



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 07-14127
SSN:)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: Robert Bohn, Esquire

April 14, 2010

Decision

CEFOLA, Richard A., Administrative Judge:

The Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP), on October 9, 2006. On February 27, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines E and J for the 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 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.

The Applicant acknowledged receipt of the SOR on March 20, 2009. He answered the SOR in writing through counsel the same day, March 20, 2009, and requested a hearing before an Administrative Judge. DOHA received the request on March 23, 2009, and the case was assigned to another Judge on October 27, 2009. The case was reassigned to the undersigned on January 11, 2010. DOHA had already

issued a notice of hearing on December 14, 2009, and I convened the hearing as scheduled on February 2, 2010. The Government offered Exhibits (GXs) 1 through 7, which were received without objection by way of stipulation. The Applicant testified on his own behalf and submitted Exhibits (AppXs) A through Q, which were also received without objection by way of stipulation. The Applicant further offered AppX R, which was not part of the stipulation, and was received without objection. DOHA received the transcript of the hearing (TR) on February 17, 2010. The record closed on February 2, 2010, the date of the hearing. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

In his Answer to the SOR, the Applicant admitted the factual allegations in Paragraphs 1.a, 1.b, 1.d, 1.e, 1.g, and 1.h of the SOR, with explanations. He denied the factual allegations in Paragraphs 1.c, 1.f, 1.i, and 2.a of the SOR. He also provided additional information to support his request for eligibility for a security clearance.

Personal Conduct & Criminal Conduct

The Applicant is a 55 year old "Chief Scientist" with an aerospace company. (Tr at page 4 line 16 to page 5 line 2, at page 15 line 14 to page 28 line 4, and at page 31 line 7 to page 32 line 9.) The Appellant has held a security clearance since 1978, without any reported incidents regarding his protection of classified materials. (*Id.*, GX 3 at page 7, and AppXs A~L and R.)

1.a, 1.b, 1.c, 1.g, 1.h, and 2.a. The Applicant used and purchased numerous illegal substances from about 1975, while he was attending college, until his last usage sometime in 1992, **about 18 years ago**. (TR at page 32 line 18 to page 36 line 8.) Specifically, he used and purchased marijuana during this entire period, with his heaviest usage being about "once a week" in the "mid-1980's." (*Id.*) He also used marijuana "once or twice," during his lunch breaks in about 1985. (TR at page 35 line 15 to page 36 line 12.) He used and purchased cocaine from about 1980 to 1990, about "once a month. On average." (TR at page 37 line 12 to page 39 line 7.) He used and purchased hallucinogenic mushrooms, about "three times . . . early 80's, about 81 or so." (TR at page 41 lines 5~24.) He used quaaludes "once . . . about 1983." (TR at page 40 lines 3~20.) He also used LSD once in about 1985. (GX 5 at page 5.) Finally, in 1982, he misused Tylenol with Codeine, which was prescribed to the Applicant who "was recovering from knee surgery," by taking a double dose to address his pain. (TR at page 42 lines 5~22.)

The Applicant executed a Personnel Security Questionnaire (PSQ) in **July of 1995**. (GX 4.) In answer to questions 22.a., 22.b., and 22.c., the Applicant admittedly failed to disclose his past drug usage, purchases, and his one time misuse of Tylenol, as described, above. (TR at page 45 line 8 to page 49 line 11, and GX 4 at page 4.) These omissions, back in 1995, were a violation of 18 U.S.C. Section 1001.

1.d, and 2.a In a **September of 1995** follow up interview with an authorized investigator, the Applicant noted no omissions or errors on his 1995 PSQ, thus admittedly failing to disclose his past drug abuse. (TR at page 50 lines 2~25.) This omission was a violation of 18 U.S.C. Section 1001.

1.e, and 2.a The Applicant executed a Security Clearance Application (SCA) in **May of 2001**. (GX 4.) In answer to question 28, the Applicant admittedly failed to disclose his past use of illegal drugs and drug activity while holding a security clearance, as described above. (TR at page 51 line 2 to page 52 line 12, and GX 3 at page 6.) This omission, back in 2001, was a violation of 18 U.S.C. Section 1001.

1.f, and 2.a In a **2001** follow up interview with an authorized investigator, the Applicant noted no omissions or errors on his 2001 SCA, thus admittedly failing to disclose his past drug abuse. (TR at page 52 line 13 to page 53 line 23.) This omission was a violation of 18 U.S.C. Section 1001.

“In **2005**, . . . [the Applicant] had a Special Access Clearance, and . . . had been called in for a polygraph exam.” (TR at page 54 lines 3~16.) He was then given “a pre-poly interview.” (*Id.*) This was not the Applicant’s first polygraph examination, as he had “had other polygraph tests” in the past. (TR at page 78 lines 9~19.) It was during this interview that the Applicant first disclosed his past drug abuse. (*Id.*) During the Department Counsel’s colloquy with the Applicant, the following evidence was elicited:

Q[uestion] In fact, he, in the pre-polygraph, asked you have you used drugs?

A[nswer] Yes.

