



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



In the matter of:)
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SSN: -----) ISCR Case No. 07-10454
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Applicant for Security Clearance)

Appearances

For Government: Richard A. Stevens, Esquire, Department Counsel
For Applicant: Pro se

May 12, 2008

Decision

ABLARD, Charles D., Administrative Judge:

Applicant failed to mitigate security concerns regarding Guideline H (Drug Involvement), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). Clearance is denied.

Statement of the Case

Applicant submitted his Security Clearance Application (SF 86), on March 15, 2007. On November 16, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H (Drug Involvement), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) 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), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on December 26,

2007, and I received the case assignment on January 3, 2008. DOHA issued a notice of hearing on January 14, 2008, for a hearing on January 30, 2008, and I convened the hearing as scheduled.

At the hearing, the government offered four exhibits (Exh.) which were admitted in evidence without objection. Applicant submitted eight exhibits which were admitted without objection. He testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on February 7 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural and Evidentiary Rulings

Notice

The hearing notice was dated 15 days before the hearing date. I advised Applicant of his right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. Applicant affirmatively waived his right to the 15 days notice and indicated he was ready to proceed (Tr. 10).

Findings of Fact

In his Answer to the SOR, Applicant admitted all of the allegations under Guidelines H (Drug Use), E (Personal Conduct), and J (Criminal Conduct).

Applicant is a thirty-year-old employee of a government contractor. He has worked since August 2006 in information systems, specializing in security issues involving the NISPOM and DSS investigations. He served on active duty in the Army between 2001 and 2006 and had a distinguished career. He was a distinguished honor graduate in advanced individual training at Ft. Benning. He served overseas in Italy and Germany and in Kuwait during Operation Enduring Freedom when he extended his tour for one year. He received a BS degree in information systems in 2005 while on active duty. He received numerous awards and citations during his military service (Exhs. B-E). He received an honorable discharge as a sergeant (E5) in March 2006. It was determined that he had a military-related disability for which he receives compensation. He received outstanding evaluations while in the service (Exh. A).

Since his employment in the defense industry, Applicant has received consistently high evaluations from his company and certificates of recognition (Exhs. F - H). He has been accepted by a university in a Master's degree program in his field for which his employer will pay the tuition costs.

Applicant is engaged to be married and has purchased a home. He no longer associates with the friends he had during his period of drug use. He lives in a different city from where he used drugs. He is from a military family. His father was enlisted in the Marines, and became an officer and a pilot. His father was his role model and inspired his military career. Applicant has also become a pilot in the last two years. He is highly motivated towards a successful career and a family. He has advised his family of his past drug use.

The allegations in the SOR must be evaluated in the context of the above stated information relative to the career path of Applicant since many of the events covered in the SOR occurred during the periods of successful performance in both the military and in his present position.

In 1998 when Applicant was 19 years of age he was arrested for DUI and possession of a controlled substance, Alprazolam (Xanax). He plead nolo contendere to the first count and was sentenced to 112 hours of community service and probation for one year. He entered a pre-trial diversion program for nine months for the drug charge and it was dismissed following completion of required counseling. He used ecstasy from 1996 until June 2000. When he enlisted in 2001, his recruiter indicated to him that he did not want to hear any information about prior drug use. The Army had a zero tolerance policy on use of drugs while on active duty. After his enlistment he used valium and hashish until June 2003. He used marijuana with varying frequency from 1996 until 2000 and from April 2002 until February 2003. He used illegal drugs and prescription drugs illegally while serving the Army from 2002 until 2006. He used cocaine at least twice between June 2005 and March 2006. He received a security clearance on September 23, 2003 while in the Army so he used the above described drugs while holding a security clearance until his discharge in March 2006.

When Applicant applied for a security clearance while in the Army in March 2001, he did not acknowledge on his SF 86 any of the above drug uses except the 1998 arrest and pretrial diversion and he did the same in an statement to an investigator (Exhs. 2 and 3). When he filed the 2007 SF 86 and in his answers to the 2007 interrogatory, he provided fully the drug use information. When he was hired for his present position, the company made it clear that there should be no drug use and should not have been any for the two previous years. He has not used drugs since March 2006. The evidence offered by the government in this case is based solely on information he provided to security officials in 2007 (Exhs. 1 and 4).

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.

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

Guideline H Drug Involvement

The security concern relating to the guideline for Drug Use 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.

(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.

Three drug involvement disqualifying conditions could raise a security concern and may be disqualifying in this case: “any drug abuse” and “illegal drug possession, including . . . purchase, sale or distribution . . .” and “any illegal drug use after being granted a security clearance.” AG ¶¶ 25(a), 25(c) and 25(g). The other five disqualifying conditions listed in AG ¶ 25 are not applicable. These three disqualifying conditions apply because Applicant used drugs after applying for a security clearance.

AG ¶ 26 provides several 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;

(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.

Drug involvement is partially mitigated by the passage of a period of over two years since his most recent use of illegal drugs and he has apparently removed himself from contact with drug users. However, the extensive period of the use of drugs and his drug use while he was in the Army and holding a security clearance weighs against mitigating his drug involvement. Moreover, he did not enroll in or complete a drug treatment or counseling program. I find that it is premature to conclude that the security concern for drug use has been mitigated.

