



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



In the matter of:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 07-09679

Appearances

For Government: Allison O'Connell, Esquire, Department Counsel

For Applicant: *Pro Se*

June 27, 2008

Decision

ABLARD, Charles D., Administrative Judge:

Applicant failed to mitigate security concerns regarding Guidelines H, J, E, and G. Clearance is denied.

Statement of the Case

On June 19, 2006, Applicant submitted an Electronic Questionnaires For Investigations Processing (e-QIP) also known as Security Clearance Application (SF 86). On January 15, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified and revised. The SOR alleges security concerns under Guidelines H, G, E, and J.

The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative

judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant responded to the SOR allegations in a sworn statement signed on February 27, 2008, and elected to have his case decided on the written record in lieu of a hearing. Documents were attached to the answer with explanatory information. A complete copy of the file of relevant material (FORM), dated April 2, 2008, was provided to him, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant provided an additional statement on April 21, 2008. The case was assigned to me on May 3, 2008.

Findings of Fact

Applicant admitted all but two allegations (SOR ¶¶ 1.d. and 2.c.) in his answer to the SOR, and offered explanations. After a complete and thorough review of the evidence of record, I make the following findings of fact:

Applicant is 40 years old. He has been an employee of a defense contractor since January 2005 working as a materiel coordinator. He was arrested in March 2002 and charged with DWI and speeding. He pled guilty. He was fined with his license suspended for six months, placed on unsupervised probation, required to participate in alcohol screening, and ordered to attend DWI school.

In March 2005 he was arrested and charged with aggravated DWI and possession of cocaine in an open container which he had just purchased in a bar for \$20. He was found guilty of the first charge and was sentenced to 179 days in jail with all but seven suspended. He was fined, placed on supervised probation and ordered to complete community service. He attended DWI school, a victim impact panel, and moral reconnection therapy. Applicant pled guilty to the drug charge. He was fined, placed on 128 months probation, and ordered to complete community service. Several other minor charges were dismissed.

Applicant used cocaine at least once in 2005 and possibly more often while holding a security clearance. In November 2005, he tested positive for cocaine while serving on probation for the 2005 drug conviction (Exh. 4, p. 10). In January 2006 he was diagnosed with alcohol and drug abuse. He received treatment at a counseling center for nine months for alcohol and cocaine abuse. He has not used drugs since his release. However, he continues to drink beer, the beverage he drank to excess, including an estimated 24 beers on a weekend, when the DWI offenses occurred (Exh. 6, p. 7).

Applicant has attempted to change his conduct since his last drug and alcohol use and his arrests. He states that the last offenses occurred when he was 37 years of age and that he has matured in the past three years. He offered no evidence to support the assertion.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised 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 common sense 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.

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by "substantial evidence," demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence "to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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 *a/so* Executive Order 12968 (Aug. 2, 1995), Section 3.

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude that the following Adjudicative Guidelines provide the standard for resolution of the allegations set forth in the SOR.

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 several conditions that could be applicable to this matter, raise a security concern, and may be disqualifying:

(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;

(d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;

(e) evaluation of drug abuse or drug dependence by a licensed clinical social worker who, is a staff member of a recognized drug treatment program;

(f) failure to successfully complete a drug treatment program prescribed by a duly qualified medical professional;

(g) any illegal drug use after being granted a security clearance; and,

AG ¶ 26 provides conditions that could mitigate 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; and,

(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 admitted use of cocaine at least once and possibly more often while holding a security clearance. While he states his intent not to use drugs and was in drug treatment and completed treatment, he did not submit any documentation concerning a favorable prognosis or other evidence required in the mitigating conditions. For the 2005 offense, he served seven days in jail and was on probation for 18 months during which time he used cocaine.

The drug use and possession offenses occurred almost three years ago but in view of the circumstances of the offenses and his use occurred while holding a security clearance, it is premature to apply the relevant mitigating conditions.

Guideline G, Alcohol Consumption

AG ¶ 21 expresses the security concern pertaining to alcohol consumption, “Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.”

AG ¶ 22 describes the following conditions that could raise a security concern and may be disqualifying:

- (a) alcohol-related incidents away from work, such as driving while under the influence, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;
- (c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;
- (d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence;
- (e) evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program; and
- (f) relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program.

AG ¶ 23 provides the following several conditions that may be applicable and could mitigate security concerns:

- (a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser);
- (d) the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar

organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

Applicant has used alcohol to excess and has been charged and found guilty of DWI in 2002 and 2005. While he avers that he only drinks socially, he stated in a response in October, 2007 that he would continue to drink beer, the drink that caused his DWI arrests. He has shown none of the evidence required to justify application of the mitigating conditions.

Guideline E Personal Conduct

The security concern relating to the guideline For Personal Conduct is set out in AG ¶ 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. 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 two conditions that could raise a security concern and may be disqualifying 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; and,
- (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

Applicant is alleged to have failed to report fully in two answers to Question 28 on his application for a security clearance the full extent of his drug use while holding a security clearance. This prompted security concerns under AG ¶¶ 16(a) and (b). He answered in the affirmative to the questions and did report specifically one use in 2005. He later admitted to several drug uses (Exh. 4), but now disputes the allegation in his last submission.

AG ¶ 17(c) provides that Applicant could mitigate security concerns from the facts in this case. It is that if 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."

Since he did report one use while holding a security clearance and the requirement in the guideline is that the omission be deliberate, I find that the omission alleged was not deliberate. Security concerns pertaining to personal conduct are mitigated.

Guideline J Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30, “[c]riminal 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 allegations under this guideline repeat the first two allegations under SOR ¶¶ 1. and 2. and the two allegations under SOR ¶ 3. Since they have all been discussed in the earlier sections of the decisions, the same findings will be made under this guideline.

AG ¶ 31(c) provides that “an allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted” is a disqualifying condition. Applicant was arrested for two DWI offenses in 2002 and 2005. He was found guilty and sentenced.

AG ¶ 32 provide two conditions that could be applicable and mitigate security concerns:

(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;

(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.

Although almost three years has elapsed since the last offenses, they all related to alcohol-induced behavior and Applicant continues to use alcohol. Therefore, there is insufficient evidence of rehabilitation and it is premature at this time to apply the mitigating conditions.

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) 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.

Applicant did not provide sufficient evidence to mitigate the disqualifying conditions previously discussed through application of the whole person concept. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the security concerns pertaining to drug, alcohol, and criminal allegations. He has made some progress in changing his conduct but the conduct alleged occurred when he was 36 years old so it cannot be attributed to youthful indiscretions.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), a careful consideration of the whole person factors and supporting evidence, application of the pertinent factors under the adjudicative process, and interpretation of my responsibilities under the guidelines. Applicant has not mitigated or overcome the government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

Formal Findings

Formal findings For or For 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 H: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant
Subparagraph 1.b.: Against Applicant
Subparagraph 1.c.: Against Applicant
Subparagraph 1.d.: Against Applicant

Paragraph 2, Guideline G: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant
Subparagraph 2.b.: Against Applicant
Subparagraph 2.c.: Against Applicant
Subparagraph 2.d.: Against Applicant

Paragraph 3, Guideline E: FOR APPLICANT

Subparagraph 3.a.: For Applicant

Subparagraph 3.b.: For Applicant

Paragraph 4, Guideline J: AGAINST APPLICANT

Subparagraph 4.a.: Against Applicant as to

Paragraphs 1 and 2 but not as to Paragraph 3

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Clearance is denied.

Charles D. Ablard
Administrative Judge