Q So, you knew that was going to be a question on the polygraph examination?

A **No. That was not one of the questions on the polygraph examination.**

Q It didn’t turn out to be. But, when they asked you that pre-question, let’s be honest, you probably had a good suspicion that he was going to ask you that or he could have asked that?

A He could have asked me that.

Q Okay. So, it wasn’t like you had an epiphany and wanted to come clean. You basically, stated something that you probably thought was going to come out anyway?

A **Well, before I went in, I wanted to be totally honest**, you know. Of course, [I] wanted to pass the poly and you have to be honest. So I had already made up my mind.

Q You knew you had to be honest about your drug use now.

A **Well, I mean I wanted to be [as] honest as I could be. I wanted to be forthcoming and answer every question as honestly as I could.** (TR at page 78 line 25 to page 80 line 4, emphasis supplied.)

I find that the Applicant's disclosure of his past drug abuse was *sua sponte*.

In **June of 2006**, the Applicant executed another SCA. (GX 1). In answer to question 28., the Applicant disclosed his past use of illegal drugs and drug activity while holding a security clearance. (GX 1 at pages 6~7.) During the Department Counsel's colloquy with the Applicant, the following evidence was elicited as to this disclosure:

Q Truth of the matter is there really is no evidence that if you didn't have to take the polygraph in 2006(*sic*), that you would have ever come clean.

A I think that when it came time to fill out my 2006 SF-86, I put everything down there. I had my Clearances. The Investigators at the time kind of led me to believe that there was not going to be any issue with my Security Clearance.

Q When did you fill out that 2006 Security Clearance [Application]?

A June of 06.

Q Okay. When did you take the polygraph?

A Probably the year before in the fall.

Q So, the truth of the matter is you had to put it on your 2006 Security Clearance Application because you already admitted it to the polygraph examiner.

A **No, not necessarily, because they're two different organizations that typically don't communicate with each other.** [The 2005 polygraph was taken for SCI access. The 2006 SCA was filled out for a security clearance.] (TR at page 81 line 9 to page 82 line 10, emphasis supplied.)

In **October of 2006**, the Applicant executed an e-QIP. (GX 2). In answer to question 24.b., the Applicant disclosed his past use of illegal drugs and drug activity while holding a security clearance. (GX 2 at page 27.)

1.i. The Applicant has cross-dressed from about 1972 until about “three or four years ago.” (TR at page 64 line 4 to page 67 line 1, and at page 67 line 19 to page 69 line 17.) The Applicant’s wife is aware of this activity, which occurs in the privacy of their home (*Id.*)

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 commonsense decision. According to AG Paragraph 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. Paragraph 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 Paragraph E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive Paragraph 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 E - Personal Conduct

The security concern for Personal Conduct is set out in AG Paragraph 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.

The guideline notes several conditions that could raise security concerns. Under Subparagraph 16(a), “*deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . or similar form . . .*” may be disqualifying. Under Subparagraph 16(b), “*deliberately providing false or misleading information concerning relevant facts to an . . . investigator, security official, . . . or other government representative*” may also be disqualifying. Here, the Applicant falsified his 1995 PSQ and his 2001 SCA. He was also less than candid with the Government in two interviews, again in 1995 and in 2001. He did not disclose his past drug involvement. These are countered, however, Subparagraph 17(c) as “*so much time has passed . . . that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgement.*” The Applicant’s last falsification was nearly ten years ago. Since then, the Applicant has repeatedly and willingly disclosed all of his past drug abuse, that occurred about 18 years ago. Furthermore, those who know the Applicant in the work place do not question his integrity and personal conduct. (AppXs A~D, and R).

It is alleged and admitted that the Applicant is a cross dresser. Arguably, the disqualifying condition noted in Subparagraph 16(e) is applicable; i.e., “*personal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress*” This is clearly countered, however, by Subparagraph 17(e) as the Applicant “*has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.*” Here, the Applicant last cross dressed three or four years ago, in the privacy of his home, and his wife knows about it.

Guideline J - Criminal Conduct

Paragraph 30 of the new adjudicative guidelines 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.

The adjudicative guidelines set out certain conditions that could raise security concerns. Paragraph 31(c) provides that an "*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted,*" may raise security concerns. The Applicant's falsifications in 1995 and again in 2001 were violations of 18 U.S.C. 1001. Here, this is clearly countered by Subparagraph 32(a) as "*so much time has elapsed since the criminal happened . . . that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.*" Again, his last falsification occurred ten years ago. Since then, the Applicant has repeatedly and willingly disclosed all of his past drug abuse.

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. Under AG Paragraph 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole-person concept. The Administrative Judge should also consider the nine adjudicative process factors listed at AG Paragraph 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.

I considered all of the evidence, including the potentially disqualifying and mitigating conditions surrounding this case. The Applicant has the unqualified support of those who know him in the work place (AppXs A~D, and R). The record evidence leaves me with no questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his Personal Conduct and related Criminal Conduct.

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 E:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	For Applicant
Subparagraph 1.i:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

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

Richard A. Cefola
Administrative Judge