and convicted of, DUI in June 2009, and subsequently used marijuana while serving probation for that conviction. This demonstrated questionable judgment, untrustworthiness, unreliability, lack of candor, and unwillingness to comply with rules and regulations.

AG ¶ 17 provides conditions that could mitigate personal conduct security concerns. Four MCs have potential applicability under the facts in this case:

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

(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; and

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

Applicant neither stopped nor promptly revealed his long history of frequent drug abuse until it was exposed by his failed urinalysis test in August 2009. These events, including his DUI arrest and conviction, were relatively recent, and did not occur under unusual circumstances. Applicant did not provide sufficient evidence from which to conclude that this misconduct does not adversely reflect on his current reliability, trustworthiness, and judgment. Nor did he demonstrate effective counseling, rehabilitation, or other steps to reduce vulnerability to manipulation or duress, except his uncorroborated claims to have remained abstinent since October 2009. Thus, Applicant failed to meet his burden to establish significant mitigation under any of these conditions.

Guideline F, Financial Considerations

The security concerns under the guideline for financial considerations are set out in AG ¶ 18, which reads in pertinent part:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information.

Department Counsel asserted, and the record evidence established, security concerns under one DC, as set forth in AG ¶ 19:

(g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant admitted that he failed to file required Federal income tax returns for tax years 2010, 2011, and 2012. He attributed this failure to his misplaced reliance on his wife having done so, and his difficulty in dealing with financial matters after she passed away in 2013. He did not explain why that tragedy prevented his assumption of tax-filing responsibility during the preceding three years that he failed to file. He also offered no indication that he has addressed these delinquent obligations to the Federal government as recently as his March 2015 response to the FORM. His ongoing pattern and history of inability or unwillingness to meet these obligations raises security concerns under AG ¶ 19(g), and shifts the burden to Applicant to rebut, extenuate, or mitigate those concerns.

The guideline includes five conditions in AG ¶ 20 that could mitigate security concerns arising from Applicant's financial difficulties:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

Applicant's failure to file required tax returns spanned multiple years, was recent, and is ongoing. His wife's terminal illness may have partially contributed to these problems, but he has not demonstrated subsequent responsible action, counseling, or other good-faith efforts to resolve them. He did not dispute his obligation to file the Federal income tax returns in question. Accordingly, the record is insufficient to establish mitigation for his financial irresponsibility under any of the foregoing provisions.

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 pertinent facts and circumstances surrounding this case. Applicant is an accountable adult, who is responsible for his voluntary choices and conduct that underlie the security concerns expressed in the SOR. His lengthy history of regular drug abuse before and after being granted a security clearance, his deliberate attempt to conceal that history from the DoD, his DUI conviction, his drug abuse and failed urinalysis while on probation, and his ongoing failure to file required Federal income tax returns, reflect a wide variety of serious voluntary misconduct reflecting untrustworthiness, unreliability, and bad judgment.

Applicant offered insufficient evidence of counseling, rehabilitation, better judgment, or responsible conduct in other areas of his life to offset resulting security concerns. The potential for pressure, coercion, and duress remains largely undiminished, and he has not demonstrated a basis from which to reasonably conclude that he would not violate laws, rules, or regulations in the future.

Overall, the record evidence leaves me with substantial doubt as to Applicant's present eligibility and suitability for a security clearance. He did not meet his burden to mitigate the security concerns arising from his drug involvement, personal conduct, and financial considerations.

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 H:	AGAINST APPLICANT
Subparagraphs 1.a through 1.d:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a through 2.c:	Against Applicant
Paragraph 3, Guideline F:	AGAINST APPLICANT
Subparagraph 3.a:	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.

DAVID M. WHITE
Administrative Judge