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's failure to report the post-1998 drug use on his 2001 SF 86, and to an investigator in 2002, prompted security concerns under AG ¶¶ 16(b) and 16(c).

AG ¶ 17 provides seven conditions that could mitigate security concerns in this case:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (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;

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

(f) the information was unsubstantiated or from a source of questionable reliability; and,

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

None of the mitigating conditions in AG ¶ 17 apply. Applicant did not promptly inform the government of the falsification of his security clearance application. He followed this falsification in 2002 with a false statement concerning his drug involvement. He did not secure counseling designed to improve his conduct. Although his falsification of his security clearance application in 2001 was not recent, it is a serious offense. No one advised him to falsify his security clearance applications or to lie to an investigator. He admitted the false statements at issue, and the falsification allegations are all substantiated. His falsifications cast doubt on his reliability, trustworthiness, and good judgment. Security concerns pertaining to his personal conduct are not mitigated.

With respect to his illegal drug use while he was on active duty in the Army and while holding a security clearance, the pertinent disqualifying conditions are AG ¶ 16(d)(3), a pattern of rule violations and AG ¶ 16(e)(1), which states, "personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing." Certainly drug use while in a sensitive position violates important military and civil rules in our society, and a lengthy history of drug use is conduct a person might wish to conceal as it adversely affects a person's professional and community standing.

The mitigating condition outlined in AG ¶ 17(e) applies to his drug use while on active duty and while holding a security clearance. Applicant has advised his family and security officials of his past drug use. In 2007, he took the important, positive step of disclosure, eliminating his vulnerability to exploitation, manipulation or duress. Thus, there is no reason he would compromise national security to avoid public disclosure of his drug problems. These personal conduct security concerns, pertaining to his drug use while on active duty in the Army and while holding a security clearance, 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 guideline notes several conditions that could raise security concerns for an applicant. Under AG ¶ 31(a) commission of a serious crime is a disqualifying condition, and making a false statement in violation of 18 U.S.C. § 1001 is a serious crime. Applicant’s false statement in his 2001 security clearance application and his 2002 statement concerning his drug use both violate 18 U.S.C. § 1001.

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 DUI in 1998, and pleaded nolo contendere. After completion of his community service, counselling and probation, the charge was dismissed. Nevertheless, there is sufficient evidence to conclude he committed the DUI, which is a criminal offense.

AG ¶ 32 provide conditions that could mitigate security concerns including:

- (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;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) evidence that the person did not commit the offense; 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.

I conclude that the AG ¶ 32(a) is applicable to his DUI in 1998. He was 19 years old (SOR ¶ 1.g) and it occurred before the maturing that occurred during his military service. He has not had a subsequent DUI. His DUI offense is unlikely to recur and does not cast doubt on Applicant's reliability, trustworthiness, or good judgment.

The false statements in 2001 and 2002 are more serious and recent than the DUI. Appellant’s false statements are beyond the 5-year statute of limitations in Fed. R. Crim. P. 12(b)(2), which is applicable to offenses under 18 U.S.C. § 1001. See *United States v. Grenier*, 513 F.3d 632, 635 (6th Cir. 2008). Furthermore, the same allegations about false statements are replicated in Guideline E, which much more specifically

addresses Applicant's misconduct. The second mitigating factor raises the issue of rehabilitation. Applicant disclosed his drug use in 2007, and his disclosures were the only evidence of his drug use. I conclude the criminal conduct alleged in SOR ¶ 3 is mitigated.

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.

While Applicant has shown evidence of rehabilitation by changes in his life style, and actions to remove himself from contact with drugs and users of drugs, the period of time elapsed since his last use of drugs has not been sufficient to warrant a whole person finding in his favor. He failed to take advantage of the lessons he should have learned after his arrest in 1998 when he went through counseling as a result of court order. The fact that he used drugs while in the Army and holding a security clearance raises questions about his judgment and rehabilitation that preclude the grant of a security clearance at this time. It is laudable that he decided to come forth in 2007 and admit his past conduct to his detriment in this matter. He believed it was the honorable thing to do and, it should serve him well in the long term.

After considering all the evidence in its totality, I conclude that Applicant has not mitigated the security concerns arising from his drug use and personal conduct. It is premature to grant him a security clearance at this time.

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 H: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant
Subparagraph 1.b.: Against Applicant
Subparagraph 1.c.: Against Applicant
Subparagraph 1.d.: Against Applicant
Subparagraph 1.e.: Against Applicant
Subparagraph 1.f.: Against Applicant
Subparagraph 1.g.: For Applicant
Subparagraph 1.h.: Against Applicant
Subparagraph 1.i.: Against Applicant

Paragraph 2, Guideline E: AGAINST APPLICANT

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

Paragraph 3, Guideline J: FOR APPLICANT

Subparagraph 3.a.: For Applicant
Subparagraph 3.b.: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant eligibility for a security clearance at this time. Eligibility for access to classified information is denied.

CHARLES D. ABLARD
Administrative Judge